

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

Complaint No.: 2017-2456

**JESSE ISAACS,
SCCS REALTY,**

Respondents.

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The above noted matter came on for a video conference hearing before the undersigned, John Kenny, on November 8, 2018, at the offices of the Department of State (“Department”) located at 99 Washington Avenue, Albany, New York.

The respondent failed to appear. The Division of Licensing Services (“DLS”) was represented by Jasmine Norman, Esq.

COMPLAINT

The complaint alleges that the respondent real estate broker retained a rental deposit after a failed rental transaction, retained an unearned commission, failed to cooperate with the DLS investigation, and provided a refund to the complainant with insufficient funds.

FINDINGS OF FACT

1) Notices of Hearing together with copies of the Complaint were served by certified and regular mail on or about September 17, 2018 and October 22, 2018. The September 17th Notice of Hearing was sent to the registered address with the DLS. The October 22nd Notice of Hearing was sent to a business address found on the respondent’s website by the DLS investigator (Transcript at 4, 5; State’s Ex. 1).

2) Jesse Isaacs is licensed as a limited liability broker who represents SCCS Realty with a license expiration date of December 14, 2019 (State's Ex. 2).

3) On or about June 8, 2017, Candy Hutchenson, contacted the respondent company, SCCS Realty, for purposes of assisting her with locating an apartment in New York. Ms. Hutchenson was shown an apartment by SCCS Realty salesperson Arturo Castaneda. Ms. Hutchenson stated that she liked the apartment and paid SCCS Realty \$1,745.00. She testified that the \$1,700.00 was the broker's fee and the \$45.00 was the application fee. After paying the broker's fee, Ms. Hutchenson testified that she contacted the respondent and informed him that the monthly rent was more than she could afford based upon her monthly rental budget (Transcript at 21-23; 26, 29,30; State's Ex. 8).

4) On or about June 12, 2017, real estate agent Castaneda showed Ms. Hutchenson an apartment located at 1292 Washington Avenue, Bronx, NY for \$1,350.00 per month. On June 29, 2017, Ms. Hutchenson paid \$2,600.00 to SCCS Realty to secure the apartment. She testified that the \$2,600.00 represented the first month's rent and one-month security. Ms. Hutchenson testified that her rental application was denied by the landlord due to her husband's low credit score (Transcript at 28-31; State's Ex. 9).

5) Approximately three weeks later, agent Castaneda contacted Ms. Hutchenson by email and informed her that she had been approved for an apartment located at 2123 Southern Boulevard, Unit 3B, Bronx, NY. On or about August 7, 2017, Ms. Hutchenson paid \$1,600.00 in the form of four money orders payable to SCCS for the August 2017 rent. In addition, she wrote a personal check to the landlord, Shiv LLC, in the amount of \$1,600.00 which was to be applied toward the August rent. On or about August 16, 2017, after checking her online checking account, Ms. Hutchenson was informed by the bank that the respondent changed the pay to the order of line on the personal check from Shiv LLC to SCCS Realty (Transcript at 37, 40-43, 44-48; State's Ex. 12; State's Ex. 13).

6) Ms. Hutchenson testified that she and her husband signed a lease for the 2123 Southern Boulevard apartment but that the landlord did not sign it. She stated the landlord did not sign the lease due to concerns regarding the balance remaining in her bank account and her ability to pay the rent after she paid the \$3,200.00. Ms. Hutchenson testified that the landlord returned the \$3,200.00 to the respondent (Transcript at 49, 52, 53; State's Ex. 14).

7) On or about August 10, 2017, the respondent's secretary called Ms. Hutchenson and requested that she come to the office to pick-up her personal check and money order for the 2123 Southern Boulevard apartment. Upon arriving, Ms. Hutchenson testified that the respondent was not at the office. She testified that the secretary called the respondent and he stated to the secretary that he deposited Ms. Hutchenson's money into his business account. The following day, Ms. Hutchenson stated that she emailed the respondent expressing her displeasure regarding the deposit of her money into his business account. The respondent replied to her email by stating that he would help her find a new apartment. Two months passed without the respondent finding an apartment for Ms. Hutchenson. On or about October 20, 2017, Ms. Hutchenson called the respondent and requested a refund of the money. She stated that the respondent promised to return the money to her during their conversation (Transcript at 53, 54, 59, 60).

