

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-

STEPHEN LIVINGSTON,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on October 6, 1999 at the office of the Department of State located at 123 William Street, New York, New York.

The respondent did not appear.

The complainant was represented by Litigation Counsel Laurence Soronen, Esq.

COMPLAINT

The complaint alleges that the respondent: Managed real property although not licensed to do so; commingled and converted trust funds; failed to cooperate the complainant's investigation; issued a check to his principal which was subsequently dishonored by the bank; and withheld from his principal rents collected on her behalf because she refused to sign a listing agreement with him.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered at his last know business address (State's Ex. 1). Notices of adjournment were subsequently served on him by regular first class mail sent to him at the same address (State's Ex. 6). He was also advised of the adjournment by a letter Mr. Soronen sent by regular first class mail addressed to him at the address on his July 19, 1999 request for an adjournment (State's Ex. 5).

2) The respondent is duly licensed as a real estate salesperson in association with Spectrum Realty Group Inc., 83 Carleton Avenue, Islip Terrace, New York 11752 (State's Ex. 1).

3) In April, 1997 the respondent, after the death of the real estate broker with whom he was licensed and although not licensed himself as a real estate broker, commenced managing property located at 5 Milburn Street, Hicksville, New York on behalf of the owner, Mary K. O'Mara. His practice was to collect the monthly rent, deposit it in his personal bank account, and then write a check to Ms. O'Mara for the rent less a \$50.00 monthly management fee and the cost of any repairs (State's Ex. 2, 3, and 4).

4) The respondent failed to remit to Ms. O'Mara the rent which he collected for the months of January, February, and March, 1998. He deposited the money in his account and used it for his own purposes (State's Ex. 3 and 4).

5) On March 30, 1998 the respondent issued to Ms. O'Mara a check in the amount of \$3,450.00 as payment for the above unremitted rents. That check was dishonored by his bank due to insufficient funds. The money was eventually paid to Ms. O'Mara's attorney on August 25, 1998 by the real estate broker for whom the respondent was then working (State's Ex. 2).

6) During the course of its investigation the complainant's investigator asked the respondent to provide him with copies of his bank records, and the respondent agreed to do so. However, such records were never provided to the investigator (State's Ex. 3 and 4).

OPINION AND CONCLUSIONS OF LAW

I- The holding of an ex parte quasi-judicial administrative hearing was permissible, inasmuch as there is evidence that notice of the place, time and purpose of the hearing was properly served. RPL §442-e[2]; *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- Real Property Law (RPL) §440-a provides that no person shall engage in the business of, or act temporarily or otherwise as, as real estate broker without being so licensed. A real estate broker is, among other things, a person who, for another and for a fee, commission, or other valuable consideration collects rent for the use of real estate. RPL §440(1). In return for a monthly fee, the respondent managed Ms. O'Mara's her real property and collected rent from the tenant Thus, his conduct fell within the defined activities of a real estate broker. Since those activities occurred without the knowledge and supervision of any employing broker, they did not fall under the protection of the respondent's license as a real estate salesperson. RPL §§440(3), 441(1)(d) and 442-c, and 19 NYCRR 175.21; *Division of Licensing Services v Miles*,

158 DOS 92. Thus the respondent violated RPL §440-a, and, in the process, demonstrated untrustworthiness and incompetence.

III- Upon commencing his management of Ms. O'Mara's property the respondent became her agent. The relationship of agent and principal is fiduciary in nature, "...founded on trust or confidence reposed by one person in the integrity and fidelity of another." *Mobil Oil Corp. v Rubenfeld*, 72 Misc.2d 392, 339 NYS2d 623, 632 (Civil Ct. Queens County, 1972). Included in the fundamental duties of such a fiduciary are good faith and undivided loyalty. Such duties are imposed upon real estate licensees by license law, rules and regulations, contract law, the principals of the law of agency, and tort law. *L.A. Grant Realty, Inc. v Cuomo*, 58 AD2d 251, 396 NYS2d 524 (1977). The object of these rigorous standards of performance is to secure fidelity from the agent to the 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*, 31 DOS 90, conf'd. *sub nom Short Term Housing v Department of State*, 176 AD 2d 619, 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).

Among the fiduciary duties assumed by a real estate licensee when acting as managing agent of a rental building is that of handling his client's funds with the utmost scrupulousness. *Department of State v Mittleberg*, 61 DOS 86, conf'd *sub nom Mittleberg v Shaffer*, 141 A.D.2d 645, 529 N.Y.S.2d 545 (1988); *Division of Licensing Services v Pellittieri*, 77 DOS 92; *Division of Licensing Services v Tripoli*, 96 DO 91. That duty is implemented through, among other things, 19 NYCRR 175.2, which requires that a broker account for trust funds. While that regulation does not apply to the respondent, as he was not a broker, the principal which it embodies is basic to the underlying fiduciary duties. The purpose of that regulation "is to assure that the rights of the lawful owners of escrow funds are not jeopardized by an agent's mismanagement of funds entrusted to the agent's care" *Division of Licensing Services v Pozzanghera*, 141 DOS 93, 7, and its violation is a demonstration of untrustworthiness and incompetency warranting the revocation of the broker's license. *Lawrence Black, Inc. v Cuomo*, 65 A.D.2d 845, 410 N.Y.S.2d 158 (1978), aff'd. 48 N.Y.2d 774, 423 N.Y.S.2d 920. "The imposition of any lesser penalty would unduly jeopardize the welfare of any persons who might do business with the respondents in the future." *Division of Licensing Services v Pellittieri*, *supra* at p. 3.

By failing place the rents he collected in an escrow account, and thereby placing those funds in jeopardy, by failing, in response to her refusal to grant him a listing on her property, to remit to Ms. O'Mara rents which he collected on her behalf, and by issuing Ms. O'Mara a check for which there were insufficient funds in his bank account, *Division of Licensing Services v Laymon*, 214 DOS 97; *Division of Licensing Services v The Coopers Realty Consultants, Inc.*, 38 DOS 91; *Department of State v Janus*, 33 DOS

89; *Department of State v Vitelli*, 50 DOS 88; *Department of State v Milk*, 59 DOS 87, the respondent breached his fiduciary duties and demonstrated extreme untrustworthiness.

IV- RPL §442-e[5] states:

"The secretary of state shall have the power to enforce the provisions of this article and upon complaint of any person, or on his own initiative, to investigate any violation thereof or to investigate the business, business practices and business methods of any person, firm or corporation applying for or holding a license as a real estate broker or salesman, if in the opinion of the secretary of state such investigation is warranted. Each such applicant or licensee shall be obliged, on request of the secretary of state, to supply such information as may be required concerning his or its business, business practices or business methods, or proposed business practices or methods."

Pursuant to RPL §442-j the Secretary of State has the authority to delegate to employees of the Department of State the above powers to compel a licensee to supply information.

The respondent failed to comply with the complainant's request that he cooperate with its investigation of Ms. O'Mara's complaint when he did not provide its investigator with the copies of bank records which it requested and which he said he would provide. That non-cooperation was a violation of RPL 442-e[5]. *Division of Licensing Services v Lawson*, 42 DOS 93.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Stephen Livingston has violation Real Property Law §§440-a and 442-e[5] and has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate salesperson is revoked effective November 1, 1999. He is directed to send 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: October 19, 1999