

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-

**MARC K. ROBIN and QUAIL RUN  
ASSOCIATES, INC.**

Respondents.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on March 4 and 5, 1997 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondents, of 228-14 Stronghurst Avenue, Bellerose, New York 11427, and 175 West 76th Street, Suit 14F, New York, New York 10023 were represented by Terence Scheurer, Esq., Scheurer, Wiggin & Hardy, 250 West 57th Street, New York, New York 10107.

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

**COMPLAINT**

The complaint in the matter alleges that in December, 1987 Mr. Robin entered into a verbal brokerage agreement to act as agent for the sale of property owned by Victor Zeines in return for a commission of 10% should he procure a purchaser;<sup>1</sup> that on June 15, 1987 the parties entered into a "Rider to Open Listing Agreement" providing that if Quail Run Associates, Inc. (hereinafter "Quail Run") obtained a purchaser for the property and Dr. Zeines retained an equity interest in the property, Quail Run would receive a 10%

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<sup>1</sup> Although from the following allegations it would appear that the date of the alleged oral agreement should be December, 1986, both the complainant and respondent objected to the tribunal's suggestion after the close of the complainant's case that the complaint be amended.

equity interest in the property in addition to the commission; that in or about November, 1987 Mr. Robin showed the property to Pashko and Leka Gojcaj (hereinafter "Pashko" and "Leka") and failed to make clear whom he represented; that in or about December, 1987 Mr. Robin untruthfully told the Gojcajs that Dr. Zeines would not sell the property to them unless he, Mr. Robin, received a 10% equity interest, and untruthfully told Dr. Zeines that the Gojcajs would not purchase the property unless the same conditions were met; that Dr. Zeines and Mr. Robin agreed that Mr. Robin would receive a 7% equity interest; that Mr. Robin, Dr. Zeines, and the Gojcajs entered into an agreement to establish a corporation to develop the property, with Mr. Robin named secretary, and with ownership divided as follows: the Gojcajs 70%, Dr. Zeines 23%, and Mr. Robin 7%; that the Gojcajs and Mr. Robin entered into a commission agreement which stated that Mr. Robin was employed by the Gojcajs, that Mr. Robin had also provided real estate brokerage services to Dr. Zeines, and that the purchasers would pay a brokerage commission of 10% of a purchase price of \$800,000; that at closing of title Mr. Robin received the agreed upon commission and equity interest; that Mr. Robin and the Gojcajs entered into an agreement for Mr. Robin to act as agent in obtaining a mortgage commitment, and that pursuant to that agreement the Gojcajs gave Mr. Robin a \$15,000 application fee and a \$5,000 appraisal fee; that Mr. Robin failed to provide any services for the foregoing fees, and did not procure a mortgage; that Mr. Robin failed to comply with a demand for a refund or an accounting; that in December, 1989 the respondents relocated their business, but did not notify the complainant of their change of address until July 31, 1991; and they by reason of the foregoing the respondents are guilty of accepting and retaining an unearned and/or unlawful commission, of acting as an unlawful dual agent, of breaching their fiduciary duties of full and fair disclosure by failing to make clear which party they represented, of acting as principal and agent in the same transaction without resigning their agency, of violating 19 NYCRR 175.1 and 175.7, of committing conversion, of engaging in fraud or a fraudulent practice, of violating Real Property Law (RPL) §441-a[5], and of demonstrating untrustworthiness and/or incompetency.

#### **FINDINGS OF FACT**

1) Notice of hearing together with a copy of the complaint was served on Quail Run by certified mail delivered on February 9, 1995, and on Mr. Robin by personal service on March 11, 1995 (State's Ex. 1).<sup>2</sup>

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<sup>2</sup> The extreme delay between the service of the notice of hearing and the actual proceedings was the result of a CPLR Article 78 proceeding in the nature of prohibition brought by the respondents.

