

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

BASIL N. APOSTLE

DECISION

For a License as a Real Estate Broker

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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 July 2 and September 22, 1992 at the office of the Department of State located at 270 Broadway, New York, New York 10007.

The applicant, of 25-82 Steinway Street, Long Island City, New York 11103, having been advised of his right to be represented by an attorney, appeared pro se.

The Division of Licensing Services was represented by Supervising License Investigator Michael Coyne.

ISSUE

The issue at the hearing was whether the applicant should be denied renewal of his license as a real estate broker because of actions which led to the suspension of his license to practice law.

FINDINGS OF FACT

1) By application dated December 24, 1991 (received on January 3, 1992), the applicant applied to renew his license as a real estate broker, originally issued on November 1, 1971 (App. Ex. A), which was to expire on January 31, 1992. In response to question (1) on the application: "Since last renewal, were you convicted of a crime (not minor traffic violation), or had a license, permit, commission or registration denied, suspended or revoked in this state or elsewhere?", the applicant answered "Yes" (Dept. Ex. 2). On the back of the application the applicant noted that his license to practice law had been suspended effective August 31, 1991.

2) By a decision dated July 1, 1991 the applicant, who was admitted to the Bar on June 24, 1968, was suspended from the practice of law for a period of three years. In its opinion, the Appellate Division, Second Department, found that the applicant improperly acquired a proprietary interest in the subject matter of litigation which he was conducting on behalf of a client which conflicted with the interests of that client. That finding arose out a divorce proceeding in which the applicant had represented the wife and had obtained a court order enjoining the husband not to encumber, relocate, sell or

dispose of assets or property, including a particular apartment building, during the pendency of the proceeding. Several years later, the divorce not having been pursued, but the order not having been vacated, the applicant was directed by his client to proceed with the action. The Court found that the applicant then attempted to negotiate a settlement and was advised by the husband's attorney that if the apartment building could be sold for \$3,000,000.00 the husband would pay the applicant's client a lump sum of \$200,000.00 as part of the divorce settlement. The Court went on to find that the applicant, acting on the suggestion of the husband that he would receive a finder's fee upon completion of the sale if the applicant located a purchaser, actively sought a purchaser without disclosing to his client that he had a different and conflicting interest from that of his client in seeking a purchaser.

The Court went on to find that the applicant improperly allowed his professional judgement on behalf of his client to become impaired by his own interests, and intentionally failed to carry out a contract of employment by failing to follow the client's specific directions. That finding was based on the fact that when the applicant located a purchaser for the apartment building and a contract of sale was entered into, the applicant negotiated a \$117,500.00 brokerage commission for himself, but failed to promptly disclose the details of the brokerage commission agreement to his client and failed to disclose that by virtue of that agreement he had a conflicting interest with respect to representing her in the sale.

In addition, the Court found that the applicant failed to obtain a written stipulation of settlement from the husband regarding the previously agreed to discussed lump sum payment to the wife, and that the husband subsequently reduced his lump sum offer to \$50,000.00. On the same day as she rejected the reduced offer, the wife directed the applicant to continue as her attorney, prepare for trial, and prevent the sale of the apartment building, but the applicant failed to file a lis pendens against the building or otherwise prevent the sale, and title closed at a sale price of \$3,450,000.00, with the applicant receiving his brokerage commission. The husband then absconded and the applicant's client received no share of the sale proceeds which, the Court found, was a direct result of the applicant's failure to protect her interests.

The marriage was eventually dissolved, and the applicant's client was awarded \$573,500.00 as her equitable distribution share, which award was reduced on appeal. The husband has failed to pay any portion of the award.

In suspending the applicant, the Court took into consideration mitigating circumstances put forward by him, including his previously unblemished record (his record as a real estate broker is equally unblemished), and character evidence presented on his behalf, but found that the suspension was called for in view of the applicant's serious professional misconduct. In reaching that conclusion the Court had

available to it character evidence which was substantially the same, with regards to the aspects of the applicant's life which were raised, and in the some cases which was given by the same persons, as that which was presented by the applicant in this proceeding (App. Ex. D).

At the same time as the complaint against the applicant was lodged with the Grievance Committee for the Second and Eleventh Judicial Districts of the Second Judicial Department, a malpractice suit was commenced against the applicant. That suit was settled with a payment of \$187,000.00 by the insurance carrier.

3) By letter dated April 29, 1992 the applicant was advised by the Division of Licensing Services that it proposed to deny his application because the actions which led to his suspension from the practice of law demonstrate incompetence and untrustworthiness, and by letter dated May 12, 1992 the applicant requested a hearing (Dept. Ex. 1).

OPINION

As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he is sufficiently trustworthy and competent to be licensed as a real estate broker. 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).

It is clear that this tribunal may not review or contradict the opinion and order of the Appellate Division, and there is no need for citation to legal authority to support the proposition that the applicant is collaterally estopped from attacking in this proceeding that Court's findings of fact. Therefore, the testimony given by the applicant, and by some of the witnesses called by him, attempting to show his innocence of the charge which led to his suspension may not be considered. All that is before this tribunal is the question of whether, in light of the Court's finding that the applicant was guilty of serious breaches of his fiduciary duty to his client, the applicant is sufficiently trustworthy and competent to be licensed as a real estate broker.

The relationship of a real estate broker to his or her clients is fiduciary in nature. L.A. Grant Realty, Inc. v. Cuomo, 58 AD2d 251, 396 NYS2d 524 (1977). It is "...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). The rigorous standards of a fiduciary relationship are imposed in real estate brokerage transactions so as to secure the fidelity of the broker/agent to the client/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, 30 DOS 90, conf'd. sub nom Short Term Housing v Department of State, _AD2d_, 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 fiduciary standards which the applicant must satisfy as a real estate broker are fundamentally the same as those which were imposed upon him as an attorney, and which the Appellate Division found that he violated. That Court found that it was appropriate to suspend the applicant from the practice of law because of his conduct, and the applicant has failed to present evidence which is sufficient to convince this tribunal that a lesser standard should be applied to the practice of real estate brokerage in which the applicant is placed in situations in which lay persons entrust him in representing them in major financial transactions which frequently provide the opportunity for the applicant to engage in conflicts of interest, including the substitution of his interests for those of his clients'. Notwithstanding the testimony of character witnesses called by the applicant, which, as noted supra, appears to be substantially similar to that which he presented to the Appellate Division, the actions of the applicant as related in the opinion of the Court clearly establish a lack of trustworthiness. Allowing the applicant to continue to engage in the practice of real estate brokerage while he is suspended from the practice of law would, in the circumstances presented by this case, be a dereliction by this tribunal of its obligation to protect the public welfare.

CONCLUSIONS OF LAW

The applicant has failed to establish that he is sufficiently trustworthy to be licensed as a real estate broker and, accordingly, his application for renewal of such license should be denied. Real Property Law §441(1)(d) and SAPA §306(1).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, pursuant to Real Property Law §§441(1)(d) and 441-e and State Administrative Procedure Act §306(1), the application of Basil N. Apostle for renewal of his license as a real estate broker 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:

GAIL S. SHAFFER
Secretary of State
By:

James Coon
Deputy Secretary of State