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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-

NATHAN FRANKEL,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on May 22, 1998 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 30 Club House Court, Jericho, New York 1753, 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 the respondent, a notary public, notarized a forged deed, the purported signatory of which never appeared before the respondent.

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, and at all times hereinafter mentioned was, a duly commissioned notary public.

3) On May 15, 1993 the respondent notarized a deed bearing the purported signature of John J. Warren, indicating that Mr. Warren had appeared before him and acknowledged the deed "to be his free act and deed before me." The deed was subsequently filed in the Essex County Massachusetts Registry of Deeds (State's Ex. 4).

4) On the day of the notarization Mr. Warren was incarcerated in the Orleans Correctional Facility, Albion, New York (State's Ex. 6).

5) The respondent has no recollection of having notarized the deed, but freely admits that it bears his signature. It was and is his standard procedure to refuse to notarize any document without the purported signatory appearing before him and presenting acceptable identification, and he asserts that he in notarizing the deed he would have adhered to that procedure.

OPINION

As the party which initiated the hearing, the burden is on the applicant to prove, by substantial evidence, the truth of all of the necessary elements of the charges in the complaint. State Administrative Procedure Act (SAPA), §306(1). Substantial evidence is that which a reasonable mind could accept as supporting a conclusion or ultimate fact. *Gray v Adduci*, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988). "The question...is whether a conclusion or ultimate fact may be extracted reasonably--probatively and logically." *City of Utica Board of Water Supply v New York State Health Department*, 96 A.D.2d 710, 465 N.Y.S.2d 365, 366 (1983)(citations omitted).

The complainant has established that the respondent notarized a deed the purported signatory of which did not appear before him. It has not, however, refuted his testimony that it was and is his regular practice not to notarize documents without the purported signatory first showing acceptable identification, and that he would have adhered to that procedure in notarizing the subject deed.

An examination of the evidence establishes that there was almost certainly a dishonest scheme initiated and carried out by a person or persons other than the respondent. The purported signature of Mr. Warren on the deed, when compared with copies of his actual signature (State's Ex. 3 and 5), appears to be a good copy or tracing. The unsworn statement of Donna L. Warren (State's Ex. 7), Mr. Warren's estranged or ex-wife, the other deed signatory, that Mr. Warren signed the deed in prison and returned it to her un-notarized, and that she then sent it to a friend in New York for notarization, is suspect inasmuch as her signature was purportedly notarized in Massachusetts on the same day that Mr. Warren's purported signature was notarized in Nassau County, New York. Under these circumstances, it is not unreasonable to believe that, as the respondent proposes, a person appeared before him and identified himself as Mr. Warren, thereby misleading him into notarizing the deed.

The respondent's defense was clearly hampered by the fact that five years have transpired since the deed was notarized.[1] Clearly, a notarization is not such a remarkable event that it can be assumed that the notary will remember the details of it five years later. SAPA §301(1) provides that "(i)n an adjudicatory proceeding all parties shall be afforded an opportunity for a hearing within reasonable time." Where a respondent demonstrates that the delay significantly and irreparably handicapped him in preparing a defense, *Reid v Axelrod*, 164 AD2d 973, 559 NYS2d 417 (1990); *Gillette v NYS Liquor Authority*, 149 AD2d 927, 540 NYS2d 61 (1989), as by making it impossible for him to testify with a clear and detailed recollection of the events, cf. *Walia v Axelrod*, 120 Misc.2d 104, 465 NYS2d 443 (Supreme Ct. Erie County, 1983), he has met his burden of showing substantial prejudice arising out of the delay. *Correale v Passidomo*, 120 AD2d 525, 501 NYS2d 724 (1986); *Geary v Com'r of Motor Vehicles*, 92 AD2d 38, 459 NYS2d 494 (1983); cf. *Eich v Shaffer*, 136 AD2d 701, 523 NYS2d 902 (1988). Thus, it is reasonable and proper to rely on the respondent's testimony as to his normal procedures even though he cannot recall the actual events involved herein.

CONCLUSIONS OF LAW

The complainant has failed to establish by substantial evidence an essential element of the complaint: That the respondent acted knowingly when he notarized a forged deed the purported signatory of which did not appear before him. Accordingly, the complaint should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the complaint herein is dismissed.

Roger Schneier
Administrative Law Judge

Dated: May 22, 1998

[1] The original letter of complaint from Mr. Warren was received by the complainant in January 1994, nearly four and a half years ago.