

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant,

DECISION

-against-

JOHN MC DERMOTT,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on May 8, 1996 at the New York State Office Building located on Veterans Memorial Highway, Hauppauge, New York, and on July 3 and September 26, 1996 and February 10 and May 28, 1997 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 39 Rose Place, Selden, New York 11784, was not present on May 8, 1996. He had appeared that day just prior to the hearing and requested an adjournment. When he was advised that the request was not in compliance with the applicable regulation (19 NYCRR 400.11) and would not, therefore, be granted, he asked if it was necessary for him to remain. He was told that it is always advisable for a respondent to be present at a hearing, but that it was his choice whether to stay. He chose to leave. The respondent was present at the subsequent sessions of the hearing, and was represented at those sessions by Anthony Colleluori, Esq., Kirk, Medina, Mielo & Colleluori, LLP, 43 Conklin Street, Farmingdale, New York 11735.

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

COMPLAINT

The complaint in the matter alleges that: Despite the November 8, 1993 revocation of his license as an apartment information vendor pursuant to a consent order the respondent has continued to operate as such and under the name under which he was previously licensed; the respondent entered into a contract with Sherri M. Bartone to provide a list of rooms and/or apartments to rent, for

which Ms. Bartone paid a fee of \$100.00, provided her with a list of accommodations which were already rented, and refused to refund the fee; the respondent entered into a contract with Mauricio Linares to provide a list of rooms and/or apartments to rent, for which Mr. Linares paid a fee of \$100.00, provided him with a list of accommodations which were either not available or for which the telephone numbers were incorrect, and refused to refund the fee; the respondent entered into a contract with Brian Rubenstein to provide a list of rooms and/or apartments to rent, for which Mr. Rubenstein paid a fee of \$100.00, provided him with a list of accommodations which were either not available or for which the telephone numbers were incorrect, and refused to refund the fee; the respondent engaged in a pattern and practice of race and national origin discrimination in the offering of information regarding housing accommodations; and the respondent engaged in discriminatory practices in hiring employees on the basis of sex.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered on February 26, 1996 (State's Ex. 1).

2) At all times hereinafter mentioned the respondent was a duly licensed real estate broker in his individual name with a business address of 39 Rose Place, Selden, New York (State's Ex. 2).¹

3) On November 8, 1993 the respondent signed a consent order in *Matter of the Division of Licensing Services v John Mc Dermott, qualifying officer of Places To Live, Inc.*, in which he waived his right to a hearing and pled guilty to charges involving the operation of his apartment information vendor business including: the failure to refund advance fees; the failure to use an approved contract form; the failure to provide all the information required in the approved escrow agreement form for advance fees; violations of 19 NYCRR 190.1, 190.3[c], 190.5, and 190.6; the demonstration of untrustworthiness and/or incompetency; and engaging in fraudulent practices. The respondent further consented to the revocation of

¹ The respondent's license expired on July 6, 1996 and was not renewed. That, however, does not divest this tribunal of jurisdiction, as the charged misconduct allegedly occurred, and the proceedings were commenced, while the respondent was licensed. *Brooklyn Audit Co., Inc. v Department of Taxation and Finance*, 275 NY 284 (1937); *Albert Mendel & Sons, Inc. v N.Y. State Department of Agriculture and Markets*, 90 AD2d 567, 455 NYS2d 867 (1982); *Senise v Corcoran*, 146 Misc.2d 598, 552 NYS2d 483 (Supreme Ct., NY County 1989). In such circumstances a license may be revoked even after its expiration. *Main Sugar of Montezuma, Inc. v Wickham*, 37 AD2d 381, 325 NYS2d 858 (1971).

his license as an apartment information vendor, and agreed never either to submit an application for such a license in the future, or to have any financial or ownership interest or to hold office or be employed by any business or individual holding such a license (State's Ex. 3).

