

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Complaints of

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

Complainant,

DECISION

-against-

**ALBINO J. LOFFREDO, CENTURY 21 BIGMAN
REAL ESTATE SERVICES, INC., ROBERT J.
ZAHER, and ANNA M. BARBARA,**

Respondents.

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This matter came on for hearing before the undersigned, Roger Schneier, on February 6 and 7 and May 4, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondents, of 1405 Deer Park Avenue, N. Babylon, New York 11703, were represented by Howard Goldson, Esq., Goldson & Radin, 861 Larkfield Road, Commack, New York 11725.

The complainant was represented by Scott L. NeJame, Esq., Assistant Litigation Counsel.

COMPLAINTS

The proceedings encompassed three complaints:

CRC #249, in which it is alleged that Albino Loffredo, acting in his capacity of representative of Century 21 Bigman Real Estate Services, Inc. (hereinafter "Bigman"), sued Paul Della Universita for a commission for the sale of property which was not owned or listed by him, thereby demonstrating incompetency, and prepared or supervised the preparation of an exclusive listing agreement through a multiple listing service which did not provide the homeowner with the option of having all negotiated offers for the property submitted either through the listing broker or the selling broker, in violation of 19 NYCRR 175.24[c][2];

CRC # 420, in which it is alleged that Paul and Frances Della Universita listed their home for sale with Jiffo Realty; that after the expiration of the listing a salesperson associated with Bigman

brought potential buyers to see the house and was told by the Della Universitas that they no longer wished to sell it but that he could show it; that the potential buyers made a written offer to purchase the house which was not accepted by the Della Universitas; that Loffredo contacted the Della Universitas on numerous occasions and threatened to sue them if they did not pay Bigman a commission; that on July 10, 1986, because of intimidation and threats Mrs. Della Universitas signed an agreement pursuant to which in return for Bigman waiving its commission claim the Della Universitas would pay Bigman a commission of 7% of the sales price whenever the property was sold by any persons or entity; that because of that agreement, on December 4, 1989 the Della Universitas entered into a broker employment agreement with Bigman; that the agreement contained no statement of services; that Bigman did not obtain a purchaser for the property; that after the expiration of the agreement the property was sold without the assistance of Bigman; that Bigman sued the Della Universitas for a commission; that in the complaint Loffredo misrepresented that the Della Universitas had granted Bigman an exclusive right to sell the property by executing a broker employment agreement in February, 1986; that Loffredo and Bigman pursued the lawsuit based upon a false representation, causing the Della Universitas to suffer pecuniary damages; and that by reason of the foregoing Loffredo and Bigman demonstrated untrustworthiness and/or incompetency, and engaged in fraud, a fraudulent practice, and unlawful business practices or, in the alternative, breached their fiduciary duties of good faith, undivided loyalty, reasonable care, skill, diligence, judgement and full disclosure, thereby demonstrating untrustworthiness and/or incompetency, and violated 19 NYCRR 175.7;

CRC 440, in which it is alleged that on or about August 24, 1992 Thomas Papaccio entered into a broker employment agreement expiring on November 25, 1992 with Bigman; that on August 26, 1992 respondent Barbara presented prospective buyers to Papaccio; that Papaccio and the prospective buyers executed a binder agreement containing an offer to purchase the property for \$116,000.00 subject to the buyers obtaining a mortgage in the amount of \$110,200.00; that the binder agreement did not contain an attorney approval clause; that Papaccio and Barbara executed a commission agreement which stated that Bigman's commission of \$6,690.00 was deemed earned and payable; that the commission agreement contained no consideration on the part of Bigman; that prior to the execution of the binder and commission agreement respondent Zaher told Papaccio that the terms in them regarding payment of a commission were the same as those in the broker employment agreement; that the terms of the broker employment agreement regarding payment of commissions contradicted the terms contained in the binder and the commission agreement; that on September 15, 1992 a purchase and sale contract conditioned on the buyers obtaining within 50 days a mortgage commitment in the amount of \$112,100.00, or \$110,200.00 if the larger loan was denied, was executed; that Chemical Bank denied the mortgage application and advised that a mortgage in the amount

of \$104,500.00 could be approved; that the buyers' attorney advised Papaccio's attorney of those facts; that Papaccio's attorney advised the buyers' attorney that Papaccio would not reduce the purchase price and returned the buyers' down payment; that Bigman filed suit against Papaccio for a commission, causing him pecuniary damages; and that by reason of the foregoing the respondents breached their fiduciary duties of good faith, undivided loyalty, reasonable care, skill, diligence and judgement to their principal, engaged in the unauthorized practice of law, and demonstrated untrustworthiness and or incompetency.