2) From at least October 31, 1987 until July 31, 1991 Mr. Robin was duly licensed as a real estate broker representing Quail Run, with an original address of 1930 Veterans Memorial Highway, Suite 5, Islandia, New York. That license was renewed, pursuant to an application dated July 12, 1991, for the period running from July 31, 1991 until July 31, 1993, with an indication of a change of address to 175 West 76th Street, New York, New York. From July 31, 1993 through the present date Mr. Robin has been licensed as a real estate broker in his individual name with a business address of 228-14 Stronghurst Avenue, Bellrose, New York. Since November 14, 1995 he has also been licensed as an associate real estate broker under the sponsorship of Prudential Long Island Realty at 215-45 Northern Boulevard, Bayside, New York (State's Ex. 2 and 3).

3) The complainant had been notified of the Quail Run change of address sometime prior to March 23, 1990. That is conclusively established by the real estate salesperson's license renewal application form sent by the complainant on that date to Francine Robin, Mr. Robin's wife, in care of the corporation at 175 West 76th Street, Suite 14F, New York, New York (Resp. Ex. J).

4) In or about January, 1987 Dr. Zeines and two partners purchased a residentially zoned piece of property consisting of approximately 1000 acres located in Highmont, New York. In January, 1987, desiring to re-sell the property, the partners, acting through Dr. Zeines, and the respondents, acting through Mr. Robin, entered into an exclusive agency agreement expiring on June 30, 1987. The agreement provided for: An asking price of \$4,000,000.00; a commission of 10% of the purchase price unless the property was sold privately; and Quail Run to act as agent for re-sale should the partnership enter into a joint venture with a purchaser obtained through the efforts of Quail Run (State's Ex. 10).

5) When the exclusive listing was nearing expiration, and no sale had been arranged, Dr. Zeines and Mr. Robin entered into a verbal agreement pursuant to which Quail Run could continue to show the property on a non-exclusive basis. That verbal agreement was supplemented by a written "Rider to Open Listing Agreement Regarding Possible Joint Venture" executed by Dr. Zeines and Mr. Robin on June 15, 1987 (State's Ex. 11). That agreement provided that: In the event of a sale to a joint venture partner secured by Quail Run, any commission on a sale would be payable by the buyer, with such a commission not to exceed \$100,000.00; if Dr. Zeines were to retain an equity position in a joint venture Quail Run would receive 10% of the total equity; in the event of a sale to a joint venture Quail Run would serve as exclusive agent for future sales, with Dr. Zeines to receive 33 $\frac{1}{3}$ % of Quail Run's gross commissions on such sales; and that Quail Run would co-broker such sales with all licensed real estate brokers acceptable to the joint venture partners.

6) In late 1987 or early January, 1988 Mr. Robin approached Pashko with an offer to sell a joint venture interest in the property to him and his brother Leka for \$800,000.00.<sup>3</sup> Mr. Robin told Pashko that he was representing Dr. Zeines, and never discussed dual representation with him. However, in January, 1988, he had them sign a commission agreement which stated that they had employed him (State's Ex. 5). While that agreement also stated that Mr. Robin was the brother in law of Dr. Zeines and had "rendered real estate brokerage services" to him, it did not indicate that those services had been rendered with regards to the property in question.<sup>4</sup> At or about the same time Mr. Robin discussed with Dr. Zeines a possible sale to the Gojcajs for \$1,200,000.00.<sup>5</sup> Eventually those discussions led to the proposed joint venture.

7) Mr. Robin took Pashko, and possibly Leka, to see the property, and, after viewing it they offered, in return for the terms proposed by Mr. Robin, to purchase a 70% interest for the asked for \$800,000.00, with Dr. Zeines to retain a 30% interest. Mr. Robin then presented the offer to Dr. Zeines, with the proviso that he (Mr. Robin) would receive a 10% interest in the joint venture pursuant to the "Rider to Open Listing Agreement." Dr. Zeines objected to granting Mr. Robin the equity interest, and asserted that the rider was no longer operative. Eventually, however, he agreed to grant Mr. Robin a 7% interest.<sup>6</sup> Mr. Robin never discussed with either Dr. Zeines or the Gojcajs the

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<sup>3</sup> The Gojcajs are real estate investors.