4) Immediately subsequent to entering into the consent order, and proceeding apparently to the time of these proceedings, the respondent continued to operate, under the color of being licensed as a real estate broker, an apartment information vendor business under the unlicensed name "Places To Live, Inc." Listings for rooms and apartments would be obtained from landlords, and the respondent would advertise in various publications the availability of rooms and "studios,"² (State's Ex. 5). When members of the public responded to the advertisements they would be sold the right to receive listings for those housing accommodations, consisting variously of rooms, "studios," and apartments, for a fee. Some of the accommodations had their own separate entrances, and in some cases the rental space consisted of one of the two living spaces in a two family house. At the current time the respondent accepts, and sells lists of, listings for apartments of all sizes, including those containing one and two bedrooms. He has presented no evidence that would support the conclusion that the listings are exclusively for accommodations of which the tenants will not have exclusive legal possession.

5) On December 4, 1993 Sherri M. Bartone entered into an agreement with the respondent d/b/a Places To Live Inc. pursuant to which, in exchange for a payment of \$100.00, she received listings of various accommodations which where purportedly available for rent. The accommodations were unfurnished, were located in private houses, consisted of a bedroom and either 1 or 2 additional rooms each, and in two cases the rent did not include utilities (State's Ex. 4).

6) On March 1, 1994 Mauricio Linares entered into an agreement with the respondent d/b/a Places To Live Inc. pursuant to which, in exchange for a payment of \$100.00, he received listings of various accommodations which where purportedly available for rent (State's Ex. 6).

7) On January 15, 1994 Nunzio Sofio entered into an agreement with the respondent d/b/a Places To Live Inc. pursuant to which, in exchange for a payment of \$125.00, he was to receive listings of various accommodations which where purportedly available for rent (State's Ex. 7).

² In the parlance used by the respondent, a "studio" consists of a single room with its own bathroom and cooking facilities. It may or may not have its own outside entrance.

8) On April 9, 1994 Brian Rubenstein entered into an agreement with the respondent d/b/a Places To Live Inc. pursuant to which, in exchange for a payment of \$125.00, he was to receive listings of various accommodations, including rooms and apartments, which were purportedly available for rent (State's Ex. 11). The respondent told him that if he could not find a place to live he would receive a refund. In fact, he was given listings only for rooms. Of the twelve listings which he tried to contact, some did not answer or the owner was not home, approximately six were already taken, and one was not suitable because the owner would not allow him to keep his dog or have friends visit. Mr. Rubenstein not being able to find suitable accommodations with the listings provided, his mother requested a refund on his behalf. Eventually, through the intercession of a government office, a refund was obtained.

9) When referring African-American and Indian customers to rooms which were available for rent, the respondent steered them to neighborhoods which were occupied primarily by members of racial minorities and away from primarily white neighborhoods. To facilitate that steering, when listings for rooms were obtained the respondent had the employees of Places To Live Inc. inquire of the landlords as to their preferences regarding the race of tenants.

10) The respondent discriminated on the basis of sex in his hiring of the employees of Places To Live Inc., and would hire only women. At most times the employees of Places To Live Inc. consisted of the respondent and one or two women. However, when a new employee was being trained the roster was at times increased to include the respondent and three women (transcript, p. 218, line 25, to p. 219, line 3).

OPINION

I- Pursuant to RPL§446-b[1], it is unlawful for any person to act or engage in business as an apartment information vendor without being so licensed. An "apartment information vendor" is any person who engages in the business of claiming, demanding, charging, receiving, collecting, or contracting for the collection of a fee from a customer for furnishing information concerning the location and availability of real property, including apartment housing, which may be leased, rented, shared or sublet as a private dwelling, abode, or place of residence (RPL §446-a[2]). The term "real property" is not defined by the statute.³ Accordingly, it is necessary to resort to General Construction Law §40, which states: "The term real property includes real estate⁴, lands, tenements⁵ and

³ RPL §2 defines "real property," but restricts the definition to RPL Articles 1-8.