8) On or about October 27, 2017, Ms. Hutchenson met the respondent at his office and he issued a check payable to her in the amount of \$2,880.00. She testified that the \$2,880.00 represented the broker's fee for the 2321 Southern Boulevard apartment. Ms. Hutchenson deposited the check into her bank account and was subsequently informed by her bank that the respondent's bank account was closed. She stated that she went to the respondent's office and spoke with the respondent about the bad check. He stated that he was not aware of the account being closed. The respondent directed his secretary to issue another check payable to Ms. Hutchenson in the amount of \$2,915.00 which covered the banking fee for the bad check. Ms. Hutchenson testified that she deposited the check into her account and was informed by her bank that the check bounced due to insufficient funds (Transcript at 60-68; State's Ex. 16; State's Ex. 17; State's Ex. 18).

9) On or about November 17, 2017, Ms. Hutchens went to the respondent's office and he stated to her that he would transfer \$6,800.00, an amount which represented the total amount of money she had paid to the respondent, into her bank account by direct deposit. She stated that the respondent never transferred the money into her account. Ms. Hutchenson testified that she subsequently went back to the respondent's office located at 818 Jennings Street, Bronx, NY. She stated that the respondent was no longer at that office location and that the SCCS Realty sign on the outside of the building had been removed (Transcript at 69- 71).

10) On or about January 3, 2018, Investigator Berschwinger mailed a letter to the respondent at the address on file with the DLS with a request that he respond within 10 days from the date of the letter. Investigator Berschwinger testified that the respondent failed to reply to the letter. On the same date, Investigator Berschwinger sent an email with a copy of the January 3rd letter attached to the respondent at the email address on file with the DLS. Investigator Berschwinger testified that she received a read receipt from the respondent and a delivery confirmation on January 3, 2018. She stated that the respondent did not reply to the email (Transcript at 10-12; 13-16; State's Ex. 4; State's Ex. 5).

OPINION

I – To obtain personal jurisdiction and bind the respondent to the agency decision, the DLS must properly serve the respondent with notice of the hearing and afford him or her an opportunity to be heard. Service properly made in a manner reasonably calculated to provide notice of the time, date, place, manner and nature of the proceedings is sufficient whether or not the opposing party actually receives notice. *See Persad v. Division of Licensing Services*, 63 DOS APP 09 (2009); *Pinger v. Division of Licensing Services*, 23 DOS APP 07 (2007).

In this case, the respondent was served with a Notice of Hearing and Complaint by certified and regular mail at the address in the records of the DLS. The certified and regular mail were not returned to the DLS by the Post Office. The DLS mailed a second copy of the Notice of Hearing and Complaint to an address at 818 Jennings Street, Bronx, NY. The certified and the regular mail were not returned to the DLS by the Post Office. Although the complainant is required to take reasonable and practical steps to ensure the respondent is afforded notice, the complainant is not required to search beyond its records and those provided by the US Postal Service for the

respondent's current address. *Department of State v. Battista*, 05 DOS APP 11. Accordingly, notice of the opportunity to have an in-person hearing was properly served, and the issuance of this decision based upon written evidence submitted by the complainant is permissible. *Patterson v. Department of State*, 36 AD2d 616, 312 NYS2d 300 (3rd Dept. 1970); *Verdell v. DeBuono*, 262 AD2d 812, 691 NYS2d 679, 680 (3rd Dept. 1999) (quoting *Silverstein v. Minkin*, 49 NY2d 260, 263, 425 NYS2d 88, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865); *Matter of the Application of Rose Ann Weiss*, 118 DOS 93 (1993).

II- As the party that initiated the hearing, the burden is on the complainant to prove, by substantial evidence, the truth of the charges set forth in the complaint. 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*, 45NY2d 176, 408 NYS2d 54, 56-57 (1978); *Tutuianu v. New York State*, 22 AD3d 503, 802 NYS2d 465 (2nd 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 *Gramatan Avenue Associate, supra*, 408 NYS2d at 57.

