68 DOS 95

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Application of

CHARLES A. SIMON **DECISION**

For a License as a Real Estate Broker

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This matter came on for hearing before the undersigned, Roger Schneier, on May 3, 1995 at the office of the Department of State located at 270 Broadway, New York, New York.

The applicant, of 73-15 170th Street, Fresh Meadows, New York 11366, was represented by Thornton J. Meachem, Jr., Esq., 320 Manhattan Avenue, New York, New York.

The Division of Licensing Services (hereinafter "DLS") was represented by Supervising License Investigator Michael Coyne.

ISSUE

The issue before the tribunal is whether, in light of his failure to satisfy outstanding judgements and of his record of disciplinary hearings, the applicant should be granted a license as a real estate broker.

PENDING MATTER

On September 18, 1989 a hearing was opened on a previous application for a license as a real estate broker by the applicant. DLS had proposed to deny that application because of the same outstanding judgements as are at issue herein. After the close of DLS's case Mr. Meachem asked for and was granted a continuance without date to allow time to either vacate or satisfy the judgments. On November 26, 1991 the matter was reopened by the tribunal sua sponte. On that date Mr. Meachem telephoned the tribunal and stated that he was ill, and acknowledged that nothing had been done by him with regards to the judgements. When the applicant appeared and stated that he could not go forward without Mr. Meachem the matter was struck from the calendar pending receipt of an application to re-open. In consideration of the identity of issues, when the instant hearing was closed the two matters were consolidated without objection. Accordingly, this decision determines both matters.

FINDINGS OF FACT

1) By application dated February 12, 1994 the applicant applied for a license as a real estate broker (State's Ex. 2).

By letter dated October 25, 1994 DLS directed the applicant to "(p)rovide a copy of the Hearing Decision and Proof of Reimbursement to the complainants" (State's Ex. 6).

By letter dated November 15, 1994 DLS advised the applicant that it proposed to deny his application because "(h)e has not satisfied judgements of Hearing Determination dated 9/30/85. History of hearings and a 1978 revocation reflect a lack of trustworthiness and/or competency." He was told that he could request an administrative review (State's Ex. 1).

By letter dated December 15, 1994 the applicant requested an administrative review, and by letter dated January 10, 1995 was advised that DLS continued to proposed to deny the application, and that he could request a hearing, which he did by letter dated January 12, 1995 (State's Ex. 1).

2) Notice of hearing was served on the applicant by certified mail on March 11, 1995 (State's Ex. 1).

3) By decision dated September 30, 1995 the applicant's license as a real estate broker was revoked based on a finding that he had demonstrated untrustworthiness and incompetency (State's Ex. 3). That decision, which was neither appealed from nor reversed, found that the applicant had failed to satisfy two judgements arising out of the operation of his real estate brokerage business: $926.00 owing to Hilda Cruz, which the applicant had agreed to return to her by letter dated August 26, 1983; and $800.00 owing to Bruce Roberts for money paid by him on or about July 2, 1983.[1] Additional grounds for the revocation were the respondent's employment of unlicensed salespersons and his failure to supervise the operation of a branch office.

The decision also made note of three previous hearings, held on December 12, 1977, February 9, 1978, and July 10, 1978, in which the applicant was found to have demonstrated untrustworthiness because he had converted to his own use monies belonging to others. As a result of the proceedings in 1978 the applicant's license as a real estate broker had been revoked.

4) Subsequent to the 1989 hearing session the applicant went to Ms. Cruz's home with money orders for the amount of her judgement without accrued interest. He spoke with a man, presum-

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[1] Copies of the actual judgements were not offered in evidence, and the 1985 decision made no reference to the dates of them. Therefore, the tribunal is unable to determine those dates.

ably Francisco Pacheco, who was involved in the underlying transaction, who refused to accept the money orders because he deemed them to be insufficient. No attempt was made to pay Mr. Roberts since, in spite of his attempt to check court records, the applicant was unable to locate Mr. Roberts' address.

