IN THE SUPREME COURT OF FLORIDA
CASE NO. 70,777

THIRD DISTRICT COURT OF APPEAL
CASE NO. 86-1605

MARVIN I. MOSS,

Petitioner,

vs.

ZAFIRIS, INC., a Florida corporation,

Respondent.

FILED
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JAN 27 1988
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REPLY BRIEF OF RESPONDENT,
ZAFIRIS, INC.,
ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This petition, by Marvin I. Moss, a defendant in the trial court, is a petition to review the Third District Court of Appeal reversal of a summary judgment. Due to the fact that the Petitioner has not set forth all the pertinent facts and has not done so in a light most favorable to the Respondent, as is the standard on a motion for summary judgment, the Respondent submits the following statement of the case and facts.

Marvin Moss engaged in fraud and negligent misrepresentation when he knowingly represented to a buyer that his client owned land to which he did not have title. Respondent, Zafiris, Inc., had brought suit in the trial court against Petitioner, Marvin I. Moss, after having been evicted from the real estate upon which it ran a gas station business on December 23, 1982, and had leased with an option to purchase the real estate upon which it was located on the same date. The seller of the business, Jules Krasner, doing business as Sunburst Petroleum Industries, Inc., was represented by the Petitioner, Marvin I. Moss, at the closing.

Zafiris, Inc. was evicted from the real property in April 1983 by its true owners, Jacob and Ann Friedman, and Irving and Arlene Canner, pursuant to an order of final summary judgment for unlawful detainer rendered in the County Court, in and for Dade County, Florida, on April 19, 1983 (Exhibit F).

Despite not having the right or title to sell the land or gas station business on December 23, 1982 (Exhibit A), Jules

Krasner sold the business, and leased with an option to purchase the real estate upon which the gas station was located (Exhibit B), to Zafiris, Inc.

Marvin Moss was aware that his client did not own the land (R. 423-425). He was aware that his client did not have the right to sell the business located thereon (R. 434 and Exhibit C). He was aware his client was seven months arrears in his own rent, and owed the true owners other sums (Exhibit D), and he was aware that there were "certain title problems" to the land (R. 430).

The record, therefore, was abundantly clear that Marvin Moss was a participant and aware of Jules Krasner's lack of legal right and financial conditions with regard to the subject real estate prior to the closing on December 23, 1982.

Yet, prior to the closing on December 23, 1982, Marvin Moss represented to Zafiris, Inc. that Jules Krasner and/or Sunburst Petroleum Industries, Inc., were the owners of the subject property. Scott R. Jay, the attorney for Zafiris, Inc. at the closing on December 23, 1982, testified that he "relied" on Marvin Moss' representations that Jules Krasner or Sunburst Petroleum Industries, Inc. were the owners of the real estate (deposition of Scott Jay, pg. 64, attached to Petitioner's brief because it was not located by the clerk's office).

At the time of the closing itself, Marvin Moss made a direct representation that Mr. Krasner owned the real estate (deposition of Constantine Zafiris, R. 316). If Mr. Zafiris had

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known that Krasner did not own the real estate, he would not have gone through with the closing (deposition of Constantine Zafiris, R. 300).

At the time of the closing, Constantine Zafiris, on behalf of Zafiris, Inc., wrote checks totalling over $52,000.00. A down payment of $40,000.00 was made for the business, which included a check to Marvin Moss for $4,335.93 (Exhibit E).

In early 1983, the true owners of the property, the Canners and Friedmans, initiated eviction proceedings against both Jules Krasner and Zafiris, Inc. The allegation against Jules Krasner d/b/a Sunburst Petroleum Industries, Inc. was for failure to pay rent, and those against Zafiris, Inc. were for lawful detainer (Exhibit F). Litigation ensued and Constantine Zafiris was evicted upon five minutes notice.

Constantine Zafiris, as president of Zafiris, Inc., lost his life savings in the down payment and business start-up costs.

