

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-

**ABDUR RAHMAN TARIZ ALI,**

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on June 8, 2000 at the office of the Department of State located at 123 William Street, New York, New York.

The respondent having been advised of his right to be represented by an attorney chose to represent himself.

The complainant was represented by Legal Assistant II Thomas Napierski.

**COMPLAINT**

The complaint alleges that the respondent, a licensed real estate broker: Perpetrated a bait and switch scheme by showing his principal an apartment which he knew or should have known was not available and for which another apartment was to be substituted; failed to return any part of the monies which he received on the rental of the apartment after his client rescinded the transaction; failed to disclose to his principal for whom he was acting; failed to represent the interest of his principal; and acted in his own self interest in the handling of the rental.

**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, duly licensed as a real estate broker in his own name (State's Ex. 2).

3) On February 9, 1998 the respondent showed the third floor apartment at 71 Jefferson Avenue, Brooklyn, New York, a building consisting of no more than four apartments, to Jeannette Moses, who was seeking to rent an apartment. She liked the apartment and, therefore, gave the respondent a deposit of \$600.00 on that day, and an additional \$890.00 on February 20, 1998 (State's Ex. 3), representing one months'

rent, one month's security, and \$290.00 towards a broker's fee (which was at some point was supplemented by a \$10.00 cash payment, for a total of \$300.00 paid towards an anticipated fee of \$600.00).

4) The respondent did not have Ms. Moses execute an agency disclosure form.

5) On February 23, 1998 Ms. Moses signed and received a fully executed copy of a lease for the apartment (State's Ex. 4).

6) When it came time for Ms. Moses to take possession of the apartment it was occupied by another person. She was offered another, unacceptable, apartment on the second floor, which offer she refused. She asked the respondent to return her money, but he said that he had given it to the managing agent. In fact, when he received the lease the respondent had given \$1,200.00 of the money to the managing agent, who then had transmitted it to the landlord (App. Ex. A).

7) Ms. Moses sued the landlord in Small Claims Part of Civil Court, Kings County, and on June 18, 1998, after a trial, was granted a judgment in the amount of \$1,000.00 (State's Ex. 5).

8) The respondent eventually refunded to Ms. Moses the \$300.00 fee received by him.

#### **OPINION AND CONCLUSIONS OF LAW**

I- Jeannette Moses and the respondent entered into an agreement pursuant to which she would pay him a commission for finding an apartment for her. In accordance with that agreement the respondent located what, based on representations of the landlord's agent, he reasonably believed to be an available apartment. He showed that apartment to Ms. Moses and, when she expressed an interest in renting it, accepted payments of rent, security, and a partial commission from her. He then obtained a lease to the apartment for Ms. Moses, which lease was executed by the landlord, gave the rent and security to the landlord's agent, and delivered the lease to Ms. Moses. At that point, he had fully performed his obligations under his agreement with Ms. Moses and, not being responsible for the apparently dishonest conduct of the landlord and/or managing agent, and but for his failure to make proper agency disclosure as discussed below, had earned a commission.

II- The complaint charges that the respondent failed to make clear to Ms. Moses for whom he was acting. Neither he nor she was asked whether he told her whom he was representing, and she was not asked whom she understood him to be representing. The only evidence on that issue is the respondent's admission that he did not have Ms. Moses execute an agency disclosure form, a violation of Real Property Law §443 not charged in the complaint.<sup>1</sup>

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<sup>1</sup> So long as the issue has been fully litigated by the parties, and is closely enough related to the stated charges that there is no surprise or prejudice to the respondent, the pleadings may be amended to conform to the proof and encompass a charge which was not stated in the complaint. This may be done even without a formal motion being made by the complainant. *Helman v Dixon*, 71 Misc.2d 1057, 338 NYS2d 139

III- As the party which initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth 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 failed to meet that burden

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** the charges herein are dismissed.

Roger Schneier  
Administrative Law Judge

Dated: June 27, 2000

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<sup>1</sup>(...continued)  
(Civil Ct. NY County, 1972). In ruling on the motion, the tribunal must determine that had the charge in question been stated in the complaint no additional evidence would have been forthcoming. *Tollin v Elleby*, 77 Misc.2d 708, 354 NYS2d 856 (Civil Ct. NY County, 1974). What is essential is that the "matters were raised in the proof, were actually litigated by the parties and were within the broad framework of the original pleadings." *Cooper v Morin*, 91 Misc.2d 302, 398 NYS2d 36, 46 (Supreme Ct. Monroe County, 1977), mod. on other grnds. 64 AD2d 130, 409 NYS2d 30 (1978), aff'd. 49 NY2d 69, 424 NYS2d 168 (1979).

The issue of the disclosure form was raised in a single question. It does not appear that the respondent appreciated the significance of the question, and the issue was in no way fully litigated. This is not, therefore, a case in which it would be proper to amend the pleadings.