EVIDENTIARY MOTION

The respondents contend that the tribunal was in error when it admitted into evidence, over their objection, the memorandum decision of District Court, Suffolk County, in *Century 21 Bigman Associates, Inc. v Della-Universita* (State's Ex. 19). They argue that the tribunal was wrong when it ruled that the decision had the effect of collateral estoppel on the following questions: did Loffredo threaten to sue the Della Universitas if they did not pay Bigman a commission on the January 18, 1986 binder agreement executed by the Novaks?; did Mrs. Della Universitas execute, on July 10, 1986, due to Loffredo's threats and intimidation, an agreement to pay Bigman a commission whenever the property might be sold?; did, due to the belief that they would have to pay a commission to Bigman, the Della Universitas enter into a broker employment agreement with Bigman on December 4, 1989?; and did, in February, 1992 Bigman commence a lawsuit against the Della Universitas for a \$10,465.00 commission, with Loffredo misrepresenting in the complaint that the Della Universitas had granted Bigman an exclusive right to sell the property by executing a broker employment agreement in February, 1986?.

In the decision, the Court held that Bigman had sued on a contract which lacked the requisite element of consideration to make it enforceable, noting that

"(a) forbearance to sue on a wholly meritless claim which is not asserted in good faith does not constitute consideration sufficient to form a binding contract (see *Springstead v Ness*, 125 AD2d 230). It cannot be gainsaid that in the absence of the plaintiff's harassing and intimidating tactics the defendants would have executed the 'contract' which forms the underlying basis of this action. The plaintiff was only able to secure the defendants' signatures based upon a feigned claim of entitlement to a real estate commission and the constant threats of a lawsuit."

The respondents assert, however, that the material issues necessarily adjudicated by the Court are different from the issues in this proceeding and that, therefore, collateral estoppel does not apply. They cite *Neidich v State Commission For Human Rights*, 53 Misc.2d 984, 280 NYS2d 463 (1967) for the proposition that where there are different issues and remedies in the two proceedings collateral estoppel does not apply. First, it must be noted that the parties in *Neidich* did not raise the issues of collateral estoppel and *res judicata* and that, therefore, the Court's discussion of them is *obiter dictum* and has no precedential value.¹ 29 NYJur2d Courts and Judges, §§481 and 482. Second, in *Neidich* the Court found that *res judicata* and collateral estoppel did not apply because the case before the Department of State involved the question of whether there had been a violation of the Real Property Law, while the case before the Division For Human Rights dealt with the questions of whether there had been a violation of the Law Against Discrimination and if a cease and desist order should issue. In the instant proceeding, however, the issue is whether the Court's factual holding: that Bigman had sued on a contract that lacked consideration both because it was based on a forbearance to sue on a wholly meritless claim which was not asserted in good faith, and because it had been entered into by the Della Universitas after intimidating and harassing tactics by Bigman, collaterally estops Bigman from denying that it coerced, threatened and/or forced the Della Universitas to execute the agreement of July 10, 1986. Thus, in this case we are dealing with collateral estoppel on issues of fact, not on issues of law.

Likewise, the holding on the issue of collateral estoppel in *Shalit v State Dept of Motor Vehicles*, 153 Misc.2d 241, 580 NYS2d 836 (1992), also cited by the respondents, is also *obiter dictum*. That is so since the decision which the Court ruled did not have a collateral estoppel effect had issued from Small Claims Court, and by statute the findings of fact in that decision could not have any collateral effect. NY City Civil Court Act §1808; Uniform District Court Act §1808; Uniform City Court Act §1808; Uniform Justice Court Act §1808. Therefore, the Court's discussion was entirely unnecessary.

In *Ryan v New York Telephone Co.*, 62 NY2d 494, 478 NYS2d 823 (1984), the plaintiffs had commenced an action for damages for false arrest, malicious prosecution, slander and wrongful discharge. The Defendants pleaded an affirmative defense of *res judicata* and collateral estoppel on the basis of a prior

¹ *Neidich* was a ruling on a motion for a preliminary injunction to bar the Commission for Human Rights from going forward with a hearing on charges of racial discrimination. The question of collateral estoppel was raised by the Court because the plaintiff's had already been found guilty of discrimination after a hearing before the Department of State.

administrative determination denying the plaintiff's claim for unemployment benefits, and the Court of Appeals reversed Special Term's granting of the plaintiff's motion to dismiss the defense. Holding that what is controlling is the identity of the critical underlying issue which has necessarily been decided in the prior action or proceeding, rather than, as respondents would have this tribunal hold, the remedies sought, the Court held that the defense of collateral estoppel barred the plaintiffs from litigating the claim. In the present case, the District Court found that Bigman harassed and intimidated the Della Universitas into signing the agreement of July 10, 1986 by asserting a wholly meritless claim and threatening a law suit and that, therefore, the agreement lacked consideration. The findings of the Court clearly resolve in the affirmative the questions set forth above as being subject to the collateral estoppel effect of the Court's decision, with the exception of the charge that Loffredo misrepresented in the complaint that Bigman had been granted an exclusive right to sell listing in February, 1986, which allegation was not contained in the final, amended complaint on which the court ruled.

