IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

STEPHEN G. BENEKE,

Respondent.

_____/

Supreme Court No. 64,090

(TFB No. 06A83H79)

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COMPLAINANT'S ANSWER BRIEF

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STATEMENT OF CASE

Appellee accepts Appellant's Statement of the Case. Appellee will be referred to as Complainant and Appellant will be referred to as Respondent in this brief to correspond with Appellant's terminology.

STATEMENT OF THE FACTS

Complainant rejects Respondent's subtle attempt to interject argument into the Statement of Facts and would restate them as follows:

Between January 1 and January 23, 1978, Respondent, as buyer, received a sales contract from the seller, and executed by the seller for a sales price of $245,000.00 on a piece of real estate (Tr. 85, 97). Respondent did not execute the sales contract at that time, but negotiated a second contract for $159,000.00 which was executed by both Respondent as buyer and by the seller on January 23, 1978 (Tr. 89, 99), See Bar Exhibit 2-A.

Although a contract for $159,000.00 had been signed by the buyer and seller for $159,000.00 two (2) days prior on January 23, 1978, Respondent submitted a loan application to the Ellis National Bank of Clearwater to obtain financing in a loan application dated January 25, 1978 (Tr. 86, 99, 102). The loan application and attachments dated January 25, 1984, sought a loan in the amount of $175,000.00 on the property (Tr. 99), See Bar Exhibit 4.

The bank's records do not ever reflect receipt of or acknowledgment of the existence of the $159,000.00 contract. Bank records only reflect knowledge of an alleged purchase price of $245,000.00 with a corresponding requested loan of $175,000.00 (Tr. 11, 12, 29, 86, 131).

Based on the $245,000.00 sales contract, on February 23, 1978, Ellis National Bank of Clearwater issued a mortgage of $160,000.00 at 9% interest to Respondent on the property, which loan was a $1,000.00 more than the actual negotiated purchase price of the property.

Neither prior to the closing nor after the closing, did Respondent ever notify the bank of the actual sales price (Tr. 100-101, 115). Respondent never told the seller he had signed the $245,000.00 contract or that he had submitted the $245,000.00 contract to the bank for financing (Tr. 112). A bank representative was not present at the closing in escrow on the property (Tr. 115). Ms. Mary Beth LeGrow, Respondent's former secretary testified that when Respondent returned to his office after the closing, he stated that it was the first time he had ever purchased property where they paid him for it, adding that the bank thought he had paid more for the property than he actually did (Tr. 68-69). She also testified that in response to repeated requests from the bank for a copy of the closing statement, which would have shown the actual purchase price, Respondent repeatedly instructed her not to send the

closing statement to the bank because he did not want the bank to see the closing statement (Tr. 72, 79-80). Ten months later, on December 28, 1978, Respondent sold said property to Bruce Taylor, Inc. for $230,000.00.

POINTS INVOLVED

There is clear and convincing evidence that Respondent was guilty of engaging in conduct involving misrepresentations or committing an act contrary to honesty and good morals.

SECOND POINT INVOLVED

Assuming that Respondent is guilty as recommended by the referee, his conduct does warrant a public reprimand.

FIRST POINT INVOLVED

THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT WAS GUILTY OF ENGAGING IN CONDUCT INVOLVING MISREPRESENTATION AND COMMITTING AN ACT CONTRARY TO HONESTY AND GOOD MORALS.

ARGUMENT

After hearing the testimony, observing the demeanor of the witnesses, and reviewing the documentary evidence submitted, the Honorable Morrison Buck, Referee, found there was clear and convincing evidence of Respondent's violation of The Florida Bar Code of Professional Responsibility, Disciplinary Rule 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) and Integration Rule, article XI, Rule 11.02(3)(a) (committing an act contrary to honesty, justice or good morals). This Honorable Court has repeatedly held that the "...fact finding responsibility in disciplinary proceedings is imposed on the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence." The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). See also The Florida Bar v. Wagner, 212 So.2d 777 (Fla. 1968) and The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978).

