IN THE SUPREME COURT OF FLORIDA

NO.: 64,278

THE FLORIDA BAR,

Complainant,

-vs-

FRED J. WARD,

Respondent.

FILED
SID J. WHITE
JAN 28 1985
CLERK, SUPREME COURT
By
Chief Deputy Clerk

RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

STATEMENT OF THE CASE AND THE FACTS

This is a petition to review the report of the referee rendered on December 6, 1984. Respondent was charged with violating four Disciplinary Rules of the Code of Professional Responsibility and was found guilty of three and not guilty of one.

The Board of Governors of The Florida Bar determined at its January 9-12, 1985 meeting, NOT to petition for review of the referee's report. This petition to review is timely from the date of that meeting.

POINTS INVOLVED

I. AN ATTORNEY CANNOT BE GUILTY OF COUNSELING OR ASSISTING HIS CLIENT IN CONDUCT THAT THE LAWYER KNOWS TO BE ILLEGAL OR FRAUDULENT WHEN THE ATTORNEY'S INTERPRETATION OF THE LAW IS SUPPORTED BOTH BY OPINIONS FROM THE FLORIDA SUPREME COURT AND OTHER LEGAL EXPERTS. (DR 7-102(A) (7))

II. AN ATTORNEY CANNOT BE GUILTY OF VIOLATING DR 5-101(A) and (B), REFUSING EMPLOYMENT, WHEN THE ATTORNEY HAD THE CONSENT OF THE CLIENT AFTER FULL DISCLOSURE.

ARGUMENT

POINT I. AN ATTORNEY CANNOT BE GUILTY OF COUNSELING OR ASSISTING HIS CLIENT IN CONDUCT THAT THE LAWYER KNOWS TO BE ILLEGAL OR FRAUDULENT WHEN THE ATTORNEY'S INTERPRETATION OF THE LAW IS SUPPORTED BOTH BY OPINIONS FROM THE FLORIDA SUPREME COURT AND OTHER LEGAL EXPERTS. (DR 7-102(A)(7).

Respondent was charged in Paragraph 21 of COUNT I of the Complaint with assisting his client, Mr. Wolkowitz, in making and permitting his client to make knowingly false warranties and statements concerning the status of his client's title to the property, such conduct constituting fraud, in violation of Disciplinary Rule 1-102(A) (4) (engage in conduct involving fraud or misrepresentation), and Rule 7-102(A) (7) (counsel or assist client in conduct lawyer knows to be fraudulent). Respondent was found not guilty of the former, but guilty of the latter.

The pre-trial order of the Referee dated May 22, 1984, restricted the issues to:

> "3. The issues in this cause are those as framed within the complaint and counsel for the Bar declines to further delineate any issue."

The Referee reserved ruling on Respondent's motions for dismissal, page 183 of the transcript of the hearing held on August 30, 1984.

As argued during the hearings before the Referee, the standard of proof in bar proceedings is clear and convincing evidence. The Florida Bar v. Hirsch, 359 So2d 856 (SC 1978) and The Florida Bar v. Musleh, 453 So2d 794 (SC 1984).

It should be noted at the outset that the opinion in Gold v. Wolkowitz, 430 So2d 556 (Fla. 3d DCA 1983) was offered in evidence, not as collateral estoppel or res judicata, but solely for the purpose of testing the credibility

of Kenneth Ryskamp, one of respondent's witnesses, and was admitted in evidence, over respondent's objections, for that limited purpose. (Transcript August 30, 1984, pages 59-60). In spite of the limited purpose for which the 3rd D.C.A.'s opinion was received in evidence, Bar counsel argued below that the decision in Gold vs. Wolkowitz "was conclusive and established as a matter of unchallenged law that based upon the facts considered by that appellate court, Respondent was guilty of the commission of the tort of civil fraud.

Thereafter, Bar counsel argued and attempted to show that the facts and issues in the civil proceedings were the same as those in the present proceedings, and that the District Court of Appeal having made a determination of the factual issues and the law applicable thereto, the Referee should adopt those findings.

