

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-

**WILLIAM N. SMITH,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on April 13, 1999 at the New York State Office Building located at 65 Court Street, Buffalo, New York.

The respondent was represented by Domenic J. Migliaccio, Esq., 69 Delaware Avenue, Suite 500, Buffalo, New York.

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

**COMPLAINT**

The complaint alleges that the respondent, a licensed real estate salesperson, while acting as a buyer's agent, negotiated and drafted promissory notes from his clients to two associates of his whom his clients had never met, guaranteed repayment of the loans, refused to honor his guarantees when the borrowers defaulted, and failed to satisfy a judgement obtained against him by his clients, and that one of the borrowers either does not exist or did not receive the loan proceeds, which were received by the respondent.

**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 known business address on February 12, 1999 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate salesperson, currently

associated with M.J. Peterson Real Estate Inc., 8180 Transit Road, Williamsville, New York 14221 (State's Ex. 1).

3) In the Spring of 1997 the respondent agreed to assist Mr. and Mrs. William Del Valle in finding a home, acting in the capacity of a buyer's agent (State's Ex. 8). In the course of that agency the respondent showed the Del Valles several homes.

4) The Del Valles had the money which they planned to use for a down payment in the bank, and in or about May 1997 the respondent approached them and suggested that they could earn some extra income by loaning \$3000.00 to another client of his. He told them that they would receive the money back with interest of 10% plus \$100.00 within two months (\$3,400.00).

On May 30, 1997 the respondent presented the Del Valles with a promissory note which he had drawn up and which provided that the Del Valles had loaned Jeffrey Pecoraro \$3,000.00, and that Mr. Pecoraro would pay the Del Valles \$3,400.00 within 60 days. The note, which was already signed by Mr. Pecoraro, whom the Del Valles never met, was signed by the Del Valles, and payment was then guaranteed by the respondent (State's Ex. 2).<sup>1</sup> The Del Valles then gave the \$3,000.00, in the form of a cashier's check payable to the attorney for the sellers of a home being purchased by Mr. Pecoraro (State's Ex. 3), to the respondent, who gave it to Mr. Pecoraro.

5) The next month the respondent again approached to Del Valles to make a loan, this time for \$2,000.00, on the same terms as the Pecoraro loan and with the same personal guaranty. The respondent said that he needed the money quickly because his clients, Jeffrey and Susan Mc Olland, were closing the same day. In response, on June 19, 1997 the Del Valles gave the respondent \$2,000.00 cash to be given the Mc Ollands, subject to a promissory note to be signed by them providing for a 60 day loan "at a interest rate of 10%" (State's Ex. 4). No such promissory note was never given to the Del Valles, who never saw or met the Mc Ollands.

6) The respondent claims that after he received the \$2,000.00 he returned to his office and prepared a promissory note for the Mc Ollands to sign. He further asserts that when a person who said he was Mr. Mc Olland, but from whom the respondent did not request identification, appeared he gave him the \$2,000.00 and the note, which that individual said he would, but never did, return after taking it out to the car to have it signed by his wife.

According to the respondent the Mc Ollands were not his clients. He testified that Mr. Mc Olland approached him claiming to be a friend of Mr. Pecoraro and seeking a loan. He claims to

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<sup>1</sup> Although the guarantee is dated 5/31/97, Mr. Del Valle testified that the respondent signed it on May 30, 1997.

have spoken with Mr. Mc Olland on the telephone after he took the money, and that Mr. Mc Olland promised to return the signed note. However, when asked for that telephone number by the complainant's investigator, whom he told he does not have an address for the Mc Ollands, he was unable to produce it.

6) Neither of the two loans were repaid.

7) The Del Valles brought suit against the respondent and Mr. Pecoraro in City Court of Buffalo, Small Claims Division, and, in the same court, not being able to locate the Mc Ollands and believing that they did not in fact exist, brought suit against the respondent only on the Mc Olland loan. After being threatened with usury charges, the Del Valles entered into settlement agreements pursuant to which Mr. Pecoraro agreed to re-pay the \$3,000.00 with reasonable interest by March, 1998, and the respondent agreed to re-pay the \$2,000.00 without interest.

No payments were made on the settlements, and as a result the Del Valles' attorney returned to court where he obtained judgements in the amount of \$3,015.00 against Mr. Pecoraro (State's Ex. 5), and \$2,015.00 against the respondent (State's Ex. 6).

8) Some payments were received from the respondent as the result of an income execution. However neither of the judgements has been fully satisfied.

#### OPINION AND CONCLUSIONS OF LAW

I- 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, and the exercise of reasonable care and skill. 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); Restatement of Agency 2nd, §379. 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). Thus, as the Del Valles' agent, the respondent owed those duties to them.

The respondent caused his principals, the Del Valle's, to enter into two loan arrangements. In the first, he induced them to

loan \$3,000.00 to another client of his at a rate of interest which he proposed to them, guaranteed that loan, and then, when the borrower failed to repay the loan, did not honor that guarantee. Although he acknowledges that he has an obligation to repay that loan, his attempt to shield himself from some of the onus of his conduct by contending that the loan was made on usurious terms, which he claims were proposed not by him but by the Del Valles, is an indication of bad faith on his part.

In the instance of the second loan, even accepting the respondent's claim that the Mc Ollands actually existed, of which except for the respondent's somewhat questionable testimony there is no evidence, he again induced the Del Valles to make the loan, orally guaranteed its repayment, and then without obtaining a signed note or receipt gave the cash to a person who he had never met before, who he didn't ask to produce any written identification, and who said he would have his wife sign the note and then would bring it back. Such conduct was the height of negligence and in total abrogation of his responsibility to protect the money with which his principals entrusted him. Then, when the note was not returned signed and the loan was not repaid, the respondent failed to honor his guarantee.

The respondent's breach of his fiduciary duties to the Del Valles was a clear demonstration of untrustworthiness and incompetency.

II- The preparation of legal instruments and contracts by a person not licensed and admitted to practice as an attorney constitutes the unlawful practice of law in violation of Judiciary Law §478. *People v Alfani*, 227 NY 334 (1919). The respondent is a real estate salesperson, and makes no claim to being an attorney at law. Yet in the Pecoraro transaction he drew up a promissory note and had it executed by the parties. That instrument, it is now claimed, provided for payment of usurious interest. By practicing law without a license the respondent clearly jeopardized the interests of his principals, and in so doing he again demonstrated untrustworthiness and incompetency. Cf. *Duncan & Hill Realty v Dept. of State*, 62 AD2d 690, 405 NYS2d 339, 343-344 (1978) (citations omitted), appeal dismissed 45 NY2d 821, 409 NYS2d 210.

#### **DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** William N. Smith has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, he shall pay a fine of \$1,000.00 to the Department of State on or before June 30, 1999, and should he not pay the fine then his license as a real estate salesperson shall be suspended for a period commencing on July 1, 1999 and terminating three months after the receipt by the Department of State 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 such time as he shall produce proof satisfactory to the Department of State that he has fully satisfied the judgement obtained against him by William and Deborah Del Valle, City Court of Buffalo #SC-46972, and has fully repaid, pursuant to his guarantee, the loan made by William and Deborah Del Valle to Jeffrey Pecoraro. The respondent is directed to send the fine, in the form of a certified check or money order, proof of the foregoing restitution, and/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: May 19, 1999