

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-

MICHELE RUBINO and GREGORY W. GALLANT,

Respondents.

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This matter came on for hearing before the undersigned, Roger Schneier, on July 13 and October 6, 1994 and January 26 and 27, 1995.

Michele Rubino, of Century 21 Rainbow, 659 Franklin Avenue, Franklin Square, New York 11010, was represented by Howard W. Goldson, Esq., Goldson & Radin, 861 Larkfield Road, Commack, New York 11725.

Gregory W. Gallant, also of Century 21 Rainbow, having agreed to a consent order settling the complaint against him prior to the hearing, was not present.

The complainant was represented by Scott NeJame, Esq.

COMPLAINT

The complaint as it relates to Michele Rubino (hereinafter "the respondent"), a licensed real estate broker, alleges that through misrepresentation and the withholding of information she steered black persons away from a predominately white neighborhood and into an integrated neighborhood.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail on May 5, 1994, and an amended complaint was subsequently served on her (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker in association with

Rainbowland Real Estate, Inc. d/b/a Century 21 Rainbow (hereinafter "Rainbow") (State's Ex. 2).

3) On Sunday May 16, 1993, having made an appointment by telephone with Mr. Gallant to see a house in Franklin Square which had been advertised by Rainbow in the May 14, 1993 edition of "Newsday" with an indication that it was a "colonial" priced in the "\$150's" (State's Ex. 5 and 8), complainant's employees Katie Meuwissen and John Frederick, who are white, visited Rainbow's office as a part of a program of testing real estate brokers to determine if they engaged in racially discriminatory practices. In accordance with their appointment they arrived at the office at 10:15 A.M., at which time they were told to return at 11:30 A.M.

Upon returning to Rainbow's office as directed they met with Mr. Gallant, who took them to see the advertised property, a vacant 2 bedroom colonial style house with a detached garage located at 60 Harrison Avenue, Franklin Square, New York. The house had an asking price of \$155,000, but Gallant said might be had for between \$140,000 and \$145,000. Ms. Meuwissen and Mr. Frederick were admitted to the house by Gallant, who had the keys.

4) Also on Sunday May 16, 1993, having on May 14, 1993 made an appointment by telephone to see the house that had been advertised, complainant's employees Gloria Brockington and Carlton Richards (hereinafter "the testers"), who are black, visited Rainbow's office as a part of the testing program. In accordance with their appointment with the respondent, who is white, they arrived at the office at 11:00 A.M.

The respondent took the testers to an upstairs office. Ms. Brockington told the respondent that she had made the appointment because they wanted to see the advertised house, and described the advertisement to her. The respondent had the testers sign a disclosure form, and asked them what types of homes they were interested in. They told her one or two family capes, colonials or tudors with a price of between \$150,000 and \$175,000 in the Franklin Square area, and provided her with financial information which established that they were financially able to purchase such a house. They also told her that they had a child, and that Ms. Brockington's mother, who might live with them. The respondent already knew, from her May 14th telephone conversation with Ms. Brockington, and confirmed in this conversation, that the testers were interested in seeing houses with 3 or 4 bedrooms (Resp. Ex. D and E). The respondent consulted a listing book, and at times during the conversation left the room to make telephone calls to arrange for the viewing of houses.

The respondent took the testers to see several houses. The first was a three bedroom house located at 1677 Lenox Road, Elmont, New York owned and/or occupied by a black family. The second, also with three bedrooms, owned and occupied by a black family, was

located across the street at 1688 Lenox Road, Elmont. The third house, which was vacant, also had three bedrooms and was located on Sterling Road in Elmont. The respondent also resides in Elmont.

The testers and the respondent then returned to Rainbow's office. She asked them if they wanted to see more houses, and they made a tentative appointment to return the following Sunday, saying that they would call her to set an exact time (Resp Ex. E). However, when the testers didn't call, the respondent called them at the telephone number which they had given her and left a message, on the machine which answered, in which she asked them to call to confirm an appointment for 3:00 P.M. on that following Sunday. Although twice instructed by his supervisor to cancel the appointment, Mr. Richards did not do so.

When on that Sunday, May 23, 1993, the testers failed to keep the appointment Maria Perodin, the real estate salesperson¹ associated with Rainbow who had obtained the listing of the advertised property and who was actually planning to meet with the testers since the respondent was unable to do so, called the telephone number left by them, and another message was left on the machine. (Prior to May 23 the respondent had discussed the testers' needs with Ms. Perodin, and had assisted her in locating listings for houses in Franklin Square. Ms. Perodin had considered what properties, in her judgement, met the stated needs of the testers, and then had made an appointment for them to view a house in Franklin Square which met those needs [Resp Ex. D]).

The following day the respondent called the testers again, and left a message in which she inquired if they were still interested in seeing more houses (Respondent's Ex. B).

