

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant,

DECISION

-against-

LAURA M. BAIRD,

Respondent.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on December 20, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 192 Amity Street, Brooklyn, New York 11201, having been advised of her right to be represented by an attorney, appeared pro se.

The complainant was represented by Compliance Officer William Schmitz.

COMPLAINTS

The complaints in the matter allege that the respondent: engaged in the real estate brokerage business using an unlicensed trade name; failed to file a termination card for a real estate salesperson who left her employ; and, in violation of 19 NYCRR 175.7, permitted a salesperson to represent both a tenant and a landlord in the same transaction without making the required disclosure to the tenant.

FINDINGS OF FACT

1) Notice of hearing together with copies of the complaints was served on the respondent by certified mail (Comp. Ex. 1).

2) The respondent is duly licensed as a real estate broker in her individual name. I take official notice of the records of the

Department of State that since February 17, 1993 she has also been licensed under the name "Laura M. Baird Real Estate."

3) While licensed only in her individual name the respondent engaged in the real estate brokerage business under the name "Laura M. Baird Real Estate." On January 2, 1992 she acknowledged in writing that she knew now that she was required to do business only under the name in which she is licensed, and agreed to comply within ten days (Comp. Ex. 2). While, as noted above, the records of the Department of State indicate that a license under the trade name was not issued until over a year later, there is no evidence in the record as to when the respondent applied for the trade name license or whether she continued doing business under that name prior to the issuance of the new license. Therefore, the delayed issuance of the license cannot be viewed as an aggravating factor.

4) In July, 1991 real estate salesperson William S. Ross ceased his association with the respondent. As of January 2, 1992 the respondent had failed to file with the complainant a notice of the termination of the association (Comp. Ex. 2). I take official notice that the records of the Department of State no longer indicate that Ross is associated with the respondent and that, therefore, a termination of association notice must have been filed sometime after January 2, 1992.

5) In February 1992 real estate salesperson Margaret Aloyi, while associated with and working on behalf of the respondent, represented Janice Bailey in the rental of an apartment. The complainant has produced no evidence that Aloyi and the respondent also represented the landlord, or that disclosure was not made to Bailey as to whom Aloyi and the respondent were representing in the transaction.

OPINION AND CONCLUSIONS OF LAW

I- Real Property Law (RPL) §440-a, as implemented by RPL §441[1], requires that a real estate broker be licensed in the exact name under which she conducts business. Division of Licensing Services v Davis, 90 DOS 93; Division of Licensing Services v Lawson, 42 DOS 93. By doing business under the unlicensed trade name "Laura M. Baird Real Estate" the respondent violated that statute. Her testimony that she was unaware of the requirement, while mitigating with regards to intent and, therefore, as to the degree of the penalty to be imposed, does not excuse the respondent's violation.

II- RPL §442-b provides that:

"When the association of any real estate salesman shall be terminated for any reason whatsoever, his broker shall forthwith notify

the Department of State thereof in such manner as the department shall proscribe."

The complainant has established that the respondent failed to file a termination of association notice for William S. Ross when he ceased working for her, and that she is, therefore, guilty of violating the statute. Division of Licensing Services v Harrington, 123 DOS 93; Division of Licensing Services v Kassorla, 23 DOS 93; Division of Licensing Services v James, 10 DOS 93.¹

The respondent has attempted to excuse the violation by testifying that Ross told her that he had sent in the termination. Even were that testimony not uncorroborated, self-serving hearsay, it would be of no avail, as the statute clearly places the burden of notification on the broker.

III- As the party which commenced the hearing, the burden is on the complainant to prove, by substantial evidence, the charge that the respondent permitted a salesperson to represent both a tenant and a landlord in the same transaction without making the proper disclosure, and thereby violated 19 NYCRR 175.7. 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 present any evidence which would tend to establish either that there was a dual representation or that full disclosure was not made. Accordingly, that charge must be dismissed.

¹ The complaint incorrectly charges that the doing business under an unlicensed trade name was a violation of RPL §440-2, a non-existent statute, instead of RPL §440-a, and alleges that the failure to file the change of association notice was a violation of 19 NYCRR 175.14. That regulation applies to the obligation of a terminated salesperson to turn records over to the former employing broker, and has nothing to do with the filing of a termination of association notice. However, since the factual bases of the charges were clearly stated and the issues were fully litigated, the pleadings are hereby amended to conform to the proof. Helman v Dixon, 71 Misc.2d 1057, 338 NYS2d 139 (Civil Ct. NY County, 1972); Tollin v Elleby, 77 Misc2d 708, 354 NYS2d 856 (Civil Ct. NY County, 1974; Cooper v Morin, 91 Misc.2d 302, 398 NYS2d 36 (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).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Laura M. Baird has violated Real Property Law §§440-a and 442-b, and accordingly, pursuant to Real Property Law § 441-c, she shall pay a fine of \$400.00 to the Department of State on or before January 31, 1994, and should she fail to pay the fine then her licenses as a real estate broker shall be suspended for a period of one month, commencing on February 1, 1994 and terminating on February 28, 1994, both dates inclusive.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER
Secretary of State
By:

James N. Baldwin
Executive Deputy Secretary of State