The applicant then mailed to the tribunal, without a covering letter, four money orders, two totaling $930.00 payable to Hilda Cruz, and two totaling $750.00 payable to Bruce Roberts, and two releases. Those items were returned to Mr. Meachem with a letter in which it was stated that although it was assumed that the applicant was attempting to satisfy the judgments, the money orders were in insufficient amounts as no provision had been made for the interest which would by then have accrued on them.[2] Mr. Meachem was also advised that it is not a function of this tribunal to distribute payments in satisfaction of judgements (State's Ex. 4). No further steps were taken by the applicant or Mr. Meachem to vacate or satisfy the judgements.

OPINION

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he is qualified to be licensed as a real estate broker. Real Property Law (RPL) §441[1-A]; State Administrative Procedure Act (SAPA), §306[1]. In particular, he must demonstrate that he is sufficiently trustworthy and competent. RPL §441[1-A][e]; Matter of the Application of Padilla, 20 DOS 95. 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).

II- "The failure to pay a judgement which has been lawfully obtained, without a showing that he is unable to do so, is a demonstration of untrustworthiness by a real estate broker. Department of State v Feldman, 113 DOS 80, conf'd. sub nom Feldman v Department of State, 81 AD2d 553, 440 NYS2d 541 (1981); Division of Licensing Services v Shulkin, 40 DOS 90; Division of Licensing Services v Janus, 33 DOS 89." Division of Licensing Services v Harrington, 123 DOS 93 at 4.

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[2] That letter failed to note that the money orders for Mr. Roberts also totaled $50.00 less than the basic judgement.

The applicant has failed to satisfy two judgements arising out of the operation of his brokerage business. He waited approximately six years to make any attempt to pay the judgement creditors, and even then tendered insufficient sums. That in 1989 he was unable to locate one of those creditors is not, considering the unconscionable amount of time which he had allowed to pass since both the awarding of the judgements and the 1985 hearing decision, a valid excuse for the non-payment. His woefully inadequate efforts, and his offer to deliver the money to the Department of State so that it can attempt to locate the judgement creditors at this late date, in no way establish that he is either trustworthy or competent.

III- The applicant's license as a real estate broker has been revoked on two previous occasions. The hearing officer in the 1985 proceeding found

> "that the history of respondent's activities as a real estate broker, including the instant proceeding, warrants a conclusion of unreliability which establishes that any confidence or reasonable expectation of his fair dealing to the general public would be misplaced." Department of State v Simon, 52 DOS 85, p. 4.

In all three of the previous proceedings, including the two which resulted in revocations, he has been found to have converted to his own use monies belonging to others. Considering that history, his promise in this proceeding to conduct his real estate business properly in the future is less than convincing.

A real estate broker serves in a fiduciary capacity. L.A. Grant Realty, Inc. v Cuomo, 58 AD2d 251, 396 NYS2d 524 (1977). He is involved in transactions which often involve very substantial sums of money which may be entrusted to him, and must abide by specific procedures designed to protect the rights of the owners of that money. See 19 NYCRR 175.1 and 175.2. Considering the applicant's past misconduct, it would be wishful thinking to expect that if granted a license as a real estate broker he will not again engage in untrustworthy and incompetent conduct.

It is clear from the record that the applicant is an incorrigible recidivist. To grant him a license as a real estate broker would be to render the licensing statute meaningless. Department of State v Milk, 59 DOS 87.

CONCLUSIONS OF LAW

The applicant has failed to establish that he is sufficiently trustworthy and competent to be licensed as a real estate broker, and, accordingly, his application should be denied. RPL §441[1-A[e]; SAPA §306[1].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Charles A. Simon for a license as a real estate broker is denied.

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:

ALEXANDER F. TREADWELL
Secretary of State
By:

Michael E. Stafford, Esq.
Chief Counsel