STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS
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In the Matter of the Application of

EWAN RICHARDS, JR.,

File No.: 2018-0345

For a License as a Real Estate Salesperson

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The above-captioned matter came on for hearing on May 17, 2018, before me at the Office of Administrative Hearings, New York State Department of State (the "Department"), located at 123 William Street, Second Floor, New York, NY 10038.

The applicant, Ewan Richards, Jr., having been advised of his right to appear with counsel or another representative of his choice, elected to represent himself (Tr. at 3-4).

The Division of Licensing Services ("DLS") was represented by David Mossberg, Esq.

ISSUE

The Department alleges that Mr. Richards' application for a new real estate salesperson license should be denied because he violated Real Property Law ("RPL") Article 12-A and Title 19 of the New York Codes, Rules, and Regulations ("NYCRR"). The applicant allegedly collected client funds, deposited them into his own personal bank account, did not notify his associated broker of the funds he was accepting or turn them over to that broker, retained these client funds, converted them into a commission for himself, and used them for himself personally.

FINDINGS OF FACT

1) The applicant was registered as a real estate salesperson from April 2009 to April 2011, and renewed his license in August of 2011. That license expired in August 2013 (State's Ex. 3). The applicant was associated with Rapid Realty Park Slope South Inc. ("Rapid Realty") in Brooklyn from 2011 to 2013 (State's Ex. 3). He has not worked in the real estate business since his association with Rapid Realty was terminated in June of 2012 (State's Ex. 4). On November 10, 2017, the applicant applied for a new real estate salesperson's license (State's Ex. 2).

2) On February 1, 2018, the DLS wrote a letter to the applicant informing him that based upon a departmental investigation of a 2012 matter, it found misconduct on his part that indicated "a lack of the good character, competence[,] and trustworthiness required for licensure," and proposed to deny his application for a real estate salesperson's license (State's Ex. 1; Tr. at 37-39). The letter informed him of his right to request a hearing within 35 days of his receipt of the letter, of his right to appear with an attorney, and of his burden to prove at trial that he is qualified for a license. The applicant filed a written request for a hearing that was received by the Department

on March 7, 2018 (State's Ex. 1). On March 22, 2018, the Department served the Notice of Hearing upon the applicant, and the hearing went forward, as scheduled, on May 17, 2018.

3) It is undisputed that the applicant accepted a personal check payable to the order of "Ewan Richards," in the amount of $1,700, from Brendan Finnegan, for the rental of an apartment in Brooklyn, and endorsed and deposited the check into his own personal bank account (State's Exs. 4, 5). The check was dated May 6, 2012, and bore the handwritten notation "Security Deposit" (State's Ex. 5).

4) Rosalind Young, a District Manager for the Department, manages license investigations for the agency (Tr. at 11-12). She explained and authenticated the documentation of the Department's investigation of a 2012 consumer complaint against the applicant concerning his previous license as a real estate salesperson. Under her supervision, Department Investigator Lawrence Magaram, who is no longer with the agency, investigated the complaint under Case No. 2012-1782 (Tr. at 13-14). The Finnegan family engaged the applicant to find an apartment for their daughter in New York (Tr. at 21). However, the apartment was not ready on the move-in date, and the tenants could not stay in the apartment because there was too much ongoing construction (Tr. at 21). Ms. Young testified that the broker of record, Rapid Realty, was not aware of the transaction at all, nor was the broker compensated for it (Tr. at 21-22; State's Ex. 3).

5) Mr. Magaram interviewed the applicant, who also submitted a written statement in response to the Department's inquiry, a signed explanation of his conduct dated November 28, 2012, which the applicant also identified at the hearing as his own statement (Tr. at 14, 16-17). In this memorandum, he admitted that he deposited the client's $1,700 check into his personal account and kept it. He wrote that he noticed a "for rent" sign in an apartment window in Brooklyn, and that the landlord refused to work with the applicant's associated broker. The apartment was a "no fee" property, the applicant listed it on Craigslist, and he expected to be paid one month's rent by the landlord should he rent the apartment. Repairs were needed in the apartment, which was not ready for occupancy by June 1 or July 1, 2012, as planned (Tr. at 42). The tenant complained when she realized that her family had paid a deposit to the applicant but got nothing for their money. The applicant wrote that the tenant wrote the check to him by "mistake," and that when he showed it to the landlord and said he would keep the money "as my fee," the landlord agreed to this arrangement:

> I deposited the check into my personal account; however, I did not keep the money until the deal was final. Once the deal was final, I kept the money. I did not split the commission with Rapid Realty; however[,] I offered the company $600 of the commission. After Rapid Realty fired me, I did not give the company any money.

(State's Ex. 4). The applicant wrote that he felt justified in keeping the money because, according to him, the landlord "wanted nothing to do with Rapid Realty," the applicant had done "all the work to rent the apartment on my own," and the tenant had signed lease, so that "the deal was complete and I had earned my fee" (State's Ex. 4).

