

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-

**JOHN DROZ, JR. d/b/a ADIRONDACK
REAL ESCAPES,**

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 April 27, 1993 at the New York State Office Building located at 333 East Washington Street, Syracuse, New York.

The respondent, of Star Route Box 50, Greig, New York 13345, having been advised of his right to be represented by an attorney, appeared pro se.

The complainant was represented by Timothy Mahar, Esq.

COMPLAINT

The complaint alleges that the respondent, a licensed real estate broker, failed to promptly place a deposit in a special account, in violation of 19 NYCRR 175.1; engaged in the unlawful practice of law by drafting preprinted terms of and addenda to a purchase and sale contract lacking an attorney approval clause; and failed to make clear for which party in a transaction he was acting.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail on November 30, 1992 (Comp. Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker under the trade name Adirondack Real Escapes (Comp. Ex. 2).

3) Sometime in 1986 the respondent entered into an agreement with Mr. and Mrs. James Grygiel to act as their agent in procuring a purchaser for the apartment house which they owned at 1001 Park Avenue, Utica, New York. Pursuant to that agreement, the respondent entered into discussions regarding the property with David Wallace, a possible purchaser.

On October 28, 1986 Wallace made an offer to purchase the property. The respondent, who is not an attorney, prepared, on a form which he had created with the advice of two attorneys and which he had copyrighted and had printed, and which had not received the approval of either a bar association or a board of realtors and which did not contain a provision making it subject to the approval of the parties' attorneys, a contract for the purchase and sale of the property. The contract provided for a total purchase price of \$190,000.00, with a deposit upon signing of \$1,000.00. The respondent also prepared an addendum providing for the sellers to hold a second mortgage, setting forth the terms of the mortgage and providing for a two week delay after closing delay before the mortgage would be recorded (Comp. Ex. 3).

With Wallace's verbal authorization the respondent signed Wallace's name to the contract. He delivered the contract and addendum to the Grygiels, who took it with them on vacation. The rest of the chronology regarding this contract is unclear. While the date written above Mr. Grygiel's signature (Mrs. Grygiel did not sign the contract) is October 28, 1986, it appears that he actually signed at some later date. Also, while the deposit check issued by Wallace is dated November 8, 1986 (Comp. Ex. 6) and was not deposited in the respondent's special account until November 25, 1986 (Resp. Ex. C), the respondent testified that his best recollection is that he received the check on November 23, 1986, while the investigator testified that it was her recollection of a conversation had with the respondent in 1987 that he said that he had received the check on November 8, 1986 and had delayed depositing pursuant to his policy of not cashing deposits until the seller had signed acceptance of the offer, a conversation of which the respondent denies any recollection.

Again at a date uncertain, Wallace decided that he did not wish to go through with the purchase at the stated price of \$190,000.00, since the property had been appraised at \$180,000.00. Accordingly, the respondent, with input from the parties and their attorneys, drew up a new contract, on the same form, providing for a purchase and sale at \$180,000.00. He also prepared, at the instance of the sellers' attorney, an addendum providing that he would accept a \$35,000.00 second mortgage as his full compensation.

This was in lieu of the previously agreed upon 10% commission, the higher figure having been arrived at in consideration of the expected need to sell the mortgage at a discount according to the calculations of the sellers' attorney (Comp. Ex. 8). It was agreed that the respondent would accept the mortgage, instead of the sellers accepting it, after they and their attorney determined that the most that they could get on discounting the mortgage would be \$15,000.00, or \$3,000.00 less than the commission which they would owe the respondent. The addendum also provided for a delay in the recording of the second mortgage; that the purchaser would receive a credit in the amount of the second mortgage against the purchase price; and that the purchaser had the option of buying the mortgage back at a yield of 20% (Comp. Ex. 4). At no time did the respondent discuss with the Grygiels what, if any, effect his participation in the transaction might have on the performance of his fiduciary duties as their agent. Wallace signed the contract on December 4, 1986 and Mr. Grygiel signed on December 10, 1986. Mrs. Grygiel again did not sign.

