

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-

PRICE G. TURNER d/b/a CAN AM REALTY,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on March 26, 1996 at the New York State Office Building located at 333 East Washington Street, Syracuse, New York.

The respondent, of Bridge Plaza, Bridge Administration Building, Room 207A, Ogdensburg, New York 13669, did not appear.

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

COMPLAINT

The complaint alleges that the respondent, a licensed real estate broker: prepared contracts for the sale of real property which did not contain an attorney approval clause and had not been approved by the local board of realtors and bar association; failed to provide the buyers with a disclosure form pursuant to Real Property Law (RPL) §443; received deposits for the purchase and sale of the property but failed to place and/or maintain those deposits in an escrow account; failed and refused to return deposit money after the contracts on which the deposits were paid were declared void; and failed to cooperate with the complainant's investigator; and that by reason thereof the respondent violated 19 NYCRR 175.1, failed to deal openly, honestly and fairly with member of the public, violated RPL §443, engaged in the unauthorized practice of law in violation of Judiciary Law §478, violated RPL §442-e[5], and demonstrated untrustworthiness and/or incompetence.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent at his home address by certified mail on February 17, 1996 (State's Ex. 1). Notice of hearing and a copy of the complaint was also sent by certified mail to the respondent's last known business address on February 12, 1996 and, having been returned by the United States Postal Service marked "unclaimed," was remailed by first class mail to the same address on March 7, 1996 in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication was from an attorney or concerned an action against the respondent (State's Ex. 2).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker d/b/a Can Am Realty at various locations in Ogdensburg, New York (State's Ex. 3).

3) On or about May 31, 1993 the respondent showed real property located on Black Lake Road, Morristown, New York to Carol Scott, her husband Fred Scott, and his uncle Billy Dean Brown. The property consisted of approximately 8.6 acres improved with a nine room home and two additional buildings, and included facilities for a bar and restaurant.¹ The respondent said that although he did not have a listing to sell the property, if the Scotts liked the property he could contact the owners and get a listing.

The Scotts decided to give the respondent an offer of \$50,000.00 to convey to the owners of the property. Since the Scotts lived in Rochester, which is some distance from the property, they and Brown decided to list Brown, who lived in the immediate area, as co-purchaser with Mrs. Scott. Accordingly, the respondent drew up a contract for Mrs. Scott and Brown to sign (State's Ex. 4). The contract set forth the names of the buyers and sellers, described the property, stated the purchase price and loan contingency, established a closing date of June 30, 1993, provided for payment of a 10% commission by the sellers to the respondent, and contained any and all other provisions required to create a binding contract upon timely acceptance by the sellers, including a merger clause. It did not contain a provision making the contract subject to the approval of the parties' attorneys, and bore no indication that it was on a form recommended by a joint bar/real estate board committee. The contract was signed by Mrs. Scott and Brown on May 31, 1993.

¹ The Scotts had initially been seeking a piece of property for a campsite, but had not found suitable a parcel which the respondent showed them. The respondent then suggested that they look at the subject property.

Pursuant to the terms of the contract Mrs. Scott issued a check to the respondent for a \$1,000.00 deposit (State's Ex. 5). The respondent failed to abide by the provision of the contract which required that he place that deposit in his escrow account (State's Ex. 10).

Several days later the respondent telephoned the Scotts, told them that their offer had been rejected, and that the owners of the property had set an asking price of \$69,900.00. He suggested to them that they come back and make a counter offer. The Scotts and the respondent decided that it would be better for Brown to serve as a stand-in for them, since he lived in the area and, as an acquaintance of the sellers, might be able to get a better price.

The Scotts decided to offer \$60,000.00, and the respondent prepared a new contract, dated June 10, 1993, which was the same as the first one except that now Brown was listed as the sole purchaser, the purchase price was increased to \$60,000.00, the projected closing date was set as July 30, 1993, and the sellers were to take back a 15 year \$50,000.00 purchase money mortgage at 9% interest. With regards to the mortgage the respondent inserted the following provision: "There will be a penalty for late payment." There was, however, no explanation of what that penalty would be. That contract was signed by Brown as buyer, and by the sellers (State's Ex. 6).

At all times the respondent was aware that Brown was merely a stand in, and that the Scotts were to be the actual purchasers of the property.

