

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-

**BRUCE G. DEPPOLITI, DEPPOLITI'S
NORTHEAST REALTY, and JAMES P.
DEPPOLITI,**

Respondents.

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This matter came on for hearing before the undersigned, Roger Schneier, on April 11 and May 24, 1995 at the New York State office buildings located at, respectively, 333 East Washington Street, Syracuse, New York and 207 Genesee Street, Utica, New York.

The respondents, of 517 North Main Street, Canastota, New York 13032, were represented by Francis E. Maloney, Jr., Esq., of Bond, Schoeneck & King, LLP, One Lincoln Center, Syracuse, New York 13202-1355.

The complainant was represented by Assistant Litigation Counsel Scott NeJame, Esq.

COMPLAINT

The complaint involves three transactions and makes the following allegations:

1) Rodman Auction. Warren and Sharon Rodman entered into an agreement with real estate salesperson James Deppoliti for Deppoliti's Northeast Realty (hereinafter referred to as "Northeast") to sell at auction their real property in Minden, New York after having been told by him that the property would sell for between \$150,000 and \$200,000; ¶15 of the broker employment agreement was in violation of 19 NYCRR 175.24 in that the type was less than six points in size and the wording did not comply with the requirements of the regulation; at no time did the respondents inform the Rodmans of the difference between a reserved and an unreserved auction; the respondents untruthfully told the Rodmans

that it was illegal for Northeast to hold a reserved auction; a week prior to the auction Northeast caused advertisements to be placed falsely indicating that the property had been sold; that Northeast never presented the Rodmans or the prospective purchasers with disclosure forms as required by Real Property Law (RPL) §443; the highest bid at the auction, \$110,000, was rejected by the Rodmans; the Rodmans never bid on the property themselves, never executed a purchase and sale contract to buy the property, and the property was not sold through any actions of Northeast; Northeast sued the Rodmans for \$13,617.90 and filed a lis pendens against the property, alleging that the Rodmans were the highest bidders by bidding \$116,000 and, therefore, owed a 10% commission plus advertising costs; the Court dismissed the lis pendens, denied Northeast's application for a preliminary injunction, awarded the Rodman's \$100 costs, and subsequently denied Northeast's motion for reargument and awarded an additional \$100 costs; Northeast paid only \$100 for the \$200 awarded to the Rodmans.

2) Wisneski Auction. On or about July 31, 1992 James Deppoliti visited Jerome and Frances Wisneski at their property, which consisted of an 18 acre wooded lot and a 42 acre lot with a house, located in Fort Plain, New York; they discussed the possibility of selling the property at auction and advised him that they needed to receive an offer of at least \$65,000 for the 42 acre parcel; the respondents advised the Wisneskis that an auction would result in bids of between \$80,000 and \$120,000 for the 42 acre parcel; a broker employment agreement which did not comply with the requirements of 19 NYCRR 175.24 was executed; Northeast never disclosed to the Wisneskis the differences between a reserved and an unreserved auction; at no time did Northeast give the Wisneskis or the approximately eight prospective purchasers at the September 12, 1992 auction the disclosure forms required by RPL §443; James Deppoliti offered the property in nine parcels without the required subdivision approval; Jerry Shaw offered \$12,925 for the 18 acre plot; the highest bid for the entire 60 acres was \$54,000 and was rejected by the Wisneskis, who accepted Shaw's bid; the Wisneskis never bid on or contracted to purchase the property; James Deppoliti prepared a purchase and sale contract for Shaw and the Wisneskis which did not contain an attorney approval clause; the sale to Shaw never closed and Northeast retained \$1,175.00 of his \$1,292.50 deposit as their commission, and retained \$117.50 in escrow; Northeast sued the Wisneskis and filed a lis pendens against the property, alleging that they bid \$65,000 for the 42 acre parcel and were, therefore, liable for a commission and advertising costs; the Court dismissed the lis pendens, denied Northeast's application for a preliminary injunction, awarded the Wisneski's \$100 costs, and subsequently denied Northeast's motion for reargument and awarded an additional \$100 costs; Northeast never paid any of the costs.