Both of the contracts had provided, based on advice received by the Grygiels from their attorney, that the closing of title must occur in 1986. The reason for that was changes which were to take effect in the treatment of capital gains pursuant to the Internal Revenue Code. However, because Wallace was unable to finalize his financing in time, while a deed was executed by the Grygiels on December 31, 1986 (Comp. Ex. 9), it had to be held in escrow pending completion of the financing.

The actual closing occurred on March 18, 1987. Wallace assumed the existing mortgage on the property and received credit for the \$35,000.00 second mortgage, and the Grygiels received \$47,000.00 net. The deed was recorded on March 24, 1987. Because of financial difficulties experienced by Wallace, the respondent never actually received the promised mortgage, which at some point it had been agreed, in order to satisfy the bank which providing the primary financing, would be on some other property owned by Wallace.

4) In addition to the matters discussed above, over the objections of the respondent that it was irrelevant, evidence was received subject to connection regarding another transaction involving property known as "The Wiffletree Inn." Having heard and reviewed all of the evidence, I find that a sufficient connection to the charges was not established. Therefore, all evidence regarding that transaction is deemed stricken from the record.

OPINION

I- The respondent has moved for dismissal of the complaint based on an alleged violation of State Administrative Procedure Act (SAPA) §301(1), which provides that "(i)n an adjudicatory proceed-

ing all parties shall be afforded an opportunity for a hearing within reasonable time," a requirement which is mandatory, not discretionary. Maxwell v Commissioner of Motor Vehicles, 109 Misc.2d 62, 437 NYS2d 554 (Supreme Ct. Erie County, 1981).

In order to show that a hearing has not been held within a reasonable time, the respondent must show substantial prejudice arising out of the delay. Correale v Passidomo, 120 AD2d 525, 501 NYS2d 724 (1986); Geary v Com'r of Motor Vehicles, 92 AD2d 38, 459 NYS2d 494 (1983); cf. Eich v Shaffer, 136 AD2d 701, 523 NYS2d 902 (1988). Such a showing can be made with a demonstration by the respondent that his ability to present defense witnesses with a clear and detailed recollection of the events has been hampered by the delay. Walia v Axelrod, 120 Misc.2d 104, 465 NYS2d 443 (Supreme Ct. Erie County, 1983). However, the respondent must show that the delay significantly and irreparably handicapped him in preparing a defense. Reid v Axelrod, 164 AD2d 973, 559 NYS2d 417 (1990); Gillette v NYS Liquor Authority, 149 AD2d 927, 540 NYS2d 61 (1989).

The events in this case occurred in 1986 and 1987. The investigation by the complainant was opened in 1987 and assigned to investigator John Eramo. After Eramo left his employment with the complainant the matter was reassigned to investigator Donna Clark, who some 14 months after the respondent spoke with Eramo, contacted and spoke with the respondent. 14 months later the respondent received another letter from Clark, and the respondent again met with her and answered her inquiries. 18 months later Clark telephoned the respondent and requested various forms, which were supplied. 12 months later Clark again telephoned the respondent and requested additional forms. The complainant's only explanations for the delay are the change of investigators, which occurred over 4 years before the commencement of these proceedings, a change of attorneys assigned to the case in the summer of 1992, approximately 5 years after the investigation was opened, and a possibility that there might have been a previous change of attorneys, none of which reasonably accounts for the passage of nearly 6 years from the events in question to the service of the complaint.

The memory of the witnesses is crucial with regards to the question of whether the respondent properly deposited Wallace's deposit. 6 years after the event, and over 4 years after her interview of the respondent on the subject, the respondent's and Clark's memories of what occurred and was said are not sufficiently clear to be relied on. The delay also appears to possibly be responsible for the lack of the testimony of Eramo, who might have been able to shed additional light on the question. I find, therefore, that with regards to the issue of the handling of the deposit the respondent has been substantially prejudiced by the delay.

