

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-

**ANNE WERNER d/b/a 24 LIBERTY STREET
REAL ESTATE, ROBERT KIRK BRUSH, and
DONNA M. BRUSH,**

Respondents.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on May 23, 1996 at the office of the Department of State located at 44 Hawley Street, Binghamton, New York.

The respondents, of 24 Liberty Street, Bath, New York 14810, were represented by George J. Welch, Esq., Welch & Welch, 17-19 East Market Street, Corning, New York 14830.

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

COMPLAINT

The complaint alleges that on September 6, 1994 Fay E. Faucett entered into a listing agreement for 24 Liberty Street Real Estate (hereinafter "24 Liberty Street") to act as his agent in the sale of real property; that the listing agreement did not contain the language required by 19 NYCRR 175.24; that prior to entering into the listing agreement the respondents failed to provide Faucett with a disclosure form pursuant to Real Property Law (RPL) §443; that on January 23, 1995 Henry and Elizabeth Frey made an offer to purchase the property, contingent on the sale of property owned by them; that prior to the Faucett's acceptance of the Frey's offer, the Freys executed a listing agreement with 24 Liberty Street for the sale of their property; that the Frey listing agreement did not contain the language required by 19 NYCRR 175.24; that the respondents became dual agents in mutually dependent transactions without the informed consent and acknowledgements of the Faucetts

and the Freys; that the respondents failed to provide the Freys with an RPL §443 disclosure form prior to the execution of their listing agreement; that on January 31, 1995 the Faucetts accepted the Frey offer, which had been prepared and presented by the respondents, and which failed to contain an attorney approval clause and had not been approved by the local board of realtors and bar association; that 24 Liberty Street had a policy of not co-brokering the sale of properties listed with it for the first 30 days of such listings, but failed to inform the Faucetts and the Freys of that policy prior to the execution of their listing agreements, with the result that, unbeknownst to the Faucetts and the Freys, potential purchasers could not view their properties during that period; that when title closed on the properties on July 10, 1995 the respondents collected and retained commissions for the sale of each property; and that by reason of the foregoing the respondents violated 19 NYCRR 175.24 and RPL §443, engaged in the unauthorized practice of law in violation of Judiciary Law §478, breached their fiduciary duties of good faith, undivided loyalty, and full and fair disclosure, demanded, received and retained unearned commissions, 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 (State's Ex. 1).

2) Anne Werner is, and at all times hereinafter mentioned was, duly licensed as a real estate broker under the trade name "24 Liberty Street Real Estate" (State's Ex. 1).

Robert Kirk Brush is, and at all times hereinafter mentioned was, duly licensed as a real estate salesperson in association with 24 Liberty Street (State's Ex. 1).

Donna M. Brush is, and at all times hereinafter mentioned was, duly licensed as an associate real estate broker in association with 24 Liberty Street (State's Ex. 1).

3) On September 6, 1994 Fay E. Faucett, acting on behalf of himself and his wife, Nancy C. Faucett, entered into an exclusive right to sell agency agreement with 24 Liberty Street, as represented by Donna Brush. The agreement provided that it would run until March 6, 1995, and that the Faucetts would be obligated to pay 24 Liberty Street a commission of 5% of the selling price should the Faucetts' property located at 6220 Route 415, Savona, New York, be sold through its efforts. It further provided that should the property be sold, within 6 months of the expiration of the agency agreement, to a person with whom 24 Liberty Street had negotiated or whose name was given to the Faucetts during the term of the listing, a commission would be payable to 24 Liberty Street.

The following language was printed on the reverse side of the agreement:

"EXPLANATION

EXCLUSIVE AGENCY

An 'exclusive agency' listing means that if you, the owner of the property find a buyer, you will not have to pay a commission to the broker. However, if another broker finds a buyer, you will have to pay a commission to both selling broker and your present broker.

