

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-

**W. JOSEPH EMBSER,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on July 1, 1997 at the New York State Office Building located at 44 Hawley Street, Binghamton, New York.

The respondent, of 85 North Main Street and 40 West State Street, Wellsville, New York 14895, having been advised of his right to be represented by an attorney, chose to represent himself.

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

**COMPLAINT**

The complaint alleges that, as established by a decision and an order of disbarment issued by the New York State Supreme Court, Appellate Division, Fourth Judicial Department, the respondent misused and misappropriated funds belonging to an estate, failed to enter into a retainer agreement with the executrix, failed to submit any billing statements to the executrix, benefitted by his neglect of the estate by issuing checks against the estate funds payable to himself after the death of the executrix, and failed to seek court approval for advance payment of attorney's fees or commissions for his services as executor of the executrix's estate, and by reason thereof seeks the revocation of the respondent's license as a real estate broker and commission as a notary public.

**FINDINGS OF FACT**

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

2) The respondent is a real estate broker pursuant to a license expiring on June 24, 1998, and a notary public pursuant to a commission expiring on January 31, 1999 (State's Ex. 2).

3) By an order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department entered on March 8, 1996 the respondent was found to be guilty of professional misconduct as an attorney and counselor at law and disbarred. That order was based on the findings of a Referee who reported

"that respondent was retained to represent the executrix of an estate and issued 50 checks against estate funds, payable to himself, for amounts totaling \$399,320. Respondent signed many of those checks using a general power of attorney, including checks signed after the death of the executrix totaling over \$118,000. Respondent did not enter into a retainer agreement with the executrix and did not submit any billing statements to her for his legal services. Additionally, he neither discussed with the executrix the issuance of checks payable to himself nor sought court approval for the advance payment of attorney's fees or commissions for his services as executor of her estate for those checks issued following her death. The Referee also found that, after the executrix had died, respondent neglected the settlement of the estate of which she was executrix and benefitted from that neglect by continuing to issue checks against the estate funds, payable to himself." *Matter of Embser*, 219 AD2d 156, 157, 639 NYS2d 240 (1996); State's Ex. 3.

#### OPINION

I- The respondent, in his statement on the record and through documents submitted by him, seeks to go behind the decision of the Appellate Division and to dispute its findings. That is, of course, precluded by the principles of *collateral estoppel* and *res judicata*. Likewise, this tribunal may not consider the defense offered by the respondent, that his conduct was justified by his long association with the executrix and her family, which defense was specifically rejected by the Court.

II- As a real estate broker, the respondent serves as agent for various principals. 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). Fiduciary status is 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).

The respondent has been disbarred because of a finding that, inter alia, he breached his fiduciary duties as an attorney when he misapplied and misappropriated funds belonging to an estate which he was representing. As a real estate broker the respondent has fiduciary duties with regards to the handling of money belonging to his principals similar to those which he abused as an attorney. 19 NYCRR 175.1, 175.2, and 175.3. In disbaring the respondent, the Appellate Division conclusively found him guilty of numerous breaches of fiduciary duty, including multiple violations involving trust funds, as well as of violations of the lawful procedures effecting the administration of estates. His conduct was a clear demonstration of untrustworthiness which, although not arising out of his activities as a real estate broker, may serve as the basis for the revocation of his license. *Matter of Dovale*, 85 AD2d 602, 444 NYS2d 694 (1981).

III- The fundamental function of a notary public is the authentication of documents. The acts of misconduct of which the Appellate Division found the respondent guilty, including the signing of checks using a general power of attorney after the death of the signatory of that power and the failure to abide by various requirements of law, warrant, pursuant to Executive Law §130, the revocation of his commission as a notary public, as it is clear from the respondent's conduct that he cannot be trusted to perform his duties as a notary honestly. *Division of Licensing Services v Erdheim*, 80 DOS 94.

#### **CONCLUSIONS OF LAW**

1) The respondent has demonstrated untrustworthiness as a real estate broker warranting the revocation of his license as a real estate broker. Real Property Law §441-c.

2) The respondent has engaged in acts of misconduct which warrant the revocation of his commission as a notary public. Executive Law §130.

#### **DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** pursuant to, respectively, Real Property Law §441-c and Executive Law §130 the

license as a real estate broker and the commission as a notary public of W. Joseph Embser are revoked, effectively immediately, and he is directed to immediately send his real estate broker's license certificate and pocket card and his notary public identification card 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: August 1, 1997