

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Complaint of

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

Complainant,

DECISION

-against-

**WILTON G.A. RICKETTS and DISCIPLES
REALTY CORP.,**

Respondents.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on October 27 and November 12, 1999, and February 17, 2000.

Mr. Ricketts appeared at the hearing on October 27, 1999 and requested an adjournment. The request was denied because of its untimeliness, but the matter was continued at the close of the complainant's case to give the respondents the opportunity to obtain counsel. Mr. Ricketts appeared again without counsel on November 12, 1999, at which point, and with his assent, a statement was placed on the record indicating that he had agreed to execute a consent order in which he would plead no contest and would agree to make restitution to the complaining witness and to have his license as a real estate broker suspended for a period of three months. Based on that agreement the matter was closed subject to the execution of the consent order and with the caveat that should the order not be executed the matter would be re-opened. Inasmuch as Mr. Ricketts failed to execute the consent order, which was sent to him on November 19, 1999 (State's Ex. 7), the matter was re-opened on February 17, 2000, at which time the respondents failed to appear.

COMPLAINT

The complaint alleges that Mr. Ricketts, representative broker of Disciples Realty Corp. (hereinafter "Disciples"), requested and received from Sherma Richards an escrow deposit of \$4,000.00 upon the representation that he would submit a purchase offer on her behalf, but that no such offer was ever submitted and Mr. Ricketts commingled and converted the escrow funds, which he refused to return. It is further alleged that he has refused to provide documents concerning the deposit to the complainant.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondents by certified mail delivered on August 12,

1999 (State's Ex. 1). A notice of re-opening was served on the respondents at their last known addresses by regular first class mail posted on January 21 and 25, 2000 (State's Ex. 6).

2) Mr. Ricketts is, and at all times hereinafter mentioned was, duly licensed as representative real estate broker of Disciples, with a current business address of 753 E. 58th Street, Brooklyn, New York 11234.

3) In or about 1995 Sherma Richards told Mr. Ricketts that she was interested in purchasing real property. Eventually, in May 1996, he showed her a property on Belmont Avenue in Brooklyn, and on May 9, 1996, wanting to purchase the property, and not knowing the name of the owners, in accordance with instruction received from Mr. Ricketts she gave an employee in the Disciples office a check for \$4,000.00, payable to "Disciples Realty &," to serve as a binder, with the expectation that Mr. Ricketts would insert the name of the owners after the ampersand. No binder agreement was executed, and the next day, without filling in the name of the owners of the property, the respondents deposited the check in a Disciples' bank account which was not denominated as either a trust or escrow account (State's Ex. 2).

4) Ms. Richards, upon learning of the negotiation of her check but not having been advised that her offer to purchase the property had been accepted, telephoned Mr. Ricketts to inquire as to the status of the transaction. In several such calls he advised her of alleged problems that he said were delaying the sale. Eventually Ms. Richards asked for the return of her money, but Mr. Ricketts said that he had given it to the owners of the property.

5) Although the property was never sold to Ms. Richards she never received the return of her money.

6) The respondent never conveyed Ms. Richard's offer to the owners of the property, and did not give them the \$4,000.00 binder (State's Ex. 4).

7) In response to a request from the complainant's investigator, made in the course of her investigation of Ms. Richard's complaint, Mr. Ricketts agreed to submit the following items to the complainant: Copy of listing; seller and buyer disclosure forms; name of seller and executor of property; commission agreements, if any; copy of signed binder which he claimed that Ms. Richards had executed; number of the bank account into which the \$4,000.00 check was deposited; cancelled check for \$4,000.00 allegedly given to the seller/executor; any other documentation relating to the transaction; a detailed written statement of the events (State's Ex. 3). He has not complied with that agreement.

OPINION AND CONCLUSIONS OF LAW

I- The holding of an ex parte quasi-judicial administrative hearing on February 17, 2000 was permissible, inasmuch as there is evidence that notice of the place, time and purpose of the hearing was properly served. *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- Being an artificial entity created by law, Disciples 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, Mr. Ricketts, within the actual or apparent scope of his authority. *Roberts Real Estate, Inc. v Department of State*, 80 NY2d 116, 589 NYS2d 392 (1992); *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; RPL § 442-c.

III- Pursuant to 19 NYCRR 175.1 a real estate broker must place all purchase deposits in a special, escrow account. By depositing the deposit received from Ms. Richards in a bank account which was denominated neither as a special nor as an escrow account Mr. Ricketts, and through him Disciples, violated that regulation, thereby demonstrating untrustworthiness and incompetency. They further demonstrated untrustworthiness when they failed to return the deposit upon Ms. Richard's demand that they do so.

IV- 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). By accepting a binder deposit from Ms. Richards on the pretense that they would then convey her offer to purchase the property to the owners, and then by failing to convey that offer, and then by failing to refund that deposit, the respondents engaged in a fraudulent business practice.

V- 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.

Mr. Ricketts failed to comply with the complainant's request that he cooperate with its investigation of Ms. Richard's complaint when he

did not provide its investigator with the copies of the records which it requested and which he said he would provide. That non-cooperation was a violation by him and Disciples of RPL §442-e[5]. *Division of Licensing Services v Lawson*, 42 DOS 93.

VI- Where a broker or salesperson has received money to which he, she, or it is not entitled, the licensee may be required to return it, together with interest, as a condition of retention of the 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). The respondents received \$4,000.00 from Ms. Richards to be held in escrow, but deposited it in an account which was denominated neither special nor escrow. Although the appropriate demand has been made they not returned that money. Accordingly, they should be required to return it with interest. That would be so even had, as Mr. Ricketts claims, given the money to the owners of the property, *Division of Licensing Services v Mittleberg*, 61 DOS 86, conf'd. *sub nom Mittleberg v Shaffer*, 141 AD2d 645, 529 NYS2d 545 (1988), since in doing so prior to the execution of a contract they would have violated their fiduciary duties as an escrow agent.

VII- In setting the penalty to be imposed for the respondents' violations, I have considered the fact that they were offered the opportunity to resolve the matter through the execution of a consent order, payment of restitution, and acceptance of a three month license suspension, agreed to that offer, but then failed to execute the consent order. In such a situation, and where the respondents have subsequently been found guilty, it is proper to impose a more stringent penalty. *Vito v Jorling*, 197 AD2d 822, 603 NYS2d 64 (1993) (finding that it was proper to impose a fine of \$22,825.00 after an offer to settle for a \$500.00 penalty was rejected).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Wilton G.A. Ricketts, UID #31RI0822850, and Disciples Realty Corp. have violated Real Property Law §442-e[5], have engaged in a fraudulent practice, and have demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, their license as a real estate broker is suspended for a period commencing on March 16, 2000 and terminating six months after the receipt by the Department of State of their license certificate(s) and pocket card(s), and upon termination of the suspension the license shall be further suspended until such time as they shall produce proof satisfactory to the Department of State that they have refunded the sum of \$4,000.00 plus interest at the legal rate for judgements (currently 9%) from March 10, 1996 to Sherma Richards. The respondents are directed to send their license certificate(s) and pocket card(s), and proof of restitution, to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: February 23, 2000