

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**

-against-

**RUSSELL J. FINLEY d/b/a FINLEY REAL ESTATE**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on March 21 and June 6, 2000 at the New York State Office Building located at 333 East Washington Street, Syracuse, New York.

The respondent, having been advised of his right to be represented by an attorney, chose to be represented by non-attorney Richard Smith, who stated that he was not compensated for his appearance.

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

**COMPLAINT**

The complaint alleges that the respondent, a licensed real estate broker, failed to make written agency disclosure to both sellers and purchasers in a real estate transaction, and engaged in the unauthorized practice of law.

**FINDINGS OF FACT**

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered on January 13, 2000 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker d/b/a Finley Real Estate at 207 Montgomery Street, Ogdensburg, New York 13668 (State's Ex. 1).

3) On March 12, 1998 the respondent entered into an exclusive right to sell agency agreement with David McDougal for the sale of the working dairy farm and single family residence located in Morristown, New York belonging to Mr. McDougal and his wife Joyce and to Gerald R. McDougal and Joan McDougal (State's Ex. 3, Resp. Ex. A, B, and C). The McDougals told the respondent that they were reserving part of the property on which there were two other residences.

4) On or about January 14, 1999 the respondent received an offer to purchase the property from Dennis and Linda Menhennett. The respondent prepared, and had signed by the Menhennetts, a purchase offer and deposit receipt which described the real and personal property to be included in the purchase, stated the purchase price and set forth the terms of a detailed mortgage contingency, set a specific deadline for the closing of title, stated the commission to be paid the respondent, contained a series of general sales conditions and agreements, and contained the following clause: "Excepting and reserving a portion on both the north and south sides of potato st. rd. (sic) of approx. 1 acre each. These lots contain the homes of Gerald and Michael McDougal." The purchase offer contained the caveat "THIS IS A LEGALLY BINDING CONTRACT, IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE." It did not state that it was subject to the approval of the attorneys for the parties. No evidence was presented as to whether it was a form prepared by a joint committee of the local county bar and realtors associations.

5) After the respondent presented the purchase offer to Mr. and Mrs. McDougal, Mrs. McDougal told him that they were unhappy with the clause reserving the house lots inasmuch as the lots were substantially larger than one acre each, and that they wanted to have the property surveyed before they signed a contract. He told Ms. McDougal to sign the contract and the matter could be worked out later (State's Ex. 5, 9, and 10). The McDougals did not execute the agreement.

6) On or about February 13, 1999, after the lots to be retained had been surveyed, the respondent prepared a new purchase offer. The terms of the document were the same as those in the original offer, with the exceptions that it added the names of Gerald and Joan McDougal to the clause identifying the sellers, and the clause reserving the two lots was worded: "Excepting and reserving 1.774 acres on the north side of Potato St. And 6.824 acres on the south side of Potato St. These lots have been surveyed at sellers (sic) expense but have not yet been recorded" (State's Ex. 7).

The respondent obtained the signatures of the buyers to the document, but when he presented it to Mr. and Mrs. McDougal they, acting on the advice of their attorney, they added the following language before they executed it: "Commission is to be paid only if

the sale is completed." Mr. and Mrs. McDougal then signed the document. The respondent was unhappy with the commission clause, and told them that it constituted a counter offer which might kill the deal, but it was eventually initialled by all of the buyers and sellers.

7) At no time did the respondent give the sellers, buyers, or any one of them an agency disclosure form.

8) Title closed on or about June 8, 1999, at which time deeds to two apparently contiguous lots from David R. and Gerald R. McDougal and from David R., Joyce A., Gerald R. and Joan McDougal were delivered to Dennis J. Menhennett and Linda Menhennett (State's Ex. 8).

#### OPINION AND CONCLUSIONS OF LAW

I- Pursuant to RPL §443 a real estate broker must, prior to entering into a listing agreement with a seller of residential real property, provide that seller with a real estate agency relationship disclosure form. The respondent contends that the statute does not apply to the subject transaction because it involved the sale of a farm and not, therefore, of residential property. His interpretation of the scope of the statute is overly restrictive. *Division of Licensing Services v Gorr*, 375 DOS 00; *Division of Licensing Services v Deppoliti*, 77 DOS 95.

RPL §4439(f) defines "residential real property" as meaning real property improved by a one to four family dwelling used or occupied or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons. That definition is different from that found in 19 NYCRR 175.24, which restricts the definition of "residential property" to the homes themselves. Therefore, although the subject property was a working farm, and was so classified for tax purposes, the fact that it was improved with a residential dwelling brought it within the scope of the statute.

The respondent argues that the complainant failed to prove that the house was used or occupied or intended to be used or occupied as the home or residence of one or more persons because no evidence was offered to show that the sellers lived in it or that the buyers intended to do so. That argument misses the point that the house was a single family residence which is, *a priori*, designed, and therefore intended, to be used or occupied as a residence for one or more persons. Black's Law Dictionary 727 (5th ed. 1979); The New Shorter Oxford English Dictionary 1388 (1993). Thus, the respondent was, as alleged in the complaint, required to deliver disclosure forms to both the sellers and the buyers, which he did not do. That failure was not only a violation of the statute, but also a demonstration of incompetency.

