

STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF ADMINISTRATIVE HEARINGS

-----X

In the Matter of the Complaint of

DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,

Complainant,

DECISION

-against-

LAN LAN WANG,

Respondent.

-----X

The above noted matter came on for hearing before the undersigned, Roger Schneier, on July 27, 1999 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent was represented by Robert A. Hantman, Esq., Hantman & Associates, 65 Bleecker Street - 4th Floor, New York, New York 10012.

The complainant was represented by Litigation Counsel Laurence Soronen, Esq.

COMPLAINT

The complaint alleges that the respondent, a licensed real estate broker, has engaged in the business of Apartment Information Vendor without being licensed to do so.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail (State's Ex. 1).

2) The respondent has been licensed as a real estate broker representing Principal Connections Limited, 444 Park Avenue South, New York, New York, since at least December 6, 1994. Neither she, the corporation, nor any of the other business entities through which she conducts or has conducted business, are, or have ever been, licensed as an Apartment Information Vendor (State's Ex. 1).

3) In or about 1996 the respondent commenced operation of "Manhattan Listing Xpress," aka "Homeline." In return for a registration fee of \$175 consumers would receive, for a period of

three months, listings of apartments which were available for rent in various New York City locations (State's Ex. 2, 3, and 4). All contacts between Manhattan Listing Express/Homeline and its customers were either in person, by voice or fax telephone, or by mail.

4) At some point the respondent ceased doing business in the above manner, and transferred her entire operation to the internet, using, among others, the names "Metro List Xpress" and "MLX."

When consumers access the respondent's web site they are offered, without fee, the opportunity obtain information about various aspects of the real estate business in New York City, about taxes, and about moving, to receive discounts from certain non-affiliated businesses, to participate in an on-line bulletin board, and to access a data base of apartments which are available for rent or sale. The data base describes the apartments which are available for rent, but does not give their addresses or otherwise indicate how to contact the landlords. By paying a fee of \$150.00 the consumer receives on-line access to the addresses of and contact information for the rental apartments, as well as increased discounts from the non-affiliated businesses (State's Ex. 1, 6 and 7, Resp. Ex. B).

5) Attached hereto, and made a part hereof, is a copy of the respondent's proposed findings of fact with my comments noted thereon.

OPINION

I- Pursuant to Real Property Law (RPL) §446-b, no person may "act or engage in the business as an apartment information vendor in this state without first having obtained a license from the secretary of state." An "apartment information vendor" is

"any person who engages in the business of claiming, demanding, charging, receiving, collecting, or contracting for the collection of, a fee from a customer for furnishing information concerning the location and availability of real property, including apartment housing, which may be leased, rented, shared or sublet as a private dwelling, abode, or place of residence." RPL §446-a[2].

An "advance fee" is

"any fee claimed, demanded, charged, received or collected from a customer before the customer has leased or rented a private dwelling, abode or place of residence through

the information provided by an apartment information vendor." RPL §446-a[3].

Nowhere in the statute is there any limitation of coverage to persons who supply information by a particular means, such as in person or in writing, or an exemption from coverage for persons who supply information by some other means, such as electronic. Nor is there any exemption for licensed Real Estate Brokers.

"While it is true that prior to the enactment of the apartment information vendor law some courts held that such activities required licensure as a real estate broker (*People v Biss*, 81 Misc2d 449, 365 NYS2d 983 (1975); *People v Sickinger*, 79 Misc2d 572, 360 NYS2d 796 (1974)), it is also true that with the enactment of the statute the law changed.

"When the Legislature enacted the apartment information vendor law, it carved out for special attention an area of the real estate business in which it decided that the public required special protection, and imposed on licensees special requirements above and beyond those placed on real estate brokers. Accordingly, unlike in the practice of real estate brokerage, apartment information vendors must establish special interest bearing trust accounts in the minimum amount of five thousand dollars (RPL §446-b[6]), are required to use specially approved contracts (RPL §446-c[1]), may be required to file quarterly reports with the Secretary of State (RPL §446-c[4]), may not retain more than fifteen dollars of any advance fee when a rental has not been effectuated (RPL §446-c[5][a]), and are forbidden to charge a fee in excess of one month's rent (RPL §446-c[5][b])." *Division of Licensing Services v Mc Dermott*, 318 DOS 97.

