

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-

MARC L. WINOGRAD and GAIL F. WINOGRAD,

Respondents.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on May 17, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

Marc L. Winograd, of 201 W. 91 Street, New York, New York 10024, an attorney at law, and Gail F. Winograd, of 94 Paulin Boulevard, Leonia, New Jersey 07605, having been advised of their right to be represented by attorneys, appeared pro se.

The complainant was represented by Scott Nejame, Esq.

COMPLAINT

The complaint alleges that Gail Winograd, when licensed as an associate real estate broker associated with a corporation of which Marc Winograd was the representative broker: acted as a double agent on behalf of a tenant and a landlord without the required disclosure, in breach of her fiduciary duties, or failed to make clear for whom she was acting; failed to advise the tenant that because the apartment involved in the transaction was located in a cooperative building approval of her tenancy would have to be obtained from the board of the cooperative; and failed to deliver to the tenant a copy of a document executed by that tenant. The complaint further alleges that Marc Winograd: wrongfully failed to maintain rent and security monies in an escrow account or to turn those monies over to the landlord; wrongfully retained deposit monies and/or an unearned commission; and is vicariously liable for the alleged misconduct of Gail Winograd.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail (Comp. Ex. 1).

2) Both of the respondents are duly licensed as real estate brokers. At all times hereinafter mentioned Marc Winograd was licensed as representative of Winograd Realty, Inc. (Winograd, Inc.), and Gail Winograd was licensed as an associate real estate broker in association with Winograd, Inc.

3) Some time in the summer of 1990 Vezira Hodja spoke with Ms. Winograd about locating an apartment to rent, and Ms. Winograd agreed to assist her. Sometime thereafter Ms. Winograd was asked by George Van Cook to assist him in subletting a cooperative apartment at 280 Ocean Parkway, Brooklyn, New York of which he was the proprietary lessee. Ms. Winograd had previously assisted Van Cook in effectuating such a rental, had the key to the apartment, and was authorized by him to approve tenants and to sign a sublease on his behalf. At no time did Ms. Winograd disclose to Van Cook that she was acting as Hodja's agent, or to Hodja that she was acting as Van Cook's agent.

Ms. Winograd thought that the Van Cook apartment would be good for Hodja. The building, although a cooperative, did not have a board of directors, and all rental decisions were made by the managing agent, with whom Ms. Winograd was acquainted. Since she perceived that Hodja might, because of her personal circumstances, have difficulty obtaining consent to sublet from a cooperative's board of directors, Ms. Winograd considered the Van Cook apartment a good option for Hodja, and she told her so.

A person named Marc, who was associated with Winograd, Inc., showed the Van Cook apartment to Hodja, who agreed to rent it. On August 13, 1990 Hodja gave Ms. Winograd cash in the amounts of \$1650.00 as rent and security, and \$1237.00 as a commission (Comp. Ex. 2), and signed a sublease for the apartment prepared by Ms. Winograd. The respondents did not place the money in a trust or escrow account, as Winograd, Inc. did not have one, and instead kept it in a locked file cabinet. Ms. Winograd did not give Hodja a copy of that sublease (trans. pp.19 and 57), and it was never seen or signed by Van Cook.

That same day Hodja moved her belongings into the apartment. She did not, however, stay in the apartment that night as it was not ready for occupancy, and when she returned to it the next day, August 14, she discovered that it had been burglarized and most of her property had been stolen. She decided that she did not want the apartment, and spoke with Van Cook about obtaining the return of her rent and security. He told her that he had not received the money. She then spoke with Ms. Winograd, and the rent and security money was returned on August 27, 1990 (Resp. Ex. A). The return of the commission was not requested, and that money was not refunded. Hodja vacated the apartment on or about September 17 or 18, 1990.

OPINION

I- As a fiduciary, a real estate broker or salesperson is prohibited from serving as a double agent representing parties with conflicting interests in the same transaction without the informed consent of the principals. Department of State v McGill, 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 page 6, conf'd. 176 AD2d 619, 575 NYS2d 61 (1991).

It is not necessary that there be a showing of injury to the principals for there to be a finding that the double 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 double 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.

It is undisputed that Ms. Winograd acted as agent of Hodja, the subtenant, for whom she agreed to locate an apartment. It is also clear that she acted, in the same transaction, as agent of Van Cook, the prime tenant/lessor.

