

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,

-against-

DECISION

**JAMES S. WHEELER, DENNIS M. PENMAN,
VICTOR L. PETERSON, VICTOR L.
PETERSON, JR., VICTOR L. PETERSON, III,
and M.J. PETERSON REAL ESTATE, INC,**

Respondents.

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on June 2, 1998 at the New York State Office Building, 65 Court Street, Buffalo, New York.

None of the respondents were present.

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

Prior to the hearing all of the respondents other than James S. Wheeler entered into an agreement with the complainant to settle the matter. A written consent order encompassing that agreement was subsequently executed by the settling respondents and, on behalf of the Secretary of State, by Frank P. Milano, General Counsel of the Department of State .

COMPLAINT

With regards to the remaining respondent (hereinafter "the respondent"), the complaint alleges that: At all times hereinafter mentioned he was a real estate broker associated with M.J. Peterson Real Estate, Inc. (hereinafter "Peterson Inc."); he represented himself as doing business as "Wheeler Real Estate" and/or "James S. Wheeler Real Estate" although not so licensed; prospective purchasers met with him with regards to their interest in purchasing a particular piece of real property; he failed to make clear to the prospective purchasers whom he represented; he did not obtain the prospective purchasers' signatures on a Real Property

Law (RPL) §443 disclosure form; the prospective purchasers executed a purchase offer for the property and he failed to give them a copy; the prospective purchasers tendered him a \$500 deposit on the property which was to be, but was not, placed into an escrow account; he negotiated the deposit check and retained the funds; without the knowledge of the prospective purchasers he failed to present the purchase offer to the owners of the property; he told the prospective purchasers that the owners were unable to sell the property due to a pending foreclosure, but when the return of the deposit was requested untruthfully told the buyers that he could not return it because it was in escrow; he failed to meet or cooperate with the complainant's investigator with regards to the matter.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by mailing it to him by certified and regular first class mail addressed to him at both his residence and last known business addresses. The notice sent to the residence address by certified mail was returned by the Postal Service stamped "unclaimed" (State's Ex. 1).

2) From October 31, 1993 through October 31, 1995 the respondent was licensed as a real estate broker in his individual name at 110 Main Street, Attica, New York 14011. From January 23, 1996 through April 8, 1997 he was licensed as a real estate broker in association with Peterson Inc. at 4779 Transit Road, Suite 17, Depew, New York 14043 (State's Ex. 2).

3) By letter dated April 8, 1997 the respondent was advised by complainant's Litigation Counsel, Laurence J. Soronen, Esq., that his license was suspended for failure to notify the Department of State of the change of his principal business address (RPL §442-a[5]). That license remains suspended (State's Ex. 3).

4) During the period of April through October, 1996, apparently acting on his own initiative, respondent spoke with Martha Beechler with regards to trying to sell the farm owned by her in Bennington, New York, but apparently being foreclosed upon by the FHA. He asked her over the telephone if she would sign a contract for the sale of the property to unnamed purchasers, but she refused and referred him to her attorney.

5) The unnamed purchasers to whom the respondent had referred where Richard L. and Cindy A. Fish. The respondent had approached them and asked if they would be interested in buying the farm. After looking at the farm several times, on March 6, 1996 the Fishes executed an offer to purchase the farm for \$90,000 which had been drawn up by the respondent, and gave him a check for \$500 as a deposit (State's Ex. 4). The respondent did not give the Fishes a copy of the purchase offer.

6) The deposit check, endorsed with two signatures, including that of the respondent, and the address of the farm property, was negotiated on March 13, 1996.

7) It was not until October, 1996 that Mr. Fish checked his records and realized that the deposit check had been negotiated. Mrs. Fish telephoned the respondent and asked him what was happening with the transaction, about which they had heard little or nothing from the respondent. The respondent said that he was still working on the deal and that the deposit was in escrow in his bank account. She told him to withdraw the purchase offer and return the deposit. He said that he would return the money, which he said was in his bank account, by the end of the week, but failed to do so. (The deposit has been returned to the Fishes as a result of the settlement with the other respondents).

8) The respondent never provided the Fishes with a real estate agency relationship disclosure form. They believed that he was acting as their agent.

9) On February 7, 1997 Senior License Investigator George Monroe wrote to the respondent and advised him that he would be at the respondent's home/office at 11:00 am on February 14, 1997 to interview him with regards to the above transaction, and to contact him by telephone if he had any questions (State's Ex. 6). Investigator Monroe went to that office at the appointed time, but the respondent was not available.

