

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant,

DECISION

-against-

**CHRISTOPHER H. LAYMON, JR. d/b/a
PERFORMANCE PLUS REAL ESTATE SERVICES,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on June 12, 1997 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 610 Wood Street, Mamaroneck, New York 10543, having been advised of his right to be represented by an attorney, chose to represent himself.

The complainant was represented by Litigation Counsel Laurence J. Soronen, Esq.

COMPLAINT

The complaint alleges that the respondent received various sums of money which he wrongfully failed to place in escrow, that he converted that money to his own use, that he issued refund checks for that of money which checks were dishonored because of insufficient funds, that the respondent has failed to satisfy judgements obtained against him for some of those sums, and that he issued a check to the Department of State for the renewal of his license which check was dishonored for insufficient funds.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered on May 2, 1997 (State's Ex. 1).

2) At all times hereinafter mentioned the respondent was duly licensed as a real estate broker. His license under the trade name "Performance Plus Real Estate Services," which was renewed on August

9, 1996, was cancelled by the complainant on January 13, 1997 because the check for his renewal fee was dishonored by his bank (State's Ex. 1[A]). As of the date of the hearing he had not paid the renewal fee and had surrendered his license certificate, but he had not surrendered his pocket card.

3) At all times hereinafter mentioned the respondent did not have an escrow account and deposited all funds received in the operation of his real estate brokerage business in his operating account.

4) On February 3, 1996 the respondent showed Ann L. Filiault an apartment which was available for rental in a cooperative building. She told him that she had to be out of her current apartment by the middle of March, and that she would need to move as close to March 1st as possible. He told her that it would take approximately two weeks for her to be approved to rent the apartment.

On February 14, 1996 Ms. Filiault viewed the apartment again, and told the respondent that she would have to be out of her apartment a couple of days before March 15th. The next day she spoke with him again, and told him that she would take the apartment. He requested, and received from her, a check for \$1,200 for his commission, and a check for \$1,200 payable to the apartment owner for a security deposit. He told her that the security deposit would not be cashed until she took possession of the apartment, and that her application would be expedited.

On February 23, 1996 Ms. Filiault returned a completed application package to the respondent along with a \$500 check payable to the apartment owner for a moving deposit. She gave the respondent tentative moving dates of March 8, 11, and 12.

On February 27, 1996 the respondent telephoned Ms. Filiault and requested additional information, which she supplied on that and the next day.

On March 2, 1996 Ms. Filiault returned to the respondent a signed copy of the lease which he had given to her. The lease had not yet been signed by the apartment owner. During the next week she learned that the co-op board had not yet approved her tenancy, and that it was unsure when and if her tenancy would be approved. Accordingly, she decided to rent another apartment elsewhere, and so informed the respondent.

Ms. Filiault placed a stop payment order on the security check, but found that it had been deposited by the respondent in his own operating account on March 1, 1996. She then spoke with the management company for the co-op to request the return of the moving deposit, and was told that because it had received a check from the respondent it was to him it would be returned, and that she would have to look to him for a refund. In fact, the respondent had

deposited that check in his operating account on March 5, 1996 (State's Ex. 2).

Ms. Filiault asked the respondent for the return of all the monies which she had given him, and he has expressed a willingness to make such a refund. As of the date of the hearing, however, he had not done so.

5) In April of 1996 Marsha Rencher spoke with respondent's employee Donna D'Agostino about renting an apartment. An apartment which met Ms. Rencher's requirements was eventually located, and, at Ms. D'Agostino's request, on April 21, 1996 she gave her a check for \$1,500.00 as payment of the respondent's commission. However, Ms. Rencher told Ms. D'Agostino that there were insufficient funds in her account, and Ms. D'Agostino assured her that the check would not be cashed until the deal was finalized. However, the respondent deposited the check in his operating account and it was dishonored. The respondent asked Ms. Rencher for a new check because, he said, he did not want to re-deposit the old one. Ms. Rencher complied, and the respondent proceeded to deposit both checks, and both checks cleared (State's Ex. 3).

The respondent agreed to refund \$1,500.00 to Ms. Rencher and gave her two checks, both of which were dishonored for insufficient funds (State's Ex. 3). She then sued him in White Plains Small Claims Court and obtained a default judgement of \$1,229.33 (State's Ex. 1[B]). That judgement has only been partially satisfied.

6) On or about May 15, 1996 Bobby Jo Morey was shown an apartment by the respondent, and on May 20, 1996 she gave him two checks for \$1,200.00 each, one for security and the second for the respondent's commission. The respondent told her that if she was unable to take the apartment the commission would be refunded.

Shortly thereafter Ms. Morey realized that she would be unable to take the apartment and attempted to contact the respondent to request a refund of the commission. After numerous attempts she was able to do so, and the respondent gave her a check dated July 1, 1996 for \$1,200.00. Ms. Morey waited until that date to deposit the check, but when she did so it was dishonored due to insufficient funds (State's Ex. 4). As of the date of the hearing Ms. Morey's money had not been refunded.