In view of the foregoing, the complainant's motion to amend the pleadings to conform to the proof on the issue of the deposit is moot.

The respondent has not established that he has been prejudiced by the delay with regards to the charge of unlawful practice of law. The basic questions there are who prepared the form, whether it had the required approvals, and whether it contained attorney approval language. As to preparation, the respondent and the attorneys who assisted him are clear in their memories, and as to content, the forms are in evidence and speak for themselves.

There has also been no prejudice established with regards to the charge of failure to make clear whom the respondent was representing. The memories of the witnesses on that issue also appeared clear.

II- Real Estate brokers 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 times, 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 draftsmanship, 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 form used by the respondent, was not recommended by a joint committee of the bar and realtors associations of any county. While it was prepared with the advice and assistance of two attorneys, it was fundamentally the creation of the respondent, who is not himself an attorney. He attached to the contracts addenda which he drafted and which included, among other things, language regarding delays in the recording of second mortgages. Such language requires legal expertise with regards to the effect of such delays.

The respondent has attempted to justify his use of the contract form on the grounds that it was reviewed by attorneys, who also had some input with regards to its content. In Flushing Kent Realty Corp. v Cuomo, 55 AD2d 646, 390 NYS2d 146 (1976), it was held that a respondent could not be found to have acted improperly where it undertook certain action (the commencement of a law suit)

on the advice of its attorney, and where there was a reasonable basis for that attorney's advice. However, action which is clearly in violation of law is not excused by reliance on the advice of legal counsel, since it is the public policy of the State of New York "that each individual, by himself, shoulders the responsibility for obeying the law...." Butterly & Green Inc. v Lomenzo, 36 NY2d 250, 367 NYS2d 230, 235 (1975). Here, the respondent's conduct was in direct violation of Judiciary Law §478. Nevertheless, reliance upon the advice of counsel can negate proof of intent, Division of Licensing Services v Guisto, 34 DOS 92; Department of State v Mole, 40 DOS 86, and may be considered in mitigation of the seriousness of the violation. Division of Licensing Services v Christiana, 164 DOS 92.

III- The remaining issue is whether the respondent failed to make clear for whom he was acting. The evidence clearly establishes that he was acting as agent for the sellers, and there is no evidence that any of the parties were unaware of that. While the complainant alleges that the respondent failed to disclose the possible conflict of interest inherent in his agreeing to accept a second mortgage from the buyer, that agreement was the result of a suggestion by the seller's attorney, who no doubt understood the implications of it.

CONCLUSIONS OF LAW

1) With regards to the charge that the respondent improperly delayed depositing the buyer's deposit in his special account, the respondent has been substantially prejudiced by the long delay in the bringing of charges. SAPA §301(1). Accordingly, that charge should be dismissed.

2) By presenting the parties with contracts on preprinted forms which had not been recommended by a joint committee of a bar association and an association of realtors and which did not contain an attorney's approval contingency clause, and which had attached to them addenda the drafting of which required legal expertise, the respondent violated Judiciary Law §478 and demonstrated incompetency as a real estate broker.

3) The complainant has failed to meet its burden of establishing by substantial evidence that the respondent failed to make clear to the parties for whom he was acting, and, therefore, that charge should be dismissed. SAPA §306(1).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT John Droz, Jr. has demonstrated incompetency as a real estate broker, and accordingly, pursuant to Real Property Law §441-c, he shall pay a fine of \$250.00 to the Department of State on or before July 31, 1993, and

should he fail to pay the fine then all licenses as a real estate broker issued to him shall be suspended for a period of one month, commencing on August 1, 1993 and terminating on August 31, 1993, and

IT IS FURTHER DETERMINED THAT upon payment of the fine or termination of the suspension in lieu thereof the respondent's licenses as a real estate broker shall be further suspended until such time as he shall file an affidavit with the complainant stating that he will no longer make use of any form contracts for the purchase and sale of real property in violation of the holding in Duncan & Hill Realty v Dept. of State, supra.

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