IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

vs.

ROBERT N. BUSSEY,

Respondent.

_____/

CONFIDENTIAL

CASE NO. 64,215
TFB No. 82,03094-06A
(formerly 06A82H71)

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THE FLORIDA BAR'S OPENING BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar". The appellee, ROBERT N. BUSSEY, will be referred to as "the respondent". "R" will refer to the record and "RR" will refer to the Report of Referee.

STATEMENT OF THE FACTS AND OF THE CASE

The following recitation of facts comes from the decision of the United States Court of Appeals for the Eleventh Circuit in Garner vs. Pearson 732 F2 850 (11th Cir.) (R,p-1) and from the Order of the United States District Court, Middle District of Florida, dated September 15, 1981, in Garner vs. Pearson, (R,P-2 composite) which were adopted by the Referee in this case.

The respondent, Tazwell Pearson and Donald Baker were the control persons of the British-American Bank Limited ("B-A Bank") and the entire British American Corporate Complex consisting of the British-American holdings S.A. ("B-A fund"), the British American Bank Corporation, Inc. ("B-A Bancorp"), the American National Bank and Trust Company of South Pasadena, Florida ("American Bank"), and the Citizens Bank of Clairmont ("Citizens Bank").

The respondent, Mr. Pearson and Mr. Baker caused the "B-A Bank" to provide funds to purchase the "Citizens Bank" stock in 1970.

On January 9, 1970, respondent and Mr. Pearson entered into a written agreement with "B-A Bancorp" that permitted

respondent and Mr. Pearson to purchase the "Citizens Bank" stock and register title in their personal names until the Federal Reserve Board approved "B-A Bancorp's" ownership of that stock. The "B-A Bancorp" agreement required respondent and Mr.Pearson to turn the "Citizens Bank" stock over to "B-A Bancorp" upon the Federal Reserve Board's approval of ownership or to dispose of the stock if approval were denied.

The respondent and Mr. Pearson registered the "Citizens Bank" stock in their personal names pending regulatory approval of the ownership of that stock by "B-A Bancorp". The Federal Reserve Board refused to approve "B-A Bancorp's" proposed ownership of the "Citizens Bank" stock and pressed respondent to divest that stock during the fall of 1971.

On October 25, 1971, the respondent, Mr. Pearson and Mr. Baker caused the "B-A Bank" to transfer all of its stock in the "B-A fund" to the "B-A fund" itself.

On October 25, 1971, Mr. Pearson caused all of the issued and outstanding shares of the "B-A Bank" to be transferred to Dr. Frederico Cruz ("Cruz"). Cruz purported to pay for these shares by delivering his 3.8 million dollar promissory note to the "B-A Bank". This transaction was found to be a sham. (R,P-2 composite, ORDER at p.2)

On December 23, 1971, the respondent and Mr. Baker personally contracted to sell the "Citizens Bank" stock to Exchange Bancorporation, Inc. ("Exchange") under the following terms: prohibiting encumbrances upon that stock; but, permitting the respondent to borrow one (1) million dollars on that stock pending the closing of the sale to "Exchange"; and requiring repayment of any such interim loan, the clearing of any pledge lien and the tender of unencumbered title at the eventual closing.

On December 28th and 29th, 1971, the respondent borrowed one (1) million dollars from First National Bank of Orlando, pursuant to the contract for sale of the "Citizens Bank" stock to "Exchange". The one (1) million dollar loan from First National Bank of Orlando was secured by substantially all of the "Citizens Bank" stock. The respondent deposited the proceeds of the one (1) million dollar loan in the "B-A Funds" account at the "American Bank", from which respondent and Mr. Baker immediately disbursed the one (1) million dollars to Mr. Pearson.

On July 17, 1972, the respondent, Mr. Pearson and Mr. Baker transferred the "Citizens Bank" stock to "Exchange" free and clear of all encumbrances in exchange for $2,385,395.12. A portion of the proceeds of that purchase was simultaneously used to repay the loan balance due from

the respondent to the First National Bank of Orlando in order to clear the interim pledge lien.

In 1972, the "B-A Bank" was placed in compulsory liquidation. The official liquidator of the "B-A Bank" learned of the sale of the "Citizens Bank" stock to "Exchange" and brought suit in the United States District Court naming the respondent as a defendant. By an Order dated September 15, 1981, The United States District Court for the Middle District of Florida rendered an Order granting the liquidator's Motion for Partial Summary Judgment. (See R, P-2, ORDER) In the September 15, 1981, Order of the United States District Court for the Middle District of Florida, Judge Ben Krentzman stated:

> "Upon a complete review of the file and its exhibits, and upon consideration of the memoranda and arguments of counsel, the Court finds as follows:
>
> The consideration for the purchase of the stock came from, or was eventually paid by, the B-A Bank. The defendants Bussy, Baker and Pearson, were in control of the Bank and its subsidaries during all of the significant transactions. The transactions of October 25, 1971 lacked considerations and were a sham. They were for the purpose of and had the effect of obscuring the fact that the B-A Bank remained the beneficial owner of the assets throughout. The individual defendants breached their fiduciary responsibility to the B-A Bank, and upon the sale of the stock converted the Bank's assets." (R, P-2 composite, ORDER at p.2)

On May 26, 1982, the United States District Court for the Middle District of Florida entered a judgment against the respondent, Mr. Pearson and Mr. Baker, in the amount of $2,899,153.78. (R, P-2 Composite, JUDGMENT p.3) The respondent and the other defendants in the civil suit appealed the United States District Court's ruling granting partial summary judgment. On May 21, 1984, the United States Court of Appeals for the Eleventh Circuit affirmed the lower court's partial summary judgment. (R,P-1)

The Florida Bar's complaint against the respondent in this cause was based entirely upon the Order of the United States District Court for the Middle District of Florida, dated September 15, 1981, granting the liquidators of the "B-A Banks" Motion for Partial Summary Judgment, and the United States Court of Appeals for the Eleventh Circuit affirmation of the lower court's Order granting Partial Summary Judgment. (RR at p.1)

The referee in this cause found that the Order of the United States District Court granting partial summary judgment formed the basis of a prima facia case by The Florida Bar against respondent. (RR at p.1)

In December 1986, a final hearing was held in this cause. Although respondent did not appear for the final hearing he was represented by counsel. The referee found

the respondent guilty of violating Disciplinary Rule 1-102(A)(1) (a lawyer shall not violate a disciplinary rule); DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); DR 1-102(A)(6) (a lawyer shall not engage in conduct adversely reflecting on his fitness to practice law); Integration Rule 11.02(3) (commission of any act contrary to honesty, justice or good morals). (RR, at p.2) The referee recommended that the respondent be suspended from the practice of law for a period of two (2) years to run concurrent with a suspension for non-payment of dues beginning October 4, 1984, and thereafter until he has demonstrated his fitness to practice law. The referee also recommended that the costs of The Florida Bar proceedings be taxed against the respondent as a condition of reinstatement. (RR, at p.2)

The Florida Bar's Board of Governors reviewed the Report of Referee and voted to seek disbarment in this matter.

SUMMARY OF ARGUMENT

In 1972, the respondent knowingly and fraudulently converted to his own use approximately $2,385,395.12 belonging to the "B-A Bank" in which the respondent was a controlling person and thus held a fiduciary position.

The referee's recommendation of a two (2) year suspension is not a sufficient disciplinary measure for such conduct. Furthermore, the recommended discipline neither achieves the purpose for which disciplinary sanctions are ordered by this Court nor is the recommendation consistent with current standards for imposing lawyer discipline.

Therefore, The Florida Bar asks this Court to disapprove the referee's recommendation of a two (2) year suspension and order the respondent disbarred from the practice of law.

ARGUMENT

ISSUE: WHETHER A TWO YEAR SUSPENSION IS SUFFICIENT DISCIPLINE FOR AN ATTORNEY WHO CONVERTS, TO HIS OWN USE, $2,385,395.12 WORTH OF ASSETS BELONGING TO A BANK, WHILE ACTING AS A FIDUCIARY FOR SAID BANK.

A two-year suspension is an insufficient discipline for the respondent's conversion of approximately $2,385.395.12 worth of assets belonging to the British American Bank, Limited ("B-A Bank") especially in light of the fact that the respondent was a controlling person of said bank and thus a fiduciary at the time the bank's assets were converted to his own use.

In The Florida Bar vs. Bunch, 195 So.2d 358 (Fla. 1967), Bunch, while serving as Clerk of the Circuit Court of Broward County, converted to his own use $55,000.00 in funds belonging to the public. Further, Bunch, while serving as Secretary/Treasurer of The Broward County Bar Association, converted to his own use the sum of $4,500.00 belonging to that association. The referee recommended that Bunch be suspended from the practice of law for a period of five (5) years and thereafter until he made full restitution of the $4,500.00 stolen from The Bar Association. The respondent had previously repaid the $55,000.00 that had been stolen from the Circuit Court of Broward County. The Florida Bar's

Board of Governors rejected the referee's recommendation with reference to disciplinary action and ordered that the respondent be disbarred from the practice of law. This Court agreed with the judgment of The Florida Bar that the respondent be disbarred. Further, this Court stated that no reinstatement of the respondent would be considered unless he showed that the he had been fully rehabilitated and, in addition to costs, that he showed repayment of the amount of money taken by him from The Bar Association.