7) On February 6, 1996, with the help of Donna D'Agostino, Patricia Cerchiara entered into an agreement to rent an apartment in Port Chester, New York. Before she took possession the landlord told her that he had misrepresented that the apartment was soundproof, released her from the rental, and returned to her the monies which he had received for the rental. Ms. Cerchiara then requested the return of the \$500.00 brokerage commission which she had paid to the respondent and, when he failed to comply with that request, she sued him in White Plains Small Claims Court. On November 15, 1996, after

arbitration, she was granted a judgement in the amount of \$605.84 (State's Ex. 1[C]). Although he had offered in court to refund the money, the respondent voluntarily paid only \$200.00 of the judgement. The balance was paid after his car was impounded by the Sheriff's Department.

8) According to the respondent, he failed to promptly satisfy the judgments because of a lack of funds to do so.

OPINION

I- The cancellation of the respondent's license for non-payment of the renewal fees does not divest this tribunal of jurisdiction, as the acts of misconduct occurred while the respondent was licensed. *Brooklyn Audit Co., Inc. v Department of Taxation and Finance*, 275 NY 284 (1937); *Senise v Corcoran*, 146 Misc.2d 598, 552 NYS2d 483 (Supreme Ct., NY County 1989). Jurisdiction would, in fact, continue even had the license expired of its own terms, and the license may still be revoked. *Albert Mendel & Sons, Inc. v N.Y. State Department of Agriculture and Markets*, 90 AD2d 567, 455 NYS2d 867 (1982); *Main Sugar of Montezuma, Inc. v Wickham*, 37 AD2d 381, 325 NYS2d 858 (1971).

II- In the various transactions involved in this proceeding the respondent was the agent of Ms. Filiault, Ms. Rencher, Ms. Morey, and Ms. Cerchiara, the agencies having been created when he agreed to assist them in obtaining apartments. The relationship of agent and principal is fiduciary in nature, "...founded on trust or confidence reposed by one person in the integrity and fidelity of another." *Mobil Oil Corp. v Rubinfeld*, 72 Misc.2d 392, 339 NYS2d 623, 632 (Civil Ct. Queens County, 1972). Included in the fundamental duties of such a fiduciary are good faith and undivided loyalty, and full and fair disclosure. Such duties are imposed upon real estate licensees by license law, rules and regulations, contract law, the principals of the law of agency, and tort law. *L.A. Grant Realty, Inc. v Cuomo*, 58 AD2d 251, 396 NYS2d 524 (1977). The object of these rigorous standards of performance is to secure fidelity from the agent to the principal and to insure the transaction of the business of the agency to the best advantage of the principal. *Department of State v Short Term Housing*, 31 DOS 90, conf'd. *sub nom Short Term Housing v Department of State*, 176 AD 2d 619, 575 NYS2d 61 (1991); *Department of State v Goldstein*, 7 DOS 87, conf'd. *Sub nom Goldstein v Department of State*, 144 AD2d 463, 533 NYS2d 1002 (1988). By mishandling funds received from his principals, failing to make refunds when due, and issuing to those principals checks for which there were insufficient funds in his account, the respondent violated his fiduciary duties and demonstrated untrustworthiness and incompetency as a real estate broker.

III- A real estate broker has the fiduciary duty of handling his or its clients' funds with the utmost scrupulousness, and must take extreme care to assure that the rights of the lawful owners of those

funds will not be jeopardized. *Department of State v Mittleberg*, 61 DOS 86, conf'd *sub nom Mittleberg v Shaffer*, 141 A.D.2d 645, 529 N.Y.S.2d 545 (1988)¹; *Division of Licensing Services v Pellittieri*, 77 DOS 92; *Division of Licensing Services v Tripoli*, 96 DO 91. That duty is implemented through 19 NYCRR 175.1, which forbids the commingling of brokers' and clients' funds and requires that client funds be maintained in a special bank account, which regulation was violated by the respondent when he placed the security and moving deposits in his operating account. The purpose of that regulation "is to assure that the rights of the lawful owners of escrow funds are not jeopardized by an agent's mismanagement of funds entrusted to the agent's care" *Division of Licensing Services v Pozzanghera*, 141 DOS 93, 7, and its violation is a demonstration of untrustworthiness and incompetency.

The use by a real estate broker for his or its own purposes of money received from and belonging to other persons warrants the revocation of the broker's or salesperson's license. *Lawrence Black, Inc. v Cuomo*, 65 A.D.2d 845, 410 N.Y.S.2d 158 (1978), aff'd. 48 N.Y.2d 774, 423 N.Y.S.2d 920. "The imposition of any lesser penalty would unduly jeopardize the welfare of any persons who might do business with the respondents in the future." *Division of Licensing Services v Pellittieri*, *supra* at p. 3.

IV- "The failure to pay a judgement which has been lawfully obtained, without a showing that he is unable to do so, is a demonstration of untrustworthiness by a real estate broker. *Department of State v Feldman*, 113 DOS 80, conf'd. *sub nom Feldman v Department of State*, 81 AD2d 553, 440 NYS2d 541 (1981); *Division of Licensing Services v Shulkin*, 40 DOS 90; *Division of Licensing Services v Janus*, 33 DOS 89." *Division of Licensing Services v Harrington*, 123 DOS 93 at 4. In this case, however, the respondent's unrefuted testimony was that he was unable to promptly satisfy the judgements, although he did make part payment.

