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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-

SALVATORE J. PERRELLO d/b/a CENTURY 21
ACTION REALTY,

Respondent.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on January 21, 1998 at the New York State Office Building located at 65 Court Street, Buffalo, New York.

The respondent, of 920 Niagara Falls Boulevard, Tonawanda, New York 14223, was represented by Joseph J. Terranova, Esq., 394 Franklin Street, Buffalo, New York 14202.

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

COMPLAINT

The complaint in the matter alleges: That the respondent, a licensed real estate broker, entered into a broker employment agreement with the sellers of a house; that the sellers told him that the basement leaked and/or there were water leakage problems and/or there were problems with the plumbing fixtures and pipes; that with the permission of the respondent a buyer's broker showed the house to his client; that a purchase of the house was negotiated by the buyer through her broker and the respondent and a contract of purchase and sale was executed; that the buyer's broker asked the respondent to provide him with a property disclosure sheet, which the respondent failed or refused to do; that at no time did the respondent inform the buyer or her broker of leakage or plumbing problems; that the respondent informed the buyer's broker that there were no problems with the property; that after the closing the buyer discovered that the basement leaked, that there were water leakage problems and/or that there were

problems with the plumbing fixtures and pipes; that when confronted with the problems in the property the respondent untruthfully told the buyer's broker that he was not aware of them; and that by reason thereof the respondent failed to deal openly, honestly and fairly with a member of the public, failed to disclose problems that existed with the house and/or misrepresented the condition of the property, engaged in fraud and/or a fraudulent practice, and demonstrated untrustworthiness and/or incompetence.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail delivered to him at his office on December 12, 1997, and at his residence on December 22, 1997 (State's Ex. 1).

2) The respondent is, and at all times hereinafter mentioned was, duly licensed as a real estate broker d/b/a Century 21 Action Realty (State's Ex. 2).

3) In or about February, 1996 Wanda Kubasiak entered into an agreement with licensed real estate broker Charles Davis pursuant to which Mr. Davis agreed to act as her agent in her search for and purchase of a house. Mr. Davis showed Ms. Kubasiak approximately five houses, including, in late March or early April, 1996, one located at 37 Race Street, Buffalo, New York (hereinafter "the house") listed for sale with the respondent pursuant to an exclusive right to sell contract executed on March 12, 1996 (State's Ex. 8).

4) When she viewed the house Ms. Kubasiak was accompanied Mr. Davis and Tony Sparcino. The respondent was not present and Ms. Kubasiak had no conversations with him prior to purchasing the house. Mr. Sparcino, who at the time claimed to be one of the owners of the house, is the husband of Joanne Sparcino, who owned the house together with her father, Richard Paczynski. When she viewd the house Ms. Kubasiak asked Mr. Sparcino whether there were any leaks in the basement and if there were any problems with the plumbing, and he replied that there were no leaks and that the plumbing was in working condition.

5) On April 5, 1996 Ms. Kubasiak, having seen the house only once, for about 15 minutes, and without having the house professionally inspected, entered into an agreement to purchase it, in its then current condition, for $55,000 (State's Ex. 4).

6) When Mr. Davis had presented the then proposed contract to the respondent he asked the respondent to sign a property condition disclosure form (State's Ex. 7), but the respondent, stating that there was no requirement that he do so, refused. Mr. Davis also asked the respondent about several specific conditions which he had observed in the house, including tape which was on the drain under

the kitchen sink, but not about the basement or the general condition of the pipes.

6) The sale closed on June 28, 1996, and the respondent received a commission of $1392.50.

7) After moving into the house (without a pre-closing inspection), Ms. Kubasiak discovered that the basement leaked and that the water pipes were corroded on the inside and had to be replaced at a cost to her of $900.00 (State's Ex. 3). When Mr. Davis asked the respondent about the problems the respondent, who had not been informed by the sellers about those problems and had observed no evidence of them, said that he was unaware of them.

OPINION

As the party which initiated the hearing, the burden is on the applicant to prove, by substantial evidence, the truth of the charges set forth 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 complaint alleges that, knowing that the basement of the house leaked and that there were problems with the plumbing fixtures and pipes, the respondent failed to disclose those problems and then lied about his knowledge of them. The evidence, however, establishes that prior to the sale to Ms. Kubasiak the respondent was not asked about the basement or the general condition of the pipes, and was unaware of the problems with them except for the fact that the drain under the kitchen sink had tape on it, a fact of which Ms. Kubasiak's agent, Mr. Davis, was aware and which the respondent did not deny or conceal.

The only evidence to support the claim that the respondent was aware of the leaking basement was the testimony of Ronald Schwartz, the complainant's investigator, who said that the respondent told him that he was aware of the basement problem prior to the sale but did not mention it because Mr. Sparcino told him that he had already disclosed it to Ms. Kubasiak. According to the respondent, however, what he told Mr. Schwartz was that Mr. Sparcino discussed the basement with him only after the post closing inquiry by Mr. Davis. Having observed and considered the testimony of Mr. Schwartz and of the respondent, I find the respondent's assertion that Mr. Schwartz misunderstood him to be credible.

CONCLUSIONS OF LAW

The complainant has failed to establish by substantial evidence that the respondent failed to deal openly, honestly and fairly with a member of the public, that he failed to disclose problems that existed with the house and/or misrepresented the condition of the property, that he engaged in fraud and/or a fraudulent practice, or that he demonstrated untrustworthiness and/or incompetence.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the complaint herein is dismissed.

Roger Schneier
Administrative Law Judge

Dated: March 4, 1998