

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.: 2016-2295

**MICHELLE SWEETLAND,
RICOLE REAL ESTATE & PROPERTY MANAGEMENT LLC,**

Respondents.

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The above noted matter came on for a video conference hearing before the undersigned, John Kenny, on May 24, 2018, at the offices of the Department of State (“Department”) located at 123 William Street, New York, New York, 99 Washington Avenue, Albany, New York and 65 Court Street, Buffalo, New York.

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

COMPLAINT

The complaint alleges that the respondent committed violations of Real Property Law, Article 12-A, and the implementing regulations thereunder in her management of two rental properties located in Rochester, New York.

FINDINGS OF FACT

1) The Notice of Hearing and Complaint was served by certified and regular mail on March 3, 2017 to the respondent at her last known business address as per the records of the DLS. The certified mail, certified mail receipt and the regular mail were not returned to the DLS by the Post Office. The DLS served a second Notice of Hearing and Complaint to an address at Northland Real Estate Services, 3654 McDonald Road, Port Leyden, New York. The certified mail was returned to the DLS by the Post Office as unclaimed. The regular mail was not returned to the

DLS. The Northland Real Estate Services address was obtained by the DLS investigator after conducting a google search of the respondent (State's Ex. 1; Transcript at 23).

2) The respondent is licensed as a limited liability company broker, UID #49SW0943098, as representing Ricole Real Estate & Property Management LLC. The respondent's license expires on June 12, 2019. The respondent is licensed as an associate broker, UID #10301211157, who is associated with Northland Real Estate Services. The respondent's license expires on January 29, 2019 (State's Ex. 2).

3) On or about December 22, 2016, Paul Micklethwaite, filed a Preliminary Statement of Complaint with the DLS stating that the respondent managed two of his properties in Rochester, New York, from February 2009 through November 2016. The complaint alleges that the respondent failed to remit monies owed to Mr. Micklethwaite and failed to provide him with monthly accounting statements. The properties are located at 260 Lexington Avenue, Rochester, New York ("Lexington Property") and 30 Wolfert Terrace, Rochester, New York ("Wolfert Property") (State's Ex. 3; Transcript at 7-8).

4) On or about February 16, 2009, Mr. Micklethwaite and the respondent entered into a property management agreement for the Wolfert property. On or about March 4, 2009, Mr. Micklethwaite and the respondent entered into a property management agreement for the Lexington property. Pursuant to the property management agreements, the respondent was to collect rents and security deposits, maintain the premises of both properties and to make necessary repairs to the properties (State's Ex. 3).

5) As per the property management agreements, the respondent was to provide monthly accounting of rents received and expenses paid out. The respondent was required to remit to Mr. Micklethwaite all income less any sums paid out (State's Ex. 3).

6) Investigator Jowsey testified that during a telephone conversation with Mr. Micklethwaite on September 12, 2017, Mr. Micklethwaite stated that the respondent did not provide him with monthly accounting statements for the two rental properties since June 2016. Mr. Micklethwaite also stated that the respondent mismanaged his properties which resulted in him being fined by the City of Rochester (Transcript at 13).

7) In his Preliminary Statement of Complaint, Mr. Micklethwaite states that the respondent owes him \$7,548.00. The \$7,548.36 estimate relied upon by Mr. Micklethwaite is based upon a six-month accounting prepared by the respondent and provided to Mr. Micklethwaite for the period from January 2016 through June 2016 for both properties (State's Ex. 3).

8) On or about December 13, 2017, Mr. Micklethwaite sent an email to Investigator Jowsey amending the amount of money that the respondent owes to him. Mr. Micklethwaite stated to her in his email that he failed to add an \$800.00 rent payment that the respondent collected on his behalf. Mr. Micklethwaite also stated to Investigator Jowsey that the tenant for the Lexington property had indicated to him that she paid the December 2016 rent in the amount of \$800.00 to the respondent. In addition, Mr. Micklethwaite stated that a fine was issued in the amount of \$300.00 by the City of Rochester for a code violation by failing to repair certain covered surfaces

at the Lexington property that were in a state of disrepair. In the same email from Mr. Micklethwaite to Investigator Jowsey, Mr. Micklethwaite stated that the respondent had agreed to pay the fine assessed by the City of Rochester and that the respondent failed to pay the fine. Mr. Micklethwaite further stated in his email that the respondent owes him \$8,648.00 based upon the respondent's failure to remit the \$800.00 rental payment owed to Mr. Micklethwaite as well as the \$300.00 fine imposed by the City of Rochester (State's Ex. 3; State's Ex. 6; Transcript at 13-15 and 39-40).

9) On or about February 21, 2017, Investigator Lee mailed a letter with a copy of the Preliminary Statement to the respondent at the address on file with the DLS with a request that she respond within 10 days from the date of the letter (State's Ex. 4).

10) On or about March 25, 2017, respondent emailed Investigator Lee from the email address at michelle@ricolemgmt.com and stated that she was reviewing the complaint and gathering information for a response. Investigator Lee never received a response from the respondent (State's Ex. 5).

11) On or about September 14, 2017, Investigator Jowsey emailed respondent at michelle@ricolemgmt.com and asked the respondent to contact her no later than September 19, 2017. The respondent failed to respond by said date (State's Ex. 7).

12) On or about September 22, 2017, Investigator Jowsey mailed a certified and first class letter with a copy of the Preliminary Statement of Complaint to the respondent's address on file with the DLS. The letters asked for a response to the complaint no later than October 2, 2017. The respondent failed to provide a response by said date (State's Ex. 8 and 9).

