

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

SIDNEY BAUMGARTEN

DECISION

For a Commission as a Notary Public

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on October 12, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 277 Broadway, New York, New York 10007, was represented by John W. Russell, Esq., 60 East 12th Street, New York, New York 10003.

The Division of Licensing Services (hereinafter "DLS") was represented by Supervising License Investigator William Schmitz.

ISSUE

The issue before the tribunal is whether the applicant should be denied renewal of his commission as a notary public because of the circumstances which resulted in his suspension from the practice of law.

FINDINGS OF FACT

1) By application dated March 31, 1995 the applicant applied for renewal of his commission as a notary public. He responded "yes" to question #1: "Since your last application, have you been convicted of a crime or offense (not a minor traffic violation) or has any license, commission or registration ever been denied, suspended or revoked in this state or elsewhere?" Attached to his application was a letter in which he explained that he had been temporarily suspended for the practice of law (State's Ex. 2).

2) On June 2, 1994, by order of the Supreme Court, Appellate Division, First Judicial Department, based on a finding that the applicant had committed acts of professional misconduct immediately threatening the public interest, the applicant was suspended from the practice of law pending further order of the Court (State's Ex. 3).

The suspension, imposed in response to a motion by the Departmental Disciplinary Committee and effective pending final consideration of the charges against the applicant, was based on a finding that the applicant had admitted that: the amount in his escrow account fell below what he should have been holding; at times the escrow account had a negative balance; he had used escrow funds to pay his own expenses; and the commingling was done in an effort to avoid liens by the Internal Revenue Service. Matter of Baumgarten, 197 AD2d 309, 613 NYS2d 361 (1994).

3) By letter dated June 28, 1995 the applicant was advised by DLS that it proposed to deny his application because the circumstances which resulted

in his suspension from the practice of law reflect a lack of trustworthiness, and that he could request an administrative review. By letter dated July 5, 1995 the applicant requested a review, and by letter dated August 12, 1995 he was advised that after reviews DLS still proposed to deny the application. The applicant then requested a hearing, and notice of hearing was served on served on him by certified mail (State's Ex. 1).

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he is of good moral character. Executive Law §§130 and 131; 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- "A notary public is a public officer and the responsibilities of the Secretary of State extend to protecting the public against misconduct by notaries, the caliber of a notary and his right to remain in office to be measured not only by his activities as such but also by trustworthiness and competence exhibited in other areas in which the public is concerned." Patterson v Department of State, 35 AD2d 616, 312 NYS2d 300 (1970)(citations omitted).

In its opinion, the Appellate Division found that the applicant had violated DR 1-102[A][4], which provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The Court found that the applicant admitted that he depleted his escrow account below the amount of funds which he should have been holding, used escrow funds to pay his own expenses, and commingled client funds with his own to avoid IRS liens.

The applicant contends that his misconduct was inadvertent. However, the Appellate Division specifically found that he had acted intentionally.

The applicant also asserts that since he has never been charged with misconduct as a notary, and in view of his past history of professional accomplishments and community involvements, his application should be granted. In light of the findings of the Court that argument is not persuasive.

The applicant has been found guilty of dishonest acts which resulted in the suspension of his license to practice law. Under the circumstances, and considering how much less economic value a commission as a notary public has, it appears probable that should he perceive it to be in his interests to engage in an act of notarial misconduct, such as notarizing a document which he knows to be fraudulent or when the purported signatory has not appeared before him, he would do so. Matter of the Application of Russakoff, 60 DOS 95. At the very least, his admitted lack of sufficient attention to something as important as the handling of client funds creates great doubt

that he can be trusted to conform properly to the proprieties required of a notary when officiating.

CONCLUSIONS OF LAW

The applicant has failed to establish that he is sufficiently trustworthy and of good enough moral character to be commissioned as a notary public. Accordingly, his application for renewal of his commission as a notary public should be denied. Executive Law §§130 and 131; SAPA §306[1].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Sidney Baumgarten for renewal of his commission as a notary public is denied.

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