

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-

**KAY B. STURDEVANT and KEUKA
SHORELINE PROPERTIES, INC.,**

Respondents.

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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 April 12, 1994 at the New York State Office Building located at 65 Court Street, Buffalo, New York.

The respondents, of 201 Elm Street, Penn Yan, New York 14527, were represented by M.E. Tillman, Esq., 1040 University Avenue, P.O. Box 40420, Rochester, New York 14604.

The complainant was represented by Scott NeJame, Esq.

COMPLAINT

The complaint alleges that Sturdevant availed her license to Janet A. Butler, and contractually arranged and permitted Butler to use the office and name of Keuka Shoreline Properties for the purpose of conducting an unlicensed brokerage.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail (Comp. Ex. 1).

2) Sturdevant has been licensed as a real estate broker representing Keuka Shoreline Properties, Inc. (Shoreline) since June 2, 1987, first at 350 Elm Street, Penn Yan, New York, and since September 20, 1988 at 201 Elm Street, Penn Yan, New York (Comp. Ex. 2).

From February 29, 1988 until November 14, 1990 Janet A. Butler was licensed as a real estate salesperson in association with Shoreline. Since November 14, 1990 she has been licensed as a real estate broker d/b/a Connect A Service Rentals (Connect) (Comp. Ex. 3), pursuant to a certificate of conducting business under assumed name filed by her in the office of the Clerk Yates County on September 21, 1988 (Comp. Ex. 4).

3) On February 8, 1988 the respondents entered into an "association agreement" with Butler (Comp. Ex. 5). That agreement, which had been drawn by an attorney retained by Butler with the specific intent of assuring that the respondents and Butler acted in compliance with the applicable licensing law, provided that Butler would operate Connect out of the respondents' office; that Shoreline would provide office facilities, telephone, and equipment to facilitate that operation and would advertise Connect's services; and that Butler was granted the right to use Shoreline's name in the operation of Connect. Shoreline and Butler were to maintain separate customer and client lists, which were to remain their own property, and their own books and records, subject to the right of the respondents to inspect those books and records at any time. Thirty per cent of the income from rentals received by Butler was to be paid to Shoreline.

Pursuant to the agreement, and in accordance with the advice of her attorney, Butler maintained separate escrow and operating accounts for Connect (Comp. Ex. 6 and 7), on which she was the sole signatory. After an initial period of operation, Butler gradually took over the payment of the costs of the business, eventually assuming all of them. When she obtained her broker's license Butler moved to her own office, taking her customer lists with her.

Prior to their agreement with Butler the respondents provided rental services to the owners of homes at Keuka Lake without charge. As the business grew it became uneconomical for the respondents, thus encouraging them to make their agreement with Butler, who took over their rental lists and then added to them over time.

During the time of their association, in addition to a daily written report Butler had several conversations a day with Sturdevant in which Butler reported on the rental operations. Sturdevant reviewed the paper work on each rental transaction, of which there were many (Comp. Ex. 8 and 9, Resp Ex. B). This supervision continued until Butler obtained her license as a broker.

OPINION

A real estate broker may be subject to discipline by the Department of State for availing her or its license to another person so as to enable that person to act as a real estate broker

without being so licensed. Department of State v Guittari, 37A DOS 87, conf'd. sub nom Guittari v Department of State 535 NYS2d 284 (A.D. 1st Dept., 1988); Department of State v Kavan, 49 DOS 91; Department of State v Shulkin, 4 DOS 90; Department of State v Brooks, 3 DOS 88; Department of State v Eksteen, 49 DOS 88.

"In order for the complainant to establish that such availing occurred it must show that unlicensed activity occurred and that the respondent either intended that it occur and facilitated it through making her license available, or that she knew that it was occurring and took no steps to stop it, or that she acted recklessly in placing her license in the office and then not taking reasonable steps to determine what was occurring in that office." Department of State v Braun, 28 DOS 89.

A necessary element of availing is a lack of supervision by the broker of the salesperson. Department of State v Guittari, supra; cf. Applications of Kavan, 49 DOS 91, conf'd. sub nom Kavan v Shaffer, AD2d, 607 NYS2d 510 (1993). In this case, although perhaps not specifically provided for in the association agreement, Sturdevant supervised Butler's activities on a daily basis. That supervision consisted not only of frequent conversations, but also involved the review by her both of daily written reports prepared by Butler and of all of the documentation arising out of rental transactions.

What the respondents did do that was improper was to permit Butler, while being supervised by them, to conduct business under an unlicensed name and to control escrow funds. Those violations, however, were neither charged in the complaint nor fully litigated at the hearing and, therefore, cannot serve as grounds for the imposition of disciplinary sanctions. Cooper v Morin, 91 Misc.2d 302, 398 NYS2d 36, 46 (Supreme Ct. Monroe County, 1977), mod. on other grnds. 64 AD2d 130, 409 NYS2d 30 (1978), aff'd. 49 NY2d 69, 424 NYS2d 168 (1979). In view of that, the question of whether the respondents' reliance upon the advice of counsel shields them from liability need not be considered.

CONCLUSIONS OF LAW

The complainant has failed to prove by substantial evidence that Sturdevant availed her license as a real estate broker to Butler for the purpose of conducting an unlicensed real estate brokerage business, and the charges should, therefore, be dismissed. State Administrative Procedure Act §306[1].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the charge that Kay B. Sturdevant availed her license to, and contractually arranged and permitted Janet A. Butler to use the office and name of Keuka Shoreline Properties for the purpose of conducting an unlicensed brokerage is dismissed.

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