Agency is a consensual relationship which is created by operation of law when the elements of consent and control are present. The existence of those elements may be established through either the words of the principal and the agent, or through their conduct. Division of

Licensing Services v Short Term Housing, supra. In this case, the agency relationship between Ms. Winograd and Van Cook was created when he asked her to obtain a satisfactory subtenant for his apartment and authorized her to show the apartment, using the key which she already had, and she agreed to act in the manner requested. The existence of that agency was further demonstrated when Van Cook authorized Ms. Winograd to sign his name to the sublease.

The fact of the double agency having been established, the burden of establishing that full disclosure had been made devolved upon the respondents.¹ The evidence is clear that Hodja understood that Ms. Winograd was acting as her agent, and that Van Cook likewise understood that Winograd was acting as his agent. There is absolutely no evidence, however, that would reasonably lead to the conclusion that Hodja understood, or was told, that Ms. Winograd was acting as agent for Van Cook, or that Van Cook understood, or was told, that Ms. Winograd was acting as agent for Hodja.

The failure to disclose the existence of the double agency was also a per se violation of 19 NYCRR 175.7, which requires that a broker make it clear for whom she is acting.

II- A real estate broker or salesperson is required to disclose to his or her principal all the material information which he or she has or obtains concerning the subject of the agency. Dickinson v Tysen, 209 NY 395 (1913); Moffat v Gerry Estates, 259 AD 403, 19 NYS2d 579 (1940). In this case there is an allegation that Ms. Winograd failed to advise Hodja that because the apartment was located in a cooperative building approval of her tenancy would have to be obtained from the board of the cooperative. The evidence, however, establishes that, for some unexplained reason, the cooperative had no board and all approvals of subleases were handled by the managing agent. Further, it was established that Hodja was told that by Ms. Winograd.

III- 19 NYCRR 175.12 provides that a real estate broker

"shall immediately deliver a duplicate original of any instrument to any party or parties executing the same, where such instrument has been prepared by the such broker or under his supervision and where such instrument relates to the employment of the broker or to any matters pertaining to the consummation of a lease...or any other type of real estate transaction in which he may participate as a broker" (emphasis added).

¹ The respondents rested immediately after the complainant's case, and presented no witnesses.

That regulation is equally applicable to an associate broker who is acting on behalf of the real estate broker with whom she is associated and who, as agent for that broker, has the duty of fulfilling that broker's legal obligations.

Ms. Winograd's explanation for not giving Hodja a copy of the sublease which she prepared and which Hodja signed, as stated to the complainant's investigators, was that at the time that Hodja signed the sublease she had not yet received permission from Van Cook to sign it on his behalf. The regulation, however, does not allow for such a delay in delivery. Hodja should have been given a copy of whatever she signed, subject to her later receipt of a copy signed by Van Cook or by Ms. Winograd on his behalf.²

IV- 19 NYCRR 175.1 provides that a real estate broker

"shall at all times maintain a separate, special bank account to be used exclusively for the deposit of said monies (of his principal) and which deposit shall be made as promptly as practicable."

It is indisputable that, in view of his admission that he did not have such an account, Mr. Winograd violated that regulation, and that the money paid by Hodja was kept, with his knowledge, in a locked cabinet for approximately two weeks. Such conduct is particularly disturbing in the case of a broker who is also an attorney at law and who should, therefore, have a heightened awareness of the requirements for the handling of clients' funds.

V- The respondents received and kept the commission paid by Hodja in spite of the fact that Ms. Winograd had acted in the transaction as an undisclosed double agent. Such conduct has been held to be an act of untrustworthiness and incompetency. Division of Licensing Services v. Short Term Housing, supra. Had the complainant established that Mr. Winograd was aware of Ms. Winograd's conduct, the retention of that commission by him would not be excused by Hodja's failure to demand its return and purported waiver of any claim to it through the signing of a release (Resp. Ex. A).³ First, Ms. Winograd should never have demanded or accepted a commission from Hodja in light of the undisclosed double agency and, second, where a provision of the law exists to protect society in general, as does RPL Article 12A, Dodge v. Richmond, 5 AD2d 593, 173 NYS2d 786 (1958), it is contrary to public policy to recognize a private waiver of the protection afforded by the

² Not addressed here, inasmuch as it was not made an issue in the proceedings, is whether, in light of the Statute of Frauds, such a verbal authorization is valid.

³ Hodja testified that she signed the release without reading it inasmuch as she is unable to read english.

statute. Hammelburger v Foursome Inn. Corp., 76 AD2d 646, 437 NYS2d 356 (1980), mod. & aff'd. 54 NY2d 580, 446 NYS2d 917 (1981). However, in the absence of proof of his knowledge of that misconduct, Mr. Winograd cannot be held liable for his retention of that commission.