EXCLUSIVE RIGHT TO SELL

An 'exclusive' right to sell' listing means that if you, the owner of the property, find a buyer or if another broker finds a buyer, you must pay the agreed commission to the present broker.

The owner hereby states that he or she has read this agreement, that he or she knows and understands the contents thereof, and hereby approves and authorizes broker to receive deposits and earnest money on the aforesaid property." (State's Ex. 7)

When entering into that agreement Mr. Faucett believed, although the subject was not raised or discussed, that the respondents would abide by what he understood to be the common practice of real estate brokers of co-brokering with other brokers properties which were listed with them. In fact, however, it was the normal practice of the respondents, as established by Ms. Werner, not to co-broker properties listed exclusively with them for the first 30 days of the listing. The evidence, however, does not establish that the respondents ever actually had occasion to apply that policy to the Faucett property.¹

4) On or about January 23, 1995 Donna Brush presented the Faucetts with an offer from Henry and Elizabeth Frey to purchase their property for \$84,500.00 (State's Ex. 10). The offer was prepared by Donna Brush on a 24 Liberty Street form which did not provide for the approval of the attorneys for the parties, and which had not been approved by any joint bar/real estate board committee. At the direction of the Freys' attorney, Henry M. Hille, Esq., Mrs. Brush had typed in: the price and description of the property; provisions for the prorating of taxes, the giving of possession on closing of title, the delivery by the seller to the buyer of a satisfactory water and septic test, and for the equal division of the cost of any required survey; a 90 day contingency

¹ The hearsay written statement of Century 21 Sunrise real estate salesperson Denny LeGro that the respondents refused to co-broker on the Faucett property (State's Ex. 4), was refuted by the sworn testimony of Donna Brush.

for the sale by the buyers of their house; a requirement that three trees be removed; a requirement for a \$100.00 deposit; a provision that the offer would be good for 4 days; and a closing date of no later than May 15, 1995. She also prepared the following addendum:

"Buyer agrees that seller may continue to list and show the property, providing however, that the buyer shall have option to remove the contingency of selling present home within 7 days notice to match any subsequent offers made on the property.

Proof must be given the buyer by the seller that such offer has been received and is equal to or more than this offer."

The Faucetts, with the encouragement of Donna Brush, delivered the offer to their attorney, John K. McCarthy, Esq., who prepared a counter offer which both modified the tree removal requirement and established more specific details regarding the Faucetts' right to sell to another buyer and their obligations should they choose to do so (State's Ex. 10).

The Freys responded with a counter offer of their own further modifying the tree removal requirement (State's Ex. 10).

Finally, on January 31, 1995, the Faucetts accepted the offer.

5) On January 24, 1995 Robert Brush presented Mr. Faucett with the agency relationship disclosure document mandated by RPL §443, and Mr. Faucett signed the acknowledgment that 24 Liberty Street was acting as his agent (State's Ex. 11). No such document had been presented to the Faucetts prior to that date.

6) On January 25, 1996 Henry and Elizabeth Frey entered into an exclusive right to sell agency agreement with 24 Liberty Street, as represented by Robert Brush. The agreement provided that it would run until May 15, 1995, and that the Freys would be obligated to pay 24 Liberty Street a commission of 5% of the selling price should the Freys' property located at 118 Rumsey Street, Bath, New York, be sold through its efforts. The form was the same as that used for the Faucett transaction, and contained the same agency explanation language on the reverse (State's Ex. 12).² As in the case of the Faucetts, no one told the Freys about the respondents' policy against co-brokering.

7) At no time did any of the respondents ever discuss with either the Faucetts or the Freys the question of 24 Liberty

² There is insufficient evidence to determine when, if at all, the Freys received the document mandated by RPL §443.

Street's serving as a dual agent representing both the sellers and buyers of the Faucett property.

