

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-

**MAGDALENE TOPPIN d/b/a FINALLY
HOME REALTY CORP.,**

Respondent.

-----X

The above noted matter came on for hearing before the undersigned, Roger Schneier, on June 13, 1996 at the New York State Office Building, Veterans Memorial Highway, Hauppauge, New York.

The respondent, of 223-05 Hempstead Avenue, Queens Village, New York 11429, was represented by Michelle C. Toppin, Esq., 618 May Street, South Hempstead, New York 11550.

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

COMPLAINT

The complaint alleges that in August, 1994, Louis Plaut advertised his house for sale; that one of the prospective purchasers who viewed the property was Willner Orcel, a real estate salesperson associated with Finally Home Realty Corp. (hereinafter "Finally Home"); that Orcel expressed an interest in purchasing the property privately; that on September 14, 1994 Plaut listed the house for sale with a broker; that Plaut gave the broker a list of the persons who had previously viewed the house in accordance with an agreement that there would be a reduced commission should he sell privately; that the broker contacted Orcel, who told her that he was a real estate salesperson and expressed an interest in purchasing the property; that the broker then told Plaut that the reduced commission clause was void; that Orcel, upon learning that the house had been listed with a broker, requested that Finally Home represent him as a buyer's broker; that Finally Home actually acted as a seller's agent, representing Plaut; that Finally Home acted as principal and agent in the same transaction without full

disclosure to Plaut; that Finally Home presented Orcel's offer to the listing broker; that Finally Home sought to receive a commission from Plaut without making proper disclosures to Plaut; that Finally Home negotiated to receive 50% of the commission to be paid to the listing broker; that on October 19, 1994 Orcel and Plaut executed a contract of sale; that on December 20, 1994 a closing took place, at which time the listing broker received a commission of \$3,875.00 and Finally Home received a commission of \$4,125.00, of which it paid \$1,856.25 to Orcel; that all of the foregoing took place with the knowledge and consent of Toppin; and that by reason thereof the respondent breached her fiduciary duties of good faith, reasonable care, skill, diligence, judgement and full disclosure to her principal, demanded, received and retained an unearned commission, demonstrated untrustworthiness and/or incompetency, and violated 19 NYCRR 175.7.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by delivering it to her attorney, who had appeared on her behalf while the matter was being investigated (State's Ex. 1). No objection was made to that method of service (State's Ex. 1).

2) The respondent is, and at all times hereafter mentioned was, duly licensed as a real estate broker representing Finally Home (State's Ex. 2).

3) On August 20, 1994 Louis Plaut placed an advertisement in *Newsday* in which he offered for sale his home located at 18 Cynthia Court, Hempstead, New York. Included in that advertisement was the statement "No Brokers" (State's Ex. 3).

4) On August 21, 1994 Willner Orcel, a salesperson licensed in association with Finally home, and his wife viewed the house (State's Ex. 4). Orcel liked the house, told Plaut that he was a real estate salesperson, and offered to purchase the house for his own use for \$165,000.00 (State's Ex. 5). In response, Plaut gave Orcel the name and telephone number of his attorney, Duncan Frazier, to whom he entrusted the entire handling of the transaction.

Approximately one week later Orcel received a telephone call from his attorney, who told him that Frazier had called with a counter offer of \$185,000.¹ Orcel rejected the counter offer, and told his lawyer that he was no longer interested.

¹ It is not clear from the record how Frazier got Orcel's offer and the name and telephone number of Orcel's attorney.

5) Plaut and his wife decided that they wished to see if they could get any better offers, so on September 15, 1994 they listed their house for sale with Century 21 Rainbow (hereinafter "Rainbow"), a licensed real estate broker, with an asking price of \$169,990.00 (State's Ex. 6). Pursuant to the exclusive right to sell multiple listing agency agreement, the Plauts agreed to pay Rainbow a commission of 6% the selling price. The commission was to be reduced to 2% should the Plauts sell to a person who had previously seen the house², and to facilitate that agreement they gave Rainbow a list of such persons. Plaut initialed the section of the agreement which provided that Rainbow could not cooperate with brokers representing buyers.

6) Having obtained his name from the list that Plaut gave her, Joanne Doherty, the real estate salesperson associated with Rainbow who had negotiated the listing, contacted Orcel and asked him if he was interested in purchasing the house. He stated that he was interested at \$165,000.00, and signed a purchase offer in that amount (Resp. Ex. A), and she obtained various relevant items of information from him, including the fact that he is a salesperson associated with Finally Home. He told her that she would have to talk to his broker, Toppin, whom he intended to have act on his behalf.^{3,4}

Doherty then discussed the matter with Jean Curtachio, Rainbow's representative broker. They concluded that since Finally Home is a part of the multiple listing service it might be entitled to share in any commission to be earned on the sale.

The next day Doherty spoke with Plaut. She told him that Orcel was a salesperson associated with Finally Home, and explained the offer, which she said would require a 6% commission. When he realized how much he would net, he rejected the offer. However, he encouraged her to continue negotiating. Eventually, it was agreed

² In accordance with the normal procedures of the multiple listing service, the information submitted to it did not mention the possibility of the 2% commission, and the respondent was not aware of that provision of the listing agreement.

³ Although Orcel intended to have Finally Home act on his behalf, Toppin did not understand that to be the case, did not agree to act in that manner, and considered that she and Finally Home were acting on behalf of Plaut, a fact of which she advised Orcel.

⁴ On September 17, 1994, prior to discussing the purchase of the house with Doherty, Orcel, acting as a real estate salesperson on behalf of Finally Home, had shown the house to a prospective purchaser, who had expressed no interest in purchasing it (State's Ex. 9 and 10).

by all the parties, including the respondents, that the commission would be reduced to 5%, to be split equally by Rainbow and Finally Home, which would give the Plauts an acceptable net return. All of the transactions after the initial conversations with Plaut were handled by Toppin, Doherty, and Frazier, who was advised by Doherty of Orcel's status as a real estate salesperson associated with Finally Home.

7) On October 19, 1994 the Plauts entered into a contract to sell their house to the Orcels for \$165,000.00. The contract, drafted by Frazier, named Rainbow and Finally Home as the brokers (State's Ex. 7).

8) Closing of title took place on December 20, 1994, at which time Rainbow received a commission of \$3,875.00 and Finally Home received a commission of \$4,125.00, of which it then gave 40% to Orcel (State's Ex. 8).

OPINION

I- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges stated in the complaint. 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- The charges against the respondent hinge on the allegation that Finally Home acted as principal and agent in the same transaction and sought to receive a commission without making the proper disclosures to Plaut, and violated 19 NYCRR 175.7.⁵ With regards to disclosure of the status of principal and agent, the evidence establishes that at the time of their first contact Orcel told Plaut that he was a real estate salesperson. The evidence further establishes that after the matter was turned over to the various brokers the information regarding Orcel's status as a real estate salesperson associated with Finally Home was conveyed by him to Doherty, and then by Doherty to both Plaut and Frazier, Plaut's attorney.

Plaut had authorized Frazier to act as his agent, with full authority to negotiate the details of the sale of the house. Accordingly, Frazier's detailed knowledge that Finally Home was

⁵ Other charges in the complaint relate to the actions of Doherty, Rainbow, and Curtachio, who settled the charges against them prior to the hearing.

acting as a seller's agent, of Orcel's status, and of the commission arrangements is imputed to Plaut. Restatement, Second, Agency §9[3]. As an attorney, Frazier is presumed to have been aware of the significance of Orcel's licensure as a real estate salesperson and his association in that capacity with Finally Home. Therefore, even if it is accepted that Finally Home was a principal in the transaction by reason of Orcel's status, there was full disclosure of the relevant facts to Frazier and, through him, to Plaut.⁶

As for the alleged violation of 19 NYCRR 175.7, which requires that a real estate broker make clear for which party that broker is acting, the complaint alleges that Finally Home was acting for Plaut, and the evidence both supports that allegation and establishes that Frazier was made aware that Finally Home was so acting. As discussed above, although Orcel wanted Finally Home to act as his agent, Toppin never agreed to do so. Since agency is a consensual relationship, requiring the agreement of both the principal and agent to the creation of the agency, Restatement, Second, Agency §15, Finally Home never became Orcel's agent. There was, therefore, no violation of the regulation.

CONCLUSIONS OF LAW

The complainant has failed to prove the essential elements of the complaint by substantial evidence. Accordingly, the complaint should be dismissed. SAPA §306[1].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the charges herein against Magdalene Toppin are dismissed.

Roger Schneier
Administrative Law Judge

Dated:

⁶ There is an implication in the complaint that there was something wrong in Orcel's sharing in the commission. Real Property Law §442 makes provision for, and specifically permits, such sharing. Therefore, so long as full disclosure is made, as it was in this case, there is nothing wrong with such a commission split.