

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
Complaint No.: 2022-6920

-against-

**MOHAWK VALLEY 1ST CHOICE REALTY
and RONALD S. STEWART,**

Respondents

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The above noted matter came on for a WebEx hearing before the undersigned, Roger Schneier, on October 11, 2022.

Respondent Stewart, having been advised of his right to be represented by an attorney, chose to represent himself.

The complainant was represented by Josette Rocco, Esq.

COMPLAINT

The complaint alleges that the respondents caused and/or approved to be printed unlawful advertisements in violation of Real Property Law §441-c (1) and 19 NYCRR 175.25 (c) (4) and failed to adequately supervise associated licensed real estate professionals, and thereby demonstrated untrustworthiness and incompetency.

FINDINGS OF FACT

1) Notice of Hearing together with a copy of the Complaint was served by Certified and regular mail posted on August 24, 2022 (State's Ex. 1).

2) Ronald S. Stewart is, and at all times hereinafter mentioned was, duly licensed as a real estate broker under the trade name Mohawk Valley 1st Choice Realty at a business address of 70 Genesee Street, New Hartford, NY 13413 (State's Ex. 2).

3) An examination of the respondents' web site on or about June 28, 2022 discovered that, on the "Meet the Team" page, two of the licensed real estate salespersons associated with the respondents were identified as "Licensed Sales Agent," while a third was listed as a "Licensed Sales Person" (State's Ex. 3).

4) According to Mr. Stewart's testimony he was responsible for the maintenance of the web page. He testified that the persons listed as Licensed Sales Agents had worked for him for an extended period of time starting prior to the change in the regulation as to how salespersons are to be identified in advertising and that he neglected to make the required changes at the appropriate time, while the person listed as a Licensed Sales Person was a more recent hire who, it appears, was added to the web page after the change in the regulations, of which change Mr. Stewart acknowledged knowledge.¹

5) Mr. Stewart testified to his disagreement with the requirement that real estate salespersons, associate real estate brokers, and real estate brokers be identified specifically as such and not as "real estate agents," which requirement he believes to be improper and misleading.

OPINION AND CONCLUSIONS OF LAW

I- 19 NYCRR 175 (c) (4), as amended in November 2020, provides that any advertisement by a real estate broker

shall correctly and accurately state the type of license held by the real estate broker, associate real estate broker, or real estate salesperson named in the advertisement....The use of the titles, "sales associate", "licensed sales agent" or simply "broker" is prohibited.

The evidence, including Mr. Stewart's testimony, clearly establishes that the respondents violated that regulation. Mr. Stewart knew that the regulations had been changed so as to prohibit his preferred use of the term "real estate agent" but failed to act to correct that usage on his website. That failure, which was also a failure to properly supervise his business², was a demonstration of incompetency as a real estate broker.

¹ The change in the regulations is discussed below. Licensed real estate brokers were informed of those changes by an email sent on May 13, 2020 (State's Ex. 4) and by two sections added to the Department of State website (State's Ex. 5 and 6). Despite his acknowledgement of knowledge of the change Mr. Stewart testified that he was not aware of the email.

² A real estate broker is obligated to supervise the real estate brokerage activities of the salespersons associated with him. RPL '441(1)(b), 19 NYCRR 175.21. That supervision must consist of "regular, frequent and consistent personal guidance, instruction, oversight and superintendence by the real estate broker with respect to the general real estate brokerage business conducted by the broker, and all matters relating thereto." 19 NYCRR 175.21(a).

Mr. Stewart's position on what a real estate salesperson, associate real estate broker, or real estate broker should be called appears to arise out of his failure to fully understand the meaning of the terminology. He seems not to understand that while every real estate salesperson, associate real estate broker, or real estate broker is an agent in that he or she serves in a fiduciary capacity on behalf of the owner/buyer/lessee of real property, *Mobil Oil Corp. v Rubinfeld*, 72 Misc.2d 392, 339 NYS2d 623, 632 (Civil Ct. Queens County, 1972), not every agent who sells or leases real property on behalf of another is a salesperson, associate broker, or broker inasmuch as they may be an unlicensed salaried or hourly employee of the owner who acts for that owner, their employer. Thus, a person buying a house directly from a home builder may be directed in an advertisement to an unlicensed employee of the seller, while in other circumstances the buyer may be directed to a licensed individual working as an independent contractor, a distinction of which the public is entitled to be aware so as to understand legal rights in the transaction.

Mr. Stewart correctly points out that in various documents, such as listing agreements (Resp Ex. C and D) and the State mandated agency disclosure form (Resp. Ex. A), the term "agent" is used while "salesperson" or "broker" is not. That, however, is explained by the fact that those documents deal with agency status, not with license status.

II- The evidence does not establish that Mr. Stewart acted with willful disregard for his obligations as a real estate broker. Therefore, I find that his conduct did not amount to untrustworthiness, for which "there should be such factual presentation concerning acts or conduct by the licensee or his agent as would warrant a conclusion of unreliability, and which establishes that any confidence or reasonable expectation of fair dealing to the general public would be misplaced." *Gold v Lomenzo*, 29 NY2d 468, 477, 329 NYS2d 805 (1972).

III- In determining what penalty to impose for the foregoing violations I have considered the lack of willfulness in Mr. Stewart's conduct. The complainant argues that this tribunal's decision in *Division of Licensing Services v Anthony Nasti et al*, 162-DOS-21 (2021), supports the imposition of heavy sanctions. However, while that case did involve the improper use of the term "licensed real estate agent," the main issue was the respondent's blatant discrimination on the basis of national origin. Thus, while the respondents' violation of the regulation and lack of supervision cannot be ignored, the penalty need not be draconian.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Ronald S. Stewart has violated 19 NYCRR 175 (c) (4) and has demonstrated incompetency as a real estate broker, 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 November 15, 2022, and should he fail to pay the fine his license as a real estate broker d/b/a Mohawk Valley 1st Choice Realty shall be suspended for a period commencing on November 16, 2022 and terminating one month after the receipt of his license certificate, pocket card, and broker identification by the Department of State. He is directed to send a check for the fine payable to “Secretary of State” or his license certificate, pocket card and broker identification to Norma Rosario, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York 12231-0001. In the alternative, the fine may be paid by credit card using the form available at <http://www.dos.ny.gov/forms/licensing/1450-f-l-a.pdf>.

/S/
Roger Schneier
Administrative Law Judge

Dated: October 11, 2022