

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-

**DONALD KINGSLEY,**

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 28, 1993 at the New York State Office Building located at 333 E. Washington Street, Syracuse, New York.

The respondent, of 248 Main Street, Oneida, New York 13421, having been advised of his right to be represented by an attorney, appeared pro se.

The complainant was represented by Compliance Officer William Schmitz.

**COMPLAINT**

The complaint alleges that the respondent violated Real Property Law (RPL) §443 by failing to complete the required agency disclosure form for a prospective buyer.

**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 duly licensed as a real estate broker d/b/a Don Kingsley Real Estate.

3) On March 20, 1992 Evan DuChene, a real estate salesperson associated with the respondent, obtained the signature of a potential buyer of real property (a relative of his) on a real estate agency disclosure form, and on March 29, 1992 he obtained the signature of the

potential co-buyer. The places provided for DuChene's name and for him to check off whether he was acting as agent of the seller or as agent of the buyer were left blank by him (Comp. Ex.2). The respondent, who had no knowledge of DuChene's omissions at the time that they occurred, had previously instructed all of the salespersons associated with him on the proper use of the form. Until being contacted by the complainant's investigator, the respondent was unaware of DuChene's failure to complete the form, and the record is devoid of any evidence that respondent received or retained any benefits, profits or proceeds of the transaction.

### OPINION

I- So long as the issue has been fully litigated by the 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).

In this case, although the complaint alleged that the respondent himself failed to complete the disclosure form, the evidence established that the failure was DuChene's. That is, however, related closely enough to the charges, that, considering the full litigation of issues, and the fact that it would appear that the same evidence would have been presented by the respondent had the complaint referred to non-completion of the form by DuChene, the complaint should be amended to conform to the proof and to allege that the respondent is liable for DuChene's failure to complete the form.

II- As the party which instigated the hearing, the burden is on the complainant to prove, by substantial evidence, that the respondent is guilty of the charges. 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- RPL §443, effective January 1, 1992, mandates that a form entitled "Disclosure Regarding Real Estate Agency Relationships" be

given to potential sellers and buyers of real property. ¶4 of that section sets forth the exact wording of the form. Included in the information which is required to appear on the form is the name of the agent presenting the form to, in this case, the buyers, and whether that agent represents the seller or the buyer. DuChene failed to include that information on the form, and the respondent readily admits that the failure to do so constituted a violation of the statute (Resp. Ex. A). The question remains, however, whether the respondent is liable for DuChene's violation.

A fundamental duty imposed on real estate brokers is to supervise the conduct of the salespersons associated with them. RPL §441(d); 19 NYCRR 175.21; Friedman v Paterson, 89 AD2d 701, 453 NYS2d 819 (1982), aff'd. 58 NY2d 727, 458 NYS2d 546. In light of that duty real estate salespersons are the agents of the brokers with whom they are associated, and not independent contractors, 2 NY Jur2d Agency §9, and brokers are liable for the acts of their associated salespersons carried out within the scope of their employment. 3 NY Jur2d Agency §239.

RPL § 442-c provides that no violation of any provision of RPL Article 12A by a real estate salesperson shall be deemed to be cause for the revocation or suspension of the license of the broker with whom that salesperson is associated unless the broker had actual notice of the violation or, after having received such notice, the broker retains the benefits, profits or proceeds of a transaction wrongfully negotiated by the salesperson. In this case, the complainant has failed to establish by substantial evidence such knowledge at the time of the violation or that the respondent retained any benefits, profits or proceeds. However, although his license may not, therefore, be subject to revocation or suspension, he still may be penalized, through the imposition of a fine, for the misconduct of his salesperson. Roberts Real Estate, Inc. v Department of State, 80 NY2d 116, 589 NYS2d 392 (1992).

III- There are several mitigating factors which must be considered in deciding what, if any, penalty should be imposed. First is the respondent's lack of knowledge of the violation and his apparent good faith efforts to educate his salespersons as to their obligations under the disclosure law. Second is the fact that at the time of the violation the statute had been in effect for less than three months. Lastly is the affidavit sworn to by the buyers in which they attest to the fact that DuChene verbally explained to them and they understood that he was acting as agent for the seller, (Resp. Ex. B), an indication that they were in no way harmed by the violation.

#### **CONCLUSIONS OF LAW**

By reason of DuChene's failure, while acting as a real estate salesperson on behalf of the respondent, to provide the buyers with a fully completed agency disclosure statement, the respondent may be held liable for a violation of RPL §443.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** Donald Kingsley has violated Real Property Law §443, and accordingly, pursuant to Real Property Law §441-c, he is reprimanded therefore.

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