

STATE OF NEW YORK  
DEPARTMENT OF STATE

-----X

In the Matter of the Complaint of

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

Complainant,

**DECISION**

-against-

**WILLIAM B. MAY CO., INC. and  
WILLIAM R. MILLER**

Respondents.

-----X

The above noted matter came on for hearing before the undersigned, Roger Schneier, on February 7, and 13, 1996 at the office of the Department of State located at 270 Broadway, New York, New York

William B. May Co., Inc. (hereinafter "WBM"), of 529 Hudson Street, New York, New York 10014, did not appear.

William R. Miller, of Brett Wyckoff Potter Hamilton, Inc., 230 Park Avenue, Suite 1160, New York, New York 10169, having been advised of his right to be represented by an attorney, appeared pro se on February 7, but did not appear on February 13.

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

**COMPLAINT**

The complaint alleges that WBM failed to pay FICA taxes for a cooperative apartment building located at 60 Plaza Street East, Brooklyn (hereinafter "the co-op"), although required to do so pursuant to its contract as managing agent; that WBM has failed to reimburse the co-op board for the FICA taxes which the board paid after WBM's default; that WBM defaulted in a proceeding regarding the co-op before the Environmental Control Board of the City of New York, with the result that a penalty was assessed against it; that although duly demanded by the co-op and the Control Board, WBM failed to pay the penalty, which was subsequently increased by late fees; that because of WBM's non-feasance the co-op is at risk that the Control Board will issue a notice of levy against it; that

although due demands have been made, WBM has failed to turn over any management records to successor managing agents; that WBM has been uncooperative with, and unresponsive to, the co-op board's attempts to contact it and Miller to resolve the foregoing issues; that Miller, although never licensed as a real estate salesperson or broker associated with WBM, acted on its behalf and held himself out as a broker representing it, and was primary person involved in all of the foregoing transactions on its behalf; and that by reason thereof the respondents breached their fiduciary duties of reasonable care, skill, diligence, judgment, disclosure and obedience to their principal, the co-op board, and demonstrated untrustworthiness and/or incompetence.

#### FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail at their last known business addresses (State's Ex. 2). Subsequently, on February 2, 1996, the tribunal received a letter from Stephen B. Wetter of 1966 MAYCO Renaissance DIP, located at the business address of WBM, in which he referred to "enclosed correspondence" although there was no enclosure, stating that WBM is operating under Chapter 11 of the United States Bankruptcy Code, and giving the name of the law firm representing it (State's Ex. 1). Neither WBM nor its attorneys had any further contact with either the tribunal or the complainant.

2) From at least November 1, 1987 until October 11, 1989, Miller was licensed as a real estate broker representing Brown Harris Stevens, Inc. From April 9, 1991 until October 30, 1991 he was licensed as a real estate broker representing L B Kaye International Realty, Inc. From February 5, 1992 until February 5, 1995 he was licensed as a real estate broker representing Wm. B. May Management Corporation. Since December 22, 1993 he has been licensed as a real estate broker representing Brett Wyckoff Potter Hamilton, Inc. Since at least November 1, 1987, the earliest date for which there are records available, he was never licensed as either a real estate broker or salesperson representing or associated with WBM (State's Ex. 3).

3) Since at least October 31, 1987 WBM has been licensed as a real estate broker. At all times hereinafter mentioned it was, and it continues to be, represented by William Bruce May, Jr., Patricia M. Mason, and Peter R. Marra. In addition, it is also currently represented by Maria Papasoff (State's Ex. 4)

4) On March 28th, 1988 60 Plaza Owners Corp., the owner of the co-op, entered into an agreement with WBM pursuant to which WBM agreed to act as managing agent of the co-op. Included in WBM's obligation's under that agreement was: that it assure that the operation of the co-op comply with all orders and violations affecting the building; that it cause to be timely prepared and

filed the necessary forms for social security taxes relating to co-op employees; that it collect maintenance and rent from tenants of the co-op; that it maintain orderly files containing rent records, insurance policies, proprietary and other leases and subleases, correspondence, receipted bills and vouchers, and all other documents and papers pertaining to the building and its operation, which records were to remain the property of the co-op and were to be delivered to the co-op upon the co-op's demand (State's Ex. 13). WBM was then obligated to pay for various co-op expenses, including the salaries of employees and withholding taxes, including FICA, from the maintenance and rent charges which it collected.

5) The management agreement was terminated sometime in the summer of 1991, and management of the co-op was assumed by Leebar Management. Harvey Ginsburg, the Leebar employee responsible for the account, repeatedly contacted WBM in order to obtain the management records, but received essentially nothing more than the rent and maintenance roll, and, on occasion, "a piece of paper would straggle in, and then two months (later) another piece of paper would straggle in" (transcript, p. 102, lines 15-17). Eventually, because of his frustration with the lack of records, Ginsburg resigned the account, which was taken over by Advanced Management Services (hereinafter "AMS") on June 1, 1992.