⁴ The term "real estate" is generally synonymous with "real (continued...)

hereditaments⁶, corporeal and incorporeal⁷." 97 NY Jur2d, Statutes §99.

Little guidance can be found in judicial precedent, as such precedent relates to matters other than the apartment information vendor business. Certainly, the apartment information vendor law would be rendered meaningless should we follow the holdings that a lease, other than one made in fee, is not real estate. See, e.g., *Fifth Ave. Bldg. Co. v Kernochan*, 221 NY 370 (1917); Statutes §233, McKinney's Consolidated Laws of NY.

It is, therefore, necessary to resort to an attempt to determine the intentions of the Legislature in enacting the Apartment Information Vendor Law. 97 NY Jur2d, Statutes §101.

"It is fundamental, as we have recently said, that 'The intent of the Legislature in enacting legislation is the primary object to be found. Whenever such intention is apparent it must be followed in construing the

(...continued)

property." It includes land and anything permanently affixed to the land, including items which would be personal property were they not affixed to buildings. BLACK'S LAW DICTIONARY 1136 (5th ed. 1979).

⁵ "This term, in its common acceptance, is only applied to houses and other buildings...." BLACK'S LAW DICTIONARY 1316 (5th ed. 1979).

⁶ "Things capable of being inherited, be it corporeal or incorporeal, real, personal, or mixed, and including not only lands and everything thereon but also heirlooms, and certain furniture which, by custom, may descend to the heir together with the land. Things which may be directly inherited, as contrasted with things which go to the personal representative of a deceased." BLACK'S LAW DICTIONARY 653 (5th ed. 1979).

⁷ "Corporeal" is a term descriptive of such things as have an objective, material existence, referring to things which are perceptible by the senses of sight and touch, and which possess a real body. Accordingly, "corporeal property" is such as affects the senses, and may be seen and handled, as opposed to incorporeal property, which cannot be seen and handled, and exists only in contemplation. A house is corporeal, but the rent payable for its occupation is incorporeal. Corporeal property may be manually transferred or, if it is not movable, possession of it may be delivered. The transfer of incorporeal property must be by other means, such as the use of a written instrument. BLACK'S LAW DICTIONARY 310 (5th ed. 1979).

statute....a thing which is within the letter of the statute is not within the statute unless it be within the intention of the lawmakers.... It is a familiar legal maxim that "he who considers merely the letter of an instrument goes but skin deep into its meaning," and all statutes are to be construed according to their meaning, not according to the letter.'" *Astman v Kelly*, 2 NY 2d 567, 572, 161 NYS2d 860 (1957)(citations omitted).

"Our cardinal function in interpreting a statute should be to 'attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used'." *Matter of State v Ford Motor Co.*, 74 NY2d 495, 500, 549 NYS2d 368. (1989)(citations omitted).⁸

"Words in statutes should be given their ordinary meaning and not extended to accomplish untoward results....Hence, we should not ascribe to the Legislature an intention to inflate the words of the statute beyond their ordinary understanding." *Glasser v Price*, 35 AD2d 98, 100-101, 313 NYS2d 1 (1970)(citations omitted).

However, while, as noted above, it is necessary to apply the common meaning of the words of a statute, the tribunal should not "blindly apply the words of a statute to arrive at an unreasonable or absurd result." *Williams v Williams, supra*, 23 NY2d at 599; *Onondaga County Savings Bank v Butler*, 147 NY 167 (1895).

In interpreting a statute it may be, as it is herein, necessary to consider the circumstances under which, and the purpose for which, it was enacted. *Onondaga County Savings Bank v Butler, supra*. Thus, the tribunal "should consider the mischief sought to be remedied and should favor the construction which will suppress the evil and advance the remedy." *New York Life Ins. Co. v State Tax Com.*, 80 AD2d 675, 677, 436 NYS2d 380 (1981).