The respondent's misconduct in this case is as serious as the misconduct of Bunch in that the respondent stole approximately $2,385,395.12 from the "B-A Bank" and, further, he has failed to make restitution. Certainly, the respondent's misconduct warrants disbarment.

Although the respondent's misconduct in this case did not occur in an attorney/client relationship, the respondent did maintain a fiduciary relationship with the "B-A Bank" due to the fact that he was a controlling person of said entity at the time of his misconduct.

In The Florida Bar vs. Bennett, 276 So.2d 481, at p.482 (Fla. 1973), this Court stated:

> "Some may consider it "unfortunate" that attorneys can seldom cast off completely the mantle they enjoy in the profession and simply act with simple business acumen and not be held responsible under the

> high standards of our profession. It is not often, if ever, that this is the case. In a sense, "an attorney is an attorney, is an attorney, is an attorney", much as the military officer remains "an officer and a gentleman" at all times. We do not mean to say that lawyers are to be deprived of business opportunities; in fact, we have expressly said to the contrary on occasions; but we do point out that the requirement of remaining above suspicion, as Caesar's wife, is a fact of life for attorneys. They must be on guard and act accordingly, to avoid tarnishing the professional image or damaging the public which may rely upon their professional standing."

In the case at hand, the respondent's conversion of $2,385,395.12 worth of bank assets to his own use, while holding a fiduciary position with the bank, severely tarnishes the public's image of the legal profession especially in light of the fact that the respondent was a highly profiled individual in the banking business at the time of his misconduct and his actions received extensive publicity.

The respondent's misconduct in this case is analagous to an attorney's misappropriation of client funds in that both involve a breach of a fiduciary duty resulting in an adverse public impact on the legal profession.

This Court has recognized that an attorney's misuse of client funds is one of the most serious offenses a lawyer can commit. The Florida Bar vs. Breed, 378 So.2d 783 (Fla.

1979). In Breed, supra, this Court stated that it would not be reluctant to disbar an attorney for misappropriating client trust funds. Subsequent to Breed, this Court has disbarred attorneys who misappropriate client funds. See The Florida Bar vs. Bond, 460 So.2d 375 (Fla. 1984), The Florida Bar vs. Nagel, 440 So.2d 1287 (Fla. 1983); The Florida Bar vs. Tarrant, 464 So.2d 1199 (Fla. 1985); and The Florida Bar vs. Sterling, 478 So.2d 1064 (Fla. 1985).

It is the Bar's position that the respondent's conversion of $2,385,395.12 worth of assets belonging to the "B-A Bank" while holding a fiduciary position with said Bank is as serious an offense as an attorney's misappropriation of client trust funds; as such, this Court should not be reluctant to disbar the respondent in this case. Furthermore, a two year suspension in this case fails to achieve the purpose for which disciplinary sanctions are ordered by this Court, in that it is not fair to society, it is not sufficient to punish the breach of ethics by respondent and it is not a severe enough sanction to deter others who might be prone or tempted to become involved in like violations. See The Florida Bar vs. Paules 233 So. 2d 130 (Fla. 1970).

Finally, according to Florida's Standards for Imposing Lawyer Sanctions (hereinafter referred to as The Standards)

approved by The Florida Bar's Board of Governors in November, 1986, disbarment is the appropriate sanction for respondent's misconduct. See The Standards, Section 5.1 "Failure to maintain personal integrity". The Standards, Section 9.2 "Aggravation" and Section 9.3 "Mitigation" set forth the aggravating and mitigating factors which should be considered when determining the appropriate discipline for an attorney's misconduct. In this case, the only mitigating factor is that the respondent did not have a prior disciplinary record. This factor alone is not sufficient to negate disbarment. There are, however, several aggravating factors which justify an increase in the degree of discipline to be imposed. The aggravating factors in this case are: dishonest or selfish motive; refusal to acknowledge wrongful nature of conduct; substantial experience in the practice of law; and indifference to making restitution.

Additional aggravating factors not set forth in Section 9.2 "Aggravation" include: respondent's failure to appear for any of the disciplinary proceedings, although he was represented by counsel; and respondent has been suspended from the practice of law for non-payment of dues since October 4, 1984.

CONCLUSION

The fundamental issue before this Court is whether a two (2) year suspension is sufficient discipline for an attorney who converts to his own use $2,385,395.12 worth of assets belonging to a bank in which he is a controlling person and to which he owes a fiduciary duty.

It is The Florida Bar's position that a two (2) year suspension is not sufficient for respondent's misconduct.

The respondent's misconduct in this case is as serious as an attorney's misappropriation of client funds and, such being the case, The Bar takes the position that disbarment would be the appropriate discipline for the respondent.

The Bar requests that the Court reject the referee's recommended discipline and impose upon respondent disbarment from the practice of law and the payment of the costs of these proceedings.

Respectfully submitted,

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