3) Henderberg Auction. In August 1993 Gary Henderberg and

Bruce Deppoliti executed a broker employment agreement for Northeast to act as Henderberg's agent for the sale at unreserved auction of his property located in Rome, New York; Henderberg informed Bruce Deppoliti that he was having trouble making his mortgage payments and that the mortgagee intended to foreclose; at no time did Northeast provide the disclosure forms required by RPL §443 to Henderberg or the approximately 161 prospective purchasers present at the September 25, 1995 auction; Henry L. Sandefer successfully bid \$19,000 for a 35 acre parcel of the Henderberg property; James Deppoliti prepared a purchase and sale contract for execution by Henderberg and Sandefer which did not contain an attorney approval clause; neither Bruce Deppoliti nor Northeast ever disclosed to Sandefer that the property was under foreclosure or that Henderberg was having difficulty making his mortgage payments; no closing took place; the mortgagee foreclosed and sold the property in its entirety to other purchasers on February 22 1994; Northeast refunded Sandefer's \$2,090.00 deposit in late September 1994.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail on February 8, 1995 (State's Ex. 1).

2) Bruce Deppoliti is, and at all times hereinafter mentioned was, duly licensed as a real estate broker d/b/a Deppoliti's Northeast Realty. James P. Deppoliti is, and at all times hereinafter mentioned was, duly licensed as a real estate salesperson in association with Northeast (State's Ex. 2).

3) In August 1993 Gary Henderberg spoke with the respondents about selling his farm in Rome, New York. He told them that he owed back taxes and was concerned that the mortgagee, Farm Credit, was going to foreclose. Therefore, sometime that month, he signed an "Exclusive Right To Sell Listing Agreement For Sale Of Real Property At Auction", which was prepared and presented to him by Bruce Deppoliti (State's Ex. 3). At no time was Henderberg, or the bidders at the subsequent auction, shown or given a document containing the disclosure language set forth in RPL §443.

The agreement provided for the sale of the property at unreserved auction on or about September 25 (no year stated), with Northeast to receive a 10% commission from the buyer, and with the seller having the right to bid for the property subject to the obligation to pay the same 10% commission.

¶15 of the agreement, printed in 8 point type reads as follows:

"THE UNDERSIGNED DOES HEREBY CERTIFY THAT THE FOLLOWING IS UNDERSTOOD:

EXPLANATION OF LISTINGS: (Require by NYS Regulations)

An 'Exclusive Right to Sell' listing means that if you, the owner of the property, find a buyer, you must pay the agreed commission to the present broker.

An 'Exclusive Agency' listing means that if you, the owner of the property, find a buyer, you will not have to pay a commission to the Broker. However, if another Broker finds a buyer, you will owe a commission to both the selling Broker and your present Broker."

4) An auction, at which both Deppolitis were present, was held on September 25, 1993. The machinery and cattle were sold before the start of the sale of the real property, which was offered in various parcels corresponding to the several deeds held by Henderberg (State's Ex. 11). No announcements were made to advise prospective bidders about the back taxes.

5) As a result of the auction Henderberg and his mother, Kathryn Henderberg, signed a contract, prepared by Northeast's real estate salesperson Pat Houser on a Blumberg's Law Products form and presented to them by James Deppoliti, for the sale of one of the vacant parcels for \$20,900.00 to Henry J. Sandefer (State's Ex. 5). It was the regular practice of the respondents to have Ms. Houser prepare such contracts, subject in all cases to the supervision of either Bruce or James Deppoliti. The form did not contain an attorney approval clause, the parties were not represented by attorneys at the time,¹ and neither the respondents nor any other representatives of Northeast ever suggested to Sandefer that he consult with an attorney. The form was executed by the parties, and Sandefer gave Northeast a deposit \$2,090.00.

Pursuant to the contract the deposit represented the buyer's premium, was to be held until the offer was accepted, and was non-refundable by Northeast. In the event that Henderberg did not provide good title he was to refund the deposit.

At no time was Sandefer given a document containing the disclosure language mandated by RPL §443, although the respondents had such a form which they had previously told complainant's investigator it was their practice to give to buyers (State's Ex. 10).

¹ Mr. Henderberg had previously spoken to his lawyer about the auction, but Sandefer had not.

Other parcels were successfully bid on by other bidders.

6) Subsequent to the auction, sometime in December 1993 or early 1994, the Henderbergs were sued by Fleet Bank, and a lien was placed against the property, thereby preventing any sales. On February 2, 1994 Farm Credit foreclosed on the farm, and it was sold to Fred and Jean Dykeman on February 7, 1994. Accordingly, none of the auction sales ever closed.