The Apartment Information Vendor law was originally enacted in 1975. Substantial amendments were made by Chapter 805 of the Laws

⁸ "A statute is 'clear and unambiguous' because the court has considered the meaning of the statute and reached a conclusions on the question of legislative intention." *Williams v Williams*, 23 NY2d 592, 598, 298 NYS2d 473.

of 1980 . As explained in the legislative memorandum submitted in support of the bill by the Department of State, which had developed the bill, in the four years that they had been licensed, apartment information vendors (at the time known as "apartment referral agents") had continued to attract an extraordinary number of complaints at a rate far exceeding that for real estate brokers and salespersons. The complaints involved such things as referrals to unavailable or nonexistent apartment, apartments that didn't meet the customer's specifications or which were uninhabitable, false and misleading advertising, inability to obtain promised additional listings, failure to divulge refund policies, rude treatment, and intimidation. Record keeping had been found to be extremely poor, with the resultant inhibition of proper enforcement of the law and rules. It was noted that because the collection of advance fees had resulted in large scale abuse the bill prohibited such activity.⁹ Memorandum of Department of State, 1980 Laws of New York, pp. 1816-1817. The same concerns were voiced by the Governor in his memorandum approving the bill. 1980 Law of New York, pp. 1906-1907.

In view of the foregoing, it is clear that the respondent's activities in the sale of information concerning the availability of rooms and, in particular, studios and other apartments, falls within the definition of "apartment information vendor." The exception which he has tried to carve out based on the distinctions which he attempts to draw between the types of housing accommodations information about which he deals in and other types of apartments is illusory. The essential concern is that he sells information about real property, including apartment housing, which may be rented as a private dwelling, abode, or place of residence.¹⁰

The respondent's argument that he is permitted to engage in the activities of an apartment information vendor under his license as a real estate broker is incorrect. While it is true that prior to the enactment of the apartment information vendor law some courts held that such activities required licensure as a real

⁹ Pursuant to RPL §446-c, the collection of an advance fee by an apartment information vendor is severely restricted. The fee may not exceed one month's rent, and the licensee may retain only \$15 for administrative services, with the balance to be deposited in an escrow account and to remain the property of the customer. The licensee becomes entitled to the fee only when the customer has leased or rented a private dwelling, and within ten days of receiving written notice that the customer has not entered into such a lease or made such a rental and does not intend to do so, the advance fee, less the administrative charge, must be refunded.

¹⁰ The respondent's referral activities were not, as his counsel would have the tribunal believe, restricted to the rental to lodgers of single rooms in private homes.

estate broker (*People v Biss*, 81 Misc2d 449, 365 NYS2d 983 (1975); *People v Sickinger*, 79 Misc2d 572, 360 NYS2d 796 (1974)), it is also true that with the enactment of the statute the law changed.

When the Legislature enacted the apartment information vendor law, it carved out for special attention an area of the real estate business in which it decided that the public required special protection, and imposed on licensees special requirements above and beyond those placed on real estate brokers. Accordingly, unlike in the practice of real estate brokerage, apartment information vendors must establish special interest bearing trust accounts in the minimum amount of five thousand dollars (RPL §446-b[6], are required to use specially approved contracts (RPL §446-c[1]), may be required to file quarterly reports with the Secretary of State (RPL §446-c[4]), may not retain more than fifteen dollars of any advance fee when a rental has not been effectuated (RPL§446-c[5][a], and are forbidden to charge a fee in excess of one month's rent (RPL §446-c[5][b])).