<sup>4</sup> Mr. Robin also never discussed the issue of dual agency with Dr. Zeines.

<sup>5</sup> Mr. Robin never discussed the possibility of a direct sale with the Gojcajs.

<sup>6</sup> I do not find credible Dr. Zeines' testimony that when he told Mr. Robin that he would not comply with the rider Mr. Robin told him that the Gojcajs insisted that he (Mr. Robin) receive a 10% interest. It is not believable that in such a situation Dr. Zeines or his attorney would not have spoken to a least one of the Gojcajs to find out why they might be making such an unusual demand. Further, although Robert Spencer, the Gojcaj's attorney, testified that at the contract signing he was under the impression that Mr. Robin was to receive a 7% interest because Dr. Zeines desired him to have it, Pashko testified that he had never been told that. Accordingly, there is insufficient evidence to support the allegation in the complaint that Mr. Robin told the Gojcajs that Dr. Zeines would not go through with the deal unless he (Mr. Robin) received an equity interest, and told Dr. Zeines that the Gojcajs would not go through with the deal unless he (Mr. Robin) received an equity interest.

implications of his being an equity participant in a transaction in which he was acting as broker.

8) On January 13, 1988 the Gojcajs, Dr. Zeines, and Mr. Robin entered into a contract of sale and a memorandum of understanding agreeing to establish a joint venture to develop the property. Pursuant to that agreement, the Gojcajs were each to receive a 35% interest, Dr. Zeines was to receive a 23% interest, and Mr. Robin was to receive the remaining 7%.<sup>7</sup> Title to the property, which was initially to be conveyed to the Gojcajs, was to be reconveyed by them to the joint venture. The Gojcajs were to pay the costs of development, Dr. Zeines was to receive a fee for supervising the development, and Mr. Robin was to be the exclusive broker for resale of any part of the property and was to be given the first opportunity to act as broker in obtaining any mortgage financing for the joint venture (State's Ex. 4).<sup>8</sup>

9) On April 1, 1988 all of the above parties entered into a shareholders' agreement which, among other things, required unanimous consent to the sale of all or substantially all of the joint venture's assets (State's Ex. 7).

10) A closing of title occurred on June 29, 1988 (State's Ex. 13), at which time a commission of \$80,000.00 was paid to Quail Run by the Gojcajs (State's Ex. 6 and 20) pursuant to the commission agreement previously entered into them and Mr. Robin.<sup>9</sup>

11) On September 19, 1988 the Gojcajs entered into an agreement with Mr. Robin for Quail Run to act as broker in acquiring a mortgage loan on the joint venture property of approximately \$1,000,000.00 at an interest rate of 12% (State's Ex. 8). Pursuant to that agreement they gave him a \$15,000.00 application fee and a \$5,000.00 appraisal fee (State's Ex. 9). The application fee, less \$500.00, was to be refunded if the borrowers were declined a mortgage commitment, while any unexpended appraisal fee was to be fully refundable. In fact, none of the appraisal fee was spent inasmuch as no appraisal was ordered or obtained.

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<sup>7</sup> It was not until the contract signing on January 13, 1988 that the Gojcajs became aware that Mr. Robin was to receive an equity interest in the joint venture.

<sup>8</sup> Exhibit 4 is the memorandum of understanding. The actual contract of sale for the property was not offered in evidence.

<sup>9</sup> The memorandum of understanding of January 13, 1988 provided that the purchase money, commission, and other monies advanced by the Gojcajs would be treated as debt owed by the joint venture to them, and would be repaid out of any net profits.