7) Prior to the foreclosure sale Sandefer's attorney wrote to Northeast, stating that if the sale to Sandefer could not close through no fault of his own he expected an immediate refund of the deposit (State's Ex. 6). After the foreclosure he contacted Northeast again, and again requested a refund. The deposit was not, however, refunded until September, 1994, after the complainant's investigator had spoken to James Deppoliti about the matter.

8) On or about July 1, 1992 Warren Rodman contacted Northeast with regards to selling his property located in Minden, New York, on which he lived and raised horses. James Deppoliti inspected the property and assured Rodman and his wife that the property would bring between \$150,000 and \$200,000 at auction.² He falsely told the Rodmans that he would have to conduct an unreserved auction, and that he would be in trouble with the State if he conducted an auction with a reserve.

On July 1, 1992 the Rodmans entered into a listing agreement, of the type used in the Henderberg transaction, with Northeast for an unreserved auction of their property on or about August 22 (no year stated), signing the same type of form (prepared by James Deppoliti) as was used in the Henderberg transaction (State's Ex. 12). Prior to the signing James Deppoliti told the Rodmans that there was no need for them to take it to an attorney.

9) Advertisements for the auction appeared in the August 24, 1992 editions of "Country Folks West" and "The Mohawk Valley Pennysaver" in which it was indicated that the Rodmans' property had been sold (State's Ex. 13 and 14). There is conflicting evidence on whether the "Country Folks West" ad was published before or after the auction. However, Mr. Rodmans' testimony that "The Mohawk Valley Pennysaver" ad was published before the auction was unrefuted. The Rodmans were billed for the ads by Northeast

² I do not find credible James Deppoliti's testimony that he does not tell prospective sellers how much they might expect to get for their property. The respondents claim that they conduct 50 to 60 real estate auctions each year, and it is simply not logical to believe that they would be able to contract with that many sellers without giving them some idea of how much money they might receive.

(Resp. Ex. C).

10) The auction took place on August 22, 1992 with both of the Deppolitis present. As it continued the bids did not reach a level which the Rodmans considered acceptable. Eventually James Deppoliti asked them what the least they would accept was, and they told him \$125,000. After resuming the auction and not getting a bid in excess of \$66,000, he announced to the assembled bidders that the Rodmans at exercised their right to bid on the property for \$115,000, and terminated the auction. At no time did the Rodmans ever make such a bid, and they did not sign any agreement to purchase the property.

11) On August 27, 1993, through the filing of a summons, complaint, and notice of pendency with the Montgomery County Clerk, Northeast commenced suit against the Rodmans (State's Ex. 15). The complaint, verified by Bruce Deppoliti, alleged that the Rodmans had bid \$116,000 for the property, and were obligated to pay Northeast a commission of \$11,600 and an additional \$2,000 for advertising costs.³ Northeast subsequently served an order to show cause why an amended complaint alleging that the Rodmans had bid \$116,001 after a top bid of \$116,000 and a preliminary injunction against the conveyance of the property should not be granted (State's Ex. 16).

On March 14, 1994 the Hon. Robert P. Best, Supreme Court, Montgomery County, in accordance with a decision dated February 23, 1994, issued an order denying Northeast's motion for a preliminary injunction, granted both the Rodmans' cross motion to cancel the notice of pendency and Northeast's motion for leave to serve an amended complaint, and awarded the Rodmans \$100 in motion costs (State's Ex. 17 and 20). In the underlying decision the Court found that because no purchase offer had been executed or agreed to, Northeast had failed to establish the likelihood of success on the merits. The \$100 was paid to the Rodmans' attorney, and they paid him an additional \$300 for his services (State's Ex. 19).

Northeast subsequently moved for permission to reargue the motion for a preliminary injunction. By decision and order dated August 2, 1994, Justice Best denied the motion and granted unspecified costs to the Rodmans (State's Ex. 18). Those costs were never paid.⁴

12) At no time were the Rodmans or the bidders given a

³ The advertising costs, which were authorized by the Rodmans in the listing agreement with Northeast (Comp. Ex. 12), and were substantiated with Respondents' Exhibit C.

⁴ No evidence was presented as to the amount of those costs.

disclosure document containing the language mandated by RPL §443.

