

STATE OF NEW YORK  
DEPARTMENT OF STATE  
OFFICE OF ADMINISTRATIVE HEARINGS

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In the Matter of the Application of

**ALEXIS MENDEZ**

**DECISION**

Complaint No.: 2017-2512

For a License as a Real Estate Broker

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The above noted matter came on for hearing before the undersigned, Roger Schneier, on April 24, 2018 at the office of the Department of State located at 123 William Street, New York, New York.

The applicant having been advised of his right to be represented by an attorney chose to represent himself.

The Division of Licensing Services (DLS) was represented by Hearing Presenter Nadine S. Azarian, who appeared by video conference from the Department of State office located at 99 Washington Avenue, Albany, New York.

**ISSUE**

The issue before the tribunal is whether the applicant should be denied a license as a real estate broker because he failed to refund an unearned commission to a client and did not cooperate with a prior investigation by DLS.

**FINDINGS OF FACT**

1) By application submitted on August 15, 2017 the applicant applied for a license as a real estate broker. His previous license as a real estate broker expired on March 4, 2015 (State's Ex. 2).

2) In September 2014 Myrna Cruz gave the applicant \$1,000.00 to be used for the payment of a brokerage commission should Ms. Cruz rent an apartment located for her by the applicant. No such rental occurred, and Ms. Cruz asked for the return of the money. The applicant gave her a check for \$1,000.00, but that check was dishonored by the bank due to there being insufficient funds in the applicant's account (State's Ex. 3).

3) The applicant was contacted by DLS and he agreed to be interviewed regarding a complaint which had been filed against him by Ms. Cruz. However, he then cancelled the interview but agreed to respond to questions in writing. He subsequently failed to submit a written statement (State's Ex. 2). According to the applicant, in refusing to speak with DLS he was acting on the advice of his attorney.

4) The applicant testified that he was a real estate broker for almost 20 years. According to that testimony there have been no other complaints lodged against him, and no evidence to the contrary was presented.

5) Prior to the hearing the applicant refunded the \$1,000.00 to Ms. Cruz after the intervention of Ms. Azarian.

4) By letter dated October 25, 2017 the applicant was advised by DLS that it proposed to deny his application because the investigation of Ms. Cruz's complaint indicates a lack of the good character, competence and trustworthiness required of a real estate broker and that he could request a hearing, which he did by letter received on November 16, 2017 (State's Ex. 1).

### **OPINION AND CONCLUSIONS OF LAW**

I- As the person who requested the hearing, the burden is on the applicant to prove, by substantial evidence, that he is entitled to be licensed as a real estate broker. State Administrative Procedure Act §306(1). Substantial evidence “means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact... More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt (citations omitted).” *300 Gramatan Avenue Associates v. State Div. of Human Rights*, 45 NY2d 176, 408 NYS2d 54, 56-57 (1978); *Tutuianu v. New York State*, 22 AD3d 503, 802 NYS2d 465 (2<sup>nd</sup> Dept. 2005). “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 AD2d 719, 465 NYS2d 365, 366 (1983), quoting *300 Gramatan Avenue Associates, supra*, 408 NYS2d at 57.

II- Pursuant to Real Property Law (RPL) §441 [1] [b], an applicant for a license as a real estate broker must establish that he is trustworthy. DLS contends that the applicant is not trustworthy, as evidenced by his dealings with Ms. Cruz and his failure to cooperate with the investigation of her complaint.

The failure to cooperate resulted from advice which the applicant received from his lawyer. Therefore, it does not support a conclusion that the applicant is not trustworthy or competent. However, the respondent's failure to promptly return an unearned commission, and his issuance of a check drawn on account with insufficient funds, does support such a conclusion. A real estate broker acts in a fiduciary capacity, *L.A. Grant Realty, Inc. v Cuomo*, 58 AD2d 251, 396 NYS2d 524 (1977), and the applicant's failure to make the refund was a breach of his fiduciary duties. It required the proposed denial of his application and the intervention of Ms. Azarian to get him to finally make the refund. I find, therefore, that he has failed to meet his burden of proving that he is sufficiently trustworthy to be licensed as a real estate broker.<sup>1</sup>

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<sup>1</sup> In light of his prior unblemished record, had the applicant applied for a license as a real estate salesperson, in which capacity he would work under the supervision of a licensed broker, the conclusion might have been different.

**DETERMINATION**

**WHEREFORE, IT IS HEREBY DETERMINED THAT** pursuant to Real Property Law §§441 and 441-e the application of Alexis Mendez for a license as a real estate broker is denied.

/s/

Roger Schneier  
Administrative Law Judge

Dated: April 24, 2018