

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-

**BRADLEY E. SIMMONS d/b/a BESTROW
REAL ESTATE, and MICHELLE M. MACEDON,**

Respondents.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on October 19, 1999 at the office of the Department of State located 123 William Street, New York, New York.

Neither of the respondents were present in person or by counsel when the matter, which had been calendared and noticed for 11:00 am, was opened at 11:15 am. A default hearing was held, and the matter was closed at 11:40 am. When Bradley E. Simmons arrived at 11:50 am the matter was re-opened in the interests of justice, he was allowed to examine the complainant's exhibits, and he testified. He was also granted two weeks in which to submit certain documentary evidence. Michelle M. Macedon never appeared, but at the end of its case the complainant withdrew its charges against her.

The complainant was represented by Litigation Counsel Laurence Soronen, Esq.

COMPLAINT

The complaint alleges that: The respondents commingled and converted escrow funds received in a real estate rental transaction and refused to return the funds when the transaction failed to close; Mr. Simmons failed to satisfy a judgement arising out of that transaction which was obtained against him; Mr. Simmons failed to cooperate with an investigation by the complainant and misled the complainant's investigator; and Mr. Simmons issued a check to the Department of State which was returned for insufficient funds and remains unpaid.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were mailed to the respondents at their last known business addresses by certified and regular first class mail on August 30, 1999 (State's Ex. 1, 4, and 5). Mr. Simmons acknowledges receipt of the notices sent to him. The notices sent to Ms. Macedon were returned by the Postal Service marked "moved-left no address" and "attempted-unknown" (State's Ex. 5).

2) Mr. Simmons is, and at all times hereinafter mentioned was, duly licensed as a real estate broker d/b/a Bestrow Real Estate (hereinafter "Bestrow") (State's Ex. 2).

3) At all times hereinafter mentioned Ms. Macedon was duly licensed as a real estate salesperson in association with Bestrow. Although her license as a real estate salesperson does not expire until March 13, 2000, she is no longer associated with any broker, having terminated her association with Bestrow on January 1, 1999 and with the broker with which she was subsequently associated on February 20, 1999 (State's Ex. 3 and 6).

4) In November, 1998 Ms. Macedon showed Jennelle Mahone an apartment for which Mr. Simmons was acting as rental agent, and Ms. Mahone agreed to rent the apartment if certain repairs were made. In order to secure the rental she gave Mr. Simmons \$800.00 in advance rent and security and a commission of \$1650.00. Mr. Simmons deposited the rent and security in a special account which he maintains for such funds at Carver Federal Savings Bank, and deposited the commission in his business operating account at Chase Manhattan Bank. Mr. Simmons claims that he subsequently gave the rent and security to the landlord. However, although he was given two weeks after the hearing to produce a copy of the check with which he testified he paid the landlord he has been unable to do so. In his letter of October 31, 1999 addressed to the tribunal he stated: "Upon reviewing my files we cannot find a check sent to Mr. Frank Bocogna" (Resp. Ex. A).

5) Ms. Mahone did not receive a lease to, and did not take possession of, the apartment. However, when she requested the return of her money Mr. Simmons failed to comply, believing that she had improperly backed out of the transaction after having been accepted by the landlord and after repairs had been made to the apartment.¹ She then sued him in Small Claims Court, and on June 3, 1999, after a trial, she was granted a judgement \$2,575.38

¹ The complainant contends that the landlord was not aware of Ms. Mahone as a prospective tenant. The only evidence offered to support that contention was, however, hearsay, which was refuted by Mr. Simmons' sworn testimony.

(State's Ex. 9). He satisfied that judgement in full on June 8, 1999 (Resp. Ex. A).

6) Prior to commencing her lawsuit Mr. Mahone filed a complaint with the complainant. When License Investigator Rosalind Young interviewed Mr. Simmons about the complaint he misled her by giving her a fictitious name for the landlord of the apartment, and by telling her that he had given the rent and security to that landlord.

7) On December 11, 1998 the Mr. Simmons issued a check for \$10.00 to the Department of State in payment of the filing fee for a salesperson's change of association form. The check, issued in error on the Carver Federal Savings Bank account, was returned for insufficient funds inasmuch as Mr. Simmons was not holding any trust funds at the time (State's Ex. 10). Contrary to the allegations in the complaint, Mr. Simmons subsequently made good on the check.

OPINION AND CONCLUSIONS OF LAW

I- Pursuant to 19 NYCRR 175.1, a real estate broker may not commingle the money of a principal with his own, and must maintain a separate, special bank account to be used exclusively for the deposit of such monies.² The complainant alleges that Mr. Simmons violated that regulation. The evidence, however, establishes that he did, in fact, maintain such an account at Carver Federal Savings Bank and did deposit the rent and security received from Ms. Mahone in it. Accordingly, the charge that Mr. Simmons commingled and converted funds must be, and is, dismissed.

II- The complainant alleges that Mr. Simmons failed to satisfy the judgement obtained by Ms. Mahone. The evidence, however, establishes that the judgement was satisfied within 5 days. Accordingly, that charge must be, and is, dismissed.

III- Mr. Simmons refused to return the money received from Ms. Mahone, including the commission, until after she obtained the judgement against him. The complainant contends that in so doing he acted improperly. While the claiming or retention of an unearned commission is a demonstration of untrustworthiness, *Division of Licensing Services v Loffredo*, 83 DOS 95, conf'd. *sub nom Loffredo v Treadwell*, 235 AD2d 541, 653 NYS2d 33 (1997), in order to establish such untrustworthiness the complainant must show that the respondent acted in bad faith in asserting his claim. In this case, Mr. Simmons believed that inasmuch as Ms. Mahone had backed out of the transaction after being accepted as a tenant and after repairs she requested had been made to the apartment he had

² The regulation does not set any specific standards for the account, such as a requirement as to how it is to be titled.

earned the commission. While he was wrong, based on the evidence presented to the tribunal it cannot be said that he acted in an untrustworthy manner asserting his right to contest Ms. Mahone's claim.

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 on 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.

Mr. Simmons failed to cooperate with the complainant's investigation of Ms. Mahone's complaint when he misled its investigator about the name of the landlord and his handling of the rent and security. *Division of Licensing Services v Naftal*, 189 DOS 99. That non-cooperation was a violation of RPL 442-e[5], *Division of Licensing Services v Lawson*, 42 DOS 93, and was a demonstration of untrustworthiness.

V- Mr. Simmons issued a check to the Department of State in payment of a fee which was due to it. That check was dishonored by his bank due to insufficient funds. While the issuance of the check on the particular account was in error, and therefore not a demonstration of untrustworthiness, the mistaken issuance of such a check was a demonstration of incompetence.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Bradley E. Simmons has demonstrated untrustworthiness and incompetency and, accordingly, pursuant to Real Property Law §441-c, he shall pay a fine of \$750.00 to the Department of State on or before December 31, 1999, and upon failure to pay the fine his license as a real estate broker shall be suspended for a period commencing on January 1,

2000 and terminating two months after the receipt by the Department of State of his license certificate and pocket card. He is directed to send the fine in the form of a certified check or money order payable to "NYS Department of State" or his license certificate and pocket card to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.

Roger Schneier
Administrative Law Judge

Dated: November 22, 1999