

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-

ERNESTO D. CEPPARO

Respondent,

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This matter came on for hearing before the undersigned, Roger Schneier, on January 11, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 2108 Joshua's Path, Central Islip New York 11722, did not appear.

The complainant was represented by Compliance Officer William Schmitz.

COMPLAINT

The complaint alleges that the respondent violated Real Property Law (RPL) §443.3 by failing to provide a disclosure form to both a tenant and a landlord and by failing to obtain signed acknowledgements from them, thereby demonstrating untrustworthiness and incompetency.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail on October 13, 1994 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker representing Superior Family Homes Inc. (Superior). (State's Ex. 2).

3) On June 1, 1993 Charlie Gunzel, as landlord, and Asia Jones and Stephanie Jones, as tenants, as the result of efforts of a salesperson associated with Superior, entered into a lease of an apartment located at 126 Front Street, Brentwood, New York, a two

family house (State's Ex. 3). Neither the landlord nor the tenants were given agency disclosure forms.

OPINION AND CONCLUSIONS OF LAW

The complaint alleges that the respondent failed to provide the disclosure forms, not that he is responsible for the failure of a salesperson associated with Superior to provide the forms. The evidence, however, establishes that an un-named salesperson failed to provide the forms, an omission for which the respondent might, if properly charged, have been held liable (RPL §442-c), and that the respondent may have been guilty of a failure to properly supervise that salesperson.

Inasmuch as the respondent was not present at the hearing this is not a case in which the pleadings can be amended to conform to the proof. Such action can be taken only where the issue has been fully litigated by the parties. Helman v Dixon, 71 Misc.2d 1057, 338 NYS2d 139 (Civil Ct. NY County, 1972). 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).

Therefore, since the complaint did not give the respondent notice that he was charged with the violations shown by the evidence, and he was not placed on notice of what it was against which he was to defend himself, the complaint must be dismissed. John Urban Realty v Cuomo, 72 AD2d 947, 422 NYS2d 233 (1979).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the charge herein against Ernesto D. Cepparo 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:

ALEXANDER F. TREADWELL
Secretary of State
By:

Michael E. Stafford, Esq.
Chief Counsel