8) Sometime in April, 1995 Kathryn Warren, a real estate salesperson associated with Lucy Knapp Real Estate, spoke with Donna Brush and attempted to make an appointment to show the Freys' house to a prospective purchaser. She said that she would like to show it the following week, and Mrs. Brush told her that she'd get back to her. The purchaser, however, was anxious to view the property sooner, so Ms. Warren called 24 Liberty Street and spoke with Robert Brush, who said he would get back to her. When Mr. Brush did call back, he refused to co-broker a possible sale to Ms. Warren's customer because he was upset that that customer, who lived across the street from the Freys' house and had bought her house through Mr. Brush, had not come directly to him.

In a separate transaction, real estate salesperson Gilbert Ferris was permitted to show the Freys' house to prospective purchasers Duane and Rosina Will on behalf of his broker, Linda Cohn of Century 21 Sunrise (hereinafter "Sunrise"). However, when he attempted to make a follow up appointment for another inspection, Robert Brush told Mr. Ferris that because he was acting on behalf of Ms. Cohn, with whom Mr. Brush had personal problems, he could not show the house again. Ms. Cohn then called Mr. Hille, the Freys' attorney, who told her to call the Freys, who allowed the house to be shown. Ms. Cohn did not discuss the matter with Ms. Werner, and her office was allowed to show the property to other customers, although the record does not indicate whether those customers, or customers of any other brokers, were allowed to view the house during the initial 30 day period of the listing.

9) The respondents were unsuccessful in marketing the Freys' house, with the result that the contract for the sale to them of the Faucetts' house lapsed.

10) After 24 Liberty Street's agency agreements had expired Sunrise obtained listings for both the Faucett and Frey properties. The Wills then contacted salesperson Ferris and asked to see the Freys' house, and on June 11, 1996 they and the Freys entered into a contract of purchase and sale, with Sunrise to receive a commission of 7% of the \$110,000.00 sales price (Resp. Ex. A). Sunrise was also able to renegotiate the sale of the Faucetts' house to the Freys, again with a 7% commission.

11) Ms. Werner took the position that 24 Liberty Street was entitled to a full 5% commission on the Faucett sale because of the original, expired contract (State's Ex. 13). She also claimed the right to share in the commission on the Frey sale. A closing on the sale of the houses took place on July 10, 1995. Ms. Werner demanded and received commissions of \$4,225.00 from the Faucetts, and of \$2,875.00 from the Freys.

12) Ms. Werner was, at all times, aware of the actions and omissions of the other respondents.

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 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 respondents are charged with violating 19 NYCRR 175.24 because the listing agreement used in the Faucett and Frey transactions did not contain the required language:

"EXPLANATION:

An 'exclusive right to sell' listing means that if you, the owner of the property, find a buyer for your house, or if another broker finds a buyer, you must pay the agreed commission to the present broker.

An 'exclusive agency' listing means that if you, the owner of the property find a buyer, you will not have to pay a commission to the broker. However, if another broker finds a buyer, you will owe a commission to both the selling broker and your present broker."

The language on the 24 Liberty Street form is essentially the same as that mandated in the regulation with a few minor exceptions: First, the explanations of the two types of agency agreements are reversed in the order in which they are presented; second, captions have been added before each explanation; third, in the second sentence of the explanation of "exclusive agency" the phrase "you will have to pay a commission" is substituted for mandated "you will owe a commission"; lastly, an acknowledgement of receipt and authorization to receive deposits is added at the bottom.

While the use of language which does not conform exactly to that contained in the regulation is a demonstration of incompetency by Ms. Werner, who as the broker for 24 Liberty Street has the responsibility to provide forms with the proper language, in this circumstance the violation is *de minimis*. She is admonished, however, to immediately cease using forms not containing the proper language.

III- The complaint alleges that prior to entering into the respective listing agreements the respondents failed to provide the Faucetts and the Freys with the disclosure form mandated by RPL §443. The evidence establishes, and the respondents do not dispute, the truth of that allegation with regards to the Freys, but fails to establish when, if at all, the form was delivered to the Freys.