6) In response to an inquiry from the Department, Alfred M. Fazio, Esq., of Capuder Fazio Giacoia LLP, counsel to Rapid Realty, wrote a letter report dated January 9, 2013, to Department Investigator Magaram, indicating that Mr. Fazio had interviewed two workers at Rapid Realty,

Valoneecia Tolbert and Sherita Delgado. He wrote that Rapid Realty had agreed to reimburse the Finnegans for the money they had paid to the applicant (State's Ex. 6). Mr. Fazio confirmed that Ms. Tolbert took a telephonic complaint from Theresa and Amanda Finnegan in late May or early June 2012, that despite giving a deposit to the applicant for the apartment, they had not heard anything from him, and that their check had been cashed. Upon checking the company records, Ms. Tolbert, according to Mr. Fazio, found no record of this transaction as a Rapid Realty matter. She contacted the applicant, then a licensed real estate salesman for the firm, and he reportedly told her that the tenant and the landlord had been introduced and that he gave "the deposit" to the landlord (State's Ex. 6).[1] When Ms. Tolbert offered to have Rapid Realty complete the transaction, she told Mr. Fazio, the landlord refused to work with anyone except the applicant (State's Ex. 6). Ms. Tolbert was reportedly unable to confirm that the transaction was ever consummated and learned that the complainants "were not going to allow Rapid Realty to become involved in the transaction" (State's Ex. 6).

7) Ms. Delgado, as the broker of record, according to Mr. Fazio, also checked the firm's files, but could not locate any documentation of the transaction at issue. Ms. Delgado further reported to Mr. Fazio that when Rapid Realty could not raise any of the parties to the transaction, Rapid Realty fired the applicant (State's Ex. 6). Mr. Fazio, Ms. Tolbert, and Ms. Delgado each signed the letter of Mr. Fazio to Mr. Magaram (State's Ex. 6), indicating that the two Rapid Realty workers vouched for the accuracy of Mr. Fazio's recitations of their statements, by signing under the legend "Consented to and agreed by" (State's Ex. 6).

8) The applicant is 31 years old, and was 25 at the time of this transaction (State's Ex. 2). However, he had been licensed for four years by the time of this transaction (Tr. at 49; State's Ex. 3). He admitted that he knew that commissions must be paid to the broker of record (Tr. at 49). He denied telling the tenant to write his name or "Security Deposit" on the check (Tr. at 40-41, 49-50, 53), but he nonetheless accepted it. The applicant admitted that he tried to garner this commission for himself because the landlord adamantly refused to do business with Rapid Realty (Tr. at 41-43). He also admitted that he knew the broker was unaware of this deal and proceeded on his own precisely because the landlord told him he would not deal with Rapid Realty, and that he did not inform the broker of the transaction before he accepted the money (Tr. at 42, 47-48). He knew that the property was not listed with his broker (Tr. at 49). In other words, he cut the broker out, and did not offer to share the money until after the tenant complained.

9) The applicant admitted further: "I know for sure it wasn't all 100 per cent . . . how it was supposed to be done," but he was "trying to make everything be okay again" (Tr. at 43-44). He knew that the check was marked "Security Deposit," and knew the difference between a security deposit and a commission (Tr. at 50). He testified that he understood that the check should be held in escrow, but he had no escrow account because he was not a broker (Tr. at 50-51). He added: "This was wrong for me to accept it, but the fact that I accepted it and tried to do my good faith in distributing it, that should be the main point" (Tr. at 51). But he then admitted, contrariwise: "it wasn't the right thing to do at the time. . . . I know the knowledge of real estate

[1] Both Ms. Young and the applicant agreed that the tenant paid additional monies directly to the landlord (Tr. at 21, 32-36, 42). Although the applicant took issue at the hearing with one statement by Ms. Tolbert, that the landlord told her that he had not received "any deposit" (State's Ex. 6), as a false denial by the landlord, this was a moot point because the Department does not complain of any payments to the landlord, only of the $1,700 payment from the tenant to the applicant, which he kept for himself.

enough to know that I'm not even supposed to – even if it has it in my name, if this was to go directly to me, I know for sure that's not doing something in good faith," and he knew so at the time in 2012 (Tr. at 52). He testified that to get his prior license, he was trained in the proper accounting for money (Tr. at 58-59).

10) The applicant admitted on cross-examination that he deposited the money into his bank account, converted it to his own personal use, and spent it (Tr. at 53).

11) The applicant contended that this transaction occurred six years ago, that he has "gr[ow]n up" since then, that he studied for and passed the test for licensure, and that he has shown good character throughout his real estate career (Tr. at 39-40). Since 2012, the applicant has worked as and continues to be an administrative assistant and paralegal at a children's law center (Tr. at 54-55).