On February 19, 1997 Investigator Monroe sent the respondent another letter, in which he asked the respondent to appear at the investigator's office in Rochester on February 28, 1998 to be interviewed with regards to the above transaction. The letter gave the respondent two telephone numbers to call if he had any questions, and advised him that if he did not appear for the interview disciplinary action would be taken (State's Ex. 7). The respondent neither contacted the investigator nor appeared for the interview.

10) On February 14, 1997, when Investigator Monroe visited the respondent's residence at 110 Main Street, Attica, New York, he observed a sign on the respondent's door which said "James S. Wheeler, Real Estate" and a sign outside the building which said "Wheeler Real Estate."

OPINION AND CONCLUSIONS OF LAW

I- The holding of an ex parte quasi-judicial administrative hearing was permissible, inasmuch as there is evidence that notice of the place, time and purpose of the hearing was properly served. RPL §441-e[2]; *Patterson v Department of State*, 36 AD2d 616, 312 NYS2d 300 (1970); *Matter of the Application of Rose Ann Weis*, 118 DOS 93.

II- A real estate broker who wishes to conduct brokerage business under a name other than that on his license must apply for a license under that new name. RPL §441[1][a]. *Division of Licensing Services v Cucci*, 65 DOS 95; *Division of Licensing Services v Perry*, 57 DOS 95; *Division of Licensing Services v Morse*, 12 DOS 95; *Division of Licensing Services v Scala*, 38 DOS 94; *Division of Licensing Services v Feld*, 147 DOS 93; *Division of Licensing Services v Cruz*, 8 DOS 93; *Division of Licensing Services v Fishman*, 153 DOS 92; *Division of Licensing Services v Selkin*, 47 DOS 92; *Division of Licensing Services v Tripoli*, 96 DOS 91; *Department of State v Prater*, 29 DOS 88; *Department of State v Lombardo*, 30 DOS 86. The respondent was licensed only in association with Peterson Inc., and, therefore, could do business only under that name. By doing business under the names "James S. Wheeler, Real Estate" and "Wheeler Real Estate" as evidenced on the signs at his home, he violated the statute and demonstrated incompetency.

III- Pursuant to 19 NYCRR 175.7, a real estate broker must make it clear to the persons with whom he deals for which party in a transaction he is acting. The complaint alleges that the respondent failed to comply with that statute in his dealings with the Fishes. The evidence, however, establishes that they believed that he was representing them, which, in the absence of any evidence that he had obtained a listing from its owner, was correct. Accordingly, the charge that the respondent violated 19 NYCRR 175.7 should be, and is, dismissed.

IV- Pursuant to RPL §443 the respondent was required to provide the Fishes with a real estate agency relationship form prior to entering into an agreement to act as their agent. When he failed to do so he violated that statute and demonstrated untrustworthiness and incompetency.

V- Pursuant to 19 NYCRR 175.12 a real estate broker must immediately deliver a duplicate original of any instrument to any party or parties signing that instrument where the instrument has been prepared by the broker and relates to the purchase of real property. In failing to give the Fishes a copy of the purchase offer which he prepared and they signed the respondent violated that regulation and demonstrated untrustworthiness and incompetency.

VI- Pursuant to 19 NYCRR 175.1 a real estate broker must place all purchase deposits in a special, escrow account. By depositing the deposit received from the Fishes in his own bank account rather than in Peterson Inc.'s escrow account, the respondent violated that regulation, thereby demonstrating untrustworthiness and incompetency. He further demonstrated untrustworthiness when he failed to return the deposit upon Mrs. Fish's demand that he do so.

VII- The complaint alleges that the respondent failed to present the Fish's offer to the owner of the property. The evidence, however, establishes that he did tell the owner about the offer and attempted to consummate the sale. Accordingly, that charge is dismissed.

VIII- Real Property Law (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.

The respondent failed to comply with the two of the complainant's requests that he cooperate with its investigation of the Fishes' complaint by meeting with its investigator, thereby violating RPL §442-e[5].

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT James S. Wheeler has violated Real Property Law §§441[1][a], 442-e[5], and 443, and has demonstrated untrustworthiness and incompetency, and accordingly, pursuant to Real Property Law §441-c, his license as a real estate broker is revoked, effective immediately. 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: July 14, 1998