13) In or about early July 1992, pursuant to an appointment, James Deppoliti came to the house of Frances and Jerome Wisneski to discuss with them the sale of their 60 acre property, on which they lived, and which they operated as a dairy farm. He told them that the land could be subdivided and would bring between \$80,000 and \$120,000 at auction. Mrs. Wisneski told him that they needed to get between \$65,000 and \$75,000 to pay off the mortgages on the property.

On July 31, 1992 the Wisneskis signed a listing agreement of the type used in the Henderberg and Rodman transactions given to them by James Deppoliti (State's Ex. 21).

14) The auction took place on September 12, 1992 with both Deppolitis present. The property was offered both as a whole and in 9 parcels. James Deppoliti and Mr. Wisneski had previously been advised by local Town authorities that properties could be divided into 4 parcels without subdivision approval, and that binders could be taken prior to such approval. In addition, since the Wisneski property consisted of two separate tax parcels, one of which was divided by a public road, it was anticipated by the town attorney that there would be no need to obtain planning board approval for the 9 parcels (State's Ex. 22).

At a break in the auction proceedings the respondents advised the Wisneskis, who were inside the house while the bidding took place outside, that the bids were up to \$39,000 or \$40,000, but that it was only the first round and they would keep going. By the next break the bidding was up to something between \$50,000 and \$55,000, and the Wisneskis told the respondents that they needed to get \$65,000. The next thing the Wisneskis knew the auction was over and they were given a contract for the sale of a single 18 acre wood lot for \$12,925.00, which they signed (State's Ex. 23).

The contract for the sale of the 18 acres was on a Blumberg form prepared by salesperson Houser, and did not contain an attorney approval clause. Prior to their signing of it the Wisneskis were not advised by the respondents to see a lawyer.

The sale never closed because the buyer refused to complete the transactions. The Wisneskis did not receive any part of the ten percent buyer's premium which the buyer had paid to the respondents. Northeast claimed as its commission for the sale of the 18 acre parcel all but \$117.50 of that premium.

15) The Wisneskis never bid on or signed a contract to purchase the property. However, on or about August 19, 1993 Northeast caused the Wisneskis to be served with a summons, a notice of pendency, and a complaint, verified by Bruce Deppoliti,

in an action alleging that they had bid \$65,000 for the property and, therefore, owed a commission of \$6,500.00 and advertising expenses of \$2,000.00.⁵ After crediting the Wisneskis with the \$117.50 of the buyer's premium on the 18 acres which it had not claimed as a commission on that transaction, Northeast demanded damages of \$8,382.50 (State's Ex. 24).

By order to show cause dated October 19, 1993 Northeast moved for a preliminary injunction or an order of attachment and to amend its complaint, and the Wisneskis cross moved to cancel the notice of pendency. By decision dated February 17, 1994 and order dated March 14, 1994 the Court, finding that Northeast had failed to establish the likelihood of success on the merits, denied Northeast's motion except for granting leave to amend the complaint, granted the cross motion to cancel the notice of pendency, and awarded the Wisneskis \$100.00 in costs (State's Ex. 25 and 26). Because the respondents were never asked by their attorney for money to pay the costs, they were never paid.

16) Because of the notice of pendency the Wisneskis had been unable to close on contracts for the sale of two parcels which had resulted from a new auction conducted by another auctioneer, and the deals died. At the time the Wisneskis were in arrears on their mortgage, but the mortgagee had agreed to wait for the sales. When those sales did not take place the mortgagee demanded payment. In view of that, and of other debts which the Wisneskis had hoped to be able to partially satisfy through the sales, they were forced to file for bankruptcy. As a result of the bankruptcy Northeast's law suit has been stayed.

17) At no time were the Wisneskis or the bidders given a disclosure document containing the language mandated by RPL §443.

OPINION

I- As the party which requested the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges contained 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).

II- So long as the issue has been fully litigated by the

⁵ The advertising expenses were provided for in the listing agreement (Comp. Ex. 21).

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 (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 complaint names Deppoliti's Northeast Realty as a separate respondent. That is, however, merely the assumed name under which Bruce Deppoliti conducts business. See General Business Law §130. Accordingly, all of the above stated requirements having been met, the complaint should be and is amended to conform to the proof, so that any references in it to Northeast are read as applying to Bruce Deppoliti. This ruling is not affected by RPL §442, inasmuch as Bruce Deppoliti was directly involved in and/or aware of the misconduct at the time that it occurred.

