IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARTHA S. SIEGEL,

Respondent.

_____/

CONFIDENTIAL

CASE NO. 68,956
(TFB #12A85H75)

THE FLORIDA BAR'S REPLY BRIEF

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RESPONSE TO RESPONDENT'S STATEMENT OF THE FACTS

The Florida Bar, complainant, takes issue with several portions of respondent's statement of facts.

Respondent indicates in his Brief that, following negotiations and discussions, the parties entered into an agreement and stipulation for a public reprimand, and that based on this agreement for stipulation, the respondent waived her right to respond to the Request for Admissions ((Respondent's Cross Petition (RCP) p.2)). Respondent cites to her Motion for Continuance. This motion indicates that the agreement and proposed stipulation related only to the Second Request for Admissions. (Respondent's Motion for Continuance, paragraph 4). After Bar Counsel was directed to withdraw the stipulation, counsel for the parties met with Judge Pack, Referee, and agreed to a continuance. Complainant's Motion to Deem the Second Request for Admissions admitted was denied, without objection by the Bar. During the period of continuance, on December 9, 1986, a Third Request for Admissions was submitted to respondent, by and through her counsel at that time ((Complainant's Third Request for Admissions (CTR)).

No stipulation to a public reprimand was entered into (TR 56, line 14-18). At final hearing, in fact, respondent argued for a private reprimand, evidencing that there was no stipulation to a public reprimand (TR 56, line 21-23).

Respondent, by and through her counsel, represents that the only continuance ever granted during the course of these proceedings was that granted based on the withdrawal of the proposed stipulation (RCP p.4). Respondent's current attorney was not counsel of record during any of the proceedings prior to this appeal, and apparently is unaware of delays and continuances occasioned by respondents while attempts were being made to have the hearing before the grievance committee and then while respondent's counsel negotiated for a consent judgment. In the final hearing David Beckerman, co-counsel for respondent, stated as follows: "In saying the proceedings has (sic) gone on for two years, I did not mean the Bar's fault and I don't lay blame there. I don't lay blame anywhere. It's just a fact" (TR 64, line 10-13).

At page 4 in respondent's brief it is stated that respondent testified and introduced substantial mitigating evidence. To clarify this point, it is noted that respondent did not testify during the case in chief (TR 3-6). Further, respondent introduced no evidence or argument to counter the Matters Deem Admitted and in fact directed testimony only to mitigation after a finding of guilty based on the Matters Deem Admitted and documents in evidence. There was no objection by respondent's counsel to any of the documents admitted into evidence, to Matters Being Deem Admitted, or to the findings of guilt, including violation of DR 1-102(A)(3) (engaging in illegal conduct) (TR 3-6).

RESPONSE TO RESPONDENT'S ARGUMENT

Respondent argues that no testimony was presented by any witnesses as to how the bank arrived at the $50,000.00 cash equity figure on the mortgage loan report, or that the amount was to be in cash rather than by a promissory note (RCP 9). The Third Request for Admission was Deem Admitted, and thereby it was admitted that Siegel and Canter did not list the unrecorded mortgage for $50,000.00 to Mr. Bluck as a liability on the personal financial statement dated July 1, 1984 (CTR #6), that loan officers at the time of the loans in question were unaware of Siegel and Canter's mortgage with Robert Bluck and of the promissory note given as security (CTR #7), and further that the loan officers at Southeast Bank believed Siegel and Canter to have $50,000.00 cash equity in the subject property (CTR #8). Additionally, in the commercial mortgage and security agreement executed October 7, 1983 by Siegel and Canter, Paragraph 29 states "subject to all terms and conditions of commitment letter dated September 10, 1983" (Exhibit F). The commitment letter of September 10, 1983 specifically indicates that there will be no secondary mortgage financing without the bank's expressed written consent (Exhibit D, p.2). In the instant case, the referee could reasonable conclude from respondent's failure to inform the bank of the secondary financing, from the above mentioned matters deemed admitted, and from other documents available to him that

the bank relied on information presented to it by respondent when concluding that there was $50,000.00 cash equity in the property, and that the Bank reached that conclusion due to the representations and omissions by respondent.

Respondent suggests that it is arguable that Southeast Bank, N.A., was aware of the agreement between Respondent and Bluck (RCP 20). This was not argued at the final hearing, and is inconsistent with CTR 7, which indicates loan officers were unaware of the mortgage.