SUMMARY OF ARGUMENT

Marvin Moss knew that his client did not own the property. Yet, Marvin Moss for his own gain and that of his client represented to the buyer of the property, as well as its attorney, that his client owned the land and had the right to sell it. In doing so, he induced the buyer to lose in excess of $80,000.00 when he lost his down payment and start-up costs in an eviction proceeding by the true owners of the property.

The Third District Court of Appeal correctly reversed the summary judgment finding genuine issues of material fact. Furthermore, the Third District Court of Appeal correctly applied Florida law finding that the privity requirement for cases involving a lawyer's duty to his own client was inapplicable in this case of direct fraud and misrepresentation.

Marvin Moss' actions clearly went above and beyond his legal duty to his client. They constituted fraud and negligent misrepresentation. This is, therefore, not a claim to which the privity requirement applies. This is not a claim based on Marvin Moss' duty to his client. This is a claim for direct fraud and negligent misrepresentation against an attorney who acted beyond his capacity as counsel for a seller.

This is not a claim where an attorney failed to disclose a material fact in an arms length negotiation. This is not a claim against an attorney who simply owed a duty to perform non-negligently for his client. This is a claim against an attorney who made untruthful representations to induce a buyer to act to

his detriment.

The Third District Court of Appeal has not taken a step away from the privity requirement, which applies to liability for negligence in the performance of their professional duties to their own client, but rather found that Marvin Moss exceeded the duties he owed to his own client and affirmatively engaged in fraud and negligent misrepresentation in inducing Zafiris, Inc. to rely to its detriment.

The Third District Court of Appeal correctly determined that the privity requirement does not apply where an attorney affirmatively makes untruthful and fraudulent disclosures in an effort to induce a buyer to purchase property which the attorney knows his client does not own.

The Third District Court of Appeal's opinion is not a departure from existing law, but reinforces the rule that an attorney may be liable for fraud and negligent misrepresentation by his affirmative acts. It does not make Marvin Moss the watchdog of his client's conduct. It makes him a watchdog of his own conduct.

ISSUES

I. WHETHER AN ATTORNEY WHO REPRESENTS A SELLER IN A REAL ESTATE TRANSACTION, CAN BE HELD LIABLE FOR HIS OWN CONDUCT WHEN HE KNOWINGLY MAKES AN UNTRUTHFUL REPRESENTATION THAT HIS CLIENT OWNS THE LAND, TO INDUCE THE CLOSING FOR HIS OWN GAIN.

II. WHETHER THE PLAINTIFF BELOW SET FORTH SUFFICIENT EVIDENCE TO ESTABLISH GENUINE ISSUES OF MATERIAL FACT AS TO FRAUD, AGAINST AN ATTORNEY WHEN THE ATTORNEY KNOWINGLY MISREPRESENTED TO THE PLAINTIFF THAT HIS CLIENT OWNED LAND, FOR HIS OWN BENEFIT.

ARGUMENT

I. WHEN AN ATTORNEY, WHO REPRESENTS A SELLER IN A REAL ESTATE TRANSACTION, MAKES A REPRESENTATION TO THE BUYER, HE HAS A DUTY TO DO SO TRUTHFULLY.

In his petition, Marvin Moss has argued that he did not have a duty to Zafiris, Inc. to tell the truth when he represented to them that his client owned the land. He states that as an attorney, he has no such duty because he was not in privity with Zafiris, Inc. This argument misrepresents the law and the facts of this case, and the petition should be denied.

While this suit is indeed one against an attorney for actions taken in the course of his profession, it is not one in which the Petitioner can use the privity requirement to hide behind. The Third District Court of Appeal took no unprecedented steps away from the privity requirement of traditional legal malpractice, and its decision is not in conflict with prevailing law.

What the Petitioner fails to understand is that this is not

a claim by a third party for attorney's negligent services to his own client, i.e., for legal malpractice. This is a direct claim for fraud and misrepresentation against an attorney who knowingly misrepresented that his client owned land, for his own gain.