As the owner of Bigman, being in privity with it and having the right to control the litigation on its behalf, Loffredo is equally bound by the Court's decision. 73 NYJur2d, Judgements, §§397, 399, and 403.

I have considered the respondent's additional arguments on the issues of burden of proof and prejudice and find them to be wholly without merit.

FINDINGS OF FACT

1) Notice of hearing together with copies of the complaint were served on the respondents by certified mail (State's Ex. 1, 2, and 3).

2) Albino J. Loffredo is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Bigman. He is also currently licensed as a real estate broker representing Century 21 Bigman Realty/Bigman Associates of Babylon Inc.

Robert J. Zaher is, and at all times hereinafter mentioned was, duly licensed as a real estate broker in association with Bigman.

Anna M. Barbara is, and at all times hereinafter mentioned was, duly licensed as a real estate salesperson in association with Bigman.

CRC #249 and #420

3) Sometime in 1985 Paul and Frances Della Universita entered

into a three month listing agreement with Jiffo Realty for the sale of their home located at 23 Shipman Avenue, North Babylon, New York. Shortly after the expiration of the listing a salesperson licensed in association with Bigman telephoned Mrs. Della Universita and told her that he would like to show the house to someone who was interested in it. She repeatedly told him that the house was no longer for sale, but he pressed the issue, finally acknowledging that he knew the house was not for sale but asking her to let his customers see it anyway, and she agreed.

4) The salesperson came to the house, and Mr. Della Universita again told him that the house was not for sale. The salesperson replied that they might change their minds again, and he was permitted to show the house to his customers.

5) Several days later the salesperson telephoned Mrs. Della Universita and said that he had brought her a buyer. She reminded him that she had told him that the house was not for sale. As found by the District Court in *Century 21 Bigman Associates, Inc. v Della-Universita, supra*, Loffredo, acting on behalf of Bigman, then proceeded to harass and intimidate the Della Universitas with constant threats of a law suit. The result was that Mrs. Della Universita agreed to enter into an agreement with Bigman pursuant to which the claim for a \$10,465.00 commission would be waived in return for the Della Universita's commitment to pay Bigman a commission of 7% of the sales price whenever and by whomever the house was sold. The agreement also contained language granting the Della Universitas the option of listing their property with Bigman (State's Ex. 16).

6) Several years later, the Della Universitas decided to sell the house. Mrs. Della Universita telephoned Bigman and arranged for a salesperson to come to the house to take a listing, which was done on December 8, 1989 (State's Ex. 20). The agreement was an exclusive right to sell listing expiring on February 4, 1990, with a sales price of \$229,000.00, as suggested by the salesperson, and providing for the payment by the sellers of a 6% commission if sold by Bigman or another broker, or a 1% commission in the event of a private sale. It provided for the filing of the listing information with members participating in the Multiple Listing Service of Long Island, Inc. It did not contain a provision granting the Della Universitas the option of having all negotiated offers to purchase the house submitted either through Bigman or through some other selling broker, and instead contained a pre-printed provision barring direct negotiations by selling brokers. During the term of the agreement Bigman brought no customers to view the house.

7) In July, 1990, well after the expiration of the listing, Mrs. Della Universita advertised the house herself and sold it for \$175,000.00 without a broker.

8) On our about February 6, 1992 Bigman commenced suit against the Della Universitas. In the complaint it alleged, among other things, that on or about February, 1986 the Della Universitas granted it an exclusive right to sell their house by executing a written agreement, and that on our about January 27, 1984 (sic) it provided a ready, willing, and able buyer for the house, stated as being located at 65 Bowling Lane, Deer Park, New York, for a sales price of \$85,500.00. In his attached affidavit, Loffredo stated that he had read the complaint and knew the contents thereof, and that it was true to his knowledge (State's Ex. 17). In fact, there was no written listing agreement executed between Bigman and the Della Universitas until December 8, 1989, their house was located at 23 Shipman Avenue, North Babylon, New York, and the offer to purchase the house was for \$149,500.00. In a subsequent amended complaint, also verified by Loffredo on March 30, 1992, the allegation regarding the written listing agreement was deleted and the offering price was corrected, but the wrong address of the property was retained, although the correct address was also stated (State's Ex. 18). On June 5, 1992 the attorneys for the parties stipulated as to the correct address (Resp. Ex. D).

The lawsuit resulted in the District Court decision discussed *supra*.

CRC #440

9) On August 24, 1992 Thomas Papaccio telephoned Bigman. He spoke with Zaher and told him that he wished to sell his house, located at 15 W. Lakeland Street Bay Shore, New York. Zaher went to the house, looked it over, and accepted an exclusive right to sell multiple listing service listing from Papaccio, with a price of \$122,990.00 (State's Ex. 5). The commission terms of the agreement were as follows:

"The undersigned owner hereby agrees to pay this broker or the participating selling realtor a commission of 6% (of the selling price) in the event that the property, or any portion thereof, is sold or exchanged during the term of this contract. The commission is also due and payable in the event a purchaser is obtained, ready, willing, and able to purchase the property upon the above terms or upon such other terms as accepted by me...."²

In addition, Papaccio and Zaher executed a rider to the listing agreement, providing that should Papaccio sell the property privately the commission would be reduced to 1% (State's Ex. 6).

² Zaher explained to Papaccio that in normal practice the commission would be payable at closing.

10) The next day, Barbara showed the house to William and Patricia Kosin. Later that day Barbara telephoned Papaccio, and she told him that the Kosins liked the house and were interested in making an offer of \$112,000.00. Papaccio replied that the offer was too low, and Barbara said that she would talk to the Kosins and get back to him. That same day she telephoned again, and Papaccio agreed to an offer of \$116,000.00.

11) The following day (August 26, 1992), both Zaher and Barbara went to the house. Zaher gave Papaccio, and Papaccio signed in the place for the owner's approval and acceptance, a "sales agreement" bearing the Bigman name (State's Ex. 7), which Zaher stated was a standard form used by Bigman. The agreement acknowledged receipt of \$100.00 on account, provided for the sale of the property for \$116,000.00, with an additional \$5,700.00 to be deposited upon signing a more formal contract, and was subject to the Kosins obtaining, within 60 days, a "Sonimae" (sic) mortgage in the amount of \$110,200.00, with a 25 or 30 year term. It contained a clause providing that the seller agrees that the broker's commission is earned, and that the seller agrees to be responsible for any and all legal costs incurred in the collection of that commission. It did not contain an attorney's approval clause. Formal contracts were to be signed on or about September 3, 1992, and closing of title was to be on or about October 30, 1992.

Zaher and Barbara also presented Papaccio with a commission agreement on a form mandated by Loffredo (State's Ex. 8), which Zaher told him provided for a commission based on the percentage rate set in the listing agreement, and said that the commission of \$6,960.00 would be due at the closing. He did not tell Papaccio that the commission agreement differed from the previously agreed upon provisions as to when the commission was due and payable that were contained in the listing agreement. The body of the agreement read as follows:

"It is hereby mutually agreed between CENTURY 21 BIGMAN REAL ESTATE SERVICES, Inc. as BROKER, and Mr. Thomas Papaccio as SELLERS, that CENTURY 21 BIGMAN REAL ESTATE SERVICES, Inc. as BROKER has brought about a meeting of the minds, between the SELLERS and William & Patricia Kosin as PURCHASERS, regarding the sale of premises known as 15 W. Lakeland Street Bayshore New York, and the commission in the amount of \$6960 is hereby earned and payable, irrespective of any agreements entered into or not entered into between the BUYER and SELLER. Sellers agreed to be responsible for any and all legal costs incurred in collection of said Commission."

Papaccio signed the commission agreement as seller, and

Barbara signed on behalf of Bigman.

12) Papaccio then retained James A. Cappa, Esq. to draw up a contract. On or about September 15, 1992 the parties executed the contract, which provided for a purchase price of \$118,000.00,³ with a down payment on signing of \$5,800.00, and was contingent upon the Kosins obtaining, within 50 days of the date of the contract, a firm mortgage commitment in the principal sum of \$112,100.00, with a 30 year term, and with the added proviso that the Kosins would accept a commitment of \$110,200.00 if the greater amount were to be denied (State's Ex. 9).

13) On October 20, 1992 Chemical Bank issued a letter to the Kosins in which it stated that it would grant a mortgage of only \$104,500.00 (State's Ex. 10).

14) October 30, 1992 the Kosins' attorney wrote to attorney Cappa. The letter stated that due to a low appraisal Chemical Bank would not grant a mortgage in the amount stated in the contract and that, accordingly, the Kosins were not in a position to complete the transaction without a reduction in the purchase price (State's Ex. 11).

15) On the day that Papaccio was informed that the house did not appraise for the full purchase price he spoke to Zaher, who suggested that Papaccio lower the price, agree to hold a second mortgage of \$5,000.00 or \$6,000.00, or have some additional work done on the house. Barbara also asked Papaccio to give the Kosins extra time to go to another bank or to have the house re-appraised. Papaccio, who had purchased the house the year before for \$114,000.00 and had done substantial work on it, refused.

16) On November 3, 1992 Cappa wrote to the Kosins' attorney, advised him that Papaccio did not wish to reduce the purchase price or allow additional time, and that, in accordance with that attorney's request, he was returning the down payment. The letter was accompanied by a check to the Kosins for \$5,800.00 (State's Ex. 12).

17) Sometime in November, 1992 Papaccio received a bill for a commission from Bigman. He telephoned Zaher, who told him he would have to talk to Loffredo. Loffredo told Papaccio that he should have granted the extension, that he believed that Papaccio didn't want to sell the house, and that if he didn't pay the bill he would be sued.