OPINION AND CONCLUSIONS OF LAW

I- As the party who requested the hearing, the burden is on the applicant to prove, by "substantial evidence," that he is entitled to be registered as a real estate salesperson. State Administrative Procedure Act ("SAPA"), § 306(1); *see Matter of Kelly v. DiNapoli*, 30 NY3d 674, 684 (2018) (defining substantial evidence). Substantial evidence is that which "a reasonable mind" could "accept as adequate to support a conclusion or ultimate fact." *300 Gramatan Ave. Associates v. State Div. of Human Rights*, 45 NY2d 176, 180 (1978); *Tutuianu v. New York State*, 22 AD3d 503, 504 (2d Dep't 2005). "The question. . . is whether 'a conclusion or ultimate fact may be extracted reasonably -- probatively and logically.'" *City of Utica Bd. of Water Supply v. New York State Health Dep't*, 96 AD2d 719 (4th Dep't 1983), *quoting 300 Gramatan Ave. Associates, supra,* 45 NY2d at 181. The applicant has not met his burden.

II- A real estate salesperson must be associated with, and work under the supervision of, a real estate broker and must keep that broker apprised of monies that must be directed to the broker. Real Property Law §§ 440(3), 441(I-A)(a)(ii), 442, 442-a; Tr. at 28-29. As an applicant for a real estate salesman's license, Mr. Richards was required to provide information to the Department

> . . . to enable it to determine the *trustworthiness* of the applicant and the applicant's *competence* to transact the business of real estate salesman in such a manner as to *safeguard the interests of the public*, including the *applicant's working knowledge of the basic concepts of law pertaining to contracts, real property, agency and this article which govern conduct of such business, mastery of basic skills* needed to perform the applicant's duties, *working knowledge of the ethical obligations of a real estate salesman*, and knowledge of the provisions of the general obligations law pertaining to performance of the applicant's duties.

Real Property Law § 441(1-A)(b) (emphasis supplied).

III- I find that the applicant's conduct in receiving and keeping the tenant's check for $1,700 patently violated section 442-a of the Real Property Law, which provides:

> No real estate salesman in any place in which this article is applicable shall receive or demand compensation of any kind from any person, other than a duly licensed real estate broker with whom he associated, for any service rendered or work done by such salesman in the appraising, buying, selling, exchanging, leasing, renting or negotiating of a loan upon any real estate.

Real Property Law § 442-a ("Compensation of salesperson; restrictions"). By the same token, his conduct in failing to direct client monies to an associated real estate broker was inconsistent with the real estate broker's duty not to commingle the client's money with his own and to maintain a separate, special bank account to be used exclusively for the deposit of client monies, to safeguard such monies and to prevent loss or misappropriation of funds. 19 NYCRR § 175.1.

Because members of the public must be able to rely upon the trustworthiness of real estate professionals, the kind of knowing and deceitful conversion of a tenant's monies for personal use by a real estate salesperson shown here must not be tolerated or repeated. The public interest must be safeguarded, according to the Real Property Law, against such sharp practices.

IV- Pursuant to RPL §441-e, the Department may deny a real estate salesperson's license after an administrative hearing. The fact that the applicant pocketed the tenant's money for his own account came to light only after the rental deal went sour and the tenant complained to the broker. By accepting the tenant's check for his own account, failing to have an associated broker accept the money in accordance with the law, keeping and converting the deposit into a commission, spending the money for his personal use, cutting out his associated broker, and failing to return the money to the tenant, who got no apartment (Tr. at 12-13, 21), the applicant did not show the requisite trustworthiness, competence, knowledge of contracts, real property, and agency, or the working knowledge of the ethical obligations of a real estate salesman. That the tenant wrote "Security Deposit" on the check tends to show that the $1,700 payment was in no way intended as a commission for the applicant. His denials that he told the tenant to make out the check to himself personally defied common sense and, therefore, seemed disingenuous. *See Prince, Richardson on Evidence* § 1-309 (2008) (testimony that is improbable or contrary to human experience is not credible).

I have considered the applicant's self-assessment that he has grown up since 2012, but the fact remains that he kept the money. This was not his first real estate deal; by his count at trial, he had rented an estimated 100 residential properties before this one (Tr. at 45). In his 2012 memorandum, closer to the time of the transaction at issue, he wrote that in his four years with Rapid Realty, he had rented "about 200 apartments" (State's Ex. 4).

Unless he was associated with a real estate broker with whom this landlord would deal, the applicant should have declined to pursue this transaction. The dishonesty that permeated this transaction leaves no alternative but denial of the real estate salesperson's license.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT the application of Ewan Richards, Jr. for a license as a real estate salesperson is denied.

/S/
Joan R. Salzman
Administrative Law Judge

Dated: July 11, 2018