In fact, the respondent was advised of his need for an apartment information vendor's license in a Declaratory Ruling (92-43) (State's Ex. 12) issued by the General Counsel of the Department of State on November 6, 1992 in response to his request. Specifically, he was advised that in order to sell information about the availability of apartments, defined as consisting of one or more rooms separated and set apart from all other rooms in a dwelling and containing at least one bathroom, and more particularly information about the availability of "studio rooms," he must have such a license.¹¹

¹¹ The fact that the respondent received a letter dated May 18, 1989 from the District Manager of complainant's Mineola office in which he was advised that furnished rooms do not come under the jurisdiction of the Department of State (Resp. Ex. A) is irrelevant because: 1) the letter speaks of "furnished rooms" and not of "studios" or "studio rooms"; 2) the letter does not discuss the issues of whether the rooms are separated and set apart from the other rooms in the dwelling and of whether they have bathrooms; and 3) the letter predates the Declaratory Ruling and was signed by a person in a non-legal position with less authority than that of the General Counsel.

Neither do the telephone conversations which the respondent had in 1995 and 1996 with attorneys Dan Shapiro and Bruce Stuart (Resp Ex. D) and investigator Michael Elmendorf support the respondent's case. Mr. Shapiro, Mr. Stuart, and Mr. Elmendorf serve in positions of less authority than that of General Counsel; the respondent failed to advise them of the existence of the Declaratory Ruling; the conversations post date the unlicensed activity; and the respondent apparently never availed himself of

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Thus, the respondent knowingly violated RPL§446-b[1]. Further, the violation occurred after he had agreed in a consent order: Never to apply for such a license; never to have a financial or ownership interest in any business holding such a license; and never to hold office or be employed by a holder of such a license. Thus, since it is clear that when he then went ahead and engaged in the apartment information vendor business under the color of his license as a real estate broker he did so with the conscious intent of evading the spirit of the consent order, the respondent's conduct was a demonstration of gross untrustworthiness.¹²

II- The respondent contends that the discrimination charges are barred by the doctrines of res judicata and collateral estoppel. That contention is based on the fact that prior to these proceedings the Attorney General of the State of New York settled, by way of a consent judgement, an action brought in the United States District Court for the Eastern District of New York in which discrimination was alleged and injunctive and declaratory relief was sought.

The doctrine of res judicata is not applicable in this case inasmuch as the primary relief sought by the complainant herein, the revocation of the respondent's license as a real estate broker, was not available in the action in the Eastern District. *Burgos v Hopkins*, 14 F.3rd 787 (2nd Cir. 1994).

The doctrine of collateral estoppel is one of issue preclusion. It "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior

¹¹(...continued)

Mr. Elmendorf's suggestion of September 9, 1996, and Mr. Shapiro's offer of September 27, 1996, to request a written opinion.

Accordingly, even were the doctrine of equitable estoppel to be applicable to this proceeding, as it is generally not to the actions of governmental agencies, *Parkview Associates v City of New York*, 71 NY2d 274, 525 NYS2d 176 (1988), it would be of no use to the respondent.

¹² The respondent entered into the consent order without the advice of counsel. However, the order contains the following language: "WHEREAS, respondent is unrepresented by counsel and has been advised as to his right to obtain counsel, and after having been so advised, respondent has determined to continue to represent himself in this matter...." (State's Ex. 3). Having made such an informed waiver, the respondent cannot now be heard to attack the validity of the order. *Vixon v Ambach*, 114 AD2d 617, 494 NYS2d 456 (1985); *Walston v Axelrod*, 103 AD2d 769, 477 NYS2d 440 (1984), leave to appeal denied 64 NY2d 611, 490 NYS2d 1024; see, also, *People v Holms*, 126 AD2d 963, 511 NYS2d 738 (1987).

action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." *Ryan v New York Telephone Co.*, 62 NY2d 494, 478 NYS2d 823, 826 (1984). For it to apply the issues must have actually been litigated and determined. *Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 492 NYS2d 584 (1985).

Counsel for the complainant ably points that *Prudential Lines, Inc. v Firemen's Ins. Co. of Newark, N.J.*, 91 AD2d 1, 457 NYS2d 272, cited by the respondent to support the proposition that a consent judgement has the same effect as does a judgment, is not applicable herein. In *Prudential*, the consent judgement stated that all issues had been resolved by the parties. The consent judgement between the Attorney General and the respondent contains no such language, and merely imposes certain obligations on the respondent. There is no mention of any resolution of the issues, and it is stated that the parties consented to the entry of the judgement "to avoid the expense, delay and uncertainty of prolonged litigation...." (Resp. Ex. E). In no way can such a consent judgement be viewed as a determination of the issues.

