

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

Complaint No.: 2017-0458

-against-

**ANAYS CACERES and
A MER C LIMITED INC,**

Respondents.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on February 5, 2019 at the office of the Department of State located at 123 William Street, New York, New York.

The respondents did not appear.

The complainant was represented by Matthew Wolf, Esq.

COMPLAINT

The complaint alleges that the respondent real estate brokers wrongfully commingled client funds, failed to remit money owed to a client within a reasonable time, retained a credit check fee although the credit check was not consummated, and allowed their escrow account to have a negative balance.

FINDINGS OF FACT

1) Notice of Hearing and a copy of the Complaint were served by certified mail delivered at the respondents' last known business address on December 7, 2018. A subsequent Notice of Adjournment sent by regular mail to the same address was returned by the Postal Service marked "attempted – not known" and "unable to forward" (State's Ex. 1).

2) Anays Caceres is, and at all times hereinafter mentioned was, duly licensed as a corporate real estate broker representing A Mer C. Limited Inc. (hereinafter "A Mer"). The license was issued initially on July 2, 2015, was renewed on June 17, 2017, and is due to expire on July 1, 2019 (State's Ex. 2 and 5).

3) On January 27, 2017 Kristina Waring gave "Sherri," the respondents' secretary, a check for \$1,450.00 in payment of the first month's rent on an apartment and for a credit check to be ordered by the landlord's management company. However, on February 7, 2017 Ms. Waring learned that the apartment had been rented to someone else. The next day they requested a refund of the \$1,400.00 rent, and Sherri told her it would take 72 hours. However, when she went to collect the money on February 13, 2017 Sherri told her that the respondents had not yet requested the return of the money from the landlord. When Ms. Waring contacted the landlord's managing agent, however, she was advised that they had not received any money from the respondents (State's Ex. 3).

4) The credit check, for which Ms. Waring paid \$50.00, was performed by the landlord even though the landlord did not receive the \$50.00.

5) On February 15, 2017 Sherri gave Ms. Waring's mother the respondents' check for \$1,400.00 which was drawn on their operating account and was dated February 10, 2017. The next day Ms. Waring deposited the check, but on February 21, 2017 the bank returned the check due to insufficient funds. Ms. Waring subsequently received a refund of \$1,400.00 in cash on or about March 2, 2017 (State's Ex. 3).

6) Ms. Waring's \$1,450.00 check was deposited in the respondents' escrow account on January 27, 2018, and was transferred to their operating account on January 30, 2018 (State's Ex. 4).

7) On January 1, 2017 the respondent's escrow account had a balance of minus 83 cents, and on January 31, 2017, the end of the statement period, it had a balance of minus \$14.81 (State's Ex. 4).

OPINION AND CONCLUSIONS OF LAW

I- To obtain personal jurisdiction and bind the respondents to the agency decision the complainant must properly serve the respondents with notice of the hearing and a copy of the Complaint and afford them the opportunity to be heard. See, Siegel, New York Practice § 58 (4th ed. 2005). Service of the Notice of Hearing and Complaint in this matter was made by certified mail addressed to the respondents at their last known business address appearing in the records of the Department of State. That mail was delivered on December 7, 2018. A subsequent Notice of Adjournment was returned by the Postal Service with a notation that it could be neither delivered nor forwarded.

Where, as here, service is returned by the Postal Service, the complainant is required to take any reasonable and practical additional steps available to ensure notice is afforded. See, Jones v. Flowers, 547 US 220, 226 (2006)). In this instance there were no reasonable and practical steps

available since the Postal Service did not have a forwarding address. The complainant was not required to search beyond its records and those provided by the US Postal Service for the respondents' current address. Department of State v Battista, 05 DOS APP 11 (2011).

Service properly made in a manner reasonably calculated to provide notice of the time, date, place, manner and nature of the proceedings is sufficient whether or not the opposing party actually receives the notice, see Persad v Division of Licensing Services, 63 DOS APP 09 (2009); Pinger v Division of Licensing Services, 23 DOS APP 07 (2007). As notice was properly served in this instance, the hearing was permissibly conducted in the absence of the applicants. Patterson v Department of State, 35 AD2d 616 (3d Dept. 1970); Staley v Division of Licensing Services, 14 DOS APP 01 (2001); Department of State v Battista, 05 DOS APP 11 (2011); Roy Staley v Division of Licensing Services, 14 DOS APP 01 (2001); Matter of the Application of Rose Ann Weis, 118 DOS 93 (1993).

II- Being an artificial entity created by law, A Mer can only act through its officers, agents, and employees, and it is, therefore, bound by the knowledge acquired by and is responsible for the acts committed by its representative broker, Ms. Caceres, within the actual or apparent scope of her authority. Roberts Real Estate, Inc. v Department of State, 80 NY2d 116, 589 NYS2d 392 (1992); A-1 Realty Corporation v State Division of Human Rights, 35 A.D.2d 843, 318 N.Y.S.2d 120 (1970); Division of Licensing Services v First Atlantic Realty Inc., 64 DOS 88; RPL ' 442-c.

III- Ms. Warring gave the respondents money which was clearly intended to secure the rental of an apartment. When that rental was not consummated, pursuant to 19 NYCRR 175.2 she was entitled to the prompt return of her advance rent payment. Instead, after a delay of a week she was given a check drawn on an account which contained insufficient funds, and she did not receive the return of \$1,400.00 advance rent payment until approximately three weeks after she requested a refund. The respondents thereby demonstrated untrustworthiness.

IV- The apparent reason for the delay in making the refund was that the money was not maintained in an escrow account as is required by 19 NYCCRR 175.1. Rather, it was transferred to the respondents' operating account, where it was improperly commingled with other, presumably non-escrow, funds, a further demonstration of untrustworthiness.

V- Included in the money which the respondents received from Ms. Warring was \$50.00 intended to pay for a credit check. That credit check was performed by the landlord, although the landlord was not paid for it. Therefore, the charge that the credit check was not performed is dismissed.

VI- The respondents allowed their escrow account to have a negative balance, a further violation of 19 NYCRR 175.1 and a demonstration of both untrustworthiness and incompetence.

VII- It is clear from the evidence that the respondents are not sufficiently trustworthy to be entrusted with money belonging to their clients and customers. They have allowed their escrow account to have a negative balance, have failed to issue a refund promptly, and have issued a bad check to a member of the public. Therefore, the public welfare requires that their license be revoked.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Anays Caceres and A Mer C Limited Inc. have violated 19 NYCRR 175.1 and 175.2 and have demonstrated untrustworthiness and incompetence, and accordingly, pursuant to Real Property Law §441-c, their license as a real estate broker, UID #10311205617, is revoked effective immediately. They are directed to surrender their license certificate, pocket card, and broker's identification by mail addressed to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York 12231-0001.

/S/
Roger Schneier
Administrative Law Judge

Dated: February 18, 2019