In his brief, Respondent did accurately identify the critical issue in this case as being whether the Respondent delivered the two hundred forty-five thousand dollars ($245,000.00) contract to the bank and failed to deliver the one hundred fifty-nine thousand dollar ($159,000.00) contract to the bank for the purpose of inducing the bank to make a larger loan than it (the bank) would have made if it had known the true sales price. A brief review of the evidence supporting the referee's finding of guilt and recommendation for a public reprimand is as follows:

1. Bernard Speaker, an officer and custodian of the bank's records, testified that the bank records only contained the executed contract for the sale of the instant real property in the amount of $245,000.00, which was the only contract Respondent submitted to the bank (Bar Exhibit 1-A). Furthermore, there was no record or any indication of the bank's knowledge of the $159,000.00 contract in the bank's records (Tr. 9-45).

2. In the bank records there are two documents, a record of Application for a Loan or Line (Bar Exhibit 4) and Minutes of the Special Meeting of the Loan Committee (Bar Exhibit 6) which clearly indicate that the bank based its $160,000.00 loan on the basis of their belief that the loan request was $175,000.00 and the purchase price of the property was $245,000.00.

3. Mary Beth LeGrow, Respondent's secretary at the time of the transaction, testified that upon returning from the closing where the bank had loaned Respondent $ 1,000.00 more than the purchase price, Respondent stated to her that the bank thought he had paid more for the property than he had actually paid (Tr. 68-69, 80); and that subsequently, Respondent had refused to send the bank a copy of the closing statement after he bought the property, despite the bank's repeated requests (Tr. 72, 80).

4. The dates of the loan application for $175,000.00 and the date of the $159,000.00 contract show that Respondent had already negotiated a second contract on the same property for $159,000.00 at the time he submitted the loan application, but that he did not submit the second, reduced contract price to the bank (Tr. 91, 100, 102).

At the hearing, respondent attempted to explain away his deception by inverting the sequence of events, but his attempts to manipulate the facts failed when confronted with logic and the dates of the documents.

Respondent testified that after acquiring possession of a sales contract executed only by the seller showing a sales price of $245,000.00, Respondent went to the bank and discussed obtaining a loan for the purchase of the property with Mr. Schotzberger, then president of the bank (Tr. 85, 138). Since

the bank could not consider the loan unless there was first a signed contract, Respondent testified that Mr. Schotzberger requested that he sign the contract, which Respondent believes he did sign at the bank and then gave the executed $245,000.00 contract to Mr. Schotzberger at that time (Tr. 86, 96). Respondent further stated that at the conclusion of their loan discussion, Mr. Schotzberger gave him the mortgage loan application and asked Respondent to fill it out and send it to him. (Tr. 86). Respondent then attempted to argue that he subsequently proceeded to negotiate the second agreement of sale for $159,000.00, and that he failed to notify the bank of the second reduced contract because they never requested it.

However, this scenario is impossible, since the contract for $159,000.00 which was executed by both parties is dated January 23, 1978, which was two (2) full days before he filled out the loan application which is dated January 25, 1978 (Tr. 89, 100, 102). Therefore, Respondent knew of the existence of the executed contract for $159,000.00 at the time he submitted the loan application dated January 25, 1978. Although the $245,000.00 contract is mysteriously dated after the $159,000.00 contract, it is clear that the Respondent intended to deceive the bank into basing its loan on a higher than actual sales price. Similarly, Respondent's argument that he had no intentions to mislead the bank since the property was appraised at $227,000.00 is misplaced, since the appraisal was not conducted until a week

after his loan application on January 25, 1978 and at least a week after he provided the bank with the $245,000.00 contract.

Respondent testified that when he submitted his loan application to the bank on or about January 25, 1978, he did not include a copy of the new $159,000.00 contract with the application because the bank did not request it, (Tr. 103). He also admitted at no time prior to the closing did he supply the bank with the $159,000.00 contract, again arguing that the bank did not request it. This line of reasoning is absurd, since logic dictates that a bank would not request a second, subsequently negotiated contract when they had already been supplied with an executed contract and had no reason to know of the existence of a second contract. Even if the $159,000.00 contract had been negotiated after the submission of the $245,000.00 contract, the burden would have been on the Respondent to notify the bank of the second, reduced contract and to submit a copy to them. However, Respondent not only failed to supply the executed $159,000.00 contract to the bank at any time, but he actively concealed its existence prior to and during the loan application process.