II- The respondent is charged with engaging in the unlawful practice of law in two ways: First by preparing the purchase agreements and, second, by advising the McDougals that the size of the retained lots could be worked out after the signing of the originally proposed purchase agreement.

Real Estate brokers are permitted to prepare purchase offer contracts subject to very definite limitations.

"The line between such permitted acts by real estate brokers and the unauthorized practice of the law has been recognized as thin and difficult to define and, at time, to discern. Whether or not the services rendered are simple or complex may have had a bearing on the outcome, but it has not been controlling....

The justification for granting to real estate brokers and agents the privilege to complete simple purchase and sale documents has been said to be the practical aspect of the matter, that is, the business need for expedition and the fact that the broker has a personal interest in the transaction. It should be noted in this regard, however, that the so-called 'simple' contract is in reality not simple....The personal interest of the broker in the transaction and the fact that he is employed by one of the opposing parties are further reasons to require that, *insofar as the contract entails legal advice and draftsmanship, only a lawyer or lawyers be permitted to prepare the document*, to ensure the deliberate consideration and protection of the interests and rights of the parties.

The law forbids anyone to practice law who has not been found duly qualified and licensed to do so....Thus, the privilege accorded to real estate brokers and agents must be circumscribed for the benefit of the public to ensure that such professionals do not exceed the bounds of their competence and, to the detriment of the innocent public, prepare documents the execution of which requires a lawyer's scrutiny and expertise." *Duncan & Hill Realty v Dept. of State*, 62 AD2d 690, 405 NYS2d 339, 343-344 (1978) (emphasis added, citations omitted), appeal dismissed 45 NY2d 821, 409 NYS2d 210.

In preparing a purchase offer contract, real estate brokers and salespersons may not insert any provision which requires the exercise of legal expertise. They may not devise

"legal terms beyond the general description of the subject property, the price and the mortgage to be assumed or given...(and) may readily protect (themselves) from a charge of unlawful practice of law by inserting in the document that it is subject to the approval of the respective attorneys for the parties. Moreover, a real estate broker or agent who uses (a purchase offer form) recommended by a joint committee of the bar association and realtors association of his local county, who refrains from inserting provisions requiring legal expertise and who adheres to the guidelines agreed upon by the American Bar Association and the National Association of Real Estate Brokers...has no need to worry about the propriety of his conduct in such transactions." *Duncan & Hill Realty v Dept. of State, supra*, 405 NYS2d at 345.

Thus, there are two steps which a real estate broker must take in preparing a purchase offer to avoid engaging in the unlawful practice of law. First, he or she must use a form which has been prepared under approved auspices and, second, regardless of the form used he or she must refrain from inserting provisions requiring legal expertise.

It is not the complainant's burden to establish that the form was not prepared in a manner approved by the Court of Appeals. Rather, once the complainant has established that the respondent has prepared a purchase contract the burden shifts to the respondent, who has the best and most accessible information as to the origins of the form, to, as an affirmative defense, show that the contract was prepared using a properly devised form. Although the form used by the respondent contains pre-printed clauses requiring legal expertise, he has failed to show that the form was prepared under the proper auspices. Thus, and regardless of the fact that there was no showing that the respondent inserted into the blanks on the purchase agreement forms any provisions requiring legal expertise,<sup>1</sup> by preparing the purchase agreements the respondent demonstrated incompetency by engaging in the unauthorized practice of law.

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<sup>1</sup> The description of the lots to be retained, although done negligently and incompetently on the first purchase agreement, does not constitute a provision requiring legal expertise, being, at it is, merely part of the description of the property.

The respondent engaged in the further practice of law, and again demonstrated incompetency, by giving legal advise to Mr. and Mrs. McDougal orally when he advised them that the description of the reserved lots could be worked out after they signed the first purchase agreement. Rohan, Goldstein, and Bobis, Real Estate Brokerage Law and Practice 7-5 (1999). By giving that advice the respondent created the possibility that the McDougals would be bound by a contract requiring them to convey more property than they had intended.

III- I have considered the respondent's motion of March 16, 2000 to dismiss the first and second causes of action, for which no supporting memoranda or other legal arguments was presented, and find it to be wholly without merit.

IV- In mitigation of the penalty to be imposed, I have considered the fact that the respondent appears to have acted in ignorance of his legal obligations and without any intent to violate the law or to harm or compromise the interests of either the sellers or the buyers.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Russell J. Finley has violated Real Property Law §443 and has demonstrated incompetency, and, accordingly, pursuant to Real Property Law §441-c, he shall pay a fine of \$500.00 to the Department of State on or before July 31, 2000. Should he fail to pay the fine then his license as a real estate broker shall be suspended for a period commencing on August 1, 2000 and terminating two months after the receipt by the Department of State of his license certificate and pocket card. He is directed to send a certified check or money order for the fine, payable to "Secretary of State," or his license certificate and pocket card, to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier  
Administrative Law Judge

Dated: July 10, 2000