RPL §443[2] clearly and explicitly provides that the form must be delivered to the seller prior to entering into the listing agreement. Accordingly, Donna Brush's explanation that, having concentrated on when the form must be delivered to buyers, she did not know when it had to be delivered to sellers, is of no avail. Whatever might have been taught in the continuing education courses which Mrs. Brush took, the statute is so clear that her failure to abide by it in her dealings with the Faucetts is a clear and unambiguous demonstration of incompetency.

IV- The next allegation in the complaint is that the respondents improperly became dual agents representing both the Faucetts and the Freys in mutually dependent transactions without the informed consent of their principals.

As a fiduciary, a real estate broker or salesperson is prohibited from serving as a dual agent representing parties with conflicting interests in the same transaction without the informed consent of the principals. *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. This legal principle is amplified by the provisions of 19 NYCRR 175.7, which mandates that a real estate broker shall make it clear for which party the agent is acting, and prohibits the agent from receiving compensation from more than one party except with the full knowledge and consent of all parties to the transaction." *Division of Licensing Services v Short Term Housing*, 31

DOS 90 at p. 6., conf'd. 176 AD2d 619, 575
NYS2d 61 (1991).

The prohibition of dual agency without proper disclosure does not apply only to the situation where the agent represents both the seller and the buyer in their negotiations with each other. It extends to situations in which the agent represents the parties in separate, but interrelated transactions. *Division of Licensing Services v Cornell*, 6 DOS 93.

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.

On January 25, 1995 Robert Brush, acting on behalf of 24 Liberty Street, entered into an agency agreement with the Freys for the sale of their house. Thus, while still agent for the Faucetts in the sale of their house, which, according to the offer of January 23, 1995 (which was accepted by the Faucetts on January 31, 1995), was contingent on the sale of the Freys' house, Mr. Brush caused 24 Liberty Street to become a dual agent in mutually dependent transactions. While it is clear that Mr. Frey was aware of the dual representation from the start, and that Mr. Faucett soon became aware of it, it is also clear that none of the respondents specifically obtained the consent of the Freys or the Faucetts to the dual representation or explained to them the significance of that representation.

While the law does not require that for it to be improper a dual agency must cause injury, it is interesting to note that in this case it appears that such injury may have, in fact, been caused. The sale by the Faucetts to the Freys was contingent upon the sale of the Freys' home. The respondents, however, had a policy against co-brokerage during the first 30 days of a listing. That policy was clearly in conflict with their obligation to facilitate the Faucett to Frey sale, and may very well have prevented potential purchasers from viewing the Frey house and making offers for its purchase. Further, potential purchasers for the house were presented by other brokers: Lucy Knapp Real Estate and Sunrise. However, Robert Brush refused to co-broker the sale through Lucy Knapp Real Estate because he was upset that the potential purchaser had not come directly to him, thereby eliminating the possibility of a sale to that customer, and he

tried to block the viewing of the house through Sunrise because he didn't like Sunrise's representative broker.

V- 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.

Donna Brush prepared a contract for the purchase of the Faucetts' house by the Freys using a 24 Liberty Street form which did not contain an attorney approval clause, and which had not been recommended by a joint bar/realtors committee. However, in preparing the contract she acted under the direction of the Freys' attorney, merely inserting into the form language which he dictated. Under those circumstances, and in light of the fact that the final contract language resulted from negotiations between the attorneys for the Faucetts and the Freys, I conclude that in this case there was no unlawful practice of law. The respondents are admonished, however, to cease the use of unapproved purchase offer forms which do not contain a properly worded attorney's approval clause.

VI- With the execution of the listing agreements with the Faucetts and the Freys, the respondents became their agents. 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 Rubenfeld*, 72 Misc.2d 392, 339 NYS2d 623, 632 (Civil Ct. Queens County, 1972). Included in the fundamental duties of such a fiduciary are good faith and undivided loyalty, and full and fair disclosure. 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).