Respondent alleges that the Bar misled as to the nature of respondent's practice (RCP 29), apparently by pointing out that respondent advertised real estate as an area in which she practiced (Bar's Opening Brief (C.B.) 8,9,11)). There was no evidence introduced by respondent to show respondent did not at any time practice real estate, but only that efforts to expand her practice past immigration work failed (TR 17). The Bar's representation was that respondent advertised that she practiced real estate law (RCP 8,9,11). (Bar's Opening Brief (C.B. 8,9,11). Based on that fact, the referee could justifiably conclude that respondent should be considered at least minimally knowledgeable in that area.

Respondent alleges a thirteen day delay in receiving the Bar's brief (RCP 31). The cause of the alleged delay is not known to the Bar. However, no extension to file a response was requested by respondent based on the alleged delay or for any other reason, and the delay should not be considered in mitigation.

Respondent argues that since investigator costs are not listed as an allowable cost under Rules of Discipline, Rule 3-7.5(K)(5), they should not be taxed against respondent (RCP 32). While the Rule does indicate those costs which shall be included, it does not preclude the payment of other costs reasonably incurred, such as investigator costs.

Respondent suggests that since most of the grievance committee hearing involved matters for which no probable cause was found, no costs or reduced costs should be awarded (RCP 32,33). However, the conduct for which respondent was found guilty was inextricably interwoven with matters involving Mr. Bluck and the loan by him to respondents. While no probable cause was found regarding the loan from Mr. Bluck per se, the evidence involving that loan and Mr. Bluck's testimony were critical to the finding of probable cause with respect to other violations.

The objections to costs incurred for the November 14, 1986 hearing (RCP 32) are well taken and no counter argument is offered in this reply.

Respondent points out that there is no evidence that when the bank learned of the agreement between respondents and Mr. Bluck, it enforced the acceleration provision of their mortgage. It is suggested that the bank was apparently satisfied with their security as negotiated and agreed to by the parties (RCP 40). There was no evidence presented by respondent regarding the reasons the bank may have elected to not accelerate, nor that it was satisfied with its security.

Respondent notes that the personal financial statement dated July 1, 1984 was not referred to by The Florida Bar in its Complaint and was never alleged to be false or misleading (RCP 11). Certainly in his deliberations the referee may consider all exhibits entered into evidence which are relevant to the underlying allegations, and is not limited to basing its conclusions only on those facts and exhibits specifically mentioned in the Complaint.

Respondent points out that on the financial statement of July 1, 1984, under the liability section respondent listed "amounts payable to others - secured" as $25,000.00 (RCP 24). No evidence was introduced to show that this secured amount reflected one half of the $50,000.00 promissory note to Robert Bluck. Under Schedule D, Exhibit L of that personal financial statement, Siegel and Canter listed as real estate owned, the office building which is the subject of the misrepresentations to the Bank. They list the mortgage amounts as $148,000.00 and fail to list the unrecorded mortgage to Mr. Bluck (Exhibit L, schedule D). Given this fact and the admission that the loan officers at the time of the loans in question were unaware of the mortgage with Robert Bluck, and of the promissory note given as security, the referee could reasonable conclude that the statements on the July 1, 1984 financial statement were misleading and/or fraudulently made.

Respondent notes that on the August 10, 1984 affidavit it is indicated that the owner is aware of no facts by reason of which the title to, or possession of, the property or any part of

it, or personal property located on it, might be disputed or questioned (RCP 11). At the time that this affidavit was completed, the unrecorded mortgage was in the possession of Robert Bluck, who had the ability to recorded it at any time, and whether or not it was recorded Mr. Bluck could potentially claim an interest in the property had respondent failed to meet the conditions of the contract with Mr. Bluck.

Respondent repeatedly notes in addressing each of the referee's findings that each finding has no separate conclusion of wrongdoing. However, after making the findings of fact, the referee does conclude that respondent is guilty as charged (Report of Referee II), and that the fraud was deliberate and intentional (Report of Referee III (5)).

Respondent points out that Bar counsel and the referee did not mention affidavits prior to the Bar's effort at obtaining enhanced punishment (sic) of the respondent (RCP 27). The affidavit was before the referee at the time of his deliberations (Exhibit J, RCP 25) and since it was in evidence, it can be considered in determining where or not the discipline administered in the instant case is appropriate.

Respondent claims that the Bar's arguments for enhanced punishment are based on the alleged submission of two false affidavits, and respondent goes on to say that only one affidavit was ever admitted into evidence (RCP 14). In point of fact, the Bar argued that there were two loans obtained from an FDIC bank, and indicates that there was "the submission of a

false affidavit." (CB 6) Two clearly referred to the number of loans, while it was never alleged that two false affidavits were submitted. (See also CB 10).