The facts in the instant case indicate that Marvin Moss directly engaged in fraud. For his own gain, (a check in the amount of $4,335.43, Exhibit E), Marvin Moss induced Zafiris, Inc. to purchase a business and land which he knew that his client did not own. Scott R. Jay, an attorney, who represented Zafiris, Inc. at the closing, and prepared the majority of the documents, charged only $1,500.00. Marvin Moss has testified that at the time of the closing Jules Krasner owed him attorneys' fees (R. 456).

The clear inference from the facts presented is that Marvin Moss for his own personal gain in receiving past due attorneys' fees induced the plaintiff to go through with the closing, knowing his client did not own the land.

This case is therefore not governed by the rule in Angel, Cohen & Rogovin v. Oberon Investment N.V., 512 So.2d 192 (Fla.1987), as the Petitioner has argued. In Oberon, this court held that the attorney had no duty to a third party when rendering services to his own client. As Petitioner has argued, it is true that an attorney cannot be held liable to one he is not in privity with if he is negligent in his duties to his own client.

However, in the instant case Zafiris, Inc. did not bring suit for Marvin Moss' negligence in performing services to Jules Krasner. Zafiris, Inc. has brought suit against Marvin Moss for his fale representations directly to Zafiris, Inc. Marvin Moss certainly had no duty to his client to misrepresent his ownership of the land. Zafiris, Inc. is therefore not suing on Marvin Moss' duty to his client, Jules Krasner. Zafiris, Inc. is suing on a misrepresentation made to Constantine Zafiris and his attorneys.

The distinction is that when an attorney does make a misrepresentation, above and beyond his duty to his own client, with the intent to induce action by a third party, that third party has a claim for fraud and misrepresentation.

This distinction should be obvious. An attorney cannot intentionally defraud a buyer with representations to that buyer for his own, and his client's gain and hide behind the privity requirement. To do so would mean that all attorneys are immune from all acts of fraud and misrepresentation if done so on behalf of their client without regard to their intent and personal gain.

Florida law clearly does not contemplate this. The Third District Court of Appeal in Zafiris, Inc. v. Moss, 506 So.2d 27 (Fla. 3rd DCA 1987), clearly elucidated the long-standing rule that an attorney may be liable to a third party for fraud or negligent misrepresentation. In Gold v. Wolkowitz, 430 So.2d 556 (Fla. 3rd DCA 1983, rev. denied, 437 So.2d 677 (Fla. 1983), the court held that an attorney had committed fraud when he prepared

an affidavit reflecting no clouds on the title to real estate which the plaintiff had purchased from the attorney's clients. The attorney prepared the affidavit despite his knowledge of a pending appeal of the foreclosure judgment through which his clients had acquired the real estate.

This is not an unprecedented step away from privity, but long-standing Florida law. An attorney cannot conspire with a client to defraud a buyer and hide behind the privity requirement.

In the instant case, the facts presented to the trial court, and Third District Court of Appeal clearly indicated Marvin Moss' knowledge and participation in the fraud. Marvin Moss was aware that Jules Krasner was a mere lessee of the land (R.423-425),and one who was in serious arrears in his own rental payments to the true owners. On October 28, 1982, a letter was sent to Marvin Moss on behalf of the real owners of the property who were Jules Krasner's landlords. The letter, attached to this brief as <u>Exhibit D</u>, indicates that as of October 28, 1982, Jules Krasner owned the Canners and Friedmans $21,665.00 in rental payments since April, 1982. The letter also indicates he owed additional payments of $2,674.00, $1,750.00 and $924.00 on other items. Finally, this letter also indicates Mr. Krasner was delinquent in the payment of interest to Mr. Canner on other property.

This letter, addressed to Marvin Moss, clearly indicates

that he was aware that his client was in financial difficulty, and certainly not an "owner" of the property.

In fact, Jules Krasner was evicted by his landlords when they received notice that Jules Krasner had sold the gas station business to Zafiris, Inc. (Exhibit H).

