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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Appellant/Cross-Appellee,

vs.

CASE NO. 69,956

KEITH A. SELDIN,

Appellee/Cross-Appellant.

CROSS-REPLY BRIEF OF APPELLEE/ CROSS-APPELLANT, KEITH A. SELDIN

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PREFACE

In its Reply Brief, The Florida Bar has not responded on an issue-by-issue basis in conformance with the arguments raised in Appellee/Cross-Appellant Keith A. Seldin's Answer Brief. Nevertheless, the first issue/argument in the Bar's Reply Brief [pp. 1-3] is clearly an answer to Seldin's Issue I on Cross-Appeal. Seldin therefore believes it appropriate and necessary to file this Cross-Reply Brief as to that Issue. The Bar appears to have otherwise accepted the correctness of Seldin's Issue II on Cross-Appeal, inasmuch as it has made no direct or even indirect response to it.

ISSUE I ON CROSS-APPEAL

THE SPECIAL REFEREE'S FINDINGS ON COUNTS II AND V ARE NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE APPROPRIATE TO THE ISSUE.

In its Reply Brief [pp. 1-3], The Florida Bar argues that the evidence was clear and convincing to sustain the special referee's findings regarding Seldin's alleged "theft." Aside from the fact that the special referee never expressly or by necessary implication concluded that a "theft" had occurred,[1] the Bar's recitation of the evidence is thoroughly skewed and reflective of nothing more than the author's subjective opinion as to what the evidence actually shows. Even judged in a light most favorable toward sustaining the special referee's findings, that evidence simply does not constitute competent, substantial evidence, appropriate to a clear and convincing standard, that Betty Boneparth was not the "procuring cause" of the sale of the Estate's property.

The Bar argues, for example, that the sales contract entered into by Thomas E. Lee, the purchaser of the property in dispute, and the Estate expressly provided that no broker commission was involved and that Mr. Lee testified that "there was no broker involved." [Reply Brief, p. 2] Lee's conclusory statement that no broker was involved, however, is nothing more than an expression of opinion, not fact, on Mr. Lee's part as to

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[1]The Bar's persistence in making this unfounded accusation in perplexing. Not only did the referee never render such a conclusion, the Bar's argument that Seldin stole from the Estate is completely inconsistent with its other argument that the brokerage firm for which Betty Boneparth worked was "defrauded" by the payment of a finder's fee to Betty. Furthermore, it cannot be gainsaid that Betty's finder's fee ($10,000.00) was far less than the commission to which the brokerage firm (for whom Betty worked) would have been entitled under its exclusive listing agreement with the Estate ($31,500.00). Thus, in a very real sense Seldin saved the Estate money, as the Estate's representative requested he do. He certainly did not commit a theft.

The Bar argues, for example, that the sales contract entered into by Thomas E. Lee, the purchaser of the property in dispute, and the Estate expressly provided that no broker commission was involved and that Mr. Lee testified that "there was no broker involved." [Reply Brief, p. 2] Lee's conclusory statement that no broker was involved, however, is nothing more than an expression of opinion, not fact, on Mr. Lee's part as to the ultimate fact in issue, i.e., whether Betty Boneparth was the "procuring cause" of the sale. Such a conclusion of law, or opinion, was clearly not within his competence to give and is in any event inconsistent with his other testimony as to Betty's involvement in the transaction.

Notwithstanding Mr. Lee's self-serving and conclusory opinion as to whether a broker relationship existed,[2] the unequivocal and undisputed testimony of Betty Boneparth and Keith Seldin clearly establishes that Betty was indeed the procuring cause of this sale. As set forth in Seldin's Answer Brief/Cross-Appeal Brief [pp. 12-13], the undisputed evidence shows that "but for" Betty's relationship with both Lee and the deceased, Bob Stephenson, and her efforts, the parties would never have been brought together and the sale would never have taken place. See, e.g., Alcott v. Wagner & Becker, Inc., 328 So.2d 549 (Fla. 1976), which holds that so long as the broker calls a

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[2]The Bar argues that Mr. Lee is a "disinterested" and "totally objective" witness. Mr. Lee, however, can hardly be described as such, for he was vitally concerned in the resolution of the central issue to this proceeding, i.e., whether Betty was the "procuring cause" of the sale of the real estate. If she was the "procuring cause," then logically she, or her employer, is entitled to a commission from the seller, the Estate, under the Estate's exclusive listing contract with Fidelity Properties. It was therefore to his financial benefit to attempt to assert the contrary. Thus, Lee certainly had a pecuniary interest, albeit indirect, in the resolution of these proceedings. At common law, persons having a pecuniary interest in a legal action were excluded from testifying because they were deemed a class especially likely to speak falsely. See, e.g., Day vs. Sickle, 113 So. 2d 559 (Fla. 3rd DCA 1959). While this restrictive common law rule has been largely abolished by statute, §90.601, Fla. Stat., Mr. Lee simply is not the unassailable witness described by the Bar.

there was to be no "commission to broker." That solitary provision, however, does not prove that which the Bar says it does. It does not prove or provide competent, substantial evidence appropriate to a clear and convincing evidentiary standard that Betty Boneparth was not the "procuring cause" of the disputed sale. At best, it proves nothing more than that, under the contract, Mr. Lee would not be obligated to pay a commission to a broker. Both the special referee and the Bar have thus done nothing more, and nothing less, than pile an impermissible inference (i.e. that Betty Boneparth was not the "procuring cause") upon a quite permissible inference (i.e. that Mr. Lee was not responsible for a commission for the sale/purchase of the disputed property). See, e.g., McCormick Shipping Corp. v. Warner, 129 So.2d 448 (Fla. 3d DCA 1961).