12) Mr. Robin proceeded to attempt to obtain the mortgage, and, although he never had the property appraised and no actual mortgage commitment was obtained (State's Ex. 23, p.84), he eventually received a letter of intent from Acceptance Associates of America, parent company of Horizon Financial Enterprises, Inc., to grant a \$1,200,000.00 loan with an interest rate of 13.99% (Resp. Ex. K). No further steps were taken with regards to that letter as the Gojcajs refused to consider it.<sup>10</sup> Mr. Robin has not complied with the Gojcaj's demand for the return of the application and appraisal fees, and they have brought suit against him for, among other things, the return of that money (State's Ex. 14).

13) At a date not appearing in the record, whatever interest Dr. Zeines held in the joint venture was purchased by the Gojcajs for approximately \$100,000.00.

14) Sometime in 1990 the Gojcajs entered into an agreement to sell the property to one Kingdon Gould. However, because of Mr. Robin's objections, and his demand that he receive \$500,000.00, the sale was not consummated (State's Ex. 17).

15) During the course of the above transactions Mr. Robin spoke with, and relied upon the advice of, counsel with regards to certain of the matters involved. He did not, however, discuss with his attorneys the question of what he should or should not disclose to the Gojcajs and Dr. Zeines (transcript p. 352, lines 14-17).

15) In 1991 Mr. Robin filed a petition in bankruptcy, and in 1993 he was granted a discharge which covered the above noted commissions and payments received by him.

#### OPINION

I- The respondents have raised as a defense the doctrine of laches. Traditionally, the common law rule has been that laches may not be interposed as a defense against the State when acting in a governmental capacity and the public interest. That principal has, however, been abrogated by State Administrative Procedure Act (SAPA) §301[1], which provides that "(i)n an adjudicatory proceeding, all parties shall be afforded an opportunity for a hearing within reasonable time." *Cortland Nursing Home v Axelrod*, 66 NY2d 169, 495 NYS2d 927 (1985). That requirement is mandatory, not discretionary. *Maxwell v Commissioner of Motor Vehicles*, 109 Misc.2d 62, 437 NYS2d 554 (Sup. Ct. Erie County, 1981).

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<sup>10</sup> Mr. Robin claims that the Gojcajs and Dr. Zeines prevented him from pursuing the obtaining of a mortgage by failing to provide him with documents that he requested. He failed to establish, however, that it was possible for them to produce such documents.

In order to show that a hearing has not been held within a reasonable time, the respondents must show substantial prejudice arising out of the delay. *Correale v Passidomo*, 120 AD2d 525, 501 NYS2d 724 (1986); *Geary v Com'r of Motor Vehicles*, 92 AD2d 38, 459 NYS2d 494 (1983), *aff'd* 59 NY2d 950, 466 NYS2d 304 (1983); *Cf. Eich v Shaffer*, 136 AD2d 701, 523 NYS2d 902 (1988). Such a showing can be made with a demonstration by the respondents that their ability to present defense witnesses with a clear and detailed recollection of the events has been hampered by the delay. *Walia v Axelrod*, 120 Misc.2d 104, 465 NYS2d 443 (Sup. Ct. Erie County, 1983). However, the respondents must show that the delay significantly and irreparably handicapped them in preparing a defense. *Reid v Axelrod*, 164 AD2d 973, 559 NYS2d 417 (1990); *Gillette v NYS Liquor Authority*, 149 AD2d 927, 540 NYS2d 61.

The only part of the respondents' case which was affected by the complainants' delay in commencing this proceeding involved the mortgage. While it was established that the delay may have resulted in the unavailability of a witness, and possibly of a document, as discussed *infra* the respondents were able to establish their defence without the witness and the document. Therefore, I find that the respondents' failed to establish the existence of prejudice sufficient to support the defense of laches.

