

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

-----X

In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant,

DECISION

-against-

**RAYMOND COSTELLO d/b/a
R. COSTELLO REALTY COMPANY,**

Respondent.

-----X

The above noted matter came on for hearing before the undersigned, Roger Schneier, on January 6, 1997 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 2206 Starling Avenue, Bronx, New York 10462, having been advised of his right to be represented by an attorney, appeared *pro se*.

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

COMPLAINT

The complaint in the matter alleges that the respondent: Conducted business under an unlicensed name; refused to return an unearned deposit; and failed to satisfy a judgement obtained against him for the unearned deposit.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail on November 7, 1996 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker using the tradename "R. Costello Realty Company," with an office located at 2206 Starling Avenue, Bronx, New York 10462 (State's Ex. 2).

3) At all times hereinafter mentioned the respondent engaged in the business of real estate brokerage under the name "Starling Realty

Corp." (Starling) (State's Ex. 4 and 5). No license as a real estate broker has been issued under that name, although when the applicant submitted his application for the March, 1996 renewal of his license, which was well after the events which are the subject of this proceeding, he mentioned on the form that he was using that name. Starling is a family owned corporation of which the respondent is a shareholder and which, in his capacity of president, is controlled by the respondent.

4) Sometime in early July, 1994, Clarence Nelson spoke with the respondent about renting an apartment located at 3834 Barnes Avenue, Bronx, New York, which was owned by the respondent. The respondent agreed to rent the apartment to Mr. Nelson and his wife, who had also viewed the apartment, for a monthly rent of \$825.00, with the Nelsons to pay an additional \$825.00 as security and a brokerage commission of \$1,237.50.¹ The rental was to be subject to a one year lease, and the respondent told Mr. Nelson that he would have to give him an \$825.00 deposit to hold the apartment. Accordingly, several days later Mr. Nelson gave the respondent \$825.00 cash.

The evidence is equivocal, and insufficient to reach a conclusion, on the question whether at the time of discussing the proposed rental Mr. Nelson told the respondent that he would need to obtain the approval of the Department of Social Services (DSS) for the rental. It is clear, however, that such approval was in fact, required, and that it was not granted.

Being unable to obtain DSS approval for the rental, the Nelsons were unable to, and did not, execute the lease and take possession of the apartment. Accordingly, after the apartment had been kept off the market for a month or slightly longer, Mr. Nelson asked the respondent for a refund of the \$825.00 deposit. The respondent told him that he would have to wait until the apartment was re-rented. However, although such rental was eventually effectuated, the respondent has failed to refund the deposit.

5) Not having received a refund, Mr. Nelson eventually commenced a small claims action against Starling in Civil Court, Bronx County. When no one appeared on behalf of Starling an inquest was taken, and the arbitrator granted Mr. Nelson a judgement in the amount of \$849.14 including interest and disbursements (Index No. S.C. 4646/94) (State's Ex. 6). On December 12, 1994 Mr. Nelson sent the respondent a copy of notice of judgement by registered mail (State's Ex. 7), but there is no evidence that the respondent received the mail. On January 26, 1995 Mr. Nelson gave the New York City Sheriff a "Requisition Request for Small Claims Execution," (State's Ex. 8),

¹ The issue of whether the respondent was entitled to seek a commission for the rental of an apartment owned by him was not raised in the proceedings.

but again there is no evidence what, if anything, the Sheriff did in response to that requisition.

On July 23, 1996 Mr. NeJame wrote to the respondent and advised him of the need to satisfy the judgement (State's Ex. 9). On September 9, 1996, having received that letter, the respondent telephoned Mr. NeJame and asked for a copy of the judgement, which Mr. NeJame sent to him that same day (State's Ex. 10). Although he received the copy of the judgement, the respondent never contacted Mr. NeJame again. The only action which the respondent took with regards to the judgement was to visit the courthouse and learn that he would have to go to the archives because of the age of case. He has not satisfied the judgement, and has not taken any substantive action to appeal it, re-open it, or have it vacated.

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 set forth 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- So long as the issue has been fully litigated by the parties, and is closely enough related to the stated charges that there is no surprise or prejudice to the respondent, the pleadings may be amended to conform to the proof and encompass a charge which was not stated in the complaint. This may be done even without a formal motion being made by the complainant. *Helman v Dixon*, 71 Misc.2d 1057, 338 NYS2d 139 (Civil Ct. NY County, 1972). In ruling on the motion, the tribunal must determine that had the charge in question been stated in the complaint no additional evidence would have been forthcoming. *Tollin v Elleby*, 77 Misc.2d 708, 354 NYS2d 856 (Civil Ct. NY County, 1974). What is essential is that the "matters were raised in the proof, were actually litigated by the parties and were within the broad framework of the original pleadings." *Cooper v Morin*, 91 Misc.2d 302, 398 NYS2d 36, 46 (Supreme Ct. Monroe County, 1977), mod. on other grnds. 64 AD2d 130, 409 NYS2d 30 (1978), aff'd. 49 NY2d 69, 424 NYS2d 168 (1979).

III- The complaint alleges that although licensed under the name "R. Costello Realty Company" the respondent conducted business under the unlicensed name of "Starling Realty." The evidence establishes that the name used by the respondent was, in fact, "Starling Realty Corp." Considering that the issue of the use by the respondent of the name "Starling Realty Corp." was fully litigated without objection, and that the similarity between the name alleged in the complaint and

that actually used is so great as to negate any possibility of surprise or prejudice, the complaint is amended *sua sponte* to charge that the respondent did business under the unlicensed name "Starling Realty Corp."