This impermissible inference, moreover, stands alone and the face of uncontradicted testimony offered by Betty Boneparth and Keith Seldin which establishes that "but for" her relationship with the deceased and with Lee and her efforts to promote the sale, the sale would never have taken place. Since this uncontradicted testimony consisted of facts, as distinguished from the opinions of Mr. Lee and an impermissible inference, and is not illegal, improbable, unreasonable, or contradictory within itself, it cannot be wholly disregarded but should have been accepted as proof of the issue. See, e.g., Kinney v. Mosher, 100 So. 2d 644, 646 (Fla. 1st DCA 1958).

The uncontradicted nature of this testimony presented by Seldin and Boneparth becomes even more compelling when one considers Lee's own evasive, inconclusive, and self-serving evidence on the same score. For example, when asked how he learned that Seldin was representing the Estate, and was thus the person with whom to deal, Lee equivocally stated: "I don't know, maybe Keith told me. I could see him in the parking lot or in the hall." On the other hand, however, he candidly admitted that he also could have learned about the property's availability from Betty Boneparth. [R: 29,32] This

equivocation on his part is hardly the quantum and quality of evidence expected of a Bar disciplinary action. See State ex rel. The Florida Bar v. Junkin, 89 So. 2d 481 (Fla. 1956). It certainly does not meet the test enunciated in State ex rel. The Florida Bar v. Bass, 106 So. 2d, 77, 78 (Fla. 1958), where this Court's affirmed that the power to discipline or disbar should be exercised only "in a clear case for weighty reasons and on clear proof."

Since the probative value of the contractual provisions has been conclusively discounted, the only other evidence offered by the Bar as to whether Betty Boneparth was, or was not, the "procuring cause" of the sale is Thomas E. Lee's evasive and inconsistent testimony. Its probative value, too, must be discounted for the reasons given, and when the Court does so, it is left with a record devoid of any competent, substantial evidence to sustain the referee's findings of fact and conclusions on Counts II and V of this disciplinary complaint. Compare State ex rel. The Florida Bar v. Junkin, Bowling v. Department of Insurance, 394 So. 2d 165 (Fla. 1st DCA 1981). Therefore, for all these reasons, the special referee's findings regarding Counts II and V, and the conclusions of law based on those findings, are not supported by competent, substantial evidence and must be stricken.

ISSUE II ON CROSS-APPEAL

THE SPECIAL REFEREE'S RECOMMENDATION THAT SELDIN BE SUSPENDED FROM THE PRACTICE OF LAW FOR ONE YEAR IS TOO HARSH AND SHOULD BE REDUCED TO A PENALTY THAT IS COMMENSURATE WITH THE PROVEN VIOLATIONS.

In his Answer Brief/Cross-Appeal Brief [pp. 16-18], Seldin has argued that, should the Court agree with his argument that the special referee's findings on Counts II and V are not supported by competent, substantial evidence, it should also refashion Seldin's suspension to one that is better tailored to the charges actually proven. Seldin further suggested a suspension of no more than ninety (90) days. The Bar, in its Reply Brief, did not respond to this argument. By failing to appropriately respond, the Bar appears to to have accepted the logic of this argument. Therefore, if the Court does agree with the argument presented in Seldin's Issue I on Cross-Appeal, it is respectfully submitted that the recommended suspension of one (1) year should be reduced to no more than ninety (90) days.

REQUEST FOR RELIEF

Appellee/Cross-Appellant, Keith Seldin, respectfully requests this Court to find that the special referee's findings of fact and conclusions regarding Counts II and V are not supported by competent, substantial evidence appropriate to the issue. Upon doing so, the Court should reduce the recommended discipline from a one (1) year suspension to, at most, a ninety (90) day suspension.

Alternatively, should the Court decide that the findings of fact and conclusions of law regarding Counts II and V are otherwise supported by competent, substantial evidence, it should still ratify the special referee's recommended sanctions as being appropriate to the nature of those violations (if proven).

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail upon DAVID M. BARNOVITZ, Esquire, Assistant Staff Counsel, The Florida Bar, 915 Middle River Drive, Suite 602, Ft. Lauderdale, Florida 33304; and JOHN T. BERRY, Esquire, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226, on this 22 th day of February, 1988.

William L. Hyde

WLH/Brief/tlh