

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-

**BUTLER A. MILES, HERBERT KRAMER,
and FIRST AMERICAN REALTY GROUP LTD.**

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 July 14, 1988 at the office of the Department of State located at 270 Broadway, New York, New York.

Butler A. Miles, of 347 Fifth Avenue, Suite 900, New York, New York 10016 was not present at the hearing but was represented by Richard Kelly, Esq. of Baer Marks & Upham, 805 Third Avenue, New York, New York 10022.

Herbert Kramer and First American Realty Group Ltd. (First American), currently of 551 Madison Avenue, New York, New York 10022 were present, and were represented by Barry R. Fertel, Esq. and Joseph Capobianco, Esq. of Bell, Kalnick, Klee & Green, 300 Park Avenue, New York, New York 10022.

The complainant was represented by Paul S. Heyman, Esq.

At the close of the testimony the matter was adjourned to September 14, 1988, with Mr. Kelly directed to have Miles appear on that date for examination by Mr. Heyman. On September 12, 1988 I received a letter from Mr. Kelly, accompanied by a letter from his client's physician, in which it was stated that the medical condition which prevented Miles' appearance on July 14 would prevent his appearance on September 14. In response, I adjourned the matter without date pending Miles' recovery, and on September 13, 1988 issued an interim order suspending his license as a real estate salesperson pending completion of the hearing.

On April 2, 1992, not having heard anything further from respondents or their attorneys, I restored the matter to the calendar,

with the hearing scheduled for May 20, 1992. On April 20, 1992 I received a letter dated April 16, 1992 from Mr. Kelly, in which he informed me that he is no longer associated with Baer Marks & Upham and that neither he nor that firm still represents Miles. Mr. Kelly stated that he believed that Miles had relocated to either the West Coast or to Mexico. Nothing was heard from Miles, to him a notice had been sent at his last known business address.

On May 14, 1992 I received a letter of the same date from Allen Green, Esq. of Rubin, Kalnick & Bailin, P.C., 405 Park Avenue, New York, New York 10022, in which it was stated that Kramer and First American were now represented by that firm, which was seeking to locate its file on the matter. In view of that, and of a prior commitment of Kramer's, an adjournment, to which Mr. Heyman consented, was requested. The matter was, therefore, adjourned to July 9, 1992.

Mr. Heyman subsequently left the employ of the complainant, at whose request the matter was then again adjourned without date to allow for substitution of counsel and re-evaluation of the case. On October 28, 1992 Daniel E. Shapiro, Esq., now representing the complainant, wrote to Mr. Green and advised him that in view of the apparent unavailability of Miles the complainant would rest its case, and he asked if Mr. Green wished to have an opportunity to put in a case on behalf of his clients. By letter dated November 16, 1992 to Mr. Shapiro, Mr. Green replied that he also would rest his case, and urged that on the record the matter should be dismissed.

COMPLAINT

The complaint in the matter alleges that Kramer, a licensed real estate broker, referred a client to Miles, a licensed real estate salesperson associated with First American, to negotiate various residential property transactions; that Miles agreed to obtain a lease for the client and requested and received from her \$16,000.00 as the first and last month's rent; that Miles retained half of the money and deposited the other half in the account of a (non-respondent) corporation of which Kramer is an officer; that Miles, with the knowledge and consent of Kramer, demanded the money with no intention of performing any brokerage services for the client but with the intent of retaining the money for his and Kramer's use; that a lease to the apartment was not obtained and Miles has refused to refund the money; that Kramer failed to provide adequate supervision of Miles; and that Miles acted as an unlicensed real estate broker and wrongfully demanded and received compensation from a person other than the real estate broker with whom he was associated.

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) Herbert Kramer is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing First American, a brokerage firm which deals strictly with commercial real estate, and at all times hereinafter mentioned Butler A. Miles was duly licensed as a real estate salesperson in association with First American. At the time of the hearing Miles was licensed as a real estate salesperson in association with broker Anthony Bozich (Comp. Ex. 2), and I take official notice of the records of the Department of State that that license expired (while subject to the interim suspension) on October 31, 1989 and has not been renewed.

3) Sometime in 1985 Miles introduced Dr. Marquise R. Cvar to Kramer, stating that Cvar was a friend of his. Sometime thereafter Kramer had a conversation with Cvar in which they discussed the possibility of locating office space for her. Acting as agent for the owner, Kramer referred Cvar to space which was available in the General Motors building, but nothing ever came of the referral.

Sometime thereafter Miles injured himself in a fall. Before the accident Miles had visited the First American office on a regular basis, and had discussed pending deals with Kramer on a daily basis. After the accident, however, Miles seldom went to the office, and, so far as Kramer was aware, stopped working.

