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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-

TRACY EVANS
EVANS BLAKE WINTHROP REALTY

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 January 11, 1993 at the office of the Department of State located at 270 Broadway, New York, New York 10007.

The respondent, of 280 Park Avenue South, Suite 22A, New York, New York 10010, was represented by Leslie Trager, Esq., Trager & Weiss, 230 Park Avenue, New York, New York.

The complainant was represented by Daniel Shapiro, Esq.

COMPLAINT

The complaint in the matter alleges that the respondent, a licensed real estate broker, has been convicted after trial of various felony counts based upon her actions in defrauding the State of New York of Medicaid monies, and that by reason thereof she is not entitled to be licensed as a real estate broker and has engaged in conduct demonstrating untrustworthiness and/or incompetency.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondent by certified mail received on October 23, 1992 (Comp. Ex. 1).

2) Tracy Evans is duly licensed as a real estate broker d/b/a Evans Blake Winthrop Realty, with an office located at 280 Park Avenue South, Suite 22A, New York, New York 10010 (Comp. Ex. 2).

3) On January 9, 1992, after a trial by jury, a verdict was rendered in Supreme Court, County of Bronx, finding the respondent guilty of one count of grand larceny in the second degree, one count of grand larceny in the third degree, one count of conspiracy in the fourth degree, and twenty counts of offering a false instrument for filing in the first degree, all felonies (Resp. Ex. A). She has received neither a certificate of good conduct or of relief from disabilities nor an executive pardon. The conviction is currently on appeal before the Appellate Division, First Department, and the respondent has been released on bail pursuant to the order of that Court.

OPINION

I- Real Property Law (RPL) §440-a states:

> "No person shall be entitled to a license as a real estate broker or real estate salesman under this article who has been convicted in this state or elsewhere of a felony, and who has not subsequent to such conviction received executive pardon therefor or a certificate of good conduct from the parole board, to remove the disability under this section because of such conviction."

The Court of Appeals has held that the issuance of a certificate of reasonable doubt (which counsel for the respondent equates with the order releasing the respondent on bail), and the pendency of an appeal, does not stay the applicability of a statutory provision which is activated by a conviction. "The application of the statute is not defeated by the possibility that the judgement might be reversed." In re Obergfell, 239 NY 48, 50 (1924).

This tribunal is aware of only one court decision interpreting that provision of the statute. Colombo v Lomenzo, 66 Misc.2d 604, 321 NYS2d 1000 (Supreme Ct., Special Term, New York County, 1971). For the reasons stated below we believe that decision to have been wrongly decided and respectfully decline to follow it.[1]

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[1] The decision was never reviewed on appeal, possibly because the petitioner, Joseph Colombo, was murdered. It may be of some significance that according to Shepard's New York Supplement Citations the decision has not been cited in any subsequent decision of any court.

In Colombo the Court distinguished the case before it by ruling that unlike in Obergfell the revocation of Colombo's license as a real estate salesperson was punishment for failure to live up to the standards of conduct required of such a licensee. An analysis of RPL Article 12A reveals that the loss of a license pursuant to RPL §440-a is not a punishment, which is provided for elsewhere in the statute, but rather is simply a disqualification from licensure. That becomes evident when reference is made to RPL §441-c, which states the grounds upon which a license as a real estate broker or salesperson may be revoked, and which makes no reference to conviction of a felony. Since the Legislature certainly cannot be thought to have meant that although conviction of a felony is a bar to holding a license under the statute once a license is issued a conviction will have no effect, it appears obvious that the effect of the statute is to nullify any previously issued license immediately upon the conviction of its holder.

The language of RPL §440-a is analogous to that of Judiciary Law §90(4)(a), which provides that any attorney convicted of a felony ceases to be an attorney. That section has been repeatedly interpreted as mandating immediate disbarment regardless of a pending appeal of the conviction. "The provisions of the statute above cited are mandatory and upon proof of conviction the order of disbarment follows as matter of course, notwithstanding the pendency of an appeal from the judgement of conviction." In re Frankel, 264 AD 299, 35 NYS2d 214, 215 (1942). See, also, Matter of Piluso, 68 AD2d 556, 418 NYS 111 (1979).

> "Stay of execution of a sentence does not alter the fact of conviction....Respondent is free to pursue appeal of his conviction. However, stay of execution of his sentence pending appeal has no effect on a petition to strike from the rolls the name of an attorney convicted of a felony." Matter of Dague, 91 AD2d 386, 458 NYS2d 588, 589 (1983).

Although not raised directly by the respondent, the question of due process of law in the context of this proceeding should be addressed.

> "The starting point for a discussion of appellant's due process claim must be the well-accepted rule that 'the requirements of procedural due process must be met before a State can exclude a person from practicing law.' We have said that in the disbarment context, the primary concern is the 'protection of the

> public interest.'[2] In our view, this concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession....Due process considerations do not require that a person convicted of a crime after a full and fair trial on the merits be afforded appellate review. Defendant's right to appeal from a judgement of conviction is solely predicated on statute[3]....Certainly, if appellant was given no right to appeal, his judgement of conviction would be final for all purposes. Even though the appellant here was afforded a right to appeal, this judgement of conviction is entitled equal respect as a final judgement on the merits unless and until reversed upon appeal. (Appellant) has had his day in court, and has had every opportunity to refute the charges made against him. In convicting him, a jury of his peers has credited the testimony of his accusers and rejected whatever defenses and evidence he may have set forth. A strong presumption of regularity attaches to that judgement of conviction." Mitchell v Ass'n of Bar of City of New York, 40 NY2d 153, 386 NYS2d 95, 96-97 (1976) (emphasis added, citations omitted).

II- In view of the foregoing, the question of whether the conduct underlying the convictions was a demonstration of untrustworthiness and/or incompetency is moot and need not be considered.

CONCLUSIONS OF LAW

By reason of her having been convicted of felonies and not having received neither a certificate of good conduct, a certificate of relief from disabilities, nor an executive pardon, the respondent is not entitled to be licensed as a real estate broker, and the license previously issued to her is no longer in effect.

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[2] The same has been said about Article 12A of the RPL. See, e.g., Dodge v Richmond, 5 AD2d 593, 173 NYS2d 786 (1958).

[3] While the cited case was considering a conviction under Federal law, the same applies to the right of appeal from a New York State conviction. See, e.g., People v Reed, 276 NY 5 (1938); People v Dunn, 157 NY 528 (1899).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT, pursuant to Real Property Law §440-a, Tracy Evans is not entitled to be licensed as a real estate broker and her license as a real estate broker was revoked by action of law upon her conviction.

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:

Maureen F. Glasheen
Deputy Secretary of State