III- Pursuant to 19 NYCRR 175.24, all commission agreements obtained by broker which provide for an exclusive listing of residential property consisting of one, two or three family dwellings must contain certain specified language explaining exclusive listings, printed in type the size of which is not less than six points. As alleged in the complaint, the language in the Rodman and Wisneski listings was not in compliance with that regulation.⁶ However, both the Rodman and Wisneski properties were working farms, and, therefore, the regulation does not apply to those listings.

IV- When the Rodmans and the Wisneskis entered into the listing agreements with Northeast the respondents became their agents. Division of Licensing Services v Donati, 17 DOS 90, conf'd. sub nom Donati v Shaffer, 187 AD2d 426, 589 NYS2d 552 (1992), mod. on other grnds. 83 NY2d 828, 611 NYS2d 495 (1994). The relationship of agent and principal is fiduciary in nature,

⁶ The explanation of an exclusive right to sell used by the respondents only contains the required language regarding sales by the owner of the property, and omits the required language regarding sales by other brokers. The evidence establishes that the size type used was 8 point and, therefore, larger than the minimum required.

"...founded on trust or confidence reposed by one person in the integrity and fidelity of another." Mobil Oil Corp. v Rubenfeld, 72 Misc.2d 392, 339 NYS2d 623, 632 (Civil Ct. Queens County, 1972). Included in the fundamental duties of such a fiduciary are good faith and undivided loyalty, and full and fair disclosure. Such duties are imposed upon real estate licensees by license law, rules and regulations, contract law, the principals of the law of agency, and tort law. L.A. Grant Realty, Inc. v Cuomo, 58 AD2d 251, 396 NYS2d 524 (1977). The object of these rigorous standards of performance is to secure fidelity from the agent to the principal and to insure the transaction of the business of the agency to the best advantage of the principal. Department of State v Short Term Housing, 31 DOS 90, conf'd. sub nom Short Term Housing v Department of State, 176 AD 2d 619, 575 NYS2d 61 (1991); Department of State v Goldstein, 7 DOS 87, conf'd. sub nom Goldstein v Department of State, 144 AD2d 463, 533 NYS2d 1002 (1988).

Even before the creation of the agency the respondents had the obligation to be honest with their prospective principals, as they did with all members of the public. Division of Licensing Services v Century 21 All The Best Ltd., 122 DOS 93; Division of Licensing Services v Linfoot, 60 DOS 88, conf'd. sub nom Harvey v Shaffer, 156 AD2d 1013, 549 NYS2d 296 (1989). In spite of that, James Deppoliti falsely represented to the Rodmans that they could not set a reserve price in their auction. In so doing, he demonstrated untrustworthiness. Likewise, by failing to disclose to the bidders at the Henderberg auction that back taxes were owed on the property, a fact that could impact on their ability to obtain clear title, the respondents demonstrated untrustworthiness and incompetency.

The record does not support the allegations that the respondents failed to explain to the Rodmans and the Wisneskis the difference between an auction with a reserve and an auction without a reserve, and that charge should be dismissed. In addition, the charge that Bruce Deppoliti and Northeast failed to disclose to prospective bidders that the Henderberg property was under foreclosure must be dismissed, as at the time of the auction no foreclosure proceeding had been started.

V- The evidence that prior to the Rodman auction Northeast caused to appear in the "Pennysaver" an advertisement stating that the property had been sold was unrefuted. While James Deppoliti testified that the expected number of persons came to the auction, it was certainly an act of incompetency to allow such a false and misleading advertisement, for which the Rodmans were billed, to appear.

VI- Pursuant to RPL §443 a real estate broker or salesperson must supply an agency disclosure form to the owner of residential real property prior to entering into a listing agreement, and to a

prospective buyer at the first substantive contact. The respondents contend that the statute does not apply to the transactions which are the subject of this proceeding because they all involved the sale of working farms and not, therefore, of residential property. Their interpretation of the scope of the statute is overly restrictive.

RPL §4439(f) defines "residential real property" as meaning real property improved by a one to four family dwelling used or occupied or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons. That definition is different from that found in 19 NYCRR 175.24, which restricts the definition of "residential property" to the homes themselves. Therefore, although the Henderberg, Rodman, and Wisneski properties were all working farms, the fact that they were improved with occupied dwellings brought them within the scope of the statute, and Northeast was, as alleged in the complaint, required to deliver disclosure forms to both the sellers and the bidders.

It appears that the violation of the statute arose from the respondents' misunderstanding of its applicability. That misunderstanding precludes, under these circumstances, a finding of untrustworthiness, but not of incompetency.