III- Being an artificial entity created by law, SCCS Realty can only act through its officers, agents, and employees, and it is, therefore, bound by the knowledge acquired by and is responsible for the acts committed by its representative broker, Mr. Isaacs, within the actual or apparent scope of his authority. *Roberts Real Estate, Inc. v. Department of State*, 80 NY2d 116, 589 NYS2d 392 (1992); *A-1 realty Corporation v. State Division of Human Rights*, 35 A.D.2d 843, 318 N.Y.S.2d 120 (1970); *Division of Licensing Services v. First Atlantic Realty Inc.*, 64 DOS 88; RPL § 442-c.

IV- Where a broker has received money to which he or she is not entitled, he or she may be required to return it, together with interest, as a condition of retention of the license. *Donati v. Shaffer*, 83 NY2d 828, 611 NYS2d 495 (1994); *Kostika v. Cuomo*, 41, NY2d 673, 394 NYS2d 862 (1977); *Zelik v. Secretary of State*, 168 AD2d 215, 562 NYS2d 101 (1st Dept. 1990); *Edelstein v. Department of State*, 16 AD2d 764, 227 NYS2d 987 (1st Dept. 1962). By collecting \$6,800.00, and then retaining unearned commissions for the failed rental transactions, Respondent Isaacs, individually, and as a representative broker for Respondent Brokerage, violated RPL Article 12-a and demonstrated untrustworthiness and incompetency pursuant to RPL 12-A §441-c.

V- As a real estate broker the respondent acted as the agent for Ms. Hutchenson who was his principal. The relationship of agent and principal is fiduciary in nature, “...founded on trust or confidence reposed by one person in the integrity and fidelity of another.” *Mobil Oil Corp. v. Rubenfeld*, 72 Misc.2d392, 339 NYS2d 623, 632 (Civil Ct. Queens County 1972). Included in the fundamental duties of such a fiduciary are good faith and undivided loyalty, and full and fair disclosure. Such duties are imposed upon real estate licensees by license law, rules and regulations, contract law, the principals of the law of agency, and tort law. *L.A. Grant Realty, Inc. v. Cuomo*, 58 AD2d 251, 396 NYS2d 524 (1977). The object of these rigorous standards of performance is to secure fidelity from the agent to the principal and to insure the transaction of the business of the agency to the best advantage of the principal. *Dubs v. Stribling & Assoc.*, 96 NY2d 337, 728

NYS2d 413 (2001); *Department of State v. Short Term Housing*, 31 DOS 90, conf'd. *sub nom Short Term Hosing v. Department of State*, 176 AD2d 619, 575 NYS2d 61 (1991); *Department of State v. Goldstein*, 7 DOS 87, conf'd. *sub nom Goldstein v. Department of State*, 144 AD2d 463, 533 NYS2d 1002 (1998).

The respondent retained money for the three rental transactions involving Ms. Hutchenson despite his statements to refund the money to her. In several instances he purported to make refunds but issued checks with insufficient funds or no viable bank account to draw from. The respondent's conduct was a breach of his fiduciary duty to safeguard and account for his principals' money and, therefore, a further demonstration of untrustworthiness and incompetency.

VI- By refusing to return the deposit money to Ms. Hutchenson, the respondent violated 19 NYCRR175.3 (b). By placing the deposit in his operating account, thereby comingling it with his personal funds, the respondent violated General Obligation Law §7-103.

VII- Pursuant to RPL §442-e (5), a real estate broker is obligated to cooperate with investigations of his or her activities conducted by the Department of State. By failing to reply to the letter and email sent by the DLS in a timely manner, Mr. Isaacs violated the regulation and further demonstrated untrustworthiness and incompetency.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Jesse Isaacs, UID#10491205850, retained a rental deposit in violation of 19 NYCRR §175.3 (b), accepted an unearned commission in violation of RPL §443, provided a refund to the complainant with insufficient funds in violation of RPL §441-c, failed to cooperate with the DLS investigation in violation of RPL §442-e (5), and demonstrated untrustworthiness and incompetency in violation of RPL §441-c. Accordingly, his limited liability company broker's license is revoked, effective immediately. Should he ever apply for a new license as a real estate broker or salesperson no action shall be taken on that application until he presents proof satisfactory to the Department of State that he has made the following payment, to Candy Hutcheson in the amount of \$6,800.00, together with interest from November 17, 2017 at 9%, the current rate for interest on judgments. He is directed to send his license certificate, by certified mail, to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, 5th Floor, Albany, New York 12231-0001.

/S/

John E. Kenny
Administrative Law Judge

Dated: February 1, 2019