V- The respondent issued a number of bad checks, which is a further demonstration of untrustworthiness and incompetency. *Division of Licensing Services v The Coopers Realty Consultants, Inc.*, 38 DOS 91; *Department of State v Janus*, 33 DOS 89; *Department of State v Vitelli*, 50 DOS 88; *Department of State v Milk*, 59 DOS 87.

VI- Fraudulent practices "...as used in relation to the regulation of commercial activity, is often broadly construed, but has generally been interpreted to include those acts which may be characterized as dishonest and misleading. Since the purpose of such restrictions on commercial activity is to afford the consuming public expanded protection from deceptive and misleading fraud, the

¹ Pursuant to *Mittleberg*, a broker may even be required to refund trust funds which he improperly transferred to a third party and of which he no longer has possession.

application is ordinarily not limited to instances of intentional fraud in the traditional sense. Therefore, proof of an intent to defraud is not essential." *Allstate Ins. Co. v Foschio*, 93 A.D.2d 328, 464 N.Y.S.2d 44, 46-47 (1983) (citations omitted). A single fraudulent practice may be the basis for the imposition of disciplinary sanctions. *Division of Licensing Services v Linfoot*, 60 DOS 88, conf'd. *sub nom Harvey v Shaffer*, 156 A.D.2d 1013, 549 N.Y.S.2d 296 (1989).

The respondent accepted money which he was required to retain in escrow, deposited that money in his operating account, and then failed to return it to the rightful owner. He also purported to make refunds by issuing bad checks. In so doing he engaged in fraudulent practices.

VII- Pursuant to 19 NYCRR 175.2 a broker who collects money on behalf of his client is required to render an account to that client and to return to the client any of such money which was unexpended. The respondent has failed to account to Ms. Filiault for the \$500.00 moving deposit which was returned to him by the co-op management. In so doing he has demonstrated untrustworthiness and incompetency.

VIII- The complaint alleges that the respondent violated 19 NYCRR 175.3[b]. That regulation, governs the handling of rent security deposits, is by its own term clearly referable to a situation in which a real estate broker is managing rental property. That is not the case herein and, therefore, the regulation does not apply to these proceedings.

IX- Where a broker has received money to which he is not entitled, he may be required to return it, together with interest, as a condition of retention of his license. *Donati v Shaffer*, 83 NY2d 828, 611 NYS2d 495 (1994); *Kostika v Cuomo*, 41 N.Y.2d 673, 394 N.Y.S.2d 862 (1977); *Zelik v Secretary of State*, 168 AD2d 215, 562 NYS2d 101 (1990); *Edelstein v Department of State*, 16 A.D.2d 764, 227 N.Y.S.2d 987 (1962).

CONCLUSIONS OF LAW

1) The Department of State retains jurisdiction to impose disciplinary sanctions on the respondent in spite of the cancellation of his license because of his failure to pay the renewal fee.

2) By mishandling funds received from his principals, failing to make refunds when due, and issuing to those principals checks for which there were insufficient funds in his account, the respondent violated his fiduciary duties and demonstrated untrustworthiness and incompetency as a real estate broker.

3) By violating 19 NYCRR 175.1 the respondent demonstrated untrustworthiness and incompetency as a real estate broker.

4) In light of his financial inability to do so, the respondent's failure to promptly satisfy judgements obtained against him was not a demonstration of untrustworthiness or incompetency.

5) The respondent's issuance of checks for which he had insufficient funds on deposit was a demonstration of untrustworthiness and incompetency.

6) By accepting money which he was required to retain in escrow, depositing that money in his operating account, and then failing to return it to the rightful owner, and by purporting to make refunds by issuing bad checks, the respondent engaged in fraudulent practices.

7) By failing to account to Ms. Filiault for the moving deposit which was returned to him the respondent violated 19 NYCRR 175.2 and thereby demonstrated untrustworthiness as a real estate broker.

8) The respondent did not violate 19 NYCRR 175.3[b].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Christopher H. Laymon, Jr. has engaged in fraudulent practices and has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate broker is revoked, said revocation to be deemed to have been imposed on January 13, 1997, the date of the cancellation of the license for non-payment of the renewal fee. Should he ever re-apply for a license as a real estate broker or salesperson, no action shall be taken on such application until he shall have produced proof satisfactory to the Department of State that he has refunded to Ann L. Filiault the sum of \$2,900.00 plus interest at the legal rate for judgements (currently 9%) from March 1, 1996, that he has fully satisfied the judgement obtained against him by Marsh Rencher in White Plains Small Claims Court, and that he has refunded to Bobby Jo Morey the sum of \$1,200.00 plus interest at the legal rate for judgements from July 1, 1996. The respondent, who has already

surrendered his license certificate, is directed to immediately send his license pocket card to Diane Ramundo, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: July 9, 1997