Next, Respondent argues that he was unaware of the internal operational records of the bank, specifically a Record of Application for Loan or Line (Bar Exhibit 4) or the Minutes of the Special Meeting of the Loan Committee (Bar Exhibit 6). Again, logic belies this argument, since Respondent knew or

should have known that the bank would have relied on the $245,000.00 purchase price in computing their purchase price to loan percentage formula; especially since the $245,000.00 contract was the only contract he had provided to the bank and the only contract that he had allowed the bank to know about. The documents in the bank records which were submitted into evidence verify the fact that the bank relied on the purchase price of $245,000.00 in extending Respondent a loan for $160,000.00. (See Bar Exhibit 6, the Minutes of the Special Loan Committee). It is also significant that the bank reduced Respondent's loan request by $15,000.00, from $175,000.00 to $160,000.00, even though the bank was under the false assumption that the purchase price was $245,000.00. Respondent next asserts that the testimony of Respondent is clear to the effect that Mr. Schotzberger committed the bank to lend 70% of the appraised value of the property, and therefore, the purchase price was immaterial. The testimony of Respondent that Mr. Schotzberger had made such a commitment is self-serving hearsay, unsupported by any other testimony or documentary evidence. Respondent could not produce anything in writing from Mr. Schotzberger or any other witness of the bank to support his contention.

This argument is belied not only by the Minutes of the Special Loan Committee (Bar Exhibit 6), and the fact that the decision on the loan was made by committee decision, not just Mr. Schotzberger, but by logic. Simply stated, if Respondent really believed that the purchase price was irrevelant,

then why did he go to such great lengths to conceal the existence of the second contract from both Mr. Schotzberger and the Special Loan Committee, by refusing to provide the bank with the actual purchase price?

In furtherance of his cover up and non-disclosure to the bank, Respondent admitted that a bank representative was not present at the closing in escrow on the property (Tr. 115). Respondent also testified that at the subsequent loan closing with the bank, he did not disclose to the bank the change in purchase price of the property (Tr. 115). Respondent also admitted that he never informed the seller that he executed the $245,000.00 contract or that he had submitted the $245,000.00 contract to the bank (Tr. 112). Respondent further testified that he did not believe that the bank requested a closing statement and that a closing statement was irrevelant to the loan (Tr. 100, 115). However, not only did Respondent refute this by his own admissions and conduct, but his former secretary, Mary Beth LeGrow also refuted this contention. Respondent admitted that after the closing he knew the bank had requested a closing statement, and that he could not produce any record from any source of his compliance with the bank's request.

On the contrary, Mrs. LeGrow testified that a bank representative called Respondent's office many times requesting a copy of the closing statement and that Respondent told her

repeatedly not to send the $159,000.00 contract and not to worry about it because he did not want the bank to see the closing statement (Tr. 72, 79-80). Ms. LeGrow testified further that upon Respondent's return to his office after the closing on or about February 23, 1978, Respondent was boasting and waiving money in the air and announced it was the first time he had ever purchased property where they had paid him for it. Respondent added that the bank thought he had paid more for the property than he actually did (Tr. 68-69). These comments by Respondent explain why he did not want the bank to receive a copy of the closing statement. Mrs. LeGrow next testified that when Respondent was subsequently planning to sell the same property on or about December, 1978, Respondent asked her to handle the paperwork for the closing (Tr. 70-71). Mrs. LeGrow further explained that when she was trying to compile the figures for resale of the property, she found two contracts of purchase. Upon asking Respondent for clarification, Respondent said no one at the closing was supposed to see both contracts and cautioned Ms. LeGrow to never tell anyone about it (Tr. 74-75).

