

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-

THOMAS L. LAWSON,

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 March 10, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of Box 3046, Main Street, Bridgehampton, New York 11932, an attorney at law, having been advised of his right to be represented by counsel, appeared pro se.

The complainant was represented by Compliance Officer William Schmitz.

COMPLAINTS

The complaints in the matter allege that the respondent failed to furnish information concerning his real estate brokerage business upon request of a representative of the Secretary of State; failed to conspicuously display his real estate broker's license at his principal place of business; failed to file a change of association application for a salesperson in a timely manner; operated an unlicensed branch office until on or about August 12, 1992 at an address in Sag Harbor, New York; and operated a real estate brokerage business under an unlicensed trade name.

FINDINGS OF FACT

1) Notice of hearing together with a copies of the complaints was served on the respondent by certified mail (Comp. Ex. 1).

2) The respondent is currently licensed as a real estate broker in his individual name with a main office at box 3046, Main Street, Bridgehampton, New York, and with a branch office at box 2767 Main

Street, Sag Harbor, New York, his home (Comp. Ex. 2). However, as to the locations of his main and branch offices as of August 12, 1992, the time in question in the complaint, the evidence is conflicting. While a handwritten license search, used for the purposes of taking official notice of the records of Department of State, indicates that on that date the main office was located in Bridgehampton, a copy of a license certificate (Comp. Ex. 3), indicates that the main office was located in Sag Harbor. According to the respondent's testimony, Sag Harbor was a branch office.

3) On August 6, 1992 License Investigator Sam Napolitano conducted an inspection of the respondent's Bridgehampton office and observed that the respondent's license as a real estate broker was not posted. The license (Comp. Ex. 3) was then found, either on or in a desk, by Helen Fischetti, a real estate salesperson associated with the respondent.

Fischetti, although she was working as a real estate salesperson in association with the respondent, and had been since April, 1992, was not licensed in association with the respondent. An attempt to file a change of association card dated April 15, 1992 had been made, but the filing had been rejected because the card listed the broker's name as "Thomas Lawson Real Estate", a trade name, rather than just "Thomas Lawson", the respondent's individual name under which he is and was licensed (Comp. Ex. 5). Rather than then submitting a corrected card, the respondent decided to attempt to change the name on his license (which was unsuccessful apparently because of his submission of a defective application) and to wait to submit a change for Fischetti until the renewal of her license, which was not due until November 30, 1992.

The problem with the trade name on the change card resulted from the fact that the respondent was already doing business under the unlicensed assumed name (Comp. Ex. 7, Resp. Ex. A).

4) During his August 6, 1992 inspection Investigator Napolitano asked Fischetti to show him copies of the disclosure forms required pursuant to Real Property Law (RPL) §443 and of the underlying documents from the relevant transactions. She did not show him the disclosure documents, although she may have given him a copy of at least one lease (Resp. Ex. A). On a subsequent visit Napolitano again asked for the documents, and was then told by Fischetti that she had been instructed by the respondent not to give him any further documents. Napolitano then, at a later date, met with the respondent, who also refused to show him any documents until given a comprehensive written request listing all of the documents Napolitano was seeking. Napolitano declined to give the respondent such a writing.

OPINION

I- As the party which instituted the hearing, the burden is on the complainant to prove, by substantial evidence, the truthfulness 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).

The evidence regarding the charge that the respondent operated an unlicensed branch office in Sag Harbor is equivocal and confusing. There is no dispute or doubt that the office was licensed. The only issue raised by the complainant is whether the office had the proper type of license. Yet depending upon which documentation submitted by the complainant the tribunal relies, it can be concluded that the Sag Harbor office was licensed as either a main office or a branch office. Therefore, the complainant has failed to prove that the respondent operated an unlicensed branch office.

II- RPL §441-a(4) states:

"The license of a real estate broker shall be conspicuously displayed in his principal place of business at all times. Licenses issued for branch offices shall be conspicuously displayed therein."

The respondent admits, as reported by Napolitano, that his license was not posted in his Bridgehampton office. His explanation that his business was new and not yet fully organized does not excuse the violation. Nor is it mitigating, since compliance with the statute is such a simple matter.

III- RPL §442-b requires that where a real estate salesperson has entered into association with a broker, having previously been associated with another broker, the successor broker must file a change of association notification with the Department of State. While the respondent initially attempted to comply with that statute, the failure of the filing to be accepted was wholly of his own making.

The respondent, while licensed under his individual name, was doing business under an unlicensed trade name, in violation of RPL §§440-a and 441(1), which require that a real estate broker be licensed in the exact name under which he conducts business. Division of Licensing Services v Cruz, 8 DOS 93; Division of Licensing Services v Fishman, 153 DOS 92; Division of Licensing Services v Selkin, 47 DOS 92; Division of Licensing Services v Tripoli, 96 DOS 91; Division of Licensing Services v Prater, 29 DOS 88; Division of Licensing Services v Lombardo, 30 DOS 86. It stands to follow that any change of association submitted under the unlicensed name would be rejected. Once that happened, the respondent should have immediately submitted a change containing the correct name, and should not have waited for some

other events to transpire. His failure to file a correct change card was a violation of the statute. Division of Licensing Services v Resource Realty of New York, Inc., 92 DOS 91; Division of Licensing Services v LoVuolo, 44 DOS 88.

IV- RPL §442-e(5) states:

"The secretary of state shall have the power to enforce the provisions of this article and upon complaint of any person, or an his own initiative, to investigate any violation thereof or to investigate the business, business practices and business methods of any person, firm or corporation applying for or holding a license as a real estate broker or salesman, if in the opinion of the secretary of state such investigation is warranted. Each such applicant or licensee shall be obliged, on request of the secretary of state, to supply such information as may be required concerning his or its business, business practices or business methods, or proposed business practices or methods."

Pursuant to RPL §442-j the Secretary of State has the authority to delegate to employees of the Department of State the above powers to compel a licensee to supply information.

The respondent was asked by Napolitano to show him certain documents. The respondent, however, took it upon himself to set conditions for his compliance with that lawful request. While this tribunal can sympathize with the respondent's desire to assure that after supplying documents Napolitano would not issue a supplementary request, thereby causing the respondent some inconvenience, the law does not allow the setting of such conditions by a licensee, the imposition of which might be used to impede a lawful investigation.

CONCLUSIONS OF LAW

1) The complainant has failed to prove by substantial evidence that the respondent has operated an unlicensed branch office. Accordingly, that charge should be dismissed. SAPA §306(1).

2) By failing to conspicuously display his license in his Bridgehampton office, the respondent violated RPL §441-a(4).

3) By failing to submit for filing a change of association form for Fischetti in the proper form, the respondent violated RPL §442-b.

4) By conducting his real estate brokerage business under an unlicensed trade name the respondent violated RPL §§440-a and 441(1).

5) By failing to show Investigator Napolitano the documents which Napolitano asked to see, the respondent violated RPL §442-e(5).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Thomas L. Lawson has violated Real Property Law §§441(1), 441-a(4), 442-b, and 442-e(5), and accordingly, pursuant to Real Property Law §441-c, he shall pay a fine of \$1,000.00 to the Department of State on or before June 30, 1993, and should he fail to pay the fine then his licenses as a real estate broker shall be suspended for a period of one month, commencing on July 1, 1993 and terminating on July 31, 1993.

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