Although not required by the new contract, the respondent asked Mr. Scott for an additional deposit of \$5,000.00, which he said he would combine with the previously received \$1,000.00 to cover his 10% commission. Mr. Scott agreed, gave the respondent a bank check (State's Ex. 7). As with the original deposit, the respondent did not deposit that \$5,000.00 in his escrow account (State's Ex. 10).

The property was in a bad state of disrepair, and Mr. Scott was anxious to commence repairs. Accordingly, on June 26, 1993 Brown entered into an agreement with the sellers to allow such work to be done (State's Ex. 8), and the Scotts eventually spent \$21,000.00 on repairs.

Eventually, the Scotts decided that they did not want to complete the purchase because the transaction was taking too long. They so informed the respondent who, on August 23, 1993 refunded \$2,000.00 to them (State's Ex. 5), with the understanding that he would return an additional \$3,000.00 three days later. He failed, however, to make that additional refund, and told the Scotts that he had spent the money. The original \$1,000.00 deposit was split evenly with the sellers.

Brown attempted to find other persons interested in completing the purchase. Being unable to do so, on November 2, 1993 he executed a document seeking to be released from the contract, and in return releasing the sellers from their obligation to sell to him (State's Ex. 11). The document made no reference to the \$1,000.00 deposit previously paid by the Scotts and not part of the refund received by them in August.

Sometime in the summer of 1994 an agreement was reached between the respondent and the sellers pursuant to which the original \$1,000.00 was split evenly between them. Accordingly, on August 10, 1994 the respondent's attorney sent the attorney for the sellers a check for \$500.00, having previously received a check in that amount from the respondent (State's Ex. 10).

4) The respondent never gave the Scotts or Brown the disclosure form set forth in Real Property Law (RPL) §443.

5) Having been assigned to investigate the foregoing matters, Senior License Investigator Dale R. Bolton made an appointment to meet with the respondent on November 14, 1994, which appointment was cancelled by the respondent. A new appointment, made for November 15, 1994 through the office of the respondent's attorney, was also cancelled by the respondent. On November 28, 1994 Bolton sent the respondent a letter asking him to call him to arrange a new appointment, but the respondent did not reply. On December 13, 1994 Bolton sent the respondent another letter, by certified mail, seeking to set up an appointment, but that letter was returned unclaimed. An additional letter, sent to the respondent and his attorney on December 22, 1994, received no response (State's Ex. 10, 12, and 13).

OPINION

I- The holding of an ex parte quasi-judicial administrative hearing 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- Real Estate brokers are permitted to prepare purchase offer contracts subject to very definite limitations.

"The line between such permitted acts by real estate brokers and the unauthorized practice of the law has been recognized as thin and difficult to define and, at times, to discern. Whether or not the services rendered are simple or complex may have had a bearing on the outcome, but it has not been controlling....

The justification for granting to real estate brokers and agents the privilege to complete simple purchase and sale documents has been said to be the practical aspect of the matter, that is, the business need for expedition and the fact that the broker has a personal interest in the transaction. It should be noted in this regard, however, that the so-called 'simple' contract is in reality not simple....The personal interest of the broker in the transaction and the fact that he is employed by one of the opposing parties are further reasons to require that, insofar as the contract entails legal advice and draftsmanship, only a lawyer or lawyers be permitted to prepare the document, to ensure the deliberate consideration and protection of the interests and rights of the parties.

The law forbids anyone to practice law who has not been found duly qualified and licensed to do so....Thus, the privilege accorded to real estate brokers and agents must be circumscribed for the benefit of the public to ensure that such professionals do not exceed the bounds of their competence and, to the detriment of the innocent public, prepare documents the execution of which requires a lawyer's scrutiny and expertise." *Duncan & Hill Realty v Dept. of State*, 62 AD2d 690, 405 NYS2d 339, 343-344 (1978) (citations omitted), appeal dismissed 45 NY2d 821, 409 NYS2d 210.