After reviewing the evidence, i.e., the exhibits and the testimony, it is obvious that Respondent's assertion that the "opinion" of the Referee is contrary to the testimony of Respondent is true; however, Respondent's conclusion that the Referee's findings were therefore based solely on

suspicion is a nonsequitur. In his Report of Referee, the Referee noted that he was "of the opinion that the actions of Respondent were subtly intended to support (Respondent's) application for a loan in excess of the purchase price of the property", despite Respondent's testimony. For Respondent to one-sidely assert that the Referee based his opinion solely on suspicion simply because the Referee apparently did not believe all of Respondent's testimony blatantly attacks the inherent responsibility of the trier of fact, and ignores the cumulative weight of the testimony of all the other witness and evidence presented during the hearing upon which the Referee correctly relied in rendering his report.

SECOND POINT INVOLVED

ASSUMING THAT RESPONDENT IS GUILTY AS RECOMMENDED BY THE REFEREE, HIS CONDUCT WARRANTS A PUBLIC REPRIMAND.

ARGUMENT

Before fully addressing the appropriateness of the Honorable Referee's recommendation of a public reprimand under the facts, three of Respondent's erroneous attempts at mitigation must be addressed.

First, Respondent's argument that the sanction should somehow be mitigated because no one complained to The Florida Bar concerning Respondent's conduct in the instant transaction is misplaced for at least two reasons. Initially, Respondent was well aware that the instant matter was brought to the attention of The Florida Bar at least by one individual since he unsuccessfully filed a motion with the referee seeking the disclosure of the identity of the confidential informant. Complainant's position was that the issue was not how The Florida Bar learned of Respondent's activity but rather whether or not the activity itself had occurred. Agreeing with the complainant, the Referee held that the identity of such informant was irrevelant to the issue of whether or not the Respondent attempted to conceal the true purchase price from the bank so that he could receive a loan

for an amount greater than the bank would have given had it known the true sales price. Additionally, complainant would submit that it is irrevelant whether one (1) or ten (10) people report an unethical act to The Florida Bar. It is the misconduct itself that must be addressed, not how many people initiate a particular inquiry. This is especially true since at the time of most lawyer misconduct, including this instant conduct, there are relatively few witnesses and the lawyer seldom broadcasts his misconduct beyond a relatively small circle of individuals.

Secondly, another of Respondent's smokescreen arguments is that to his knowledge the bank never voiced dissatisfaction with the loan. Again, it is submitted that the issue is not whether the bank voiced dissatisfaction, but whether Respondent intentionally misrepresented and concealed the true purchase price of the property from the bank for the purpose of securing a greater loan than if the bank knew the actual purchase price. Additionally, this line of circular argument is illogical since the bank could not be expected to voice dissatisfaction about facts behind the loan of which the bank was without knowledge due to Respondent's intentional concealment.

Finally, Respondent appears to insinuate that The Florida Bar lacks authority to pursue disciplinary action against an attorney for activities outside the attorney/client relationship. This argument ignores both the spirit and the letter

of The Florida Bar Integration Rule, article XI, Rule 11.02 (3)(9) which states in part:

> ...The commission by a lawyer of any act contrary to honesty, justice, or good morals, whether the act is committed in the course of his relation as an attorney or otherwise, whether committed within or outside the State of Florida, and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline. (Emphasis added).

Furthermore, The Florida Code of Professional Responsibility, Disciplinary Rule 1-102(A)(4) states: "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Even a cursory reading of these provisions reveals no exclusion for activities outside of attorney/client relationships.

In The Florida Bar v. Davis, 373 So.2d 683 (Fla. 1979), this Honorable Court considered an attorney's conduct in the promotion of real estate transactions which were outside the attorney/client relationship. Although the facts can be distinquished, this Court followed the Referee's recommendation of a public reprimand, holding as follows: "...without any question or a doubt his moral conduct was not within the moral standards set by Rule 11.02(3)(a) because his acts were contrary to justice and good morals." (Id at 685). Respondent's conduct in this real estate matter certainly was contrary to justice and good morals, clearly demonstrating his elevation of economics over ethics. In his mad dash to make a profit, Respondent's actions and attitude provide a

textbook example of the effects of greed. At the hearing, Respondent admitted that he signed both sales contracts without ever telling the seller he signed both contracts and without ever informing the seller that he had submitted the higher contract to the bank. Is not this conduct far below the standards we expect of an honest layman, much less an attorney?