The respondents fell short of the full performance of their fiduciary duties when they failed to tell the Faucetts and the Freys of their 30 day no co-brokerage policy. That the Faucetts and Freys learned of that policy sometime later does not excuse the failure which arose at the inception of the agency relationship. Nor is that failure excused by the respondents' assertion that it was their normal practice to disclose that policy. At best, that indicates that their conduct resulted from negligence, rather than intent, and were demonstrations of incompetency, rather than of untrustworthiness.

VII- Based on the terms of the original agency agreements, Ms. Werner demanded and received commissions on the sale of the Faucetts' and the Freys' properties in spite of the fact that the respondents had been unable to bring those sales to fruition, and title had closed only after: their listings had expired, the properties had been relisted with other brokers, and those other brokers had been able to finalize the transactions.

A real estate broker does not earn a commission merely because he or she introduced a party to the property sold. *Sibbald v Bethlehem Iron Co.*, 83 NY 378 (1881). The broker must be the procuring cause of the sale. *Greene v Hellman*, 51 NY2d 197 (1980). Thus, the mere fact that the Freys were introduced to the Faucetts' property by the respondents would not entitle the respondents to a commission on a sale which was brought about by another broker on a new listing. Nor would that result be altered by the fact that the respondents had obtained a contract which failed to result in a closing. Likewise, the fact that the Wills, the eventual purchasers of the Freys' property, had learned about it because it was listed with the respondents would not entitle the respondents to a commission on the sale of the property by another broker after the expiration of their listing. Thus, the respondents had no common law claim to the commissions.

As noted above, however, the claim to the commissions was premised on the listing agreements, which provided that 24 Liberty was entitled to a commission on any sale made within six months of the expiration of the listing to a person with whom it had negotiated or whose name had been given to the seller during the life of the listing. Such a contract claim might, under the proper circumstances, be fully supportable. That, however, is not the case here.

Firstly, the listing agreements were tainted from their inception by the respondents' failure to disclose their non-co-brokerage policy, and then additionally by the improperly disclosed dual agency. In addition, the original sale to the Freys was impeded by the actions of Robert Brush in interfering with the

viewing of the Freys' house by the Wills³ and in refusing to allow the Freys' house to be viewed by another potential purchaser. Had he not acted in such an unprofessional manner it is conceivable, perhaps likely, that the Freys would have sold their house during the term of the 24 Liberty Street listing, and would thereby have satisfied the contingency standing in the way of the sale of the Faucetts' house.⁴

In *Gold v Lomenzo*, 29 NY2d 468, 329 NYS2d 805 (1972), the Court of Appeals said that "(b)rokers' fees must represent charges for actual services...." 329 NYS2d at 813. Here, Robert Brush acted to prevent the sale of the Freys' house, and thereby precluded the sale of the Faucetts' house. It took the efforts of another broker, after the expiration of the 24 Liberty Street listings, to bring about the sales, and it is that other broker who earned the commissions.

Ms. Werner, d/b/a 24 Liberty Street, demanded, received and kept commissions which were unearned. Such conduct has been held to be an act of untrustworthiness and incompetency. *Division of Licensing Services v Short Term Housing, supra*.

VIII- Where a broker has received money to which she is not entitled, she 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).

Ms. Werner, d/b/a 24 Liberty Street, received commissions of \$4,225.00 on the sale of the Faucetts' property and \$2,875.00 on the sale of the Freys' property. That money was deducted from the

³ Where a party refuses to deal with an agent and the principal negotiates directly with such party, the agent is not entitled to a commission. *Companhia Geral De Comercio v American Airlines, Inc.*, 280 F. Supp. 158 (S.D.N.Y. 1968). An agent who refuses to negotiate with a party should not be placed in a better position.