At some point in time Miles, without the knowledge of Kramer, had a discussion with Cvar about finding her an apartment. Miles subsequently advised Cvar that he had located an apartment for her to rent at the Hotel Carlyle, and in response to his request for the first and last months' rent Cvar, who was living in Boston, had her bank transfer \$16,000.00 to Miles. The payment was issued in the form of two checks, for \$8,000.00 each, payable to Miles (Comp. Ex. 5).

At least one of the checks was deposited by Miles in the account of SEO Exploration Corp. (SEO) (Comp. Ex. 7), a corporation of which Miles was president. The SEO's corporate banking resolution lists Kramer as vice-president. Kramer's signature, however, does not appear on either that document or on the signature cards for the bank account (Comp. Ex. 6), and he disclaims any association with SEO¹.

When no lease was forthcoming, Cvar made efforts to obtain one from Miles. He advised her that the matter was under negotiation. Finally, in January, 1986, Cvar demanded a refund from Miles. He promised her that the money would be returned to her, but failed to carry through.

¹ Neither Cvar nor Miles were present at the hearing. The only non-hearsay testimony with regards to how Kramer and Miles became acquainted with Cvar, the degree of Kramer's knowledge as to Miles' dealings with Cvar, and Kramer's alleged association with SEO, therefore, was that of Kramer himself.

OPINION

I- It is Miles' contention, as stated in his response to a law suit by Cvar (Comp. Ex. 3), that he was merely retained by Cvar to obtain the consent, of the then current tenants of the apartment, to the rental of that apartment by Cvar. For that, he claims, Cvar agreed to pay him \$20,000.00 without any regard to whether the hotel consented to the rental. The expectation that anyone would believe such an assertion is, I find, extremely fanciful. While, considering the cost of the apartment that she was seeking to rent, it seems clear that Dr. Cvar may be quite wealthy, it strains credulity to state that a person would agree to pay \$20,000.00 under the circumstances asserted by Miles. Rather, while the proof is insufficient to establish what Miles intended from the onset of the transaction, it is clear from the facts and circumstances that he did agree to assist Cvar in obtaining the apartment, that she gave him \$16,000.00 to be applied to the rental, that Miles deposited at least some of that money in the account of a corporation which he controlled, that Miles failed to effectuate the rental, and that Miles then refused to return the money to Cvar.

A real estate broker or salesperson 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); Division of Licensing Services v Pellittieri, 77 DOS 92; Division of Licensing Services v Tripoli, 96 DO 91. The use by a real estate broker or salesperson 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.

Miles' conduct with regards to Cvar's money was not only a breach of his fiduciary duties. It also constituted a fraudulent practice. The term "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).

II- Real Property Law (RPL) §440-a provides that no person shall engage in the business of, or act temporarily or otherwise as, as real estate broker without being so licensed. A real estate broker is, among other things, a person who attempts to negotiate the rental of interest in real estate. RPL §440(1). Therefore, the conduct of Miles, whether in attempting to negotiate the leasing of the apartment, as is claimed by Cvar, or in negotiating for the then tenants of the apartment to cede their interest to Cvar, as is claimed by Miles, fell within the defined activities of a real estate broker. Since those activities occurred without the knowledge and supervision of Kramer, they did not fall under the protection of Miles' license as a real estate salesperson. RPL §§440(3), 441(1)(d) and 442-c, and 19 NYCRR 175.21.

III- RPL §442-a states:

"No real estate salesman in any place in which this article is applicable shall receive or demand compensation of any kind from any person, other than a duly licensed real estate broker with whom he associated, for any services rendered or work done by such salesman in the appraising, buying, exchanging, leasing, renting or negotiating of a loan upon real estate."

Miles has demanded, in his answer and counterclaim to Cvar's lawsuit, just such a payment. He has claimed that Cvar agreed to pay him \$20,000.00 for obtaining the consent of the tenants of the apartment to the rental by Cvar; that Cvar paid him \$16,000.00 of that fee; and that he is entitled to payment of the \$4,000.00 balance. Further, not only is that defense and counterclaim a demand, it is an admission by Miles to the receipt by him of at least part of just such a statutorily proscribed payment.

IV- A real estate broker is obligated to supervise the real estate brokerage activities of the salespersons association with him or it. RPL §441(1)(d). That supervision must consist of

"regular, frequent and consistent personal guidance, instruction, oversight and superintendence by the real estate broker with respect to the general real estate brokerage business conducted by the broker, and all matters relating thereto." 19 NYCRR 175.21(a).