II- The respondents have also raised, as a defense to the charges alleging that Mr. Robin failed to make certain disclosures to the Gojcajs and Dr. Zeines, the fact that throughout the transactions they consulted with, and relied on the advice of, attorneys. In *Flushing Kent Realty Corp. v Cuomo*, 55 AD2d 646, 390 NYS2d 146 (1976), it was held that a respondent could not be found to have acted improperly where it undertook certain action (the commencement of a law suit) on the advice of its attorney, and where there was a reasonable basis for that attorney's advice. However, as noted in finding of fact #15, the evidence establishes that while Mr. Robin was represented by counsel there were never any discussions between him and his attorneys regarding disclosure. There also is no evidence that he ever discussed the question of refunds with his attorneys. Without such discussions there could be no reliance, and, therefore, with regards to the charges regarding disclosure and the failure to make refunds the defense of reliance on the advice of counsel must fail. The defense is discussed separately, *infra*, with regards to the charge that the respondents acted as principal and agent in the same transaction without resigning their agency.

III- Mr. Robin claims that the Department of State lacks jurisdiction over his actions with regards to mortgage brokerage because he was allegedly not acting as a real estate broker. That defense fails for two reasons:

1) Mr. Robin is under the impression that a license as a real estate broker was not required to act as a mortgage broker in the

subject transaction because, he claims, his actions fell under the license as a mortgage broker issued to him by the New York State Banking Department pursuant to Article 12-D of the Banking Law. In that he is in error.

RPL §440-a provides that a license as a real estate broker is required to act as such, and RPL §440 includes as a "real estate broker" any person, firm or corporation which "negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage, other than a residential mortgage loan, as defined in section five hundred ninety of the banking law..." Pursuant to Banking Law §590, a residential mortgage loan is a loan to a natural person made primarily for personal, family or household use, which is secured by property improved by a one to four family dwelling and not by unimproved real property upon which such dwellings are to be constructed. The loan in question here was to be made to a corporation, and was to be secured by undeveloped property. Accordingly, Mr. Robin's actions did not fall under the RPL §440 exception for residential mortgage loans.

2) Even had Mr. Robin not been acting as a real estate broker, the Department of State would have had jurisdiction to consider their conduct in determining whether he demonstrated untrustworthiness and/or incompetency. *Dovale v Patterson*, 85 AD2d 602, 444 NYS2d 694 (1981).

III- 19 NYCRR 175.7 states that "(a) real estate broker shall make it clear for which party he is acting...."

"The regulation places a heavy burden on the broker: 'to make it clear what the state of facts are. It is the broker's responsibility to be sure that the person with whom he or she is dealing understands...." *Department of State v Almo*, 24 DOS 87 at 3.

In confirming that decision, the Appellate Division wrote that the regulation "requires that real estate brokers clearly state for which party they are acting." *Almo v Shaffer*, 149 AD2d 417, 539 NYS2d 765 (1989).

In addition to the requirement of such disclosure, a real estate broker is strictly limited in his or her ability to act as a dual agent: As a fiduciary, a real estate broker is prohibited from serving as a dual agent representing parties with conflicting interests in the same transaction without the informed consent of the principals. *Division of Licensing Services v Werner*, 160 DOS 96, conf'd. 3 DOS APP 96; *Department of State v McGill*, 21 DOS 92; *Department of State v Home Market Realty*, 1 DOS 90; *Department of State v Island Preferred Properties*, 34 DOS 89. "If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark

significance." *Wendt v Fischer*, 243 NY 439, 443 (1926); *Guidetti v Tuotti*, 52 Misc. 657, 102 NYS 499 (Supreme Ct. App. Term, 1907).

"Therefore, a real estate agent must prove that prior to undertaking to act either as a dual agent or for an adverse interest, the agent made full and complete disclosure to all parties as a predicate for obtaining the consent of the principals to proceed in the undertaking. Both the rule and the affirmative defence of full disclosure are well settled in law." *Division of Licensing Services v Short Term Housing*, 31 DOS 90 at p. 6., conf'd. 176 AD2d 619, 575 NYS2d 61 (1991).