VI- Pursuant to RPL §440(2) Ms. Winograd's conduct, because of her status as an associate broker, is governed by the provisions the law which relate to real estate salespersons. Therefore, Mr. Winograd, as representative broker of Winograd, Inc., had the duty of supervising her conduct.⁴ RPL §441(d); 19 NYCRR 175.21; Friedman v Paterson, 89 AD2d 701, 453 NYS2d 819 (1982), aff'd. 58 NY2d 727, 458 NYS2d 546. In light of that duty Ms. Winograd was the agent of Winograd, Inc., with which she was associated, and not an independent contractor, 2 NY Jur2d Agency §9, and Mr. Winograd, as the representative broker through whom the corporation acted, is liable for her acts carried out within the scope of her employment. 3 NY Jur2d Agency §239.

RPL § 442-c provides that no violation of any provision of RPL Article 12A by a real estate salesperson shall be deemed to be cause for the revocation or suspension of the license of the broker with whom that salesperson is associated unless the broker had actual notice of the violation or, after having received such notice, the broker retains the benefits, profits or proceeds of a transaction wrongfully negotiated by the salesperson. However, the broker may be penalized, through the imposition of a fine, for the misconduct of his salesperson. Roberts Real Estate, Inc. v Department of State, 80 NY2d 116, 589 NYS2d 392 (1992). However, where the broker is found directly liable for his own separate acts of misconduct as well as vicariously liable for the misconduct of his salesperson, then a license suspension or revocation may be imposed.

VII- Where a broker or salesperson has received money to which he is not entitled, he may be required to return it, together with interest with interest where appropriate, as a condition of retention of his license. 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).

VIII- In mitigation of the penalties to be imposed, I have considered the fact the Hodja's money was kept in a locked cabinet, apparently was not commingled by the respondents with other funds, and was returned to her.

⁴ In the case of a corporation, the licensing scheme established by the Legislature clearly envisions that the representative broker of the corporation, who must be an officer of that corporation, will assume that corporation's supervisory duties (RPL §§441 and 441-b[2]), inasmuch as a corporation can only act through its officers and employees.

CONCLUSIONS OF LAW

1) By acting as agent for both Hodja and Van Cook at the same time and without disclosing that to them, Ms. Winograd violated 19 NYCRR 175.7 and demonstrated untrustworthiness and incompetency as a real estate broker.

2) In view of the fact that board approval of Hodja's subtenancy was not required, the charge that Ms. Winograd failed to disclose to Hodja the need for such approval must be dismissed.

3) By failing to give Hodja a copy of the sublease at the time that she signed it, Ms. Winograd violated 19 NYCRR 175.12 and demonstrated incompetency as a real estate broker.

4) By reason of Ms. Winograd's status as an associate broker associated with a corporation of which Mr. Winograd was representative broker, Mr. Winograd is liable for her misconduct.

5) By failing to maintain in a special account the rent and security monies paid by Hodja, Mr. Winograd violated 19 NYCRR 175.1 and demonstrated untrustworthiness and incompetency as a real estate broker.

6) Inasmuch as the evidence does not establish that Mr. Winograd was aware of Ms. Winograd's misconduct in acting as an undisclosed double agent, he cannot be held to have acted improperly in retaining to date the commission paid by Hodja. However, in view of his liability for her conduct, and the fact that the commission was received as a result of that conduct, he may be directed to return that commission to her, and, inasmuch as he is now aware of the misconduct, he may be required to pay interest on that money should the refund not be made promptly.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Marc L. Winograd has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate broker is suspended for a period of four months, commencing on August 1, 1993 and terminating on November 30, 1993. He is further directed to refund to Vezira Hodja the sum of \$1237.00 plus interest from August 1, 1993 at the legal rate for judgements, and pending receipt of satisfactory proof that he has made such a refund, upon expiration of the suspension of his license that license shall be further suspended for an indefinite period; and

IT IS FURTHER DETERMINED THAT Gail F. Winograd has demonstrated untrustworthiness and incompetency and accordingly, pursuant to Real Property Law §441-c, her license as a real estate broker is suspended for a period of three months, commencing on August 1, 1993 and terminating on October 31, 1993, and

IT IS FURTHER DETERMINED THAT the charges that Gail F. Winograd failed to advise Vezira Hodja that board approval of her sublease was required, and that Marc L. Winograd wrongfully retained the commission paid by Vezira Hodja 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:

GAIL S. SHAFFER
Secretary of State
By:

James N. Baldwin
Executive Deputy Secretary of State