

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Complaint of

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

Complainant,

DECISION

-against-

**AVI MANSHER, GOLDEN EAST REALTY, INC.
and ESTELLA CRUZ,**

Respondents.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on January 5, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

Estella Cruz, of Realty World-Golden Heights, 81-18 Northern Boulevard, Jackson Heights, New York 11372, was represented by Jim D. Sarlis, Esq., 40-06 Warren Street, Elmhurst, New York 11373.

Avi Mansher, of 95-20 63rd Street, Rego Park, New York 11374, having been advised of his right to be represented by counsel, appeared pro se.

The Division of Licensing Services was represented by Daniel E. Shapiro, Esq.

COMPLAINT

The complaint in the matter alleges that Cruz, with the knowledge and consent of Mansher, acted as and misrepresented herself to be a licensed real estate salesperson prior to being so licensed and that Mansher availed his license as a real estate broker to Cruz; that Cruz, under the direction of Mansher, engaged in the unlicensed practice of law; that Mansher breached his fiduciary duty of good faith and loyalty to his principal by acting as principal and agent in the same transaction and by placing his own self interest ahead of that of his principal; and that by reason thereof the respondents engaged in fraud or fraudulent practices and demonstrated untrustworthiness and/or incompetency.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail (Comp. Ex. 1).

2) Mansher is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Golden East Realty, Inc. (Golden East) (Comp. Ex. 3).

Cruz is duly licensed as a real estate salesperson in association with real estate broker Realty World-Golden Heights. She was first licensed as a real estate salesperson (in association with Golden East) on April 25, 1988.

3) Sometime in January, 1988 prior to her licensure as a real estate salesperson, Cruz was employed by Mansher to work as a salesperson trainee for Golden East. Her duties included going through spanish language classified advertisements and telephoning homeowners and landlords to see if they wished to have Golden East assist them in the sale or rental of their property.

One of the homeowners whom Cruz telephoned was Leonore Rivas, who had advertised her house for sale. Cruz told Rivas that she was telephoning on behalf of Golden East, but did not explain what her capacity was. Cruz asked Rivas if she would like Golden East to assist her in the sale of her house. Rivas, replied that while she was unwilling to enter into a written agency agreement, she would pay Golden East a commission of 6% of the sales price should it assist her in making a sale.

Cruz reported on this conversation to Mansher, and he had her show the Rivas house to three potential purchasers, with whom she discussed the asking price of \$220,000.00, but none of whom made an offer. Eventually, Mansher decided to make an offer to purchase the house himself. Using a Golden East form, he had Cruz draw up a purchase offer: naming Mansher as the purchaser of the Rivas house for a price of \$158,000.00, subject to him being able to secure a mortgage of \$126,000.00; identifying Mansher as a real estate broker; setting a closing date of July 30, 1988; and waiving any broker's commission. Mansher then signed the document (Comp. Ex. 4).

Cruz telephoned Rivas and told her that she had an offer to present, and, on April 13, 1988, went to Rivas' home with the written offer. Rivas, who does not speak or read english well, had her english speaking granddaughter review the agreement for her. Because the granddaughter thought that July 30 would be too soon for a closing, Cruz added the following above the closing date stated in the agreement: "Subject to agreement between owner & Buyer." Rivas signed the offer, indicating her acceptance, and Cruz returned to the Golden East office with it. Mansher then initialled the change regarding the closing date.

The next day (April 14, 1988), Rivas changed her mind because she thought that the price offered by Mansher was too low. Mansher, however, took the position that he had a binding contract to purchase the house. He commenced a law suit against Rivas for specific performance and, on May 20, 1988 filed a notice of pendency against the Rivas house. Rivas answered with, inter alia, a defence of fraud in the inducement, contending that she had been led to believe that she was signing an agreement to sell the house for \$258,000.00 at a time that she had an offer from another potential purchaser in the amount of \$255,000.00. Eventually, on June 1, 1990 the matter was settled, with Rivas paying Mansher \$7,000.00 (Comp. Ex. 5 and 6).

OPINION

I- Pursuant to Real Property Law (RPL) §440-a, no person may hold him or herself out or act temporarily or otherwise as a real estate salesperson without first procuring a license therefor. A real estate salesperson is "a person associated with a licensed real estate broker to list for for sale, sell or offer for sale...to buy or offer to buy or to negotiate the purchase or sale...of real estate...." RPL §440(3). Such a license is required even where the broker with whom the salesperson is associated is acting as a principal. 1934 Op. Atty. Gen. 234.

Through her actions with regard to the Rivas property, Cruz both held herself out and acted as a real estate salesperson. She held herself out as a salesperson by implication when she spoke with Rivas about the possibility of Golden East assisting Rivas in the sale of her house in return for a commission, and when she presented Mansher's offer, while in both instances failing to tell Rivas that she was only a trainee and not a licensed salesperson. She acted as a salesperson when she solicited Rivas' agreement to have Golden East act as her agent in the sale of her home and when she presented Mancher's offer to Rivas.

II- A real estate broker may be subject to discipline by the Department of State for availing his license to another person so as to enable that person to act as a real estae broker without being so licensed. Department of State v Guittari, 37A DOS 87, conf'd. sub nom Guittari v Department of State 535 NYS2d 284 (A.D. 1st Dept., 1988); Department of State v Kavan, 49 DOS 91; Department of State v Shulkin, 4 DOS 90; Department of State v Brooks, 3 DOS 88; Department of State v Eksteen, 49 DOS 88.

"In order for the complainant to establish that such availing occurred it must show that unlicensed activity occurred and that the respondent either intended that it occur and facilitated it through making her license available, or that she knew that it was occurring and took no steps to stop it, or that she acted recklessly in placing her license in the office and then not taking

reasonable steps to determine what was occurring in that office." Department of State v Braun, 28 DOS 89.¹

III- Real Estate brokers and salespersons 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.

¹ It should be noted that, although it was not charged and, therefore, it cannot serve as the basis of a finding against Mansher, the employment by a real estate broker of an unlicensed salesperson is, pursuant to RPL §442-c, a misdemeanor.

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 purchase offer prepared by Cruz at the direction of Mansher does not conform to the above rules. There is no provision in it that the document is subject to the approval of the parties' attorneys, and there was language inserted which goes beyond the permitted general terms (i.e. the phrase "Subject to agreement between between owner & Buyer", which was used and positioned in the document in such a way as to be unclear). This is not a case which falls outside of proscription against the unlicensed practice of law because the drafter of the document was a party to the transaction (since Cruz merely followed Mansher's directions in the initial preparation of the document it could be said that she acted at that stage in a secretarial capacity), as it was Cruz who added, without being told to do so by Mansher, the improper extra provision only after Rivas raised an objection to the wording of the document. Mansher then initialed the change, thereby ratifying Cruz's act. See, Restatement (Second) of Agency, §§82-84.

IV- When the respondents agreed to assist Rivas in finding a purchaser for her house they became her agents. Restatement (Second) of Agency, §15. 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).

It is

"well settled as the law in this state that where an agent for the sale of property enters upon negotiations for the purchase of it himself he thereby terminates the agency....

The two positions, that is of agent and principal, are inconsistent with each other; in the one case, the agent is bound to exercise his best skill and ability and a high degree of fidelity and good faith to secure for his principal the best price possible for the property to be sold; in the other he is justified in using all means in his power not unlawful to secure the property at the lowest price possible. When an agent purchases from his principal for his own benefit he is presumed to have resigned his agency. The policy of the law is to prohibit a person from attempting to fill the two positions at the same time, and the principle applies in all cases alike, and not merely in those cases where the agent has been guilty of fraudulent conduct." Morgenstern v Hill, 8 Misc. 356, 358-359, 28 NYS 704 (Superior Ct. Buffalo, 1894) (citations omitted). See, also, Dobson v Racey, 8 NY 216 (1853).

However,

"One employed as agent violates no duty to the principal by acting for his own benefit if he makes a full disclosure of the facts to an acquiescent principal and takes no unfair advantage of him....(T)he disclosure must include not only the fact that the agent is acting on his own account...but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal...the agent's duty of fair dealing is satisfied only if he reasonably believes that the principal understands the implications of the transaction." Restatement (Second) of Agency, §390, comment a. See, also, 3 NY Jur.2d, Agency, §195.

Once it has been established that the agent has acted as an adverse party, the burden of proof is on the agent to establish that he has made the required prior disclosure, and that the disclosure led to the principal's informed consent. Restatement (Second) of Agency, §390, comment g. See, also, Department of State v Goldstein, *supra*; c.f. Department of State v Ting Kwok Chan, 43 DOS 88, conf'd. *sub nom* Ting Kwok Chan v Department of State, 540 NYS2d 118 (A.D. 1st Dept. 1989); Department of State v Almo, 24 DOS 87, conf'd. *sub nom* Almo v Shaffer, 149 AD2d 417, 539 NYS2d 765 (1989). "Disclosure which is 'indefinite and equivocal does not set the agent free to bargain for his own account....' (Hasbrouck v Rymkevitch, 25 AD2d 187, 189, 268 NYS2d 604 [3d Dept. 1966])." TPL Associates v Helmsely-Spear, Inc., 146 AD2d 468, 536 NYS2d 754, 756 (1989).

The question is, then, whether the respondents made sufficient disclosure to Rivas. Rivas knew that Mansher was the real estate broker responsible for the operation of Golden East, and that Mansher was seeking to purchase the property himself. However, there is no claim by the respondents, nor evidence to support such a claim should one be made, that they made any disclosure to Rivas of the conflicts inherent in Mansher being both agent and principal in the same transaction. "The burden of proving that such disclosure has been made is in the nature of an affirmative defense. In other words, acting as an adverse party is a breach of fiduciary duty unless it can be justified with a showing that adequate disclosure has been made." Department of State v Barmonde, 48 DOS 91 at 4. The respondents, however, have shown only that they disclosed that Mansher was the broker and that he would be purchasing the property himself. See Department of State v Lepkowski, 26 DOS 92.

V- 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 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).

VI- Where a broker or salesperson 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. 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). As such a requirement may be imposed even where the licensee has obtained such money through a court awarded judgement, Department of State v Fitzsimons, 3/6/72, conf'd.

sub nom Fitzsimons v Department of State, 40 AD2d 843, 337 NYS2d 499 (1972), it certainly may be imposed where the licensee has received the money as the result of a settlement. A licensee may not be permitted to use the courts to extort money to which he is not otherwise entitled.

VII- Being an artificial entity created by law, Golden East can only act through its officers, agents, and employees, and it is, therefore, bound by the knowledge acquired by and is responsible for the acts committed by its representative broker, Mansher, within the actual or apparent scope of his authority. A-1 Realty Corporation v State Division of Human Rights, 35 A.D.2d 843, 318 N.Y.S.2d 120 (1970); Division of Licensing Services v First Atlantic Realty Inc., 64 DOS 88; Roberts Real Estate, Inc. v Department of State, NY2d (10/20/92); RPL § 442-c.

VIII- The only explanation offered by Mansher for his serious misconduct is an argument that Cruz was only acting as a translator since she was the only person in his office who spoke Spanish. The uncontested evidence, however, establishes that there were other employees in the office who spoke Spanish, and, far from acting as a translator, while Cruz conducted her dealings with Rivas subject to the general oversight and with the knowledge of Mansher, Mansher did not directly participate in those dealings, some of which even occurred without him being present. His testimony indicates that he neither understands why his conduct was unlawful, nor appreciates the seriousness of his wrongdoing. Such an attitude may be considered in determining what penalty should be imposed in furtherance of the Department of State's obligation to protect the welfare of the general public. Department of State v Dorfman, 67 DOS 82, conf'd. sub nom Dorfman v Paterson, 97 AD2d 515, 467 NYS2d 1020 (1983).

In determining what penalty to impose on Cruz I have taken into consideration the Division of Licensing Services' recommendation that, in light of her cooperation and her truthful testimony, she should receive a reprimand. I have also considered the facts that prior to her employment by Mansher and East West Cruz had never worked in real estate brokerage; the events in question occurred only shortly after the commencement of that employment; and Cruz only did what Mansher told her to do.

CONCLUSIONS OF LAW

- 1) By holding herself out and acting as a real estate salesperson when not so licensed Cruz violated RPL §440-a.
- 2) By engaging in the unlicensed practice of law Cruz demonstrated incompetency.

3) By permitting and directing Cruz to act as a real estate salesperson when not so licensed, and by facilitating such unlicensed activity, Mansher availed his real estate broker's license to Cruz and demonstrated untrustworthiness and incompetency.

4) By failing to disclose to Rivas the conflicts inherent in his purchasing her home and acting as principal and agent in the same transaction, and as a result acting without her informed consent, and by thereby placing his own self interest ahead of the interest of his principal, Mansher breached his fiduciary duties to Rivas and demonstrated untrustworthiness and incompetency, and engaged in a fraudulent practice.

6) By permitting and ratifying Cruz's unlicensed practice of law Mansher demonstrated untrustworthiness and incompetency.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Avi Mansher and Golden East Realty have engaged in a fraudulent practice and have demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c their licenses as real estate brokers are revoked, effective immediately, and should they ever apply for reissuance of licenses as real estate brokers or as a real estate salesperson no action shall be taken on such application until they shall have produced proof satisfactory to the Department of State that they have refunded the sum of \$7,000.00 plus interest at the legal rate for judgements (currently 9%) from June 1, 1990 to Leonor Rivas, and

IT IS FURTHER DETERMINED THAT Estella Cruz has violated Real Property Law §440-a, has engaged in a fraudulent practice, and has demonstrated incompetency, and accordingly, pursuant to Real Property Law §441-c, she is reprimanded therefor.

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:

GAIL S. SHAFFER
Secretary of State
By:

Maureen F. Glasheen
Deputy Secretary of State