6) On January 15, 1993 Robert Alper of AMS wrote to WBM, advised it that AMS had assumed management of the co-op, and requested that it review its files to verify that all of the co-op's property had been turned over to Leebar, which had transferred to AMS the few documents that it had from the period of WBM's management of the co-op (State's Ex. 14). Included in the files not turned over to AMS, because WBM had not turned them over to Leebar, were various permits, miscellaneous correspondence, and records of closings on the transfer of apartments. Mortimer Goldstein of WBM replied that it appeared that all records in WBM's possession had been transferred to Leebar, and that he would forward a receipt attesting to that. However, no such receipt was ever sent (State's Ex. 15). A request for the transfer of the records was also made by Dennis Drucker, the president of the co-op board. Sometime later a box containing some additional, but still incomplete, records, was delivered to AMS. Then, when Drucker spoke with Goldstein about the records, Goldstein said that he assumed that the other records had been sent to Leebar (State's Ex. 19).

7) On or about February 2, 1993 the co-op received notice from Chemical Bank that the Internal Revenue Service had filed a levy in the amount of \$548.36 against the co-op's reserve funds for unpaid FICA taxes and "statutory additions" for the tax period ended June 30, 1988 (State's Ex. 16). The money was taken from the account by the IRS on March 4, 1993.

Both AMS and Drucker contacted WBM with regards to the levy, but received no satisfaction. WBM first promised to reimburse the co-op, but then reneged, and the co-op has never received satisfaction (State's Ex. 19, 20, and 24).

8) On October 5, 1990 the Environmental Control Board of the City of New York issued to WBM a notice of violation and hearing charging it with operating an incinerator at the co-op building with an expired permit (State's Ex. 7). WBM failed to appear on November 20, 1990 as directed in the notice, and a default, with the assessment of a penalty of \$875.00 was entered, with a notice mailed to WBM on November 23, 1990 (State's Ex. 8). WBM failed to pay the penalty, and a dunning notice was sent to it on December 10, 1990. Apparently someone from WBM contacted the Control Board, and the hearing was rescheduled. However, no one appeared for the rescheduled hearing, and a second default notice was issued on March 1, 1991. An additional dunning notice was sent to WBM on March 18, 1991 (State's Ex. 9), with additional notices sent on April 12 and May 7, 1991. On May 5, 1991 WBM was notified that a late penalty of \$175.00 had been imposed (State's Ex. 10). On October 25, 1993 WBM was notified that to avoid legal action it must pay the full amount due (State's Ex. 11). As of the date of this hearing payment had not been made (State's Ex. 6 and 12), and the violation had not been converted to a judgement.<sup>1, 2</sup>

9) At some point, although apparently without the benefit of a contract with the co-op, Wm. B. May Management Company had assumed WBM's management operation. In his capacity as representative of that firm, Miller had contact, both written and by telephone, with the co-op and its agents. In all cases, those communications involved attempts to ameliorate pre-existing problems. The communications were directed to him at WBM (State's Ex. 19) and at William B. May Management Company (State's Ex. 21), both of which were then located at 555 Madison Avenue, New York.

#### OPINION

---

<sup>1</sup> The complaint alleges that the failure of WBM to pay the penalty exposes the co-op to the possibility that the Environmental Control Board will issue a notice of levy against it. The evidence, however, establishes that the violation and penalty applies only to WBM, and that before it can be converted to an enforceable judgment an action must be commenced in a court.

<sup>2</sup> The complainant presented evidence of other violations assessed against WBM. However, as those violations were not alleged in the notice of hearing, and in the absence of WBM the issues regarding them could not be fully litigated, those additional violations cannot form the basis for any action against WBM, and will be disregarded.

I- One of the respondents, WBM, was not present at the hearing. However, 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, it having been sent by certified mail to WBM's last known business address (Real Property Law [RPL] § 441-e[2]). *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- WBM is currently operating under Chapter 11 of the United States Bankruptcy Act. While that status creates an automatic stay of proceedings against the debtor, there is an exception which applies to governmental units seeking to enforce their police and regulatory power to prevent and stop, among other things, violation of consumer protection and regulatory laws. That exception does not, however, extend to the imposition of monetary sanctions or the enforcement of pre-petition obligations of the debtor. *In re Massenzio*, 121 BR 688 (1990).

This proceeding was brought pursuant to the provisions of RPL Article 12-A, which was designed "to protect the public from inept, inexperienced or dishonest persons who might perpetrate or aid in perpetration of frauds upon it, and to establish protective or qualifying standards to that end " *Dodge v Richmond*, 5 AD2d 593, 173 NYS2d 786, 787-788 (1958), and seeks, among other things, the revocation or suspension of the respondents' licenses because their conduct was allegedly untrustworthy, incompetent, and in violation of various fiduciary duties. Thus, to the extent that it seeks such revocation or suspension, the proceeding is exempt from the stay under the Bankruptcy Act. However, in so far as the complaint seeks restitution to the co-op board and the imposition of monetary penalties, this tribunal may not grant the relief sought.