A real estate broker who wishes to conduct brokerage business under a name other than that on his license must apply for a license under that new name. Real Property Law (RPL) §441[1][a]. *Division of Licensing Services v Cucci*, 65 DOS 95; *Division of Licensing Services v Perry*, 57 DOS 95; *Division of Licensing Services v Morse* 12 DOS 95; *Division of Licensing Services v Scala*, 38 DOS 94; *Division of Licensing Services v Feld*, 147 DOS 93; *Division of Licensing Services v Cruz*, 8 DOS 93; *Division of Licensing Services v Fishman* 153 DOS 92; *Division of Licensing Services v Selkin*, 47 DOS 92; *Division of Licensing Services v Tripoli*, 96 DOS 91; *Department of State v Prater*, 29 DOS 88; *Department of State v Lombardo*, 30 DOS 86. The respondent was licensed only under the trade name "R. Costello Realty Company." By doing business under the name "Starling Realty Corp." he violated that statute.²

It appears from the evidence that as of the date of the hearing the respondent was still doing business under the unlicensed name. He is admonished, therefore, that in order to continue to do business as Starling Realty Corp. he must first obtain a corporate real estate broker's license for that corporation. RPL §441-b[2].

IV- The complaint alleges that when Mr. Nelson gave the respondent the deposit it was conditioned on his wife liking the apartment, and that the offer to rent the apartment was withdrawn by Mr. Nelson when his wife did not agree to the rental. The evidence, however, established that there never was a question of whether Mrs. Nelson liked the apartment, and that what prevented the rental was the failure to obtain DSS approval, something which is not even alluded to in the complaint. Thus, the facts as proven are so different from what was alleged in the complaint that I find that, with regards to those allegations, it would be unduly prejudicial to amend the complaint to conform to the proof.

V- The complaint alleges that Mr. Nelson obtained a judgement against the respondent. In fact, the judgement was obtained against Starling. However, the issue of the judgement, a copy of which was had been in the respondent's possession for several months, was fully litigated without objection by the respondent. Accordingly, the complaint is amended to charge that the judgement was against Starling.

² The question of whether it was an additional violation for the respondent to do business through an unlicensed corporation was not raised in the proceedings.

The respondent has failed to either satisfy or take steps to appeal, re-open, or vacate the judgement. Even if he was not aware of the judgement until being contacted about it by Mr. NeJame, he has now had several months to act. "The failure to pay a judgement which has been lawfully obtained, without a showing that he is unable to do so, is a demonstration of untrustworthiness by a real estate broker. *Department of State v Feldman*, 113 DOS 80, conf'd. *sub nom Feldman v Department of State*, 81 AD2d 553, 440 NYS2d 541 (1981); *Division of Licensing Services v Shulkin*, 40 DOS 90; *Division of Licensing Services v Janus*, 33 DOS 89." *Division of Licensing Services v Harrington*, 123 DOS 93 at 4.

Although the judgment is against Starling, and not the respondent, it arises directly out of his conduct. The respondent is a shareholder and the president of Starling. In response to a question as to how much of the corporation he owns he responded "I pretty much control all of it" (transcript, p. 40, line 25 to p. 41, line 2). Under those circumstances, his failure to see to it that the corporation satisfies the judgement is as much a demonstration of untrustworthiness as it would be were the judgement against the respondent himself. Cf. *Division of Licensing Services v First Atlantic Realty Inc.*, 64 DOS 88.

CONCLUSIONS OF LAW

1) By engaging in the business of real estate brokerage under an unlicensed name the respondent violated RPL §441[1][a] and demonstrated incompetency as a real estate broker.

2) The complainant failed to establish by substantial evidence that in spite of the fact that he had accepted a deposit from Mr. Nelson conditioned on Mrs. Nelson wife accepting the apartment he refused to refund that deposit when Mrs. Nelson did not accept the apartment, and that charge should be dismissed. SAPA §306[1].

3) By failing to satisfy or have Starling satisfy the judgement obtained by Mr. Nelson the respondent has demonstrated untrustworthiness as a real estate broker.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Raymond Costello has violated Real Property Law §441[1][a] and has demonstrated incompetency and untrustworthiness as a real estate broker, and accordingly, pursuant to Real Property Law §441-c, he shall pay a fine of \$750 to the Department of State on or before February 28, 1997, and should he fail to pay the fine then his license as a real estate broker shall be suspended for a period of one month commencing with the receipt by the Division of Licensing Services of his license certificate and pocket card. Upon payment of the fine or termination of the suspension in lieu thereof the respondent's license shall be further suspended until he shall produce proof satisfactory to the

Department of State that he has fully satisfied the judgment in the matter of *Clarence A. Nelson v Starling Realty Inc.*, Civil Court, Bronx County, Index No. S.C. 4646/94, together with interest at the legal rate for judgements (currently 9%) from November 22, 1994. The respondent is directed to send the fine and proof of satisfaction of the judgement, or in lieu thereof his license certificate and pocket card, to: Thomas F. McGrath, Revenue Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 1220.

Roger Schneier
Administrative Law Judge

Dated: January 28, 1997