13) In early to mid-November 2017, Investigator Jowsey attempted to contact the respondent at three different email addresses she had obtained from various sources during her investigation. Investigator Jowsey asked the respondent to respond by a date certain in each email. The respondent failed to respond to any of the email requests from Investigator Jowsey. Investigator Jowsey subsequently contacted Janette Vander Baan, broker of record for Northland Real Estate, who stated that the respondent no longer worked for her. Ms. Vander Baan provided Investigator Jowsey with a cell phone number and an email address to contact the respondent (State's Ex. 11 and 13; Transcript at 23-31).

14) On or about December 4, 2017, Investigator Brimmer emailed the respondent and stated that the case was being referred to counsel's office for review. On December 8, 2017, the respondent replied to Investigator Brimmer and stated that she would send the information that DLS needed to conduct its investigation. On the same date, Investigator Jowsey followed up with an email by asking the respondent to provide invoices for repairs and maintenance, property management agreements and accounting statements no later than December 14, 2017. (State's Ex. 13, Transcript at 31-34).

15) On December 10, 2017, the respondent did reply to Investigator Jowsey's email dated December 8, 2017. The respondent stated that she would cooperate with the investigation and

provide the DLS with the necessary documentation. The respondent used the email address at michelle@ricolemgmt.com (State's Ex. 14 and 15; Transcript at 33-38).

16) In an email dated December 13, 2017, Investigator Jowsey granted the respondent an extension until January 1, 2018 to provide the documentation that she requested in her email dated December 8, 2017. The respondent failed to provide the documentation to Investigator Jowsey (State's Ex. 14).

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 mail and regular mail were not returned to the DLS by the Post Office. The DLS mailed a copy of the Notice of Hearing and Complaint to a second address at Northland Real Estate Services wherein the certified mail was unclaimed and the regular mail was 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.

As part of his Preliminary Statement of Complaint, Mr. Micklethwaite prepared his own estimate of the monies owed to him by the respondent for the two rental properties. To arrive at his estimate, Mr. Micklethwaite used an accounting from January 2016 through June 2016 prepared by the respondent as the basis for showing the monies that are owed to him. Mr. Micklethwaite estimates the respondent owes him \$8,648.00 for the period from July 2016 through November 2016. The documentary evidence regarding the monies that are owed by the respondent are equivocal at best. There is insufficient evidence to show what monies are owed to him by the respondent other than Mr. Micklethwaite's Preliminary Statement of Complaint which is unsworn. Without the testimony of Mr. Micklethwaite, it is difficult to determine how he arrived at the estimate of the monies owed to him by the respondent. In addition, the only proof that the respondent failed to provide Mr. Micklethwaite with monthly accounting statements is in the form of documentary evidence and verbal statements that were provided by Mr. Micklethwaite to Investigator Jowsey during the course of the investigation which are also unsworn. Accordingly, the charge that the respondent failed to render an accounting and remit monies owed to Mr. Micklethwaite is dismissed.

III – Real estate salespersons and brokers are special fiduciary agents upon whom the law imposes the fiduciary duties of good faith and undivided loyalty of full and fair disclosure, of reasonable care, of confidentiality and to account. *L.A. Grant Realty Inc. v. Cuomo*, 58 AD2d 252, 396 NYS2d 524 (4th Dept. 1977). A failure of a real estate broker to protect a principal from foreseeable harm falls within the general rule of reasonable care. In this case, the DLS alleges that the respondent is responsible for paying a fine to the City of Rochester for a code violation. While the documentary evidence shows there is proof that a fine is owed to the City of Rochester, there is no proof that the respondent is responsible to pay the fine. The property management agreement does not address the issue of who is responsible for the payment of fines. The only evidence of the respondent's liability for the payment of the fine are Mr. Micklethwaite's unsworn statements in the emails that he sent to Investigator Jowsey. Accordingly, the charge that the respondent failed to pay the fine to the City of Rochester is dismissed.

IV- Pursuant to RPL §442-e (5) a real estate broker is obligated to cooperate with the DLS investigation of possible license violations. The respondent failed to respond to the inquiries from the DLS to provide documentation regarding the property management agreement between herself and the complainant. The DLS attempted to contact the respondent numerous times through email and letters to no avail. The respondent simply ignored any requests from the DLS to provide the required documentation despite her statements that she would cooperate with the investigation. The respondent ultimately failed to provide the documentation that the DLS was seeking in order to conduct its investigation, and, therefore, violated RPL §442-e (5) and demonstrated incompetency and/or untrustworthiness in violation of RPL §441-c.

V- Pursuant to RPL §441-a (5) a real estate broker must file with the DLS any change in the address of his/her principle place of business. In this case, the respondent failed to notify the DLS of her change of address for Ricole Real Estate & Property Management LLC and for Northland Real Estate.

VI- Pursuant to 19 NYCRR §175.3 (a), a real estate broker, when acting as an agent in the management of property, shall not accept any commission, rebate or profit on expenditures made

for his client without his full knowledge and consent. The DLS failed to provide any evidence that any of the fees for repairs, commissions or management fees taken by the respondent on behalf of Mr. Micklethwaite were without his full knowledge and consent (Transcript at 40). Accordingly, this charge is dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Michelle Sweetland, UID#49SW0943098 and UID#10301211157, failed to cooperate with the DLS investigation in violation of RPL §442-e (5), failed to notify the DLS of a change of address in violation of RPL §441-1 (5) and demonstrated untrustworthiness in violation of RPL §441-c. Accordingly, her limited liability company broker's license and her associate broker's license are revoked, effective immediately. She is directed to send her license certificates, 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: August 30, 2018