Respondent's position that he felt he did not have to supply the bank with the second, actual sales contract because they did not request it is morally bankrupt since he knew the bank had no knowledge of or reason to believe there was a second, lower sales contract.

Respondent's waiving money on the day of the closing and boasting to his office staff that the bank had lent him more money than the property cost because the bank thought he was paying more for the property than he actually paid, demonstrates Respondent's lack of concern for the public's impression of his own ethical standards and his callous disregard of the public's image of attorney ethics in general.

Respondent's refusal to allow his secretary to submit the closing statement to the bank that had just lent him $160,000.00 despite repeated requests from the bank, graphically depicts Respondent's desire to conceal his misrepresentation of the actual sales price to the bank and his lack

of concern for honesty and good morals.

While it may be difficult for an attorney to isolate his position as an attorney when involved in personal business transactions, special care must be taken to avoid breaching the ethical obligation to the public and the legal profession. By failing to exercise any semblance of the high standard of ethical conduct of his profession, Respondent must be sanctioned in an appropriate manner.

The Referee who was able to observe Respondent's attitude, complete lack of remorse, and demeanor correctly decided that the appropriate disciplinary measure under all the facts and circumstances would be to "receive a reprimand by means of publication of the Order in West's Southern Reporter, but without probation added." Since the deterrent effect on other potentially errant attorneys is an important aspect of determining the appropriate discipline, See The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979), and since complainant maintained that he felt his conduct should escape discipline because he was not dealing in an attorney/client situation; there may be other attorneys harboring under this mistaken double standard. Although it is clear that Respondent knew exactly what he was doing and his argument is merely an afterthought, it is submitted that the instant case presents an opportunity for this Court to make a clear statement to the attorneys of this State that an attorney's ethics are not a hat that is taken on and off at the lawyer's

convenience.

It is submitted that to allow Respondent to conceal his misconduct under the confidentiality of a private reprimand would appear to be an inappropriate manner in which to sanction his original acts of concealment (his failure to provide the bank with the actual sales price or contract) and cover up (his refusal to provide the bank with the closing statement after repeated requests). Alternatively, it is submitted that a public reprimand is the appropriate discipline in light of Respondent's desire to publicize his successful deception of the bank upon his boastful return to his office after the closing where the bank had been mislead into lending the money based upon an invalid, inflated sales price.

In an effort to have the discipline fit the misconduct, this Court held in The Florida Bar v. Blalock, 325 So.2d 401 (Fla. 1976) that various factors are weighed in determining the appropriate discipline, including a responsibility to protect the public and to generate confidence in the integrity of the legal profession. How better can the public be protected than to put would-be-errant attorney's on clear notice that The Florida Bar Integration Rule, article XI, Rule 11.02(3)(a) means what it says, and that there is no "real estate transaction excluded" clause or "business dealings" exception? If only one lawyer is deterred from dishonest conduct in a non-client transaction as a result of

a public reprimand in this instant factual situation, then it is more than justified.

It is submitted that taking a public stand that Respondent's greed-induced manipulations and misrepresentations are unacceptable conduct for a Florida attorney under any circumstance is a positive step toward rebuilding the public confidence in the integrity of the legal profession.

CONCLUSION

The Complainant respectfully requests that this Court adopt the Referee's Report as to the findings of misconduct and impose the recommended discipline of a public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished to RICHARD T. EARLE, JR., Attorney for Respondent, Earle & Earle, 447 Third Avenue North, St. Petersburg, Florida 33701; JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, Tallahassee, Florida 32301; and a copy to JOHN T. BERRY, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301; on this 9th day of October, 1984.

Steve Rushing

STEVE RUSHING