It is not necessary that there be a showing of injury to the principals for there to be a finding that the dual agent acted improperly. *New York Central Insurance Company v National Protection Insurance Company*, 14 NY 84 (1856). Nor is it necessary for there to be a finding that the dual agent is guilty of actual fraud. *Carr v National Bank & Loan Co.*, 167 NY 375 (1901), aff'd. 189 US 426, 23 S.Ct. 513. See, also, *Hasbrouck v Rymkevitch*, 25 AD2d 187, 268 NYS2d 604 (1966). "This rule is not affected by the existence of the usage or custom of an agent to act for both parties to a particular transaction unless it is shown that the principal has knowledge of it." 3 NY Jur2d, Agency §201.

The evidence establishes that it was clear to Dr. Zeines that the respondents were representing him. When Mr. Robin broached the subject of the property with the Gojcajs it was also clear to them that the respondents were representing Dr. Zeines. The waters became muddied, however, once Mr. Robin had the Gojcajs execute a commission agreement in which the Gojcajs acknowledged that they had employed Quail Run as broker in the purchase transaction, and that had been informed that "Mr. Robin has also rendered real estate brokerage services to Dr. Zeines" (State's Ex. 5).

There is no evidence on the questions of whether the Gojcajs understood that after they retained the respondents the respondents continued to represent Dr. Zeines, and of whether Dr. Zeines knew that the respondents had entered into an agency relationship with the Gojcajs. Since the complainant has the burden of proof on that issue (State Administrative Procedure Act [SAPA] §306[1]), that aspect of the charges must be dismissed. However, it is clear that the respondents have not met their burden of establishing the affirmative defense of full disclosure on the issue of dual representation. In fact, they presented absolutely no substantial evidence regarding that issue.

The evidence clearly leads to the conclusions: That Mr. Robin never discussed the question of dual representation with either Dr. Zeines or the Gojcajs; that Mr. Robin never explained to them the

significance of such representation; and, therefore, that he never obtained their informed consent to dual representation.

IV- When the respondents first became involved in the subject transactions it was as agents. However, once it was agreed that Mr. Robin would receive an equity interest in the joint venture he became a principal.

"A real estate broker may act concurrently as an agent and as a principal in a transaction on disclosing all relevant facts fully and completely to his or her principal. A fact is relevant if it is one which the agent should realize would be likely to affect the judgement of the principal in giving his or her consent to the agent to enter into the particular transaction on the specified terms....The agent's duty of fair dealing is satisfied only if he or she reasonably believes that the principal understands the implications of the transaction. The burden of proof is on the agent to show that all the duties required have been satisfied." *Division of Licensing Services v Marotta*, 73 DOS 95 (citations omitted).

The respondents have failed to meet their burden of proof on this issue. The Gojcajs did not know that Mr. Robin was to have an equity interest in the joint venture until the day of the contract signing. The evidence establishes that they were not offered the opportunity to purchase the property outright, which would have resulted in Mr. Robin not participating as a principal, and there is no evidence that the significance of his receiving the interest, such as how the price they were paying might have been affected, was explained to them or to Dr. Zeines.<sup>11</sup> However, the evidence does clearly establish that Mr. Robin reasonably relied on his attorney to see to it that this unusual transaction was handled correctly. Accordingly, while proper and timely disclosure was not made, Mr. Robin may not, under these circumstances, be held liable therefore.

V- The complaint alleges that with regards to the sought after mortgage: The respondents failed to provide any services to the Gojcajs from which to earn a fee; that they did not procure a mortgage; and that Mr. Robin improperly failed to refund or account for the payments received by him.

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<sup>11</sup> While the allegation in the complaint is simply that the respondents "acted as principal and agent in the same transaction without resigning their agency," I have deemed the complaint to include an allegation that the disclosure which was required for the lack of a resignation as agent to be proper was not made, which allegation is necessarily implicit in the charge.

With regards to the issues of what services were provided and whether the respondents should have returned the application fee because they failed to procure a mortgage, Mr. Robin did, in fact, attempt to obtain mortgage financing for the project, and was able to obtain a letter of intent to make a loan from a lender. Accordingly, some services were provided.<sup>12</sup>

The Gojcajs refused to pursue the loan which was referenced in the letter of intent. That refusal effectively prevented and excused Mr. Robin from further pursuing the loan. A. Corbin, *Corbin on Contracts, One Volume Edition* §640 (1952).