The facts clearly show that Marvin Moss was not merely representing a client about whom he knew very little. Marvin Moss was completely aware of the entire history of Jules Krasner's relationships with the subject property and in fact had represented Jules Krasner when he first leased the subject property from the Canners and Friedmans in 1981 (deposition of Marvin Moss, R. 424).

The facts and inferences show that Marvin Moss knew exactly what Jules Krasner was doing at the time of the closing. He knew that Jules Krasner was in financial difficulty and he needed a mark to bail him out. He knew that Jules Krasner did not own the land, and yet, he represented to Constantine Zafiris that Krasner did not own the land (deposition of Constantine Zafiris, R. 300), and to Scott Jay (deposition of Scott Jay, pg. 51). He participated directly in the closing in order to induce its completion. As indicated above, the evidence also showed the personal interest Marvin Moss had in seeing the closing go through.

The Petitioner's argument is therefore a misstatement of the facts and law. The issue is not whether Marvin Moss <u>should</u> have informed Zafiris, Inc. of his client's non-ownership. The issue

is whether he did so truthfully when he took it upon himself to make the representation.

As the Petitioner has pointed out, Zafiris, Inc. had its own attorney. Normally, the buyer's attorney would have investigated ownership. However, in the instant case, it is clear from the testimony of Scott Jay that he relied on Marvin Moss' representations and so did not conduct a full investigation. At page 64 of Scott Jay's deposition, line 3, the question is asked, "Did you, as the attorney for Zafiris, Inc., rely on the representations made by Marvin Moss prior to consumating the closing on the 23rd of December?"; his answer, "Yes, I did".

The clear inference of the testimony of Scott R. Jay on pages 41 through 64 are that Marvin Moss induced him to rely on representations that Jules Krasner owned the land.

At page 43 of the deposition of Scott Jay when asked whether he made any inquiry with regard to ownership, he testifies, "it was simply stated that he owned it by Mr. Moss. I took my fellow attorney's word ... as I understood it, Sunburst Petroleum owned both the business and the property. I was never told otherwise".

From these facts, the Third District Court of Appeal found the existence of genuine issues of material fact that Marvin Moss engaged in fraud and negligent misrepresentation. Clearly, the facts and inferences drawn therefrom support this conclusion.

The Petitioner's remaining arguments for the privity requirement, though compelling, are not relevant. The Third

District Court of Appeal's opinion in this case does not place it in conflict with the privity requirement. Under the circumstances cited by the Petitioner, an attorney has no duty to disclose information to a buyer and has no duty to a third party to perform his services for his own client non-negligently. The Respondent therefore agrees with the Petitioner's review of Florida law, including the cases of Southworth v. Crevier, 438 So.2d 1011 (Fla. 4th DCA 1983), Adams v. Chenowith, 349 So.2d 230 (Fla. 4th DCA 1977), and Amey, Inc. v. Henderson, Franklin, Starns & Holt, P.A., 367 So.2d 633 (Fla. 2nd DCA 1979). However, the instant case does not involve the performance of an attorney's duties to his client. They involve an attorney's misrepresentations to a third party. Again, it is clearly not an attorney's duty to his own client to misrepresent his client's ownership of land.

The Third District Court of Appeal's decision in the instant case therefore does not make Marvin Moss a watchdog of his client's conduct. It makes him a watchdog of his own conduct. Had Marvin Moss made no inducing misrepresentations, he would not be before this Court.

The Third District Court of Appeal's decision, likewise, does not require an attorney to protect the interest of persons with whom his client is dealing. It simply requires the attorney to be truthful in his representations and to not knowingly further his client's fraud. Here, Marvin Moss knew his client did not own the land, and not in performance of his duties to his

client, but for his own gain, made misrepresentations to induce the closing.