That duty has been affirmed judicially, Division of Licensing Services v Giuttari, 37A DOS 87, conf'd. 535 NYS2d 284 (AD 1st Dept. 1988); Friedman v Paterson, 453 NYS2d 819 (1982), aff'd. 58 NY2d 727, 458 NYS2d 546, and has been restated in numerous determinations of the Department of State. (See, e.g., Division of Licensing Services v Misk, 64 DOS 92; Division of Licensing Services v Gelinis, 38 DOS 92; Division of Licensing Services v Levenson, 52 DOS 91; Division of

Licensing Services v Capetanakis, 42 DOS 90; Division of Licensing Services v Shulkin, 4 DOS 90). Where, however, the salesperson has acted in such a way as to prevent the broker from being aware of his conduct, Division of Licensing Services v Bell, 21 DOS 89, and the broker has no reason to be aware that the salesperson is engaging in any sales activity, it cannot be said that the broker failed to meet his supervisory obligations.

Prior to his accident, Miles had discussed his brokerage activities with Kramer on a daily basis, and had gone to the First American office regularly. After the accident Miles went to the office only occasionally, and Kramer believed that he was no longer active as a salesperson. Although Miles was still licensed in association with First American, Kramer had no reason to believe that he was active, particularly with regards to residential real property, an area in which First American was not involved.

V- The complainant has failed to present any proof which would establish that Kramer, and through him First American, were aware of Miles' improper conduct. The only direct, non-hearsay evidence on that question is Kramer's testimony, in which he denied either such knowledge or receiving any of the money collected by Miles. Under such circumstances, neither Kramer nor First American may be subjected to suspension or revocation of their licenses by reason of Miles' conduct. In certain circumstances, however they might be subject to the imposition of a fine and/or an order of restitution. RPL §442-c; Roberts Real Estate v Department of State, NYLJ, 10/26/92, p.29 col.2 (Court of Appeals). Whether this is such a case requires consideration of various provisions of the common law of agency.

By reason of a broker's obligation to supervise the activities of the salespersons licensed in association with that broker (RPL §441(1)(d); 19 NYCRR 175.21(a)), Miles relationship with Kramer and First American was, for purposes of agency law, that of a servant (Restatement (Second) of Agency, §219), which is a type of agent (Restatement (Second) of Agency, §2). Therefore, they may be held liable for his conduct engaged in while acting within the scope of his employment if they intended his conduct or its consequences; were negligent or reckless; violated a non-delegable duty; or Miles purported to act or speak on their behalf, and there was reliance upon apparent authority or he was aided by the existence of the agency authority. (Restatement (Second) of Agency, §219(1)). The evidence, however, establishes that Miles was acting outside of the scope of his agency.

First American deals strictly with commercial real property. Therefore, it was not within the scope of Miles' employment for him to be involved in the brokerage of residential real property. Even had it been within that scope, the record does not establish that Kramer and First American intended Miles' conduct or its consequences, were negligent or reckless, or violated a non-delegable duty. Nor is there

substantial evidence² that Miles purported to act or speak on their behalf, that Cvar relied on his apparent authority, or that Miles was aided by the existence of his agency authority.

CONCLUSIONS OF LAW

1) By failing to refund to Cvar the \$16,000.00 which she paid to him after he was unable to achieve the purpose to which that money was intended to be applied, and by using at least some of that money for his own purposes, Miles demonstrated untrustworthiness and incompetency, and engaged in a fraudulent practice.

2) By engaging in real estate brokerage activities without the knowledge and supervision of the broker with whom he was associated, Miles engaged in the unlicensed practice of real estate brokerage in violation of RPL §440-a.

3) By demanding and receiving compensation for brokerage services from a person other than the broker with whom he was associated, Miles violated RPL §442-a.

4) The complainant has failed to establish by substantial evidence that Kramer and First American knew of and/or received and retained benefits from Miles' misconduct, or that they failed to properly supervise Miles, or that by reason of Miles' status as their agent/servant they are responsible for his conduct in these circumstances. SAPA §306(1).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Butler Miles has violated Real Property Law §§440-a and 442-a, has engaged in a fraudulent practice, and has demonstrated untrustworthiness and incompetency and, accordingly, pursuant to Real Property Law §441-c, should he ever reapply for licensure pursuant to Real Property Law Article 12A such application shall be dealt with as if his license as a real estate salesperson was revoked and shall not be considered until he shall have produced proof satisfactory to the Department of State that he has refunded the sum of \$16,000.00, together with interest at the legal rate for judgements from September 20, 1985, to Dr. Marquise Cvar; and

IT IS FURTHER DETERMINED THAT all charges herein against Herbert Kramer and First American Realty Group, Ltd. are dismissed.

² Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. Gray v Adduci, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--probatively and logically." City of Utica Board of Water Supply v New York State Health Department, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted).

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