There is also a question as to whether this proceeding even concerns 1966 MAYCO Renaissance DIP, the debtor in possession and successor to WBM . The licenses in question were issued to and in the name of WBM, and I take official notice that no real estate broker's license has been issued to the debtor in possession. Since a real estate broker may only operate under the name in which it is licensed, *Division of Licensing Services v Cucci*, 65 DOS 95, it would appear that the revocation or suspension of WBM's licenses will have no effect on the debtor in possession, which, if it is engaged in the business of real estate brokerage, is apparently doing so without the benefit of a license.

III- WBM was the agent of the co-op board for the purpose of the management of the co-op. The relationship of agent and principal is fiduciary in nature, "...founded on trust or confidence reposed by one person in the integrity and fidelity of another." *Mobil Oil Corp. v Rubinfeld*, 72 Misc.2d 392, 339 NYS2d 623, 632 (Civil Ct. Queens County, 1972). Included in the fundamental duties of such a fiduciary are the obligation to act

with reasonable care and skill. Such duties are imposed upon real estate licensees by license law, rules and regulations, contract law, the principals of the law of agency, and tort law. *L.A. Grant Realty, Inc. v Cuomo*, 58 AD2d 251, 396 NYS2d 524 (1977). The object of these rigorous standards of performance is to secure fidelity from the agent to the principal and to insure the transaction of the business of the agency to the best advantage of the principal. *Department of State v Short Term Housing*, 31 DOS 90, conf'd. *sub nom Short Term Housing v Department of State*, 176 AD 2d 619, 575 NYS2d 61 (1991); *Department of State v Goldstein*, 7 DOS 87, conf'd. *Sub nom Goldstein v Department of State*, 144 AD2d 463, 533 NYS2d 1002 (1988).

IV- Pursuant to its agreement with the co-op to act as its managing agent, WBM was required to assure that the co-op complied with all orders and violations affecting the building. In spite of that, it defaulted in an Environmental Control Board proceeding, and, having been adjudicated in violation, failed to pay the assessed penalty in spite of numerous notifications and demands. The agreement also required WBM to make proper tax filings and to pay the taxes from the maintenance and rent collected from tenants of the building. In spite of that it failed to remit FICA taxes for a particular tax period, with the result that the IRS levied against, and collected the taxes and a penalty from, the co-op's bank account. It then failed to comply with demands that it reimburse the co-op.

In its action, or inaction, with regards to the Environmental Control Board and FICA matters, WBM breached both its specific agreement with the co-op board and its fiduciary duties to exercise reasonable care and skill in its management of the building. Not only did it fail to pay the taxes, for which it had collected the necessary funds, or to properly respond to the notice of violation, it also ignored the results of its disregard of its obligations to its principal and was uncooperative in attempts to resolve the matters. Thus, it demonstrated untrustworthiness and incompetency as a real estate broker.

V- The complaint alleges that, in spite of the receipt of proper demands, WBM totally failed to remit management records to the co-op or its agents. The evidence, however, established that some records were turned over. In view of that, and absent circumstances in which it would be proper to amend the pleadings to conform to the proof, that charge must be dismissed.

VI- The complaint also alleges that Miller, although not licensed in association with WBM, handled on its behalf all of the transactions which are the subject of this proceeding, and held himself out as the broker representing it. While the evidence does show that during the efforts to resolve the problems the co-op and its agents had some contacts with Miller, it fails to establish that he was responsible for the account at the time of the

Environmental Control Board and FICA violations, or that he ever held himself out as being the broker representing WBM. Therefore, the charges against him must be dismissed.

**CONCLUSIONS OF LAW**

1) Notice of hearing and complaint was properly served on WBM, and it was, therefore, proper to conduct the hearing in its absence. RPL §441-e[2]).

2) To the extent that the complaint seeks the suspension or revocation of WBM's licenses this proceeding is exempt from the stay arising from the bankruptcy proceedings. That stay does, however, preclude the tribunal from considering the demand that WBM be required to make restitution and pay monetary penalties.

3) In its action, or inaction, with regards to the Environmental Control Board and FICA matters, and in its failure to cooperate in efforts to resolve the matters, WBM breached both its specific agreement with the co-op board and its fiduciary duties to exercise reasonable care and skill in its management of the building, and demonstrated untrustworthiness and incompetency as a real estate broker. RPL §441-c.

4) The complainant has failed to establish by substantial evidence that WBM totally failed to remit management records to the co-op or its agents, or that Miller, although not licensed in association with WBM, handled on its behalf all of the transactions which are the subject of this proceeding, and held himself as the broker representing it. Accordingly, those charges must be dismissed. State Administrative Procedure Act §306[1].

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** William B. May Co., Inc. has demonstrated untrustworthiness and incompetency as a real estate broker, and accordingly, pursuant to Real Property Law §441-c, all real estate broker licenses issued to it shall be suspended for a period of two months, commencing on May 1, 1996 and terminating on June 30, 1996, both dates inclusive. It is directed to submit its license certificates to Thomas F. McGrath, Revenue Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, New York 12208.

**IT IS FURTHER DETERMINED THAT** the charges herein against William R. Miller are 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