II. AN ATTORNEY CAN BE HELD LIABLE FOR FRAUD WHEN HE INDUCES A NON-CLIENT TO ACT TO HIS DETRIMENT.

In his petition, Marvin Moss has argued that he does not owe a duty of disclosure of facts and cannot be held liable for fraud to an non-client who is not the intended beneficiary of his services. Though artfully stated, this argument does not follow the facts or law of the instant case. First, this case does not concern the issue of whether Marvin Moss owed a duty of disclosure to Zafiris, Inc. The Respondent concedes that if all else were equal, Marvin Moss would not owe a duty of disclosure. However, when he did disclose that his client owned the land in order to induce the closing, he certainly had a duty to do so non-fraudulently; Gold v. Wolkowitz, 430 So.2d 556 (Fla. 3rd DCA 1983), rev. denied, 437 So.2d 677 (Fla. 1983).

Secondly, the issue is also not whether Marvin Moss had a duty to Zafiris, Inc. while performing his services to his client. Again, the Respondent concedes that if all else were equal that would be true. However, Marvin Moss' representations regarding his client's ownership of the land were not a part of his services to his client. They were attempts to induce Zafiris, Inc. not to investigate ownership of the land and to complete the closing. It certainly was not a duty on the part of Marvin Moss to misrepresent his client's non-ownership of the property.

The issue in this case is not whether Moss owed a "duty" to Zafiris, but whether the facts were sufficient to establish material issues as to whether Marvin Moss engaged in fraud.

The Petitioner argues that the record "indisputably shows that Zafiris did not establish the facts necessary to prevail on a claim for fraudulent misrepresentation" (page 18 of Petitioner's brief). Nothing could be further from the truth.

In addition to the Third DCA specifically finding the existence of genuine issues of material fact, the facts before this Court clearly have raised the spector of fraud.

The elements of fraud include:

1. A false statement concerning a material fact.

2. A showing that the representer knew or should have known that the representation was false.

3. An intent that the representer induced another to act upon it.

4. Damages in reliance on the representation.

Lance v. Wade, 457 So.2d 1008 (Fla. 1984); Jet Engine Support, Inc. v. Jet Research, Inc., 474 So.2d 337 (Fla. 3rd DCA 1985). As the Third DCA correctly determined, Zafiris raised genuine issues of material fact on each element.

As has been established in the depositions of Constantine Zafiris and Scott Jay, Marvin Moss made a false statement concerning a material fact; to-wit: that his client owned the land. Pages 41 through 64 of Scott Jay's deposition establish

this fact. Specifically, at page 43, Scott Jay states, "it was simply stated he owned it by Mr. Moss. I took my fellow attorney's word". In the deposition of Constantine Zafiris (R. 316), he testifies that Marvin Moss stated that his client owned the property at the time of the real estate closing.

The facts have also established that Marvin Moss knew that the representation was false. In his deposition (R. 423-425), he states that he knew the Canners and Friedmans were the true owners of the land. In those pages, he also states that he represented Krasner at the beginning of the transaction for the lease of the land. Exhibit D, the letter dated October 28, 1982, two months prior to the closing, indicated that Marvin Moss was aware that his client was seven months in arrears on his rental payments and owed in excess of $25,000.00 to the true owners.

The facts presented clearly show that Marvin Moss was not merely representing a client about whom he knew very little. Marvin Moss was completely aware of the entire history of Jules Krasner's business relationship with the subject property, knowing full well that his client was in financial difficulty and certainly not an owner of the property.

The intent to induce Zafiris, Inc. to go through with the closing, and indeed to not investigate title to the land, is clear from the testimony of Scott Jay. As extensively briefed above, Scott Jay testifies in his deposition <u>that he took his fellow attorney's word</u> that his client owned the land when he made inquuiries as to ownership (pg. 43, Scott R. Jay's

deposition). Marvin Moss' personal gain of $4,300.00 lends furuther credence to Marvin Moss intent that his representations induced Zafiris, Inc. to go through with the closing.

That the plaintiff was not damaged by the fraud is ludicrous. Constantine Zafiris lost his life savings. He was evicted from a new business (Exhibit F). Jules Krasner's offer to return some of his losses with a small down payment and terms in no way takes away these damages as the Petitioner has argued. There was no offer to reimburse Zafiris for his time and labor, his start-up costs, his lost tools and equipment, or the business opportunity.

