IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DONALD E. MCLAWHORN,

Respondent.

_____/

Case No. 69,240
TFB #85-13,630(13B)

THE FLORIDA BAR'S ANSWER BRIEF

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I. The Referee's Findings of Fact come before this Court clothed with a presumption of correctness. The referee did not err in finding that respondent's Traverse was deceitful or constituted misrepresentation to the court.

II. There is clear and convincing evidence to support the Referee's finding that respondent deprived the court of its ability to order the sale of property being litigated by his conveyance of the subject property into his own name.

III. There is clear and convincing evidence to support the Referee's finding that respondent acquired a proprietary interest in property which was the subject of litigation. The respondent's explanation as to why he transferred said property is not a sufficient defense to the charge of violating DR 5-103(A).

IV. A thirty (30) day suspension is warranted under the facts of this case and in consideration of respondent's prior disciplinary record.

PRELIMINARY STATEMENT

The Florida Bar shall use the same symbols and abbreviations as set forth in respondent's Amended Initial Brief.

STATEMENT OF THE FACTS

In June 1984 Ms. Varon was represented by Halton Hart, not Howell Hart.

The purpose of the conveyance from Mr. Draughn to respondent on August 28, 1984 was not to "enable the respondent, who was representing Mr. Draughn in a criminal charge, to become the sole owner of whichever piece of property that would have otherwise gone to Mr. Draughn either by stipulation and agreement of the parties or Order of the Court." The purpose of the aforementioned conveyance was to allow respondent to acquire a proprietary interest in property which was the subject of litigation.

No hearing occurred in the underlying action on September 9, 1984. The date of the hearing was September 11, 1984.

Judge Giglio was not made aware of the August 28, 1984 conveyance from Mr. Draughn to respondent until the day of the hearing on September 11, 1984.

I. ARGUMENT AS TO RESPONDENT'S FIRST ISSUE FOR REVIEW

It is well-settled that the judgment of a trial court comes before this court clothed with a presumption of correctness. St. Joe Paper Company v. State Dept. of Env. Reg., 371 So. 2d 178, 181, (1st D.C.A. 1979). Therefore, The Bar, as prevailing party below, is entitled to the benefit of all reasonable inferences that can be drawn from the evidence in a light most favorable to the Bar. Rose v. Grable, 203 So. 2d 648 (2d D.C.A. 1967), reh. den. November 29, 1967.

Respondent's first argument is that the Referee erred in finding that respondent's Traverse (Bar's Exhibit No. 4) was deceitful or constituted misrepresentation. Respondent argues that his intent was not to have any proprietary interest in the conveyed property, yet that is exactly what occurred. Mr. Draughn conveyed the subject property to respondent.

In addition, respondent argues that all parties were aware of the transfer prior to the September 11, 1984 hearing. Ms. Varon testified, however, that she and her attorney did not know the property had been transferred until the day of the hearing. (R. pg. 12, line 14).

It is impossible to assert that the Traverse was filed "to effectuate an agreement between the parties that the

property should be sold so as to avoid litigating that issue since the hearing was only thirty minutes in length which was insufficient." The length of hearing time set for September 11, 1984 is not relevant to the assertion in the Traverse that the "parties are joint owners of another piece of property" (Bar's Exhibit No. 4, paragraph 5). This assertion within the Traverse is what constituted the deceit or misrepresentation to the court. Respondent knew that pursuant to the August 28, 1984 conveyance Mr. Draughn was no longer a "joint owner" of any property with Ms. Varon.

II. ARGUMENT AS TO RESPONDENT'S SECOND ISSUE FOR REVIEW

The Referee did not err in finding that respondent deprived the Court of the ability to order the sale of the property being litigated. Respondent argues that the Referee relied upon the opinion of Ms. Varon that the August 28, 1984 conveyances prohibited the entry of an Order of Sale at the September 11, 1984 hearing. It is clear that Judge Giglio could not have entered an Order on September 11, 1984 ordering Mr. Draughn to sell the subject property since, at that time, the property was titled in the name of respondent.