The respondent's operation of Manhattan Listing Xpress/Homeline clearly fell within the statutory definition of "Apartment Information Vendor." Put simply, she sold listings of apartments which were available for rent. While in her current on-line business she has modified her operation somewhat, the essence of the business remains the same. For a fee she provides her customers with information as to the location and availability of apartments which may be rented. Although she also provides other information and makes available certain discounts from unrelated businesses, but most of that information and of those discounts is

available without charge, and the essence of the service for which her customers are paying is the access to the apartment listings.

Unlike a newspaper, in which the reporting of news is the primary function and apartment rental advertisements, placed by a landlord or broker for a fee, are only a secondary function, the primary function of the respondent's business, and the source of her revenues, is the sale of access to listings of apartments which are available for rent. See, *Lefkowitz v Harrell's Employment Guide, Inc.*, 89 Misc. 2d 807, 392 NYS2d 529 (Albany County Supreme Court, 1977). The fact that her service is electronic and interactive, or that she refers to it as a "portal," in no way changes the essence of what she is selling. Nor does the fact that the apartment information is in data base form rather than in a written list, a change of form rather than of substance, exempt it from the coverage of the statute.

II- The respondent seeks to be exempted from coverage by the statute by arguing that the intent of the Legislature and Governor was that it should apply to written lists. Setting aside the fact that it is unlikely that at the time of the enactment of the statute the Legislature and Governor could have anticipated the availability of the internet, and the fact that the apartment availability information supplied by the respondent is nothing more or less than a customized list in electronic form, the respondent's resort to an analysis of legislative intent is misplaced. Inasmuch as the language of the statute is clear and unambiguous, its words should be given their plain meaning. *Matter of State v Ford Motor Co.*, 74 NY2d 495, 549 NYS2d 368 (1989). The respondent is engaged in just the type of conduct which the statute was designed to regulate: the sale of listings of apartments available for rent. Thus, this is not a situation in which the application of the above principal will result in an unreasonable or absurd result, *Williams v Williams*, 23 NY2d 592, 298 NYS 2d 473 (1969).

While the respondent may not have engaged in any of the fraudulent and harmful conduct which the statute seeks to prevent, it is illogical to argue that she should, therefore, be exempt from licensure. One need not demonstrate a dishonest nature before being required to be licensed. If such were the requirement, no licenses would be issued and the statute would be meaningless, as licenses are not to be issued to dishonest persons, GBL §446-b[1], and honest persons wouldn't need them.

III- The respondent argues that licensure should not be required because certain aspects of the statute and of the regulations enacted pursuant to the statute are absurd when considered in regards to the nature of an internet operation. That argument is premature, and can be properly made only after the respondent obtains a license.

IV- The respondent contends that an exemption from coverage by the statute has been granted to a service known as "Apartment Store," which, according to the respondent, claims to be a credit service which provides apartment listings as an ancillary service, and that such exemption should apply to her. In fact, charges were brought against the licensed real estate broker who operates that business, a hearing has been held before this tribunal, and the matter is currently *sub judice*.

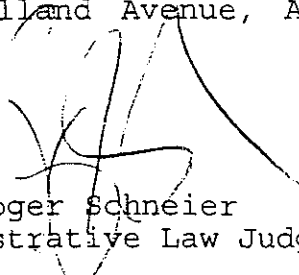
V- The respondent seeks to have this tribunal rule on the constitutionality of the statute. The tribunal lacks the authority to do so. *Cherry v Brumbaugh*, 255 AD 880, 7 NYS2d 956 (App. Div. 2nd. Dept., 1938); *Richardson v Tennessee Board of Dentistry*, 913 SW2d 446 (Sup. Ct., Tennessee, 1995).

CONCLUSIONS OF LAW

By operating an unlicensed Apartment Information Vendor business the respondent violated GBL §446-b, and thereby demonstrated untrustworthiness and incompetence as a Real Estate Broker

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Lan Lan Wang has demonstrated untrustworthiness and incompetence, and accordingly, pursuant to Real Property Law §441-c, her license as a Real Estate Broker is suspended effective April 1, 2000 until such time as she has presented proof satisfactory to the Department of State that she, either directly or through any business controlled by her, is no longer engaged in the business of Apartment Information Vendor as defined by General Business Law §446-a[2]. The respondent is directed to send such proof, or her license certificate and pocket card to Usha Barat, Customer Service Unit, Department of State, Division of Licensing Services, 84 Holland Avenue, Albany, NY 12208.


Roger Schneier
Administrative Law Judge

Dated: January 31, 2000