It is axiomatic that on a motion for summary judgment the evidence is to be taken in the light most favorable to the party being moved against; Holl v. Talcott, 191 So.2d 40 (Fla. 1966). The Petitioner's version of the facts in his argument make no pretense of construing the facts in the light most favorable to Zafiris. Quite to the contrary, he argues the facts most favorable to him and ignores those which support Zafiris' claim.

The facts, as briefed extensively above, at a very minimum show genuine issues of material fact as to each element of fraud. The Third District Court of Appeal concurred in this assessment. The record before this Court, particularly the depositions of Scott R. Jay, Constantine Zafiris, and Marvin Moss likewise clearly establish issues of fact. In addition to the pages of testimony, the single statement by Scott Jay at page 43 of his

deposition, "it was simply stated that he [Jules Krasner] owned it by Mr. Moss. I took my fellow attorney's word", is sufficient to preclude a summary judgment.

Furthermore, as the Petitioner himself pointed out, a knowing withholding of a material fact with the suppression of the truth may constitute fraud (pg. 19). Clearly, where an attorney makes representations and induces a party to purchase his client's property, knowing full well that his client does not own that property, there is evidence of fraud. The issue is not whether Moss had a duty to disclose, but whether the disclosures he did make were to fraudulently induce Zafiris to act to his detriment.

The Petitioner's cynical remarks that the parties were dealing at arms length with the facts lying equally open to both parties (pg. 20) is simply not true. Clearly, only Moss and his client had knowledge that his client did not own the land. As outlined on page 43 of Scott Jay's deposition, he made attempts to discover ownership by calling the City of North Miami, Bell Telephone Company, and a number of other people to find out ownership. The taxes were paid, the license was in the name of Moss' client, and by all appearances Marvin Moss' client owned the property. However, by concealing the critical fact that his client did not own the land, and by giving his fellow attorney his word, Marvin Moss did much more than fail to disclose a material fact. He engaged in fraud.

Likewise, the Petitioner's argument that Moss'

misrepresentations did not induce Zafiris, Inc. to act are inaccurate. Again, Jay's statement that he took his fellow attorney's word is indicative of inducement. Jay went no further in investigating ownership because by all outward appearances, through the telephone book, the City of North Miami, the tax records and the municipal licensing department, Marvin Moss' client owned the land. It was only Jay's reliance on Moss' word that prevented further action. At page 64 of Scott Jay's deposition, the question was asked, "Did you, as the attorney for Zafiris, Inc., rely on the representations made by Marvin Moss prior to consumating the closing on the 23rd of December", answer, "Yes, I did".

Furthermore, Constantine Zafiris testified he would not have gone through with the closing had he known Krasner did not own the land (R. 300). He was clearly induced to lose his life's savings.

CONCLUSION

The Third District Court of Appeal was correct in finding the existence of genuine issues of material fact against Marvin Moss for fraud and misrepresentation. The Third District Court of Appeal furthermore correctly applied Florida law finding that a mere lack of privity between an attorney and a third party will not insulate the attorney from liability to that party for fraud or negligent misrepresentation. The Court correctly adduced that this was not a case by an unintended third party beneficiary against an attorney for negligence to his own client. This is a direct claim for fraud and negligent misrepresentation against an attorney who induced a third party to act to its detriment. Privity is not the issue, whether Marvin Moss was truthful is.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of January, 1988, to: SHELLEY H. LEINICKE, of Wicker, Smith, et al., Attorneys for Petitioner, Post Office Drawer 14460, Fort Lauderdale, FL 33302.

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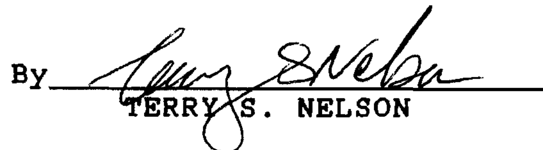
By 
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