IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

STEPHEN G. BENEKE,

Respondent.

_____/

File No. 06A83H79

Supreme Court No. 64,090

RESPONDENT's REPLY BRIEF

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STATEMENT OF FACTS

In its "Statement of Facts", the Complainant "rejects Respondent's subtle attempt to interject argument into the Statement of Facts ...." and attempts to restate them. The Complainant's Statement of Facts is notable for its omissions.

Complainant completely overlooks the testimony of the Respondent to the effect that when he received the $245,000.00 contract signed by only the Seller, he went to the Bank and discussed the matter with its president to ascertain if he could secure a mortgage loan on the property (Tr.-85). At that time, he delivered the $245,000.00 contract executed by him to the president of the Bank and at the same time the president of the Bank gave him a mortgage loan application with the request that he fill it out and send it to him (Tr.-86). Subsequently, respondent filled out the loan application (Tr.-86). The loan application made no mentioned of the purchase price of the property being acquired. (Bar's Exhibit 4)

Complainant states "based on the $245,000.00 sales contract of February 23, 1978, Ellis National Bank of Clearwater issued a mortgage of $160,000.00...to Respondent on

the property....". Omitted from this statement are the Bank's records reflecting that in making this loan, the Bank also relied upon the appraisal made by its appraiser.

Complainant also fails to mentioned that the same bank, in December, 1976, made a loan to the Respondent to finance the acquisition of real estate, based solely upon the Bank's appraisal and without any information as to the purchase price of the land (Tr.39-41). Of equal significance is the evidence to the effect that in February, 1979, the same bank loaned the Respondent money for the acquisition of real estate and not only did not require a copy of the contract, but, in fact, knowingly loaned Respondent $1400.00 more than the acquisition costs (Tr.41-44).

FIRST POINT INVOLVED

At the outset of the argument on the first point involved, Complainant states "This Honorable Court has repeatedly held that "...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". This is an acurate statement, but is incomplete. The findings of the Referee must be based upon clear and convincing evidence.

On page 9 of the Complainant's brief, it is argued that the $159,000.00 contract was in existence at the time the loan application was filed and that Respondent "not only failed to supply the executed $159,000.00 contract to the Bank at the time, but he actively concealed its existence prior to and during the loan application process. And on pages 9 and 10 of its Brief, the Complainant stated "if Respondent really believed that the purchase price was irrelevent, than why did he go to 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." The evidence does reflect the following sequence of events:

1. Respondent received from the real estate broker the $245,000.00 contract.

2. He took the contract to the bank and discussed a mortgage loan with Mr. Schotzberger and he left the contract at the bank and took away a mortgage loan application to be filled out.

3. He subsequently renegotiated the loan to a purchase price of $159,000.00.

4. Immediately after renegotiating the loan, he filed the loan appliation, which contained no information relative to the purchase price of the property.

5. The Bank had the property appraised, which appraisal was for $227,000.00.

6. The loan was consummated.

7. Subsequent to the closing of the loan and the acquisition of the property, the Bank asked for a copy of the closing statement and it was not delivered to it.

The Bank did not request a copy of the closing statement until well after the loan was closed. Thus, there was no evidence to the effect that the Respondent went

"to 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" or that Respondent "actively concealed" the existence of the $159,000.00 contract.

Respondent's testimony to the effect that Mr. Schotzberger told him that the Bank would lend him 70% of the appraised value of the property is unrefuted by any testimony and by the Bank's records. It is corroborated by the fact that, in December, 1976, the same bank made a mortgage loan to finance the acquisition of real estate without inquiring into the purchase price of the property. It is further corroborated by the fact that, in February 1979, the same bank made a loan to Respondent for acquiring real estate without requiring a copy of the contract for the purchase and disbursed the loan funds, knowing full well that the amount of the loan was approximately $1400.00 more than the purchase price.

SECOND POINT OF LAW

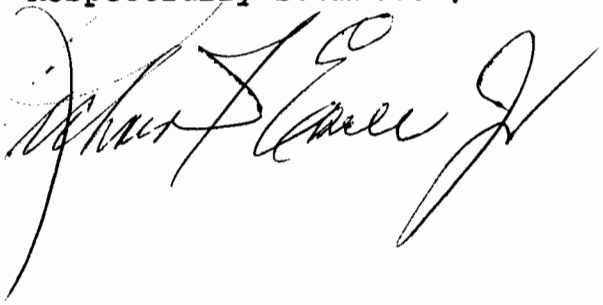
It was not, and it is not, the Respondent's position that "sanctions should somehow be mitigated because no one complained to the Florida Bar concerning Respondent's conduct....". It is Respondent's position that the Bank was in no way harmed by Respondent's conduct and, insofar as the record reflects, was and still is well satisifed with the loan.

It is likewise not the Respondent's position that the Bar lacks authority to pursue disciplinary action against an attorney for activities outside the attorney-client relationship. It is Respondent's position that if he misled the Bank by failing to furnish it a copy of the $159,000.00 contract, the evidence does not reflect that it was the result of an attempt to deceive, but was the result of a reliance on Mr. Schotzberger's statement to the effect that the Bank would lend him 70% of the appraised value of the property, so that Respondent did not believe that the actual purchase price of the property was of any importance to the Bank.

In considering these sanctions,the Court should consider the two loans made by the Bank to the Respondent in

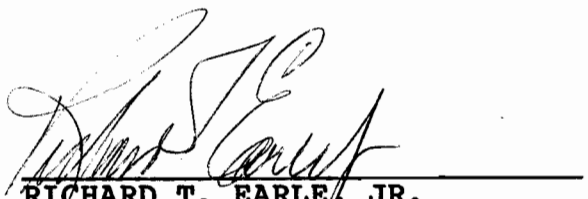
December, 1976 and in February, 1979. The same bank made no inquiry as to the purchase price of the property purchased through the former loan and as to the latter loan, knowingly disbursed more than the purchase price. The two transactions corroborate Respondent's testimony to the effect that the president of the bank stated that the bank would lend Respondent 70% of the appraised value.

Respectfully submitted,



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Steve Rushing, Branch Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607 and John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida 32301, by United Stateds Mail this 2nd day of November, 1984.



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