VII- Real estate brokers and salespersons are permitted to prepare purchase offer contracts subject to very definite limitations.

"The line between such permitted acts by real estate brokers and the unauthorized practice of the law has been recognized as thin and difficult to define and, at time, to discern. Whether or not the services rendered are simple or complex may have had a bearing on the outcome, but it has not been controlling....

The justification for granting to real estate brokers and agents the privilege to complete simple purchase and sale documents has been said to be the practical aspect of the matter, that is, the business need for expedition and the fact that the broker has a personal interest in the transaction. It should be noted in this regard, however, that the so-called 'simple' contract is in reality not simple....The personal interest of the broker in the transaction and the fact that he is employed by one of the opposing parties are further reasons to require that, insofar as the contract entails legal advice and drafts-

manship, only a lawyer or lawyers be permitted to prepare the document, to ensure the deliberate consideration and protection of the interests and rights of the parties.

The law forbids anyone to practice law who has not been found duly qualified and licensed to do so....Thus, the privilege accorded to real estate brokers and agents must be circumscribed for the benefit of the public to ensure that such professionals do not exceed the bounds of their competence and, to the detriment of the innocent public, prepare documents the execution of which requires a lawyer's scrutiny and expertise." Duncan & Hill Realty v Dept. of State, 62 AD2d 690, 405 NYS2d 339, 343-344 (1978) (citations omitted), appeal dismissed 45 NY2d 821, 409 NYS2d 210.

In preparing a purchase offer contract, real estate brokers and salespersons may not insert any provision which requires the exercise of legal expertise. They may not devise

"legal terms beyond the general description of the subject property, the price and the mortgage to be assumed or given....(and) may readily protect (themselves) from a charge of unlawful practice of law by inserting in the document that it is subject to the approval of the respective attorneys for the parties. Moreover, a real estate broker or agent who uses (a purchase offer form) recommended by a joint committee of the bar association and realtors association of his local county, who refrains from inserting provisions requiring legal expertise and who adheres to the guidelines agreed upon by the American Bar Association and the National Association of Real Estate Brokers...has no need to worry about the propriety of his conduct in such transactions." Duncan & Hill Realty v Dept. of State, supra, 405 NYS2d at 345.

The complaint alleges that James Deppoliti engaged in the unlicensed practice of law by preparing the purchase offer contracts without attorney approval clauses in the Henderberg and Wisneski transactions. The evidence establishes that those contracts were prepared by salesperson Houser under the supervision of one of the Deppolitis. However, it was not shown which of the Deppolitis was involved with these particular contracts. Accordingly, the complaint has failed to establish which of the

individual respondents is responsible for those violations of Judiciary Law §478. The matter will, nevertheless, be referred to the Attorney General for investigation pursuant to Judiciary Law §476-c.

VIII- At the auction of September 25, 1993 Northeast received a deposit of \$2,090.00 towards the purchase of one of the parcels from Henry Sandefer. By the terms of purchase agreement, upon acceptance of the offer by Henderberg that deposit, representing the buyer's premium, became the property of Northeast. Northeast was not obligated to refund it, although upon failure to convey good title Henderberg was. Accordingly, the failure of the respondents to refund the deposit until September, 1994 was not, of itself, improper.⁷

IX- Northeast, acting on complaints verified by Bruce Deppoliti, sued the Rodmans and the Wisneskis. The complaints falsely alleged that both the Rodmans and the Wisneskis had made the highest bids for their properties, when what had in fact happened was that James Deppoliti, with Bruce Deppoliti present, had stopped both auctions after the Rodmans and Wisneskis had told him that they needed more money than had been bid, and, in the case of the Rodmans, falsely announced that the sellers had exercised their right to bid.

The problems with the Rodman and Wisneski auctions arose directly out of James Deppoliti's telling them that they could expect that the auctions would result in sales prices of, respectively, between \$150,000.00 and \$200,000.00, and between \$80,000.00 and \$120,000.00. Had he not made such representations on behalf of Northwest it is fair to presume that the Rodmans and the Wisneskis, who had the right to rely on the respondents' good faith and expertise, 3 NYJur2d Agency, §§186-188, would not have so readily entered into the agency agreements with Northwest.