In preparing a purchase offer contract, real estate brokers and salespersons may not insert any provision which requires the exercise of legal expertise. They may not devise

"legal terms beyond the general description of the subject property, the price and the mortgage to be assumed or given....(and) may readily protect (themselves) from a charge of unlawful practice of law by inserting in the document that it is subject to the approval of the respective attorneys for the parties. Moreover, a real estate broker or agent who uses (a purchase offer form) recommended by a joint committee of the bar association and realtors association of his local county, who refrains from inserting provisions requiring legal expertise and who adheres to the guidelines agreed upon by the American Bar Association and the National Association of

Real Estate Brokers...has no need to worry about the propriety of his conduct in such transactions." *Duncan & Hill Realty v Dept. of State, supra*, 405 NYS2d at 345.

The respondent prepared two contracts. Both of those contracts contained involved clauses setting forth in full the legal rights of the buyer and of the seller. The second contract contained a purchase money mortgage clause which, because of the respondent's apparent lack of expertise, was ambiguous and probably unenforceable with regards to the late payment penalty. Neither of the contracts contained a clause making it subject to the approval of the parties' attorneys. The form used by respondent contains no indication that it was recommended by a joint bar/real estate board committee. Accordingly, the respondent is guilty of the unauthorized practice of law, and by his conduct demonstrated both untrustworthiness and incompetence. *Janes v Department of State*, 167 AD2d, 561 NYS2d 1021 (1990); *Mulford v Shaffer*, 124 AD2d 876, 508 NYS2d 302 (1986); *Tucci v Department of State*, 63 AD2d 835, 405 NYS2d 846 (1978).

III- A real estate broker or salesperson has the fiduciary duty of handling his or its clients' funds with the utmost scrupulousness, and must take extreme care to assure that the rights of the lawful owners of those funds will not be jeopardized. *Department of State v Mittleberg*, 61 DOS 86, conf'd sub nom *Mittleberg v Shaffer*, 141 A.D.2d 645, 529 N.Y.S.2d 545 (1988); *Division of Licensing Services v Pellittieri*, 77 DOS 92; *Division of Licensing Services v Tripoli*, 96 DO 91. That duty is implemented through 19 NYCRR 175.1, which forbids the commingling of brokers' and clients' funds and requires that client funds be maintained in a special bank account. The purpose of that rule "is to assure that the rights of the lawful owners of escrow funds are not jeopardized by an agent's mismanagement of funds entrusted to the agent's care." *Division of Licensing Services v Pozzanghera*, 141 DOS 93, 7.

The use by a real estate broker for his or its own purposes of money received from and belonging to other persons warrants the revocation of the broker's or salesperson's license. *Lawrence Black, Inc. v Cuomo*, 65 A.D.2d 845, 410 N.Y.S.2d 158 (1978), aff'd. 48 N.Y.2d 774, 423 N.Y.S.2d 920. "The imposition of any lesser penalty would unduly jeopardize the welfare of any persons who might do business with the respondents in the future." *Division of Licensing Services v Pellittieri, supra* at p. 3.

The contracts prepared by the respondent provided that the deposits paid by the Scotts were to be deposited in the respondent's escrow account. The respondent's failure to abide by that requirement was not only a violation of the terms of those contracts, but also, as discussed *supra*, a violation of 19 NYCRR 175.1 and a clear demonstration of untrustworthiness.

IV- The respondent asked for and received from the Scotts deposits totaling \$6,000.00. However, when the deal was cancelled and the Scotts requested the return of their money, the respondent gave them \$2,000.00 and a promise to an additional \$3,000.00 in three days, a promise which he did not keep.² The respondent's retention of the promised \$3,000, and of the original \$1,000.00, was a demonstration of untrustworthiness. *Division of Licensing Services v Gafni*, 5 DOS 94.

V- Real Property Law (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.

Senior Investigator Bolton attempted several times to make appointments with the respondent. The respondent cancelled two appointments, and failed to respond to attempts to make a new appointment. That non-cooperation was a violation of RPL 442-e[5], and a demonstration of untrustworthiness. *Division of Licensing Services v Lawson*, 42 DOS 93.

VI- Pursuant to RPL §443, a real estate broker is required to provide agency relationship disclosure forms to the buyers and sellers in transactions involving "residential real property," which is defined as real property improved by a one to four family dwelling used or occupied, or intended to be used or occupied,

² The failure to return the money was not justified by ¶12 of the contract, which provided that in the event of a buyer default the respondent would be entitled to retain one half of any deposits, with the other half to be paid to the sellers, as he may not profit through the use of contracts obtained through his unlawful practice of law.

wholly or partly, as the home or residence of one or more persons. RPL §443[1][f].

