

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-

**RICKY J. BENNETT,**

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 May 2, 1994 at the New York State office building located at 333 East Washington Street, Syracuse, New York.

The respondent, of 342 Melrose Drive, Syracuse, New York 13212, did not appear.

The complainant was represented by Scott L. NeJame, Esq.

At the opening of the hearing Mr. NeJame informed the tribunal that a tentative settlement had been reached with Rose M. Martin and Action Real Estate of Onondaga County, Inc. (Action Real Estate), who had also been named as respondents in the notice of hearing and complaint. Those respondents were, therefore, severed from the proceeding, which went forward only with regards to the charges against Mr. Bennett.

**COMPLAINT**

The complaint alleges: that the respondent, pursuant to a contract to purchase a mobile home, was liable to pay a \$1,000 deposit; that he failed to pay the deposit and in lieu thereof signed a promissory note for \$1,000; that he failed to pay on the note and a judgement was obtained against him; that he failed to satisfy the judgement; that respondent filed for bankruptcy and had the judgement discharged; and that the respondent thereby demonstrated untrustworthiness and/or incompetency.

**FINDINGS OF FACT**

1) Notice of hearing togetherwith a copy of the complaint was served on the respondent by certified mail on February 9, 1994 (Comp. Ex. 1).

2) From January 14, 1992, until the termination of his employment on August 18, 1992 the respondent was licensed as a real estate salesperson in association with Mayer Real Estate, 3001 James Street, Syracuse, New York (Comp. Ex. 3). As discussed infra, that license remained in effect, although not active, until its expiration on January 14, 1994.

3) On August 25, 1991 the respondent entered into a contract to purchase a mobile home from Jay and Barbara Sauta for \$18,000. The contract provided for the payment by the respondent of a \$1000 deposit, with the balance of the purchase price to be paid at closing (Comp. Ex. 5).

The respondent paid the deposit, but when it came to closing on September 22, 1991 was \$1,000 short. In order to enable the closing to go forward, the respondent signed a promissory note in which he agreed to pay the Sautas the \$1000 in monthly installments of \$100, but with the total amount to be paid in not more than six months, and Ms. Martin, the listing broker, guaranteed that payment would be made by March 30, 1992 (Comp. Ex. 6).

The respondent failed to make any payments on the note, and on December 3, 1991 Mr. Sauta sent him a letter demanding payment of \$200 by December 21, 1991 and stating that if such payment were not received he would "call the balance of the note due...." (Comp. Ex. 7).

The respondent still did not make any payments, and on April 7, 1992 the Sautas obtained a judgment against him and Ms. Martin for \$1049.03, including costs and disbursements, in the Small Claims part of the City Court of Syracuse (Comp. Ex. 8). The respondent's counter claim, based on an allegation of water damage to the mobile home, was dismissed. On June 10, 1992, when no payment had been made on the judgement, Mr. Sauta delivered to the Onondaga County Sheriff's Office income executions to be served on the respondent's employer and on Action Real Estate (Comp. Ex. 9).

Some payments were received from the respondent's employer, but on July 20, 1992 the respondent filed a Chapter 7 bankruptcy petition, and on November 4, 1992 the judgement was discharged (Comp. Ex. 10). No payments were received from Action Real Estate, and a new income execution was served when Ms. Martin switched employers. Payments have been made on that execution, and as of the date of the hearing the Sautas were owed \$385, \$169 of which was in the possession of the sheriff.

OPINION

I- The respondent was associated with a real estate broker only from January 14 to August 18, 1992. However, although in the absence of an association with a licensed broker the respondent could not work as a real estate salesperson (Real Property Law[RPL] §442-b), he was licensed for the two year period ending on January 14, 1994 (RPL §441-a[7]). The jurisdiction of the Department of State to conduct a disciplinary hearing regarding his license continued even after that expiration, inasmuch as pursuant to RPL §441[2] he remains eligible to automatically renew that license until January 14, 1996. Brooklyn Audit Co., Inc v Department of Taxation and Finance, 275 NY 285 (1937); Maine Sugar of Montezuma, Inc. v Wickham, 37 AD2d 381, 325 NYS2d 858 (1971); Division of Licensing Services v Carroll, 47 DOS 94.

II- As the party which instituted 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).

III- The first charge against the respondent is that he did not pay the required \$1000 deposit. The testimony of Mr. Sauta, however, refutes that, and establishes that what was not paid was \$1000 of the money which was due on closing.

The second charge against the respondent is that he failed to make payment on the \$1000 note. There is, however, evidence that in failing to make that payment the respondent was acting in the belief that because of damage to the mobile home he did not owe the money. While that argument was rejected by Small Claims Court, the complainant offered no evidence to establish that the respondent did not honestly believe that he was correct in his position and, therefore, that he acted wrongfully in standing on his right to have a bona fide dispute adjudicated in a court of competent jurisdiction.

The third charge is that the respondent failed to satisfy the judgement obtained by the Sautas. In fact, according to Mr. Sauta some payment had been made on the income execution. In any case, the fact that within four months of the docketing of the judgement the respondent filed for bankruptcy and that his petition was subsequently granted would indicate that the respondent was not able to satisfy the judgement, which is a valid defense to the charge. Department of State v Feldman, 113 DOS 80, conf'd. sub nom Feldman v Department of State, 81 AD2d 553, 440 NYS2d 541 (1981); Division of Licensing Services v Harrington, 123 DOS 94; Division of Licensing

Services v Shulkin, 40 DOS 90; Division of Licensing Services v Janus, 33 DOS 89.

The final charge is that the respondent acted improperly by filing for bankruptcy and having the judgement discharged. In view of the well established principal that the State may not interfere with the filing of bankruptcy proceedings, Asian Yard Partners v Kavounas, NYLJ 5/6/94, p. 30., col. 1 (Supreme Ct., NY County), that charge is clearly insupportable.

**CONCLUSIONS OF LAW**

The complainant has failed to establish by substantial evidence that the respondent demonstrated untrustworthiness and/or incompetency by failing to pay the deposit called for in the contract, failing to pay the note signed at the closing of title, by failing to satisfy the judgement obtained against him by the Sautas, or by filing for bankruptcy and having the judgement discharged. Accordingly, the complaint should be dismissed. SAPA §306[1].

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** the complaint against Ricky J. Bennett is dismissed.

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