5) The advertised house had been listed for sale with Rainbow on March 5, 1993. On May 12, 1993 an offer to purchase the house, received from another broker, was accepted by the seller, a fact of which the respondent was not aware when she made her original appointment with the testers. However, by the time of the visit she was aware both of that and that the contracts were actually in the mail. Ms. Perodin had told the respondent that it was a strong offer which was likely to result in a sale, and the contract of purchase and sale was, in fact, executed on May 24, 1993 (State's Ex. 6 and 7, Resp. Ex. G). Title was eventually transferred pursuant to the terms of that contract.

It is and was the policy of Jean Curtachio, Rainbow's representative broker, that properties listed with Rainbow should be shown to potential purchasers even after an offer has been accepted, until a contract has been signed. That policy was not, however, followed without exception by Rainbow's sales personnel.

¹ Ms. Perodin is now an associate broker.

The respondent violated it on a regular basis because she does not want to waste her time showing a house which she perceives as having been sold.

6) At the time of the visit by the testers Rainbow had available listings for eight other properties in Franklin Square priced within the range given by them (State's Ex. 9). There is, however, no evidence that those houses, other than the advertised house, or that any other three bedroom houses in Franklin Square, were available for showing at that time.

7) As of the 1990 census the relevant population figures of the areas in which the houses visited by the investigators was as follows: 60 Harrison Avenue, Franklin Square, 98.4% white and .2% black (State's Ex. 15); 1677 and 1688 Lenox Street, Elmont, 74.3% white and 13% black (State's Ex. 16 and 17); Sterling Road, Elmont, 58.9% white and 25% black (State's Ex. 18). For the entire communities, the relevant populations were: Franklin Square, 97.4% white and .2% black; Elmont, 75.2% white and 14.3% black (State's Ex. 19).

8) May 16, 1993 was communion Sunday. As a result of the numerous communions taking place that morning listing brokers and homeowners were otherwise engaged, many listed houses were not available for viewing, and the respondent was unable to make appointments for the investigators to inspect those homes on that day.

OPINION

I- As the party which instituted the hearing, the burden is on the complainant to prove, by substantial evidence, that the respondent steered black persons away from a predominately white neighborhood and into an integrated neighborhood. State Administrative Procedure Act (SAPA), §306[1]. 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).

II- In order to establish that racial steering occurred, the complainant must show that Ms. Brockington and Mr. Richards were not shown a house or houses, or were steered to a house or houses, because of their race. The elements which must be shown by the complainant are:

1. The testers applied to purchase housing;
2. The testers were, according to the information given to the respondent, financially qualified for the housing; and

3. The respondent rejected the testers or directed them to a particular property because of their race. Department of State v Herbert Schimkus, 29 DOS 87, conf'd. 143 AD2d 418, 532 NYS2d 564 (1988).

The complainant has established that the testers applied to purchase housing, and that they were financially qualified. It has also established that the testers were only shown houses in Elmont, a racially integrated area while, that same morning, white persons were shown a house in Franklin Square, a nearly all white area. However, it has not shown that the disparity in treatment was racially motivated.

"It cannot be expected that a case of discrimination will be proved easily and with entirely objective evidence. It is necessary to look at the totality of the situation and the reasonableness (or lack thereof) of any explanations. 'One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that the will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive--for we deal with an area in which "subtleties of conduct...play no small part".' Holland v Edwards, 307 NY 38 (1954) (citation omitted)." Department of State v Herbert Schimkus, *supra*.

The evidence, taken as a whole, establishes that racial discrimination did not take place:

1) In speaking with the respondent, the testers expressed an interest in seeing houses which were different from the advertised house which was shown to the white couple. While the testers indicated that they needed a 3 or 4 bedroom house, the advertised house had only 2 bedrooms.

2) An offer to purchase the advertised house had been accepted, and the respondent believed (correctly) that a contract would soon result. While it was the policy of the office to continue to show such properties, the respondent made a practice of violating that policy because she was interested only in showing properties which she thought that she could sell.²

² The respondent was not charged with failing to fulfill her fiduciary obligations to Rainbow's principals by not attempting to sell a home which was still available for sale.

3) The day that the testers visited the respondent's office was communion Sunday. For that reason home owners and listing brokers were otherwise engaged, and many of the homes which were listed with Rainbow or for which listings were otherwise available could not be shown that day. The complainant failed to establish that any homes in Franklin Square meeting the testers' stated requirements were available for showing at the time of their visit to Rainbow.

4) The respondent, who is white, took the testers to see homes which matched their stated requirements and were located in the community in which she lives.

5) The respondent, in cooperation with another Rainbow broker, attempted to locate homes in Franklin Square to be shown to the testers on the return visit for which they made an appointment. One such home was located, and was scheduled to be shown to the testers. The only apparent reason that the home was not shown to the testers was that they failed to keep their appointment.

CONCLUSIONS OF LAW

The complainant has failed to establish by substantial evidence that the respondent engaged in racial steering, and the complaint herein should be dismissed. SAPA 306[1].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the charge that Michele Rubino through misrepresentation and the withholding of information steered black persons away from a predominately white neighborhood and into an integrated neighborhood is dismissed.

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:

ALEXANDER F. TREADWELL
Secretary of State
By:

Michael E. Stafford, Esq.
Chief Counsel