

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-

**JOSEPH H. SWAN d/b/a JOE SWAN REALTY,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on December 9, 1997 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 6 Bailey Avenue, Bayshore, New York 11706, did not appear.

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

**COMPLAINT**

The complaint in the matter alleges that the respondent accepted a refundable escrow deposit toward the rental of a house, failed to place the deposit in escrow and converted the funds to his own use, failed to return the escrow funds after the transaction failed to close and after entry of a judgement against him, and willfully misrepresented to the complainant and his principal that the judgement would be satisfied on or before April 30, 1997.

**FINDINGS OF FACT**

1) Notice of hearing together with a copy of the complaint was served on the respondent at his last known business address by certified mail delivered on October 8, 1997 (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 Joe Swan Realty (State's Ex. 1). I take official notice of the records of the

Department of State that he is also licensed in his individual name for the period ending September 14, 1999.

3) On January 19, 1996 the respondent accepted from Dori Smith a \$1,400 deposit toward the rental of a house located in Bayshore, New York. Pursuant to the rental agreement, the deposit was to be returned to Ms. Smith if the rental was not approved for Section 8 rent assistance (State's Ex. 4).

4) The respondent did not have, and did not place the deposit in, an escrow account.

5) Ms. Smith's application for Section 8 assistance was denied. The respondent, however, refused to return the deposit (State's Ex. 2).

6) Ms. Smith sued the respondent in the Small Claims part of Suffolk County District Court, and on January 8, 1997, after an inquest, was awarded a judgement of \$1539.25, including costs and interest to that date (State's Ex. 5).

7) After the respondent failed to satisfy the judgement Ms. Smith complained to the Department of State. In response, sometime in March, 1997 Senior License Investigator William Zullo spoke with the respondent, who stated that he would satisfy the judgement within thirty days.

8) As of December 8, 1997 the judgement had not been settled (State's Ex. 6).

#### OPINION

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. *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- A real estate broker has the fiduciary duty of handling his or its clients' funds with the utmost scrupulousness, and must take extreme care to assure that the rights of the lawful owners of those funds will not be jeopardized. *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 19 NYCRR 175.1, which forbids the commingling of brokers' and clients' funds and requires that client funds be maintained in a special bank account, which regulation was violated by the respondent when he failed to place the deposit received from Ms. Smith in such an account. 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.

III- "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. Not only did the respondent fail to pay the judgement obtained against him by Ms. Smith, but, when questioned about it by the complainant's investigator, rather than claiming that he lacked the necessary funds, he promised to pay Ms. Smith within 30 days. His failure to keep that promise is a further demonstration of untrustworthiness.

IV- Fraudulent practices "...as used in relation to the regulation of commercial activity, is often broadly construed, but has generally been interpreted to include those acts which may be characterized as dishonest and misleading. Since the purpose of such restrictions on commercial activity is to afford the consuming public expanded protection from deceptive and misleading fraud, the application is ordinarily not limited to instances of intentional fraud in the traditional sense. Therefore, proof of an intent to defraud is not essential." *Allstate Ins. Co. v Foschio*, 93 A.D.2d 328, 464 N.Y.S.2d 44, 46-47 (1983) (citations omitted). A single fraudulent practice may be the basis for the imposition of disciplinary sanctions. *Division of Licensing Services v Linfoot*, 60 DOS 88, conf'd. *sub nom Harvey v Shaffer*, 156 A.D.2d 1013, 549 N.Y.S.2d 296 (1989).

The respondent engaged in a fraudulent practice, and further demonstrated his untrustworthiness, when he accepted the deposit from Ms. Smith with the express condition that it would be refunded if she was not approved for a Section 8 subsidy and, when such approval was not forthcoming, refused to make a refund.

V- Where a broker or salesperson has received money to which he is not entitled, he may be required to return it, together with interest, as a condition of retention or re-issuance of his license. *Donati v Shaffer*, 83 NY2d 828, 611 NYS2d 495 (1994); *Kostika v Cuomo*, 41 N.Y.2d 673, 394 N.Y.S.2d 862 (1977); *Zelik v Secretary of State*, 168 AD2d 215, 562 NYS2d 101 (1990); *Edelstein v Department of State*, 16 A.D.2d 764, 227 N.Y.S.2d 987 (1962). Such a refund may be required even where the licensee no longer has the money, having wrongfully transferred it to a third party. *Mittleberg v Shaffer*, *supra*.

#### CONCLUSIONS OF LAW

- 1) The holding of an *ex parte* hearing was proper.

2) By failing to place the deposit received from Ms. Smith in escrow the respondent demonstrated untrustworthiness and incompetency as a real estate broker.

3) By failing to pay the judgement obtained against him by Ms. Smith, and by misrepresenting to the complainant's investigator that he would pay the judgement within thirty days, the respondent demonstrated untrustworthiness as a real estate broker.

4) By accepting the deposit from Ms. Smith with the express condition that it would be refunded if she was not approved for a Section 8 subsidy and, when such approval was not forthcoming, refusing to make a refund, the respondent engaged in a fraudulent practice and further demonstrated untrustworthiness as a real estate broker.

5) As a condition of being licensed as a real estate broker the respondent should be required to fully satisfy the judgement obtained against him by Ms. Smith.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Joseph H. Swan has engaged in a fraudulent practice and has demonstrated untrustworthiness and incompetency as a real estate broker, and, accordingly, pursuant to Real Property Law §441-c, all licenses issued to him as a real estate broker are revoked, effective immediately. Should he ever re-apply for a license as a real estate broker or salesperson, no action shall be taken on such application until he has produced proof satisfactory to the Department of State that he has fully satisfied the judgement of \$1539.25 obtained by Dori Smith against him in Suffolk County District Court, Index #HUSC 1513-976, including interest accrued since January 8, 1997. He is directed to immediately send his license certificates and pocket cards to Diane Ramundo, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier  
Administrative Law Judge

Dated: December 9, 1997