The Referee did not overlook respondent's explanation as to why the subject property was conveyed, the Referee just did not accept respondent's explanation as constituting a defense against the charge of acquiring a proprietary interest in the subject property. Regardless of respondent's alleged motivation for transferring the subject property, there is no question that he knew it was a subject of litigation and that he transferred the property into his name. (R. page 27, line 19 and page 28, line 22).

In addition, respondent argues that the delay between the September 11, 1984 hearing and the January 22, 1985 hearing was not caused by his actions, but was due to Ms. Varon's attorney's failure to schedule enough time before

the Judge on September 11, 1984 to hear the motions scheduled on that date. Respondent's argument misses the point. Even if an entire day had been scheduled before Judge Giglio on September 11, 1984, he would not have been able to order the sale of the property involved because the property was titled in respondent's name. The only parties before Judge Giglio on September 11, 1984 were Ms. Varon and Mr. Draughn.

III. ARGUMENT AS TO RESPONDENT'S THIRD ISSUE FOR REVIEW

The Referee did not err in finding that respondent acquired a proprietary interest in property which was the subject of litigation. Respondent's argument fails to address the main focus of DR 5-103(A), i.e., "a lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client." Instead, respondent's argument, and the cases cited therein, focuses on whether the attorney's conduct was in some way detrimental to his client. The Florida Bar has never argued that respondent in some way harmed Mr. Draughn. Likewise, respondent has never been accused of misconduct as it relates to his dealings with Mr. Draughn.

The facts clearly show, however, that respondent did acquire a proprietary interest in property which was the subject of litigation. The testimony in evidence before the Referee clearly shows that respondent violated DR 5-103(A).

IV. ARGUMENT AS TO RESPONDENT'S FOURTH ISSUE FOR REVIEW

A thirty (30) day suspension is warranted in the instant case. In arguing for a lesser sanction, respondent's argument focuses on the alleged motivation of the Bar's main witness, Ms. Varon. The alleged motivation of Ms. Varon is not relevant to the sanction to be imposed upon the respondent. The Florida Bar is the complainant in this cause, not Ms. Varon. The Florida Bar has no ulterior motive in seeking the recommended discipline of a thirty (30) day suspension.

Respondent also focuses his argument on the allegation that no harm accrued to his client. Respondent's argument fails to consider the impact his actions had on the judicial system and on the opposing party. For instance, respondent's actions caused Ms. Varon to lose the homestead exemption on the Rome property which caused her taxes to increase from $202.00 to $820.00. (R. page 14, line 25 and page 15, line 8).

Respondent's argument to this Court also failed to mention his prior disciplinary record. The referee was aware of respondent's prior discipline, having sat as the Referee in that case, and the Referee considered the prior

discipline when recommending a thirty (30) day suspension in the present case. (Report of Referee, page 2). Respondent's prior disciplinary record should be given great weight by this Court in considering the sanction to be imposed upon respondent. The Florida Bar v. Greenspahn, 386 So. 2d 523, 524 (Fla. 1980), reh. den. Aug. 27, 1980 and The Florida Bar v. Vernell, 374 So. 2d 473, 476 (Fla. 1979), reh. den. Sept. 20, 1979.

The Florida Standards for Imposing Lawyer Sanctions justify a thirty (30) day suspension in the present case. Standard 6.12 provides that "suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action." Respondent knew when he filed the Traverse, (Bar's Exhibit No. 4) that it contained a false statement. The false statement consisted of the statement that Mr. Draughn was a "joint owner" of another piece of property with Ms. Varon.

Standard 7.2 provides that "suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system." Respondent knew that transferring the property into his name on August 28, 1984, when a hearing was

scheduled for September 11, 1984, was a violation of DR 5-103(A).

Standard 9.22 provides that "aggravating factors include: (a) prior disciplinary offenses; (g) refusal to acknowledge wrongful nature of conduct; and (i) substantial experience in the practice of law."

CONCLUSION

The Bar submits that the Referee's Findings of Fact are all supported by clear and convincing evidence. The discipline suggested by the Referee is appropriate and should be imposed by this court on respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Mr. Michael L. Kinney, Counsel for Respondent, 208 S. MacDill, Tampa, Florida, 33609 this 21st day of July, 1988.

R. A. Greenberg

Richard A. Greenberg