Of the \$20,000.00 in payments received by the respondents with reference to the mortgage application, \$5,000.00 was specifically earmarked for an appraisal. No such appraisal was done, and the respondents have offered no theory by which the retention of the \$5,000.00 could be justified. The failure to refund that payment was a demonstration of untrustworthiness and incompetency. *Division of Licensing Services v Short Term Housing, supra*.

VI- Normally, where a broker 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. *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). However, since the respondents' monetary obligations to the Gojcajs and Dr. Zeines were discharged in bankruptcy no such refunds may not be ordered in this case. Nevertheless, pursuant to 11 USC 362[b][4], this tribunal may still enforce its regulatory power to prevent violation of consumer protection and regulatory laws by imposing other sanctions for the respondent's failure to refund the appraisal fee when it became clear, prior to the bankruptcy, that no appraisal would be ordered and paid for by them.

VII- Being an artificial entity created by law, Quail Run 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. Robin,

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<sup>12</sup> The complaint is very specific in its charge that Mr. Robin's wrongdoing was in failing to provide any services. It does not allege that whatever services he provided did not meet the requirements of his agreement with the Gojcajs, or that he failed to abide by the refund terms of that agreement. Accordingly, I held during the course of the testimony that those issues could not be considered. Therefore, the question of the failure of the Gojcajs and Dr. Zeines to provide documents that Mr. Robin said were needed for the processing of the mortgage application must be left for court in which the Gojcajs' law suit is still pending.

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. However, inasmuch as Quail Run is not currently licensed, was not licensed at the time of the commencement of these proceedings, and has not been licensed for more than two years, its last license having expired on July 31, 1993, and, therefore, has no automatic right of renewal (RPL§441[2]), no sanctions can be applied against it.

#### CONCLUSIONS OF LAW

1) By failing to obtain the informed consent of Dr. Zeines and the Gojcajs to his dual representation of them, Mr. Robin demonstrated untrustworthiness and incompetency as a real estate broker.

2) The complainant failed to establish by substantial evidence that the respondents violated 19 NYCRR 175.7 by failing to make clear whom they were represented, and that charge should be and is dismissed.

3) By failing to return the \$5,000.00 appraisal fee to the Gojcajs when, prior to his filing for bankruptcy, it became clear that the fee would not be expended, Mr. Robin demonstrated untrustworthiness and incompetency as a real estate broker.

4) The complainant failed to establish by substantial evidence that the respondents wrongfully failed to refund the \$15,000.00 mortgage application fee after not providing any services with which to earn the fee and after not having procured a mortgage, and that charge should be and is dismissed.

5) The complainant failed to establish by substantial evidence that Mr. Robin wrongfully told Dr. Zeines that the Gojcajs insisted that he (Mr. Robin) receive an interest in the joint venture, or that Mr. Robin wrongfully told the Gojcajs that Dr. Zeines insisted on the same thing, and that charge should be and is dismissed.

6) Mr. Robin acted improperly by being both principal and agent in the same transaction without making the proper disclosure. However, inasmuch as he reasonably relied on the advice of his attorney in doing so, he may not be penalized for that misconduct.

7) The complainant failed to establish by substantial evidence that Mr. Robin relocated his office without filing the proper notification, and that charge should be and is dismissed.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Marc Robin has demonstrated untrustworthiness and incompetency as a real estate broker, and accordingly, pursuant to Real Property Law §441-c, all licenses as a real estate broker issued to him are suspended for a period of six months commencing on June 1, 1997 and terminating on November 30, 1997, both dates inclusive. He is directed to send his license certificates and pocket cards, by mail postmarked no later than May 31, 1997, to Thomas F. McGrath, Revenue Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier  
Administrative Law Judge

Dated: April 23, 1997