18) On or about January 13, 1993 Bigman, at the direction of

³ The increase in the purchase price was compensated for by an agreement that Papaccio would pay \$2,000.00 of the purchasers' closing costs.

Loffredo, commenced suit against Papaccio by the service of a summons and a complaint, verified by Loffredo, seeking damages of \$6,960.00 plus reasonable attorney's fees and expenses (State's Ex. 13). In settlement, Papaccio has orally agreed to list the house with Bigman again.

OPINION

I- Bigman brought suit against the Della Universitas based on a complaint verified by Loffredo. In that complaint it was incorrectly alleged that the Della Universita property was located at 65 Bowling Lane, Deer Park, New York. The amended complaint, also verified by Loffredo, eliminated that allegation and corrected some other errors, but again incorrectly stated the address of the property, although this time together with the correct address.

CRC #249 alleges that because of the incorrect address Loffredo sued for a commission for the sale of property which was not owned or listed by the defendant, thereby demonstrating incompetency. The respondents contend that the mistake in the first complaint was corrected and remedied by the amended complaint. They do not, however, explain the continued use of the incorrect address, which required a subsequent stipulation to correct. While the Della Universitas may have understood what they were being sued for, the fact remains that the papers, which Loffredo verified that he had read and were correct, identified the wrong property.

The action was commenced with the service of the summons, CPLR §304, and the complaint, the purpose of which was to inform the Della Universitas of the claim made against them, set forth the cause of action. 84 NYJur2d Pleading, §99. Loffredo's obvious carelessness in reviewing the complaint before verifying it resulted in a suit based on a demand for a commission for the sale of property not listed with Bigman and not owned by the Universitas, which was a demonstration of incompetency. The fact that the complaint was amended does not excuse that initial act of incompetency, particularly since the amendment, which Loffredo verified, still did not fully correct the error.

II- 19 NYCRR 175.24[c][2] provides that when a listing of residential property is obtained by a multiple listing service member broker the listing agreement must give the homeowner the option of having all negotiated offers to purchase the property submitted either through the listing broker or through the selling broker. The listing agreement used by Bigman on December 8, 1989 for the Della Universita property (State's Ex. 20) contains a pre-printed provision barring direct negotiations by selling brokers, and was, therefore, in violation of the regulation. Such a direct and blatant violation is a demonstration of untrustworthiness.

Loffredo, as representative broker of Bigman authorized to act

on its behalf (Real Property Law (RPL) §441-b[2]), had the obligation to supervise the brokerage activities of the corporation imposed by RPL §441[d] and 19 NYCRR 175.21[a], a duty confirmed by the Courts in *Friedman v Paterson*, 453 NYS2d 819 (1982), aff'd. 58 NY2d 727, 458 NYS2d 546. *Division of Licensing Services v Shulkin*, 4 DOS 90. Based on that duty there is a presumption that Loffredo was aware of the pre-printed terms of Bigman's listing agreement (the original of which was in his attorney's hearing file). While he may not have directly supervised the filling in of the blanks on, and the execution of, the form in the particular transaction, he still was involved in supervision of the preparation of the listing agreement because he permitted the pre-printed form to be used. By so doing he demonstrated untrustworthiness.

III- As noted in the discussion of the evidentiary motion, the evidence conclusively established: that Loffredo threatened to sue the Della Universitas if they did not pay Bigman a commission; that, because of Loffredo's threats and intimidation, Mrs. Della Universita executed an agreement to pay Bigman a commission should the property ever be sold; and that because of a belief that they would have to pay Bigman a commission the Della Universitas entered into the December, 1989 listing agreement.⁴

Loffredo's conduct can only be described as predatory. As stated by the Court, he harassed and intimidated the Della Universitas by threatening to sue on a wholly meritless claim. Then, having extracted an unenforceable agreement lacking any consideration, he sued them for an unearned commission.

Not only was Loffredo's conduct a demonstration of extreme untrustworthiness, it was also a fraudulent practice, which, "...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 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).

⁴ Mr. Goldson's discussion, in his memorandum of law, of other evidence received on the issues decided by the District Court is out of order. At his instance such evidence was struck from the record.

IV- In the original complaint against the Della Universitas, Loffredo stated that on or about February, 1986 they granted Bigman an exclusive right to sell the property by executing a written exclusive right to sell agreement. That claim was untrue. What was executed in March, 1986 (not February) was an agreement to pay Bigman a commission should they ever sell their property. By its very language the agreement, which stated that the Della Universitas had the option of listing their property with Bigman, was not an exclusive right to sell.

The offending language was deleted in the amended complaint. However, as discussed in ¶ I, *supra*, that does not alter the fact that Loffredo incompetently commenced the lawsuit based on a false allegation. The amendment does, however, provide a valid defense to the additional charge that he and Bigman pursued the lawsuit based upon a false representation regarding the alleged agreement.

V- The respondents are charged with engaging in the unlicensed practice of law in the Papaccio transaction because of their use of a sales agreement which did not contain an attorney's approval clause. Real Estate brokers are permitted to prepare purchase offer contracts subject to very definite limitations.

"The line between such permitted acts by real estate brokers and the unauthorized practice of the law has been recognized as thin and difficult to define and, at time, to discern. Whether or not the services rendered are simple or complex may have had a bearing on the outcome, but it has not been controlling....

The justification for granting to real estate brokers and agents the privilege to complete simple purchase and sale documents has been said to be the practical aspect of the matter, that is, the business need for expedition and the fact that the broker has a personal interest in the transaction. It should be noted in this regard, however, that the so-called 'simple' contract is in reality not simple....The personal interest of the broker in the transaction and the fact that he is employed by one of the opposing parties are further reasons to require that, insofar as the contract entails legal advice and draftsmanship, only a lawyer or lawyers be permitted to prepare the document, to ensure the deliberate consideration and protection of the interests and rights of the parties.

The law forbids anyone to practice law who

has not been found duly qualified and licensed to do so....Thus, the privilege accorded to real estate brokers and agents must be circumscribed for the benefit of the public to ensure that such professionals do not exceed the bounds of their competence and, to the detriment of the innocent public, prepare documents the execution of which requires a lawyer's scrutiny and expertise." *Duncan & Hill Realty v Dept. of State*, 62 AD2d 690, 405 NYS2d 339, 343-344 (1978) (citations omitted), appeal dismissed 45 NY2d 821, 409 NYS2d 210.

In preparing a purchase offer contract, real estate brokers and salespersons may not insert any provision which requires the exercise of legal expertise. They may not devise

"legal terms beyond the general description of the subject property, the price and the mortgage to be assumed or given...(and) may readily protect (themselves) from a charge of unlawful practice of law by inserting in the document that it is subject to the approval of the respective attorneys for the parties. Moreover, a real estate broker or agent who uses (a purchase offer form) recommended by a joint committee of the bar association and realtors association of his local county, who refrains from inserting provisions requiring legal expertise and who adheres to the guidelines agreed upon by the American Bar Association and the National Association of Real Estate Brokers...has no need to worry about the propriety of his conduct in such transactions." *Duncan & Hill Realty v Dept. of State*, *supra*, 405 NYS2d at 345.

The sales agreement presented to Papaccio by Zaher was a binding contract, inasmuch as it contained all of the essential elements: identification of the parties and property, terms of financing, items included in the sale, and date of closing. 21 NYJur2d Contracts, §§20-25. Most of the items on the form fall within the area marked out by the Court in *Duncan & Hill* as being general, non-legal terms which brokers and salespersons may insert without fear of being charged with the illegal practice of law. There is, however, one clause in the agreement which requires legal expertise and, therefore, subjects the agreement to the need for an attorney approval clause.⁵

⁵ The respondents do not contend that they are attorneys, or
(continued...)

The clause in question provides that the seller agrees both that the broker's commission is earned and to be responsible for any and all legal costs incurred in the collection of it. In effect, it is an agreement by the seller that the commission terms of the listing agreement have been satisfied. Deciding to make such an agreement requires legal expertise, as it necessitates the interpretation of the listing agreement, which provides that the commission is earned when the property is sold or exchanged or when the broker has obtained a ready, willing, and able purchaser. A lay person should not be expected to decide without the advice of an attorney whether the signing of the sales agreement constitutes the sale or exchange of the property, or whether the ready, willing, and able provision has been satisfied.

The respondents argue that an attorney approval clause is not necessary because in the use of such binders it is contemplated that the attorneys for the parties will draw a subsequent formal contract of sale. That argument is, however, rendered inefficacious by the fact that Loffredo and Bigman based their commission suit against Papaccio on the sales agreement, and in particular on the above noted offending clause.

The sales agreement is on a Bigman form for which, as discussed *supra*, Loffredo, and through him the corporation is responsible. His providing for the use of that agreement is not only the unlawful practice of law, but also a further demonstration of untrustworthiness and incompetency.

Although the agreement was presented to Papaccio by Zaher, in the company of Barbara, they should not be held liable for the offending clause, which is pre-printed on the form provided by their employer.

VI- As discussed above, the listing agreement signed by Papaccio provided that a commission would be due Bigman upon the sale or exchange of his property, or if Bigman produced a ready, willing and able buyer, while the sales agreement, executed prior to the actual sale of the property,⁶ contained an acknowledgement

⁵(...continued)
that the agreement has been approved by a joint committee of the bar association and realtors association of their local county.

⁶ "The general rule, as succinctly stated in *Eldridge v Kuehl*, 27 Iowa, 160, 173, is that anything short of passing the title is not a sale, but an agreement to sell. It is said in *Marts v Cumberland Mut. Fire Ins. Co*, 44 NJ Law, 478, 481, that the word 'sale' imports an actual transfer of title, and although it may be used as a mere contract to sell, yet in strictness it denotes an actual transmission of property. And in *Robinson v Hirschfelder*,
(continued...)

that the commission had been earned. In addition, the commission agreement, executed at the same time as the sales agreement, stated that Papaccio agreed that the commission was earned and payable "irrespective of any agreements entered into or not entered into between the buyer and seller."

In order to induce Papaccio to sign the sales and commission agreements, Zaher told him that the amount of the commission conformed to the formula set in the listing agreement. But he neglected to tell him that although he was agreeing that a commission had been earned that was not the case under the terms of the listing agreement, which he had assured him would not be payable until the closing of title. Thus, he misled Papaccio by omission, placing his, Loffredo's, and Bigman's interests ahead of those of Papaccio, their principal, in a fundamental breach of their fiduciary duties of good faith and undivided loyalty.⁷

The complaint alleges that Zaher actually told Papaccio that the terms of the agreements were the same. However, so long as the issue has been fully litigated by the parties, and is closely enough related to the stated charges that there is no surprise or prejudice to the respondent, the pleadings may be amended to conform to the proof and encompass a charge which was not stated in the complaint. This may be done even without a formal motion being made by the complainant. *Helman v Dixon*, 71 Misc.2d 1057, 338 NYS2d

⁶(...continued)

59 Ala. 503, it is said that an agreement to sell does not become a sale, if any terms in which the seller must co-operate, or which impose a duty or liability upon him, remain to be performed." *Neponsit Holding Corporation v Ansonge*, 215 AD 371, 214 NYS 91 (1926)

⁷ 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 Rubenfeld*, 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).

139 (Civil Ct. NY County, 1972). In ruling on the motion, the tribunal must determine that had the charge in question been stated in the complaint no additional evidence would have been forthcoming. *Tollin v Elleby*, 77 Misc.2d 708, 354 NYS2d 856 (Civil Ct. NY County, 1974). What is essential is that the "matters were raised in the proof, were actually litigated by the parties and were within the broad framework of the original pleadings." *Cooper v Morin*, 91 Misc.2d 302, 398 NYS2d 36, 46 (Supreme Ct. Monroe County, 1977), mod. on other grnds. 64 AD2d 130, 409 NYS2d 30 (1978), aff'd. 49 NY2d 69, 424 NYS2d 168 (1979). Applying those principles, the pleadings are amended to encompass the charge that Zaher misled Papaccio by failing to explain the full import of the sales and commission agreements.

Since all of the agreements involved were Bigman forms, it and Loffredo are responsible for their use and liable for their contradictory terms. Of particular concern is the provision in the commission agreement that the commission is payable regardless of any agreements between the seller and buyer. That eliminates any requirement that the buyer be able to perform according to the terms of the sales agreement, in which the seller and buyer agreed that the sale was contingent upon the buyer being able to obtain a mortgage loan meeting certain specifications. The use of such an agreement can only be seen as an attempt by Loffredo to assure that he would get a commission regardless of whether Bigman had actually effectuated the sale of the property, and is yet another example of gross untrustworthiness by him and Bigman.

VII- The final allegation involves the commission suit brought by Loffredo and Bigman against Papaccio. In that action it was alleged that a commission was earned by producing a buyer who was ready, willing and able to purchase on terms acceptable to Papaccio. It is the complainant's position that the suit was improper because the sale was cancelled when the purchasers were unable to obtain a mortgage. Loffredo and Bigman's position is that Papaccio should have given the buyers an extension, and that in any case the cancellation of the contract when the buyers could not get a mortgage commitment within 50 days was contrary to the terms of the sales agreement, which allowed 60 days to get a commitment. They also contend that it is significant that the price in the contract was \$2,000.00 higher than that in the sales agreement.

The sales agreement originally accepted by Papaccio gave the purchasers 60 days from August 26, 1992 to obtain a mortgage commitment. Those 60 days expired on October 25, 1992. The contract gave 50 days from September 15, 1995. Those 50 days expired on November 4, 1992. The purchasers did not obtain a

mortgage commitment by either October 25 or November 4, 1992.⁸

As for the difference in the price in the two documents, what is important is that both documents provided for a mortgage of \$110,200.00 and that the bank offered a substantially smaller loan.

Papaccio had already agreed to reduce the price of the property to below that which he had paid. He had no obligation to do so again. Likewise, he had allowed the purchaser more than 60 days from August 26th to obtain a mortgage commitment, and had no obligation to grant a further extension. In spite of that, Loffredo, although lacking a reasonable basis upon which to believe that he had been wronged but seemingly unwilling to accept one of the normal risks of the real estate brokerage business, and in an apparent attempt to shift those risks to Papaccio, his principal, relying on Papaccio's improperly obtained agreement that the commission had been earned, sued for a commission.⁹ In so doing he, and through him Bigman, violated their fiduciary duty of good faith, and again demonstrated untrustworthiness.¹⁰

⁸ While Papaccio's attorney's letter cancelling the sale was dated November 3, 1994, it certainly could not have been received before November 4, 1994. Since a mortgage commitment obviously could not have been obtained in one day (Loffredo contends that ten days would have been sufficient), it would be elevating form over substance to find that there was a breach on Papaccio's part because of the date. That is particularly so since the buyer's attorney had, in his letter, not requested extra time to get a commitment but, rather, a reduction in the purchase price. In any case, the law suit was based on the purchase agreement, not the subsequent contract.

