

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,

DECISION

Complaint No.:2016-1715

-against-

ANTHONY LEONARD HOWELL,

Respondent.
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The above noted matter came on for a video hearing before the undersigned, John Kenny, on October 18, 2018 at the office of the Department of State (“Department”) located at 99 Washington Avenue, Albany, New York and 123 William Street, New York, New York.

The applicant failed to appear. The Division of Licensing Services (“DLS”) was represented by David Mossberg, Esq.

COMPLAINT

The complaint alleges the respondent failed to satisfy a court-ordered judgment, unlawfully converted client funds, failed to remit monies collected for his client and failed to cooperate with the DLS investigation. The complaint further alleges that through this misconduct the respondent demonstrated untrustworthiness and incompetency in violation of Real Property Law (RPL) §441-c.

FINDINGS OF FACT

1) On August 30, 2018, the Notice of Hearing and Complaint were served by certified and regular mail on the respondent at his address listed in the records of the DLS (State’s Ex. 2). On the same date, the DLS also mailed a second Notice of Hearing and Complaint by certified and regular mail on the respondent at the address listed on the Preliminary Statement of Complaint (State’s Ex. 3).

2) The respondent was licensed as an individual broker representing Sky Box Realty LLC, at a business address of 107 55 126th Street, Jamaica, NY 11419, whose license expired on February 21, 2018 (State's Ex. 2).

3) In May of 2016, Keith Sidell was looking for an apartment and contacted the respondent to view an apartment. During an interview with Mr. Sidell, Mr. Sidell told Investigator McGovern he paid a deposit to the respondent to secure an apartment. Mr. Sidell further stated that he did not take possession of the apartment and that the respondent failed to return his deposit (Transcript at 11).

4) On May 9, 2017, Mr. Sidell obtained a money judgment against the respondent in Civil Court of the City of New York, Kings County for \$5,020.00. Investigator McGovern testified that she contacted Mr. Sidell and he informed her that the respondent has failed to satisfy the judgment (Transcript at 23-26; State's Ex. 7).

5) Investigator McGovern testified that the respondent failed to respond to a letter sent by regular mail from the DLS to his business address on October 19, 2017 requesting that he respond to Mr. Sidell's complaint. She also testified that the respondent failed to respond to an email sent by the DLS to the respondent dated November 3, 2017 requesting a response to the complaint (Transcript at 12-16; State's Ex. 3, State's Ex. 4).

6) Investigator Delaney testified he personally visited the building at 576 Fifth Avenue, NY, NY 10036 searching for the respondent or Sky Box Realty LLC on January 10, 2018. He was unable to locate the respondent at that address. Investigator Delaney also visited the 107 55 126th Street, Jamaica, NY 11419 address and found that no one was home. Investigator Delaney stated that he placed a copy of the DLS letter requesting a response to Mr. Sidell's complaint in the respondent's mailbox (Transcript at 26-30; State's Ex. 8).

OPINION

I- 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, 45 NY2d 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 300 Gramatan Avenue Associates, supra, 408 NYS2d at 57.

II- The Department of State retains jurisdiction to conduct this proceeding even though the respondents' license has expired; his misconduct occurred while he was licensed. *Albert Mendel & Sons, Inc. v. NYS Department of Agriculture and Markets*, 90 AD2d 567, 455 NYS2d

867 (3rd Dept. 1982); *Maine Sugar of Montezuma, Inc. v. Wickham*, 37 AD2d 381, 325 NYS2d 858 (3rd Dept. 1971).

III- To obtain personal jurisdiction and bind the respondent to the agency decision the complainant must properly serve the respondent with notice of the hearing and a copy of the complaint and afford him the opportunity to be heard (see Siegel, *New York Practice* §58 (4th ed., 2005). 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).

Service of the Notice of Hearing and Complaint in this matter was made by certified and regular mail addressed to the respondent at his last known address as appearing in the records of the DLS. The certified and regular mail were not returned to the DLS by the Post Office. The DLS served a second Notice of Hearing and Complaint by certified and regular mail to an address provided for in the Preliminary Statement of Complaint. The certified mail was returned to the DLS by the Post Office as "Return to Sender – Unable to Forward." The Post office did not provide a forwarding address for the respondent. The regular mail was not returned to the DLS. Accordingly, to the extent that there is evidence that notice was properly served in this instance, the hearing was permissibly conducted in the respondent's absence. *Patterson v. Department of State*, 35 AD2d 616 (3d Dept. 1970); *Staley v. Division of Licensing Services*, 14 DOS APP 01 (2001); *Department of State v. Battista*, 05 DOS APP 11 (2011); *Matter of the Application of Rose Ann Weis*, 118 DOS 93 (1993).

IV- "The failure to pay a judgment which has been lawfully obtained, without a showing that he is unable to do so, is a demonstration of untrustworthiness by a real estate broker. *Department of State v. Feldman*, 113 DOS 80, *conf'd. sub nom Feldman v. Department of State*, 81 AD2d 553, 440 NYS2d 541 (1981); *Division of Licensing Services v. Shulkin*, 40 DOS 90; *Division of Licensing Services v. Janus*, 33 DOS 89." *Division of Licensing Services v. Harrington*, 123 DOS 93, at p. 4. The respondent failed to pay Mr. Sidell \$5,020.00 as ordered by the court. By failing to satisfy a civil court judgment, the respondent has demonstrated untrustworthiness pursuant to RPL §441 (c).

V- Pursuant to 19 NYCRR §175.1, a licensee cannot commingle funds provided by a client with that of his or her own. There is no proof in the record which shows that the respondent commingled the funds he received from Mr. Sidell with his own personal funds. Therefore, that violation is dismissed.

VI- The complainant has established by substantial evidence that the respondent failed to remit the deposit paid by Mr. Sidell for the failed rental transaction in violation of 19 NYCRR §175.2.

VII- The complaint alleges that the respondent failed to cooperate with the Department's investigation by not responding to the DLS letter and email directing him to respond to Mr. Sidell's complaint. RPL §442-e(5) states:

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“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. By failing to respond to the DLS letters and email, the respondent has violated RPL §442-e(5).

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Anthony Leonard Howell failed to pay a lawfully obtained judgment, violated Real Property Law §§441(c), 442-e(5) and 19 NYCRR §175.2, and demonstrated untrustworthiness. Accordingly, pursuant to RPL §441-c, his license as an individual real estate broker, UID #10491206048, is deemed revoked effective immediately. Should he ever re-apply for a license as a real estate broker, no action shall be taken on such application until he shall have produced proof satisfactory to the DLS that he has satisfied the judgment as stated above plus interest at the legal rate for judgments (currently 9% per year) from May 9, 2017.

The respondent is directed to send proof of satisfaction of the judgment, to Norma Rosario, Department of State, Division of Licensing Services, One Commerce Plaza, 99 Washington Avenue, Albany, New York 12231-0001.

/S/

John E. Kenny
Administrative Law Judge

Dated: December 27, 2018