The evidence establishes: that the Scotts were seeking land for a camp site; that they instead decided to purchase a parcel on which there was a nine room home and two additional buildings; that there were facilities for a bar and restaurant; and that the Scotts expended substantial funds on repairs. However, substantial evidence that the Scotts intended to use or occupy the premises as their residence is lacking. For that reason, it is not possible to find that the respondent violated RPL §443.

VII- At the close of its case, the complainant sought to amend the complaint to conform to the proof, and add a charge of conversion. So long as the issue has been fully litigated by the parties, and is closely enough related to the stated charges that there is no surprise or prejudice to the respondent, the pleadings may be amended to conform to the proof and encompass a charge which was not stated in the complaint. This may be done even without a formal motion being made by the complainant. *Helman v Dixon*, 71 Misc.2d 1057, 338 NYS2d 139 (Civil Ct. NY County, 1972). In ruling on the motion, the tribunal must determine that had the charge in question been stated in the complaint no additional evidence would have been forthcoming. *Tollin v Elleby*, 77 Misc.2d 708, 354 NYS2d 856 (Civil Ct. NY County, 1974). What is essential is that the "matters were raised in the proof, were actually litigated by the parties and were within the broad framework of the original pleadings." *Cooper v Morin*, 91 Misc.2d 302, 398 NYS2d 36, 46 (Supreme Ct. Monroe County, 1977), mod. on other grnds. 64 AD2d 130, 409 NYS2d 30 (1978), aff'd. 49 NY2d 69, 424 NYS2d 168 (1979).

The respondent was not present at the hearing. Therefore, the issue of conversion was not litigated by him, and the complaint may not be amended to encompass the charge.

VIII- The respondent's misconduct in engaging in the unauthorized practice of law taints the entire transaction. Were it not for the contracts which he drafted he never would have come into possession of the deposit money. 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, or of the future re-issuance of such 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 applies even where the broker has released those funds to a third party. *Department of State v Mittleberg*, supra. Accordingly, the respondent may be required to refund the original \$1,000.00 deposit, along with the remaining \$3,000.00 of the additional deposit.

CONCLUSIONS OF LAW

1) Inasmuch as there was evidence that notice of the place, time and purpose of the hearing was properly served it was permissible to conduct an ex parte hearing.

2) By preparing two purchase offer contracts which were not subject to the approval of the parties attorneys, which contained provisions requiring the exercise of legal expertise, and which were on forms which were apparently not recommended by a joint bar/real estate board committee, the respondent engaged in the unauthorized practice of law and thereby demonstrated untrustworthiness and incompetence.

3) By failing to place the deposits in his escrow account, the respondent violated 19 NYCRR 175.1 and demonstrated untrustworthiness.

4) By failing to return the entire \$6,000.00 which the Scotts paid to him as deposits on the proposed transaction, the respondent demonstrated untrustworthiness.

5) By failing to cooperate with the investigation of the instant matter the respondent violated RPL §442-e[5] and demonstrated untrustworthiness.

6) The complainant failed to establish by substantial evidence that the respondent violated RPL §443, and, accordingly, that charge should be dismissed. State Administrative Procedure Act §306[1].

7) Inasmuch as the issue was not fully litigated, the complaint may not be amended to conform to the proof and to encompass as charge of conversion.

8) The respondent should be required to refund to the Scotts the deposits paid by them to him.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Price G. Turner has violated Real Property Law §442-e[5], and has demonstrated untrustworthiness and incompetency as a real estate broker, and accordingly, pursuant to Real Property Law §441-c, all licenses issued to him as a real estate broker shall be revoked, effective immediately. Should he ever re-apply for a license as a real estate broker or real estate salesperson, no action shall be taken on the application until he shall have produced proof satisfactory to the Department of State that he has refunded the sums of \$1,000.00 plus interest at the legal rate for judgements from May 31, 1993 to Carol A. Scott, and \$3,000.00 plus interest at the legal rate for judgements from August 23, 1993 to Fred Scott.

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