⁹ Loffredo argues that in suing he relied upon a discussion of the term "ready, willing and able" which was contained in a booklet published by the complainant at some undetermined date. Specifically, he cites the sentence that states: "Where the principals entered into a written contract they are both treated as being mutually satisfied of each other's ability to perform." While it may be that at the time that the purchase agreement was presented to Papaccio he was satisfied as to the purchaser's ability to perform, by the time Loffredo commenced the lawsuit he was on notice that such satisfaction was misplaced, and that the purchaser was not able to perform.

¹⁰ It does Loffredo and Bigman no good to argue that Papaccio acted in bad faith in cancelling the contract because by the time that he cancelled it he had decided that he no longer wanted to sell the house. Whether that is true or not is irrelevant. He had an absolute right to enforce the terms of the sales agreement and the contract.

As a result of the lawsuit Papaccio agreed to again list the property with Bigman should he ever decide to sell it. Inasmuch as that agreement was obtained by Loffredo and Bigman as a result of their misconduct, they can and should be required to release Papaccio from that obligation.¹¹

VIII- In setting the penalty to be imposed on Loffredo and Bigman, I have taken into consideration his August, 1994 plea of guilty to a charge that, as representative of Bigman, he placed advertising which was misleading regarding local occupancy regulations, and paid an agreed fine of \$250.00 (State's Ex. 21).

CONCLUSIONS OF LAW

1) By commencing a lawsuit against the Della Universitas using a complaint which alleged the sale of an entirely wrong piece of property Loffredo demonstrated incompetency as a real estate broker.

2) By permitting the use by Bigman of a listing agreement which did not provide the seller the option of whether or not to negotiate directly with selling brokers Loffredo violated 19 NYCRR 175.24[c][2] and demonstrated untrustworthiness as a real estate broker.

3) By harassing and intimidating the Della Universitas with threats that he would sue them on a wholly meritless claim, thereby extracting from them an unenforceable agreement lacking any consideration, and then suing them for an unearned commission, Loffredo, and through him Bigman, demonstrated untrustworthiness as real estate brokers and engaged in a fraudulent business practice.

4) By commencing a lawsuit against the Della Universitas using a complaint which falsely alleged that the Della Universitas had given Bigman a written right to sell agreement on or about February, 1986, Loffredo, and through him Bigman, demonstrated incompetency as real estate brokers.

5) By using a purchase agreement which contained all of the elements of a binding contract, and which contained a clause going beyond general, non-legal terms, but which was not recommended by a joint committee of the bar association and the real estate association of their local county and which did not contain an attorney approval clause, Loffredo and Bigman engaged in the unlawful practice of law and demonstrated untrustworthiness and incompetency.

¹¹ "One can hardly fathom a more effective means of removing the incentive for engaging in devious conduct...than a penalty which insures that the malefactor is denied the fruits of his misdeed." *Kostika v Cuomo*, 41 NY2d 673, 394 NYS2d 863, 865.

6) By misleading Papaccio by failing to explain the full import of the sales and commission agreements Zaher demonstrated untrustworthiness as a real estate broker. Loffredo and Bigman are liable for Zaher's conduct due to their supplying of the offending forms, a demonstration of untrustworthiness by them.

7) By bringing suit against Papaccio, Loffredo and Bigman violated their fiduciary duty of good faith and demonstrated untrustworthiness.

8) The complainant has failed to establish by substantial evidence that Zaher and Barbara engaged in the unlawful practice of law; that the Della Universita listing agreement contained no statement of services; and that there was no consideration in the Papaccio commission agreement, and those charges should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Albino J. Loffredo and Century 21 Bigman Real Estate Services, Inc. have engaged in a fraudulent practice and have demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, all licenses as real estate brokers issued to them are revoked, effective immediately. Should they ever apply for the issuance of new licenses no action shall be taken on such applications until they have supplied proof satisfactory to the Department of State that they have granted Thomas Papaccio an unconditional release from his agreement to list his property with them, and

IT IS FURTHER DETERMINED THAT Robert J. Zaher has demonstrated untrustworthiness, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate broker is suspended for a period of six months, commencing on November 1, 1995 and terminating on April 30, 1996, both dates inclusive, and

IT IS FURTHER DETERMINED THAT the charges herein against Anna M. Barbara are dismissed.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:
September 28, 1995

ALEXANDER F. TREADWELL
Secretary of State
By:

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Michael E. Stafford, Esq.
Chief Counsel