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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Appellee,

v.

J. B. HOOPER,
Appellant.

CASE NO. 68,954
(TFB NO. Y3D86H17)

CONFIDENTIAL

FILED
APR 15 1988
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APPELLEE'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Appellee, The Florida Bar, will be referred to as the "complainant". The Appellant, J.B. Hooper, will be referred to as the "respondent". "TR" will denote the transcript of the final hearing held on October 10, 1986.

STATEMENT OF THE CASE AND FACTS

The respondent was retained by Dr. S. Victor Kassels for representation in a partition of property proceeding against Dr. Kassels' ex-wife. Dr. Kassels paid the respondent \$400.00 as a retainer fee. A deposition was scheduled in February 1985, and evolved into a settlement conference. At that conference, Dr. Kassels and respondent had a serious dispute about the reasonableness of respondent's fee. A fee statement reflecting \$1,900.00 had been sent to Dr. Kassels a few days prior to this meeting.

Dr. Kassels was to be issued a check for \$8,500.00 for taxes he had paid on the property in dispute. At the settlement conference, respondent advised the opposing counsel to send the check directly to him for deposit into his trust account. Respondent intended to take his \$1,900.00 fee from the \$8,500.00 check. To accomplish this procedure, Dr. Kassels would have had to endorse the check, and put it into the respondent's trust account, so as to allow respondent his fee. Dr. Kassels did not refuse to pay any additional attorneys fees, but did question the reasonableness of those fees charged.

Respondent then left the settlement conference, and according to his client, abandoned him over whether respondent was going to have the \$8,500 deposited to his trust account. The \$8,500 owed Dr. Kassels for an overpayment of taxes had nothing to do with the pending partition proceeding. As a result

of the disagreement over attorneys fees, respondent then withdrew from representation of Dr. Kassels. The respondent then filed a Mechanics Lien to force the payment of his fees, even though the Mechanics Lien Statute clearly does not apply to attorneys fees.

The grievance committee found probable cause for further proceedings. The grievance committee found probable cause only after requesting legal research on the Mechanics Lien Statute. The matter was then heard before a Referee on October 10, 1986. The Referee found respondent guilty and recommended a one (1) year suspension. The Report of Referee was considered by the Board of Governors of The Florida Bar, which voted not to seek review of the Referee's recommendations.

SUMMARY OF ARGUMENT

The complainant seeks to affirm the findings of fact and recommendation of discipline as imposed by the Referee. The violations against the respondent were proven by clear and convincing evidence. The Referee made his decision after careful consideration of the statutory authority respondent asserted as his basis for filing the Mechanics Lien. The Referee was also able to evaluate the demeanor, credibility, and reliability of both the complainant and respondent's witnesses.

Respondent sought to remove the Referee in the instant case who had recently presided over a hearing in which the respondent had another grievance matter. The Referee denied respondent's Motion for Disqualification. Respondent sought no review of the denial by this Court, and is thus precluded from now attacking the recommendation of guilt after a full hearing on the matter. This Court is now in a position to review the record and to determine the propriety of the Referee's actions during the course of the final hearing.

The filing of a Mechanics Lien for attorneys fees is clearly not within the parameters of the Mechanics Lien Law. The respondent who devotes a substantial portion of his practice to real estate law was in a position to know and should have known prior to his filing of the Mechanics Lien that it was not an appropriate remedy. In fact, the respondent testified that he

presented real estate seminars to the Board of Realtors. (Tr.P.88, l.14) The filing of the Lien was simply to force the payment of attorneys fees without the necessity of proving a charging or retaining lien. The respondent relies heavily upon the assertion that no case law or other authority exists stating that an attorney could not file a mechanics lien. In effect, the respondent has demanded that the complainant prove the existence of a negative. The respondent, however, took a position clearly unsupported by statutory authority and case law.

ISSUE I

"WHETHER THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAS VIOLATED RULES 1-102(A)(4), 1-102(A)(5), and 1-102(A)(6) OF THE DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR."

"A Referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support." The Florida Bar v. Stalnaker, 485 So.2d 815, 816 (Fla. 1986). The Florida Bar v. McCain, 361 So.2d 700, 706 (Fla. 1978); The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968). The Report of Referee filed herein was supported by competent and substantial evidence which clearly and convincingly showed that respondent violated the Code of Professional Responsibility in the respects charged.

The Referee heard the testimony of Dr. Kassels, the respondent, and the two expert witnesses offered by the respondent. The Referee was able to test the credibility, and demeanor of the witnesses. The Referee was able to review the Mechanics Lien Statute, Section 713 Florida Statutes (1985), and apply the law to the testimony presented.

The respondent represented to this Court that "although the Bar offered no rebuttal testimony, or made any attempt to impeach respondent's witnesses, the Referee improperly rejected the

testimony of both of those individuals..." (p.6 of Respondent's Initial Brief). Such is clearly not the case. Both Mr. Musial and Mr. Deason were cross-examined by the attorney for The Florida Bar. (See transcript of Final Hearing p.217, and 250). In fact during the cross-examination of Mr. Musial, the following was elicited:

Q: ...are you familiar with any section of the Mechanics Lien Law that would allow for an attorney to legitimately and affirmatively file a Mechanics Lien?"