Bar counsel even went so far as to say that the respondent's defenses in these proceedings were raised in the civil trial and disposed of by the 3rd D.C.A., and attached a copy of respondent's appellate brief to emphasize that point. If Bar counsel's assertions are correct, then there really was no need for the Referee to spend two days hearing this case.

We respectfully submit, however, that Bar counsel's reliance on the opinion in Gold v. Wolkowitz is totally misplaced and, in fact, the 3rd D.C.A.'s opinion should not even have been considered by the Referee in deciding the issues in these proceedings.

First of all, when evidence is admitted for a limited purpose, such as in these proceedings, to impeach the credibility of a witness, it cannot be used for purposes of proving guilt. For example, the evidence of a prior conviction admitted to impeach a defendant when he takes the stand to testify,

cannot be used to prove he committed the act for which he is charged, and if the prosecution in final argument attempted to use such evidence to prove guilt, it would be such fundamental error as to require a reversal. (See Shepard v. U.S., 290 U.S. 96 (1933).

Secondly, and even more importantly, the decision in Gold vs. Wolkowitz is neither res judicata nor collateral estoppel as to any of the issues raised in these proceedings. This issue was raised and decided by the Supreme Court of Florida, Trucking Employees of North Jersey Welfare Fund, Inc., et al. v. Thomas Romano, et al., 450 So2d 843 (Fla. 1984).

It should also be noted at this juncture, that the burden of proof in the Gold vs. Wolkowitz civil proceedings and in the instant proceedings is entirely different (proponderance of the evidence as opposed to clear and convincing evidence), and for that reason alone neither res judicata nor collateral estoppel would be applicable.

Next, we address the issues raised in COUNT I of the Complaint.

Since the Bar is confined to the issues set forth in the Complaint, we must look to the allegations set forth therein to sustain these charges.

The main thrust of the Bar's charges against the respondent would appear to be contained in paragraphs 12, 13 and 15. In essence, the Bar says that respondent violated the above-cited rules in the following particulars:

(12). When the respondent responded to Mr. Elliott's objections regarding certain procedural aspects of the Wolkowitz vs. Cooper foreclosure proceedings, respondent did not go further and tell Mr. Elliott of the pending appeal.

(13). Respondent wrote a letter to Lawyers Title, with a copy to Mr. Elliott, wherein he stated that the objections raised by Mr. Elliott were "res judicata".

(15). Respondent prepared and permitted his client to sign a Warranty Deed and an Affidavit of Ownership, when both he and his client knew an appeal was pending.

We believe that the remaining allegations dealing with post-closing matters have no relevancy to the issues. It is admitted by the respondent that the Golds wanted to rescind the transaction and made a demand for the return of the monies paid and their promissory note. It is further admitted that respondent, as escrow agent, refused to disburse these funds or deliver the promissory note to either of the parties. Respondent had been instructed by the Golds not to disburse funds or deliver the promissory note to the Wolkowitzs, (see Bar exhibit 18), and Mr. and Mrs. Wolkowitz had instructed him not to disburse to the Golds, (Transcript of May 25, 1984, page 171). Admittedly, and looking at the situation in 20/20 hindsight, the wisest course of action for the respondent to have taken would have been to file an Interpleader action, but his failure to do so certainly does not support any of the charges made against the respondent, nor should his failure to do so have been considered by the Referee, since there is no allegation to that effect in the Complaint.

The Bar produced four witnesses: Leonard Gold, Augusta Gold, Stuart Elliott and John Hume.

1. Testimony of Leonard Gold (Transcript May 25, 1984)

Mr. Gold's testimony was primarily confined to the closing and those events which took place subsequent to the closing. He testified that his wife handled all the negotiations relating to the purchase of this property; employed Mr. Fischer and then Mr. Elliott, and that most of the matters dealing with the purchase of the property was left up to her, (Transcript Page 40).

Mr. Gold did state that he specifically asked at the closing about any "law suits", even though Mr. Elliott had not advised him that there were any law suits pending, and even though he had never seen his wife's written memorandum to Mr. Elliott, (Respondent's Exhibit #1) (Transcript Pages 43 and 44). This testimony is specifically refuted by Mr. Elliott. Mr. Elliott stated that neither Mr. nor Mrs. Gold made any inquiry as to any pending law suits at the time of the closing (Transcript Page 82).

2. Testimony of Augusta Gold (Transcript May 25, 1984)

Mrs. Gold testified that respondent told her there was some sort of suit pending regarding the property and that she should "make sure you get a good, knowledgeable, real estate attorney", (Transcript Page 17), to represent her in this transaction.

Mrs. Gold employed Marshall Fischer to represent her, and told him "That he should call Mr. Ward right away and find out what Mr. Ward wanted to speak to him about", (Transcript Page 19 - Lines 16 through 18).

Mr. Fischer did not call the respondent, and that was one of the reasons that Mrs. Gold discharged him (Transcript Page 19).

After employing Stuart Elliott, Mrs. Gold sent him a written memorandum (Respondent's Exhibit #1), to advise him of what the respondent had told her, and have him contact the respondent to find out what was going on, (Transcript Page 23). She also talked to Mr. Elliott on the telephone and advised him of her conversation with Mr. Ward at or about the time she employed him (Transcript Page 23).

To her knowledge, Mr. Elliott never specifically discussed with the respondent the litigation instituted by Cooper, which was referred to in her memorandum to him (Respondent's Exhibit #1) (Transcript Page 24).

With respect to the respondent's conversation with her regarding the pending litigation, Mrs. Gold testified:

> "Q. The nuisance suit that was your terminology, was it not?
>
> "A. No, that was his terminology.
>
> "Q. Okay.
>
> "A. It was a simplification of the legal terminology.
>
> "Q. First he used legal terminology?
>
> "A. Yes, but I did not know what he was talking about, and I said, 'what do you mean?'
>
> He said, 'it's nothing, it's a nuisance suit, it will be thrown out, because they didn't put up a bond within a certain time.'
>
> "Q. Now, what did you tell Mr. Fischer, then?
>
> "A. I told him that he should call Mr. Ward right away, and find out what Mr. Ward wanted to speak to him about. (Transcript Page 19, Lines 2 through 18).
>
> "Q. I understand, but what I am saying, specifically, is did he say it was involving this property, what you were purchasing?
>
> "A. Yes." (Transcript Page 20, Lines 18 through 21).

2. Testimony of Stuart Elliott (Transcript May 25, 1984).

Mrs. Gold advised Mr. Elliott, either by telephone or in person that there was some sort of "nuisance action going on which involved the property. (Transcript Pages 71 and 72).

Even though Mrs. Gold had instructed Mr. Elliott to call the respondent and discuss "the suit instituted by Mr. Cooper's attorney", Mr. Elliott never did so. (Transcript Page 74).

Mr. Elliott knew from the memorandum (Respondent's Exhibit #1) that the Respondent had put Mrs. Gold on notice that something was pending regarding the property. (Transcript Page 75).

As a member of Lawyers Title Guaranty Fund, when there are some questions regarding title, he is permitted to write to Lawyers Title for an opinion, with or without writing title insurance. In his letter to Lawyers Title (Bar Exhibit #8), all he did was ask for an opinion. (Transcript Page 76, Lines 17 through 19).

Mr. Elliott further testified:

> "Q. Did you discuss any suit instituted by the Cooper attorney?
>
> "A. No, I never did, nor did he.
>
> "Q. You didn't ask him about it?
>
> "A. Never." (Transcript Page 74, Lines 19 through 23).

Mr. Elliott also testified that respondent could safely assume that the Notice of Appeal filed in the Wolkowitz-Cooper foreclosure proceedings would appear in the abstract. (Transcript Page 93).

4. Testimony of Joh Hume (Transcript May 25, 1984).

With respect to the seller's attorney having the right to assume that a Notice of Appeal was in the abstract, Mr. Hume testified, "I think that would be reasonable, and if he couldn't, he should have been able to do so." (Transcript Page 104, Lines 19 through 21).

As to the seller's, or seller's attorney's duty to notify the buyer's attorney of the pendency of an appeal, absence specific inquiry, Mr. Hume testified that the seller's attorney could have assumed that it was in the

abstract, and would not be under any affirmative duty to contact and notify the buyer, and inform him that an appeal had been filed. (Transcript Page 105).

Mr. Hume further testified:

> "Q. Would you say that if the seller, the seller's attorney puts the buyer on notice of litigation involving the property, and says, 'go out and get a seasoned or experienced attorney in real estate matters to examine this title', isn't that putting him on notice?
>
> "A. At that point, I agree with you, that is putting him on notice." (Transcript Page 106, Lines 11 through 18).

Mr. Hume further testified that if the buyer told her attorney to contact the seller's attorney to discuss with the seller's attorney certain pending litigation, and the buyer's attorney fails to do so, the seller's attorney has not committed any unethical conduct in that regard. (Transcript Pages 106 and 107).

Mr. Hume further testified that a subsequent buyer (such as the Golds) would have superior title to the original defendant. (Transcript Page 116). Further, Mr. Hume testified that the memorandum which Mrs. Gold sent to Mr. Elliott indicates that it was more than a foreclosure action involved, and that it would indicate to him that Mrs. Gold had to get this information from the seller's attorney. (Transcript Page 122).

5. Testimony of Kenneth Ryskamp (Transcript August 30, 1984).

Mr. Ryskamp testified that under the facts of the Wolkowitz-Gold transaction, Mr. Wolkowitz had the right to sell the property, notwithstanding the appeal, as long as no supersedeas bond was posted. (Transcript Page 32).

With no supersedeas, the title is good, and the parties are free to deal with it as he wishes. (Transcript Page 33 - Lines 21 through 23).

Respondent agreed with the statements contained in Fla. Jura. Judgments & Decrees, Sec. 146, (Respondent's Exhibit #3) (Transcript Page 34).

Respondent could in all fairness, honesty and candor refer to the final judgment, which was on appeal without supersedeas, as being a final judgment and res judicata, as to the issues between the parties as of that time. (Transcript Page 35).

The written memorandum which Mrs. Gold sent to Stuart Elliott would certainly indicate that Mrs. Gold was aware that a law suit was pending, (Transcript Page 37) and the language of the memorandum would absolutely indicate that an appeal had been taken by the Defendant in the foreclosure proceedings. (Transcript Page 38).

Seller's attorney would have the right to assume that the Notice of Appeal was in the abstract. (Transcript Page 40).

A pending appeal is not a lien or encumbrance against the property. (Transcript Page 41).

Mr. Elliott's letter to Lawyers Title (Bar Exhibit #8), does not indicate in any way that Mr. Elliott is asking for permission to issue a title policy. It was just asking for an opinion. (Transcript Page 43).

Respondent's letter to Lawyers Title (Bar Exhibit #9), was responsive to Mr. Elliott's letter, and there was no fraud, deceit or dishonesty involved in Respondent's letter. (Transcript Page 44).

Respondent was under no obligation to do anything further than respond to those particular matters set forth in Mr. Elliott's letter to the Fund. (Transcript Page 45).

Respondent's letter to Mr. Elliott, enclosing the answers filed by Cooper and the Biscayne Bank in the foreclosure proceedings, were responsive to Mr. Elliott's inquiries, and unless there had been a specific inquiry about a pending appeal, there was no reason to send Mr. Elliott copies of any appellate proceedings. (Transcript Pages 45 and 46).

After being qualified as an expert on Grievance matters, Mr. Ryskamp testified:

That respondent, in allowing his client, Mr. Wolkowitz to execute the Affidavit of Ownership (Bar Exhibit #3), did not engage in conduct which involved dishonesty, fraud, deceit or misrepresentation. That respondent, in allowing his client, Mr. Wolkowitz, to execute a Warranty Deed to the property in question (Bar Exhibit #2), did not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. (Transcript Page 50).

Respondent did not assist his client in doing anything illegal or fraudulent. (Transcript Page 52).

My Ryskamp further stated:

"If I were Fred Ward, I would have done exactly the same thing he did." (Transcript Page 97 - Lines 6 through 8).

6. Testimony of Joel Miller and proferred testimony of Linwood Cabot and William Spencer (Transcript August 30, 1984)

The testimony of Mr. Joel Miller is essentially in accord with the testimony of Mr. Ryskamp.

Further, as noted in our profer, the testimonies of Mr. Linwood Cabot and Mr. William Spencer would have been the same as Mr. Ryskamp's testimony with regard to all material issues raised in these proceedings.

7. Testimony of the Respondent (Transcript August 30, 1984).

At the time the contract was signed, Respondent told Mrs. Gold that the Coopers, who were the Defendants in the foreclosure action, had instituted an appeal in the District Court; that they had not posted a supersedeas bond, and since there was not a unanimous opinion among the attorneys with regard to the effect of these things, she should get a seasoned or experienced attorney who handles real estate matters. (Transcript Pages 141 through 142).

Mrs. Gold wanted to know what "supersedeas bond" meant, and Mr. Ward attempted to explain the effect of posting a supersedeas and not posting a supersedeas, and told her he was not giving her any advice, and that is why he was telling her to get an attorney. (Transcript Page 142).

Mr. Ward further told her that she should have the attorney who she retained to handle this matter contact him. (Transcript Page 142).

Mr. Elliott called Mr. Ward and told him that he thought the foreclosure was defective, and that he was writing a letter to the Fund to get their opinion on it. (Transcript Page 142).

Mr. Elliott objected as to the procedural matters in the foreclosure proceedings, and respondent responded to Mr. Elliott's inquiries by sending him copies of the answers filed by the Coopers and Biscayne Bank. (Transcript Page 144).

Respondent assumed that the Notice of Appeal was in the abstract, and that the buyer or her attorney had knowledge of this. (Transcript Pages 147 and 148).

As a member of Lawyers Title, it is common practice to write or call for opinions regarding title matters, without actually writing for a title policy. (Transcript Page 148).

The letter that Mr. Elliott sent to the Fund did not indicate in any way to the Respondent that Mr. Elliott was to issue a title policy. (Transcript Page 148).

Respondent's letter to Mr. Elliott, and Respondent's letter to Lawyers Title, were in direct response to Mr. Elliott's letter. Other than his letter of July 10, Mr. Elliott did not have any further discussions with respondent relating to the title of the property (Transcript Page 149), nor did Mr. Elliott ever call respondent and discuss with him any law suit instituted by Cooper's attorney regarding this property. (Transcript Page 149).

Had Mr. Elliott or Mr. Fischer specifically asked respondent any questions regarding any procedures that might have been pending in the Wolkowitz-Cooper law suit subsequent to the final judgment, respondent would have had no hesitancy in telling them about it. (Transcript Pages 149 and 150).

A final judgment is res judicata as to all matters litigated, even though an appeal has been filed, until such time as it may be overturned by the Appellate Court. (Transcript Page 150).

The primary function of an Affidavit of Ownership or No-Lien Affidavit is to take care of unrecorded Mechanics Liens. (Transcript Page 153).

Mr. Ward first learned that the Notice of Appeal was not in the abstract two or three days after the closing, when Mr. Elliott called him.

Mr. Ward told his clients that the Golds wanted to rescind the transaction and told them the reasons why. (Transcript Page 160).

Mr. Ward told the Wolkowitzs what their alternatives were; that if they refused to rescind the transaction and refund the monies paid by the Golds, that the Golds would, in all probability, file a law suit; that as long as this matter was in dispute he could not disburse the funds to them (Transcript Page 161), and after a full discussion, the Wolkowitzs instructed the respondent to keep the money in his trust account, because they were not going to give it back voluntarily. (Transcript Pages 161-162).

After the Complaint was filed by the Golds, Mr. Ward again discussed the law suit with his clients, and explained all the ramifications of the law suit, including the fact that they were also being sued for punitive damages, and after a full discussion and because of his rapport with the Wolkowitzs, and in order to minimize the expenses to the Wolkowitzs in defending the action, it was decided that respondent would handle the matter through discovery, and if the case could not be settled, then the Wolkowitzs and Mr. Ward would have to get another attorney to defend the case. (Transcript Page 163).

The Wolkowitzs requested the respondent to stay in the case as long as he could, and that is what he did; however, when it became apparent that the case was probably not going to be settled, he contacted Mr. Marshall

Curran, which was a couple of months prior to the pre-trial, and he actively took over the litigation.

8. Testimony of Mrs. Wolkowitz (Transcript May 25, 1984)

Mrs. Wolkowitz testified that Mr. Ward told Mrs. Gold that an appeal was pending with respect to the property, and that she should get a seasoned attorney to represent her. (Transcript Pages 169 - 173).

Respondent advised Mr. and Mrs. Wolkowitz that the Golds wanted their money back, and Mr. Wolkowitz told the respondent to hold the money in his trust account. (Transcript Pages 170 and 171).

Respondent informed Mr. Wolkowitz that if he took that position, he probably would be sued (Transcript Page 171), and also told them there was no guarantee as to the outcome of the litigation. (Transcript Page 172).

Respondent represented Mr. Wolkowitz in the Gold vs. Wolkowitz law suit during a part of the case, and this was with their knowledge and consent. (Transcript Page 171).

COUNT I: We believe the real issue before the Referee is whether or not the respondent had reasonable grounds to believe:

(1) That his client was transferring a valid title.

(2) That since a supersedeas bond had not been posted, the pending appeal did not constitute a lien or encumbrance against the property.

(3) That a reversal of the final judgment would not affect the Gold's title to the property.

(4) Whether respondent, under the circumstances of this case, had an affirmative duty to notify Mr. Elliott that there was a pending appeal involving the property.

Reviewing the allegations of Count I of the Complaint, in light of the evidence adduced at the hearing, it is respectfully submitted that the Bar failed to prove by clear and convincing evidence that respondent is guilty of the charges made against him. On the contrary, the evidence shows that Respondent acted in good faith, in the honest belief that his client had the right to transfer title of the property to the Golds; that a pending appeal without supersedeas would not constitute a lien or encumbrance against the property; and that a reversal of the final judgment in the foreclosure proceedings would not affect Gold's title to the property.

Can it be said that respondent purposely and with intent to defraud, concealed the pendency of an appeal when he wrote to Mr. Elliott on July 10, or when he wrote to Lawyers Title on July 11. To do so, we would have to presume that when he wrote those letters he knew that the Notice of Appeal was not in the abstract; that Mrs. Gold had not told her attorney about the pending litigation; and that Mr. Elliott had not examined the Court file or inquired of the Clerk's office to ascertain what, if anything, had been filed subsequent to the entry of the final judgment.

Such presumptions would be entirely contrary to the weight of the evidence.

We could speculate, as the Bar did below, that because of Mr. Elliott's silence regarding the appeal, respondent knew or should have known that Mr. Elliott was unaware of the pendency of the appeal. Maybe yes, maybe

no. But it is not alleged in the Complaint, nor does the evidence support such an allegation. This type of speculation or conjecture cannot take the place of evidence.

Respondent concluded that the unsuperseded appeal file by the mortgagor could not affect the quality of the title secured in the foreclosure suit. He based his opinion on several Florida cases. Notwithstanding respondent's sincerely held opinion as to the state of the law on this point, he was found guilty of assisting his client in fraudulent conduct.

The Gold vs. Wolkowitz case never dealt with the legal question of what happens when the mortgagor appeals a final judgment of foreclosure without a supersedeas. If the mortgagee buys in at the sale, can he pass good title to a third party free of any claims of the mortgagor if he should eventually be successful on his appeal? (Incidentally, the mortgagor was not successful. See Cooper vs. Wolkowitz, 375 So2d 1099, (Fla. 3 DCA 1979), cert. den. 388 So2d 111 (Fla. 1980)). Respondent interpreted the decisions in logically concluding that the mortgagee had acquired good title which could be passed to a third party without fear of the consequences of the unsuperseded appeal. In this regard, Respondent was correct.

In Sundie vs. Haren, 253 So2d 857 (Fla. 1971), this court noted that upon reversal of a mortgage foreclosure without a supersedeas bond, the prevailing mortgagor was entitled to the restoration of his property against the mortgagee but this court specifically noted that this rule would not apply to a stranger to the title (253 So2d 858-9).

> "A supersedeas bond in the instant case would have prevented sale of the property pending appeal, but even in the absence of a supersedeas bond, reversal of the summary final decree required, as between the parties to the suit, restoration of the original status. A party against whom an erroneous judgment has been made is entitled upon reversal to have his property restored to him by his adversary (Fla. East Coast Railway Co. vs. State, 77 Fla. 571, 82 So. 136 (1919).

> "These principles were weighed by this Court in Maxwell v. Jacksonville Loan & Improvement Co. (45 Fla. 468, 34 So. 255 (1903). In that case, a mortgagor appealed without posting supersedeas; the plaintiff in foreclosure bought the property at foreclosure sale and went into possession. Upon reversal of the foreclosure decree, the mortgagor was held entitled to restoration of the property and an accounting (Accord, Bridier v. Burns, Fla. 4 So.2d 853 (1941).
>
> "It must be noted that the result in this case is limited to those situations in which the person required to make restitution was connected with the litigation. It is settled law that reversal of a decree on appeal does not affect the rights under that decree as to persons who were not parties to the appeal (Martin County v. Hansen, 111 Fla. 40, 149 So. 616 (1933); Florida Central Railroad Co. v. Bisbee, 18 Fla. 60 (1881). As to non-party persons, a purchase at an execution sale pursuant to a judgment afterwards reversed is final."

In a similar situation, in Simms v. City of Tampa, 42 So. 884, (Fla. 1906) this Court said:

> "It is well settled that restitution, on reversal of a judgment, can be compelled only from parties to the record, or from their beneficial assignees, or, in case of the death of the execution plaintiff, from his executor or administrator. Restitution cannot be compelled from third persons, strangers to the record, who were bona fide purchasers at a sale under process dependent upon a judgment subsequently reversed, or who acquired bona fide collateral rights thereunder, and their rights are in no way affected by the subsequent reversal of the judgment."

See also Garvin v. Watkins, 10 So. 818 (Fla. 1892); Walker v. Sarven, 25 So. 885, (Fla. 1899).

It is clear from the foregoing that this court has held that a stranger to the foreclosure litigation is not affected by the unsuperseded reversal of a foreclosure judgment. The successful party would be entitled to restitution against the mortgagee but not against a third party.

Assuming arguendo, that Respondent was wrong, the referee still was not authorized in finding fraudulent conduct. An attorney cannot be liable for fraud just because he differs in the interpretation of the law. Respondent's opinion was supported by all of his experts.

It really doesn't make any difference whether respondent's opinion was correct or erroneous. He held the opinion in good faith and could not be liable of aiding in fraudulent conduct. It is incredible to think that attorneys put themselves in this kind of jeopardy when advising clients.

POINT II. AN ATTORNEY CANNOT BE GUILTY OF VIOLATING DR 5-101(A) and (B), REFUSING EMPLOYMENT, WHEN THE ATTORNEY HAD THE CONSENT OF THE CLIENT AFTER FULL DISCLOSURE.

COUNT II: Respondent was charged with violating Disciplinary Rules 5-101(A) and 5-101(B).

With respect to Rule 5-101(A), it should be noted that the rule specifically provides: "Except with the consent of his client after full disclosure . . . .".

Respondent testified that he fully discussed with Mr. Wolkowitz the alternatives that he had; the probabilities that a lawsuit would be filed against them and the possible consequences. After the lawsuit was filed he had further discussions with the Wolkowitzs, again explaining all of the possible ramifications of the suit, including the fact that the Golds were seeking punitive damages.

After being fully advised, Mr. Wolkowitz requested that respondent represent him as long as he could, with the understanding that if the case could not be settled it would be necessary to obtain other counsel to try the case. This testimony was corroborated by Mrs. Wolkowitz.

Further, since both respondent and the Wolkowitzs were party defendants, their interests were mutual, not adverse.

The Bar argues below that Mr. Wolkowitz should have been advised of his right to file a cross-claim against the respondent. There is no evidence in the record to indicate whether or not he was so advised by either respondent or Marshall Curran. Assuming, however, that he was not so advised, he did not suffer any harm. If a cross-claim had been filed, and we submit that that would have been a tactical error, it would of necessity have been severed because his damages, if any, could only be ascertained by the outcome of the Gold v Wolkowitz, et al., suit. Absent the filing of a cross-claim, Mr. Wolkowitz could have filed, and still could file, a malpractice action against the respondent. The fact that he has not done so, and the fact that Mrs. Wolkowitz appeared at these proceedings to testify at the request of the respondent, clearly shows that the Wolkowitzs do not feel that the exercise of respondent's judgment on their behalf was in any way affected by his own financial, business, property or personal interests.

With respect to Disciplinary Rule 5-101(B), respondent admits that he represented Mr. Wolkowitz through most of the discovery procedure, and that when it became apparent the case may have to go to trial, Mr. Marshall Curran was retained to represent Mr. Wolkowitz, the respondent and his P.A.

Respondent testified that he undertook representing Mr. Wolkowitz because of the rapport he had with the Wolkowitzs, and he felt obliged to minimize the expenses of Mr. Wolkowitz in defending the action. This was done at the request of Mr. Wolkowitz.

We submit that Sub-Section (4) of D.R. 5-101(B) specifically applies in this proceeding.

CONCLUSION

Since the standard of proof, clear and convincing evidence, has not been met in the lower proceedings, it is respectfully suggested that the referee's report was erroneous, unlawful or unjustified. We recognize that below the burden was on the Bar and here the burden is on respondent. We feel, and earnestly suggest here, that respondent was found guilty below on speculation and conjecture and not by clear and convincing evidence. The record supports this conclusion.

As to the discipline applied, a 30-day suspension seems unduly harsh. Two circuit judges and an appellate judge all testified as to respondent's good character and reputation. Except for a private reprimand for minor misconduct over 15 years ago, respondent's record is unblemished. It has been the writer's experience that circuit and appellate judges don't testify for attorneys unless they honestly believe in that attorney's character and reputation. Respondent, except for this isolated case, has for over 28 years earned that trust.

Respectfully submitted,

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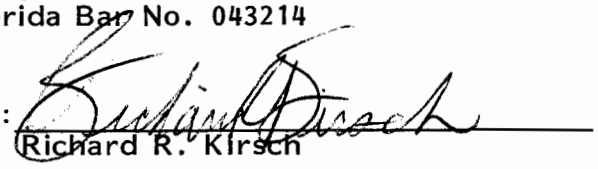
By: 
Richard R. Kirsch

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief in Support of Petition for Review was furnished by mail this 24th day of January, 1985 to DAVID M. BARNOVITZ, Bar Counsel, The Florida Bar, 915 Middle River Drive, Suite 602, Fort Lauderdale, Florida 33304.

By: Richard R. Kirsch
Richard R. Kirsch