Likewise, *Cahill v Arthur Anderson & Co.*, 659 F.Supp 1115 (S.D.N.Y. 1986) does not support the proposition that the discrimination charges are barred by collateral estoppel. It is clear from that decision that the parties in that case had resolved the underlying issues of fact, an element which is missing from the consent judgement in this matter.

III- The evidence clearly establishes that the respondent steered customers to and away from particular neighborhoods based on their race or ethnic origin, a fact which he does not deny. Such conduct is a violation of Executive Law §296[5][c], which provides:

"It shall be an unlawful discriminatory practice for any real estate broker...[1]...to deny or withhold any housing accommodation ...from any person or group of persons because of the race,...color, national origin...of such person or persons."

The respondent's conduct was also in direct violation of Executive Law §296[5][c][2], which provides that it is unlawful for a real estate broker to

"print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the...rental or lease of any housing accommodation...or to make any record or inquiry in connection with the prospective ...rental or lease of any housing

accommodation...which expresses, directly or indirectly, any limitation, specification, or discrimination as to race,...color, national origin...; or any intent to make any such limitation, specification or discrimination"

as well being a violation of Civil Rights Law §40-c[2], which provides that

"(n)o person shall, because of race,...color, national origin...be subjected to discrimination in his civil rights...by any other person or by any firm, corporation or institution...."

In addition, the respondent's conduct was in violation of 42 USC §3604, which bars, among other things, discrimination in the rental of housing on the basis of race, color, or national origin, of 42 USC §3617, which provides that it is unlawful to coerce, intimidate, or interfere with any person in the exercise or enjoyment of any right granted or protected by 42 USC §3604, of the right of all persons to make and enforce contracts pursuant to 42 USC §1981, and of the right of all citizens to lease real property pursuant to 42 USC §1982.

Such racial steering is, of course, also, by itself and without reference to the violation of any particular statutes, a demonstration of untrustworthiness. *Division of Licensing Services v Bosco*, 54 DOS 95.

IV- The respondent is also charged with engaging in unlawful employment discrimination, in that he hired employees on the basis of sex, in violation of Executive Law §296. That statute, however, does not apply to employers with fewer than four employees. Executive Law §292[5]. Since the respondent, through his closely held corporation, never met that threshold, he was exempt from the proscriptions of the statute. *Germakian v Kenny Int'l Corp.*, 151 AD2d 342, 543 NYS2d 66 (1989), appeal denied 74 NY2d 615, 549 NYS 2d 960 (1989).

CONCLUSIONS OF LAW

1) By operating an unlicensed apartment information vendor business the respondent violated RPL §446-b[1] and demonstrated untrustworthiness as a real estate broker.

2) The complainant is not barred from bringing the charges of discrimination herein by the doctrines of res judicata and collateral estoppel.

3) By engaging in racial steering the respondent violated Executive Law §§296[5][c][1] and 296[5][c][2], Civil Rights Law

§40-c, and 42 USC §§1981, 1982, 3604, and 3617, and as established by those violations, and by reason of the very nature of the racial steering, demonstrated untrustworthiness as a real estate broker.

4) The charge that the respondent engaged in unlawful employment discrimination should be, and is, dismissed.

5) The complainant has failed to prove by substantial evidence that the respondent engaged in fraud or a fraudulent practice, and that charge should be, and is, dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT John Mc Dermott has demonstrated untrustworthiness, and accordingly, pursuant to real property law §441-c, his license as a real estate broker is revoked. He is directed to immediately send his license certificate and pocket card to Diane Ramundo, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: October 31, 1997