⁴ It is noted that although present and represented by counsel, Robert Brush did not testify. "(W)here one party to an action, knowing the truth of a matter in controversy, and having the evidence in his possession, omits to speak, every inference warranted by the evidence offered will be indulged in against him." *Dowling v Hastings*, 211 NY 199, 202 (1914). See, also, *Noce v Kaufman*, 2 NY2d 347, 161 NYS2d 1 (1957); *Jarrett v Madifari*, 67 AD2d 396, 415 NYS2d 644 (1979); *Berlin v Berlin*, 64 Misc2d 352, 314 NYS2d 911 (Sup. Ct. Nassau County, 1970).

commissions payable to the selling broker, Sunrise, and should be returned to it.

IX- Ms. Werner was fully aware of what was transpiring as the subject transactions went forward. As the broker with whom the Brushes were and are associated, she is, therefore, fully responsible for their misconduct. RPL §442-c.

CONCLUSIONS OF LAW

1) By using a listing agreement which did not contain the exact language set forth in 19 NYCRR 175.24 Anne Werner demonstrated incompetency as a real estate broker.

2) By failing to provide the Faucetts with the disclosure document required by RPL §443 prior to their entering into the listing agreement with 24 Liberty Street, Donna M. Brush and Anne Werner violated that statute and demonstrated incompetency as real estate brokers. There is insufficient proof to support the charge that the disclosure document was not provided to the Freys, and that charge should be dismissed.

3) By entering into an agency agreement with the Freys while they were still the agents of the Faucetts, thereby becoming dual agents in mutually dependent transactions without the informed consent of the Freys and/or the Faucetts, Robert Kirk Brush and Anne Werner demonstrated untrustworthiness and incompetency as, respectively, a real estate salesperson and a real estate broker.

4) The respondents did not engage in the unlawful practice of law, and that charge should be dismissed.

5) By failing to disclose to the Faucetts and the Freys their policy of no co-brokering during the first 30 days of a listing the respondents demonstrated incompetency as a real estate salesperson and as real estate brokers.

6) By demanding, receiving, and retaining unearned commissions Anne Werner demonstrated untrustworthiness and incompetency as a real estate broker.

7) As a condition of retaining her license as a real estate broker, Anne Werner should be required to return to Century 21 Sunrise the commissions received by her on the Faucett and Frey sales, together with interest from July 10, 1995, the date of the closings.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Anne Werner d/b/a 24 Liberty Street Real Estate has violated Real Property Law §443 and

has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, she shall pay a fine of \$2,000.00 to the Department of State on or before September 30, 1996, and should she fail to pay the fine, then her license as a real estate broker shall be suspended for a period of three months, commencing with the surrender of her license certificate and pocket card. Upon payment of the fine or termination of the suspension in lieu thereof, her license as a real estate broker shall be further suspended until such time as she shall produce proof satisfactory to the Department of State that she has paid the sum of \$7,100.00, representing the commissions received by her on the Faucett and Frey sales, plus interest at the legal rate for judgements (currently 9%) from July 10, 1995, to Century 21 Sunrise; and

IT IS FURTHER DETERMINED THAT Robert Kirk Brush has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, he shall pay a fine of \$1,000.00 to the Department of State on or before September 30, 1996, and should he fail to pay the fine, then his license as a real estate salesperson shall be suspended for a period of two months commencing with the surrender of his license certificate and pocket card; and

IT IS FURTHER DETERMINED THAT Donna M. Brush has violated Real Property Law §443 and has demonstrated incompetency as a real estate salesperson, and accordingly, pursuant to Real Property Law §441-c, she shall pay a fine of \$1,000.00 to the Department of State on or before September 30, 1996, and should she fail to pay the fine, then her license as an associate real estate broker shall be suspended for a period of two months commencing with the surrender of her license certificate and pocket card.

The respondents are directed to send their fines or their license certificates and pocket cards 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: