

STATE OF NEW YORK  
DEPARTMENT OF STATE  
OFFICE OF ADMINISTRATIVE HEARINGS  
-----X

In the Matter of the Complaint of

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

Complainant,

**DECISION**

-against-

**ROLAND A. POIRIER,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on April 13, 2000 at the New York State Office Building located at 333 East Washington Street, Syracuse, New York.

The respondent, having been advised of his right to be represented by an attorney, chose to represent himself.

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

**COMPLAINT**

The complaint alleges that the respondent, a licensed real estate broker, refused to return an escrow deposit which he commingled and converted to his own use, and that he gave false information to the complainant during the course of its investigation.

**FINDINGS OF FACT**

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered on January 31, 2000 (State's Ex. 1).

2) The respondent is licensed a real estate broker d/b/a Virtual Reality, with an office at West Main Street, Route 11, Malone, New York 12953 for the license period of July 31, 1998 through July 31, 2000. From September 5, 1997 through September 5, 1999 he was also licensed as representative broker of United National Atlasta Home Co., Inc. (hereinafter "Atlasta" (State's Ex. 1).

2) In or about July, 1998 Gary R. Kloos and Virginia V. McDonnel, who subsequently married, gave the respondent \$25,000 as a deposit on the purchase real property located in St. Lawrence County, pursuant to an agreement between Benedikt and Jane Thrana as sellers and Mr. Kloos and Ms. McDonnel as buyers which named Atlasta as broker (State's Ex. 4 and 5). At least \$24,500.00 of the deposit was placed in the respondent's escrow account (State's Ex. 9).

3) During the succeeding months Mr. and Mrs. Kloos were allowed to move onto the property and there were extensive negotiations and unsuccessful attempts to obtain financing. Although a land contract purchase agreement was prepared it was never executed (State's Ex. 6).

4) On or about November 20, 1998 Mr. and Mrs. Kloos vacated the property and demanded the return of the deposit (State's Ex. 7). The sellers' attorney demanded that the respondent pay over the deposit and, when that did not occur, the sellers sued the respondent and Mr. and Mrs. Kloos (State's Ex. 10). That suit is still pending.

5) In January, 1999 the respondent commenced business dealings with Dr. Hector Senuoke and in June, 1999, planning to discontinue his brokerage business, the respondent transferred all of the funds in his escrow account, including the deposit in the subject transaction, to Dr. Senuoke (State's Ex. 8). In spite of that, in a conversation with Senior License Investigator Dale R. Bolton and in a letter to Mr. Bolton dated August 8, 1999 the respondent stated that he had transferred the deposit to his attorney's escrow account (State's Ex. 3).

#### **OPINION AND CONCLUSIONS OF LAW**

I- Pursuant to 19 NYCRR 175.1 a real estate broker must maintain all deposits received from prospective purchasers in escrow. The respondent placed the deposit received from Mr. and Mrs. Kloos in his escrow account. However, although the sale did not close, and in spite of the fact that he has not presented any evidence that, and does not claim that, he received the permission of any of the parties to the transaction to take that money out of escrow, he transferred it to an entirely unrelated third party for his own purposes. In so doing he demonstrated gross untrustworthiness and extreme incompetency.

The respondent's testimony that he took the money out of escrow only after being told by the parties that the transaction had closed and when he believed, therefore, that he was entitled to it as a commission is not credible. He never made such an assertion in any of his communications with the complainant's investigator, and it is evident that it is a recent fabrication created only for the purposes of these proceedings.

II- IV- RPL §442-e[5] states:

"The secretary of state shall have the power to enforce the provisions of this article and upon complaint of any person, or on his own initiative, to investigate any violation thereof or to investigate the business, business practices and business methods of any person, firm or corporation applying for or holding a license as a real estate broker or salesman, if in the opinion of the secretary of state such investigation is warranted. Each such applicant or licensee shall be obliged, on request of the secretary of state, to supply such information as may be required concerning his or its business, business practices or business methods, or proposed business practices or methods."

Pursuant to RPL §442-j the Secretary of State has the authority to delegate to employees of the Department of State the above powers to compel a licensee to supply information.

The respondent failed to cooperate with the complainant's investigation of the complaint herein when he falsely told its investigator that he had transferred the deposit to his attorney's escrow account. *Division of Licensing Services v Naftal*, 189 DOS 99. That non-cooperation was a violation of RPL §442-e[5], *Division of Licensing Services v Lawson*, 42 DOS 93, and was a demonstration of untrustworthiness.

III- 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). The respondent's transferring the deposit out of his escrow account for his own business purposes was a fraudulent business practice.

IV- Where a broker or salesperson has received or retains 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). That is so even where he no longer has the money, it having previously been transferred improperly. *Mittleberg v Shaffer*, 529 NYS2d 545 (1988).

It is not clear who is entitled to the deposit at this time. As the question is in litigation (State's Ex. 10), any final determination on that issue must await the judgement of the Court.

V- In setting the penalty to be imposed, I have considered the fact that the respondent apparently testified falsely with regards to his handling of the deposit. *Division of Licensing Services v Lyons*, 84 DOS 94.

#### **DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Roland Poirier has violated Real Property Law §442-e[5], has engaged in a fraudulent practice, and has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate broker is revoked effective July 15, 2000. Should he ever apply for a new 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 the \$25,000.00 deposit paid to him by Gary and Virginia Kloos has either been paid to

Benedikt and Jane Thrana in accordance with a judgement in their lawsuit against him or has been refunded to Mr. and Mrs. Kloos together with interest at the legal rate for judgements (currently 9% per year) from November 20, 1998. He is directed to send his license certificate and pocket card to Usha Birth, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier  
Administrative Law Judge

Dated: June 23, 2000