A: No, I am not aware of any provision in the statute.
(Tr. p.220, l.5).

Despite respondent's opinion as to the merit of the cross-examination, the Referee was in the best position to determine whether the witness had been impeached.

Sections 713.01(10), and 713.03, Florida Statutes (1985) specifically define who constitutes a lienor. Nowhere within those Sections is an attorney defined either expressly or impliedly as a lienor. The Referee correctly found that respondent had no statutory authority for the filing of the Mechanics Lien to secure attorneys fees. The Mechanics Lien Law shall not be subject to a rule of liberal construction in favor of any person to whom it applies". Section 713.37 Florida Statutes (1985).

ISSUES TWO

"WHETHER THE REFEREE IN THIS MATTER ACTED IMPROPERLY AND IN VIOLATION OF THE CODE OF JUDICIAL CONDUCT IN REFUSING TO REMOVE HIMSELF FROM THESE PROCEEDINGS AND THEN EXPRESSED HIS PREJUDICIAL PROPENSITIES THROUGH HIS CONDUCT AT THE HEARING AND THE RECOMMENDATIONS IN HIS REPORTS"

Integration Rule, article XI, Rule 11.06(5)(h) states that the "disqualification of a Referee is made in the same manner and to the same extent as a trial judge may be disqualified." Further, Rule 1.432(a) Fla.R.Civ.P. states that "the judge against whom the motion is directed shall determine only the legal sufficiency of the motion".

To determine whether the motion is legally sufficient, the court must look to the requirements of Rule 1.432 Fla.R. Civ. P. and Section 38.10, Florida Statutes (1985). However, the term "legal sufficiency" means more than technical compliance with the rule and statute. " The test of the sufficiency of the affidavit is whether or not its content shows that the party making it has a well-grounded fear that he will not receive a fair trial at the hands of the judge." Brown v. Dewell, 179 So.695, 697 (Fla. 1938). Hayslip v. Douglas, 400 So.2d 553, 556 (Fla. 4th D.C.A. 1981).

Paragraph One (1) of respondent's Motion to Disqualify states that the Referee recently presided over another grievance matter against the respondent. Surely a Referee may hear more than one grievance against the same individual. In respondent's

Motion to Disqualify the Referee, it was further alleged in paragraphs 2-4, that the Bar's key witness offered perjured testimony and that the Court elected not to investigate or otherwise inquire as to the validity of these allegations. Ironically, on page 12 of Respondent's Initial Brief, it is alleged that the Referee acted improperly during the course of the instant proceeding because he did inquire of witnesses. As to paragraph five (5) of the Motion to Disqualify, the undersigned bar counsel was not privy to the allegations made regarding ex parte communications in the previous disciplinary matter and is unable to respond. It may only be presumed that the Referee considered the entire Motion for Disqualification to be "frivolous or fanciful", and lacking in legal sufficiency.

The respondent also had the opportunity to file a writ of prohibition with the Supreme Court of Florida following the denial of disqualification by the Referee. Integration Rule, article XI, Rule 11.09(5) provides that "all applications for extraordinary writs which are concerned with disciplinary proceedings under these rules of discipline shall be made to the Supreme Court". The respondent failed to exhaust his legal remedies. "Preliminary, we note that a petition for writ of prohibition is the appropriate procedural device to test the validity of a denial of a motion to disqualify filed pursuant to Rule 1.432, Fla. R. Civ.P." Hayslip v. Douglas, 400 So. 2d 553, 555 (4th DCA 1981).

As the respondent failed to seek the appropriate writ it is not appropriate to argue after a full and thorough final hearing that the Referee should have been disqualified. The record is replete with evidence that the Referee conducted a fair and impartial trial.

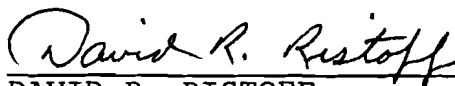
CONCLUSION

The Report of Referee is based on clear and convincing evidence that respondent filed a Mechanics Lien to enforce his fee. The filing of a Mechanics Lien to secure a fee is in violation of Disciplinary Rules 1-102(A)(4); 1-102(A)(5); and 1-102(A)(6), of The Code of Professional Responsibility. Respondent could have enforced his legal fees through a number of proper ways including a charging or retaining lien, but chose to force a Mechanics Lien on his client's property.

The respondent should not be permitted to argue his Motion to Disqualify again at this stage of the proceedings. If respondent chose to contest the denial of his Motion to Disqualify, the appropriate remedy would have been to seek a writ of prohibition from the Supreme Court of Florida. A record of the final hearing indicates that a fair and impartial proceeding was held.

The Report of Referee and recommendations of discipline are appropriate based upon the respondent's disregard for the law. The complainant respectfully requests that the findings of fact and recommendations of discipline be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing with seven copies has been furnished by Purolator to Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, with copies to B. Anderson Mitcham, Attorney for Respondent, J. B. Hooper at 1509 East Eighth Avenue, Tampa, Florida 33605; and John T. Berry, Staff Counsel, The Florida Bar, 600 Apalachee Parkway, Tallahassee, Florida 32301-8226, this 11th day of April, 1987.



DAVID R. RISTOFF