In suing the Rodmans and the Wisneskis for commissions, Bruce Deppoliti, d/b/a Northwest, demanded unearned commissions, improperly took advantage of his principals' reliance on James Deppoliti's apparently unfounded representations, and wrongfully placed his interests ahead of the interests of those principals, Restatement (Second) of Agency, §387; 3 NYJur2d Agency, §195, thereby demonstrating untrustworthiness. Essentially what happened was that first James Deppoliti, acting as agent for Bruce Deppoliti, d/a/b Northeast, his employing broker, misled the

⁷ Had the respondents been charged with misconduct for using such a contract without making proper disclosure to bidders prior to the auction, or for failing to advise Henderberg of his obligation to promptly refund the deposit, the findings with regard to this transaction might have been different.

Rodmans and the Wisneskis into agreeing to an auction and then, when the events did not conform to James Deppoliti's predictions, Bruce Deppoliti attempted to place on the Rodmans and the Wisneskis the full responsibility for the respondents' business errors.

X- Bruce Deppoliti has failed to pay the \$100.00 in costs due the Wisneskis. That is equivalent to a failure to satisfy a judgement, which has been held to be a demonstration of untrustworthiness. Department of State v Feldman, 113 DOS 80, conf'd. sub nom Feldman v Department of State, 81 AD2d 553, 440 NYS2d 541 (1981). However, the failure to make the payment in this case is excused by the fact of the Deppolitis' reasonable reliance on the advice of their attorney as to what payments are required. Flushing Kent Realty Corp. v Cuomo, 55 AD2d 646, 390 NYS2d 146 (1976).

XI- In setting the penalties to be imposed on the respondents, I have taken into consideration the very serious nature of their misconduct. James and Bruce Deppoliti failed to disclose essential information to bidders at the Henderberg auction. James Deppoliti misled both the Rodmans and the Wisneskis, causing them to enter into agency agreements for the auction of their properties. Then, when the auctions did not go as he had led them to believe they would, he caused them to be held liable for bids which they did not make. Bruce Deppoliti then brought suit against the Rodmans and the Wisneskis for unearned commissions using complaints which made false allegations. James Deppoliti's testimony on direct examination shows that he was intimately involved in those lawsuits. Such predatory conduct establishes that in doing business with the respondents "...any confidence or reasonable expectation of fair dealing to the general public would be misplaced" Chiaino v Lomenzo, 26 AD2d 469, 275 NYS2d 658 (1966).

CONCLUSIONS OF LAW

1) By falsely representing to the Rodmans that they could not set a reserve price for their auction James Deppoliti demonstrated untrustworthiness as a real estate salesperson.

2) By failing to disclose to the bidders at the Henderberg auction that back taxes were owed on the property the respondents demonstrated untrustworthiness and incompetency.

3) By causing, prior to the Rodman auction, an advertisement to appear in "The Mohawk Valley Pennysaver" stating that the property had been sold Bruce Deppoliti, d/b/a Deppoliti's Northeast Realty, demonstrated incompetency as a real estate broker.

4) By failing to supply agency disclosure forms in any of the transactions which are the subject of this proceeding Bruce Deppoliti, d/b/a Deppoliti's Northeast Realty, violated RPL §443

and demonstrated incompetency as a real estate broker.

5) By commencing suit against the Rodmans and the Wisneskis based on false claims that they had been the high bidders for their properties Bruce Deppoliti, d/b/a Deppoliti's Northeast Realty, demonstrated untrustworthiness as a real estate broker.

6) The complainant failed to prove by substantial evidence the following matters alleged in the complaint: that the respondents failed to inform the Rodmans and the Wisneskis of the difference between a reserved and an unreserved auction; that Northeast wrongfully failed to pay the full costs awarded to the Rodmans and the Wisneskis; that James Deppoliti offered the Wisneski property without required subdivision approval; that the respondents violated 19 NYCRR 175.24; that Bruce Deppoliti improperly failed to disclose to the bidders that the Henderberg property was under foreclosure; that James Deppoliti engaged in the unlicensed practice of law; and that the respondents acted improperly in not refunding until September, 1994 to Henry Sandefer the deposit paid by him. Accordingly, those charges should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Bruce G. Deppoliti, d/b/a Deppoliti's Northeast Realty, has violated Real Property Law §443 and has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, all licenses issued to him as a real estate broker is revoked, effective immediately, and

IT IS FURTHER DETERMINED THAT James P. Deppoliti has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate salesperson is revoked, effective immediately.

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