Respondent alleges that the Bar has failed to proceed in accordance with the new Rules Regulating the Florida Bar, citing violation of non-existent rules in that the rules of professional conduct have supplanted the Code of Professional Responsibility (RCP 33-35). Respondent notes that the rules in effect January 1, 1987 state "all disciplinary cases pending as of 12/01/87, shall thereafter be processed in accordance with procedure set forth in the Rules Regulating the Florida Bar" (RB 33). The case was in fact processed under those procedures, but in keeping with the desire to avoid ex post facto considerations, the respondent was charged with and found guilty based on Rules of Discipline in effect at the time of the offenses.

Respondent argues that the Bar's current petition was filed in bad faith, noting that during the referee's hearing Bar counsel suggested if there was to be a suspension, it should be brief and non-concurrent so that at all times one respondent would be able to handle the case load of the other. Respondent cites to several sections of the transcript to support the argument that this was the position of Bar counsel (RCP 35). Bar counsel did ask respondent's partner, "if your ability to practice were curtailed for a period and that period did not coincide with the curtailment of his partner's activity, would she be able to handle some of the immigration activities?"

(TR 18). This question was asked following statements by the respondent's partner that it would be difficult for his clients to find another spanish speaking attorney who is conversant with immigration law (TR 16, 1-6). Also respondent's partner was asked whether or not his partner would be able to practice during a period when perhaps his activities were curtailed, and if she could hire others to assist her (TR 19, 11-13). This likewise was asked in response to statements that clients would be jeopardized if Ms. Siegel was unable to practice and did not constitute a recommendation, but rather was meant to provide an alternative if the Judge concluded that concurrent suspension was too harmful to respondent's clients. Contrary to Respondent's representation (RCP 35), some statements allegedly made by Bar Counsel were made by the respondent's attorney (TR 56) and by his partner (TR 25).

Bar Counsel clearly stated to the court that the Bar's position is that the public reprimands given in The Florida Bar vs. Beneke and The Florida Bar vs. Barrow should be considered the least possible penalty for dishonesty and misrepresentation involving bank loans (TR 70). It was made clear that The Bar hoped that the court would also see that as the minimum possible penalty where fraud on a bank is concerned (TR 70), that The Florida Bar and The Board of Governors takes a very strong position in cases involving dishonesty and illegal conduct, and that a public reprimand would be treating the matter rather lightly (TR 68).

Respondent argues that she has done harm to no one (RCP 39). No evidence was introduced to this effect. Further it is argued that the bank is not concerned with this case as shown by the fact that this complaint is brought only by the Bar (RCP 39). The conclusion by the respondent does not logically follow from the fact that the Bar was the complainant in this case, and is not supported by any evidence.

Respondent suggests that the mortgagee in the present case was fully secured, and that therefore there was no harm to the mortgagee as there was in Beneke (RCP 41). Respondent indicates that Beneke fraudulently misrepresented the value of a piece of property in obtaining a loan and ultimately acquired a loan in excess of the property's true value (RCP 41). More accurately, in Beneke the loan obtained was in excess of the purchase price of the property by $1,000.00, but it is not reported that it was in excess of the property's true value. In fact Beneke sold the property for $230,000.00 on December 28, 1978, after obtaining a mortgage of $160,000.00 on that property on February 23, 1978. There is no indication in Beneke that there was any harm to the mortgagee. The finding in Beneke was made not withstanding the absence of any complaint by the bank as to the respondent's satisfactory performance of the obligation to it. Id.

Respondent argues that Beneke cannot be differentiated by the Bar's statements regarding a series of falsehoods made during the course of the two loan applications (RCP 41). The

statement by the Bar during final hearing was that the facts in Beneke as reported in So.2d "don't indicate whether or not there is a pattern of misconduct or two separate time periods of misconduct like we have in the instant case" (TR 70, line 4-12). In addressing what respondent terms the "flood of falsehoods", The Florida Bar asked Judge Pack to read over the Matters Deemed Admitted, the complaint to the extent that it's been admitted, and that he ask himself how many independent decisions to misrepresent were made, how many independent documents were filled out with erroneous information, and to turn his attention to the fact that the two major groups of misrepresentations fell within two time periods which were fifteen months apart (TR 66).

CONCLUSION

Based on the findings of fact, matters deemed admitted, and evidence before the referee, respondent should be suspended for ninety-one (91) days, and required to pay all costs of this action.

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