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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
DEC 30 1988
CLERK, SUPREME COURT
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Deputy Clerk

THE FLORIDA BAR,

Complainant,

vs.

MARK J. KAUFMAN,

Respondent.
_____/

Case No. 71,140

TFB File No. 85-11493-08

INITIAL BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Complainant below, files this Initial Brief in the case against Mark J. Kaufman, hereinafter referred to as Respondent. References to the hearing transcript will be designated (TR - page number), references to the trial brief of Respondent will be designated (TB - page number) and references to the order of the Referee will be designated (OR).

STATEMENT OF THE CASE AND FACTS

On September 15, 1987, The Florida Bar filed a complaint against Mark J. Kaufman. On September 22, 1987, the Chief Justice of the Supreme Court of Florida appointed the Honorable Carven D. Angel, Circuit Judge, as referee in this matter. The final hearing was set for September 29, 1988.

Prior to the hearing counsel for Respondent had delivered a trial brief to the Referee and hand delivered the same to Bar counsel just before the scheduled hearing.

Before the commencement of the formal hearing the Referee suggested that the trial brief of Respondent be addressed (TR-3).

As set forth in the formal complaint filed by The Florida Bar, Respondent was charged with having violated the following disciplinary rules under the Code of Professional Responsibility:

1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation)

1-102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice)

7-102(A)(4) (in his representation of a client, a lawyer shall not knowingly use perjured testimony or false evidence)

7-102(A)(6) (in his representation of a client, a lawyer shall not participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false)

article XI, Rule 11.02(3)(a) (any act contrary to honesty, justice, or good morals)

The allegations contained in the formal complaint stem from certain actions taken by Respondent while representing two clients, Linda and Carol Horan who had received facial scars as the result of an automobile accident.

During his representation Respondent was requested by the insurance company of the tortfeasor to supply them with updated photographs of his client's scarring to help determine the permanency of their injuries.

Prior to photographing the scars of each client the Respondent applied make-up pencils to the scars. The photographs were then forwarded to the insurance company without notice of such make-up having been used.

In the case of Carol Horan the insurance company accepted the photographs as proof of permanent injury and settled the chain of Carol Horan for policy limits of $10,000.

The thrust of Respondent's argument to the Referee was that after the probable cause hearing before the Eighth Circuit Grievance Committee the photographs taken by Respondent of Carol and Linda Horan were lost and not available at the formal hearing before the Referee. Respondent argued that such photographs were necessary and essential for The Florida Bar to prosecute its case against Respondent and without the photographs it was impossible for The Florida Bar to meet its burden of proof.

On the date of the formal hearing The Florida Bar was ready to produce the testimony of Linda and Carol Horan as to what Respondent did to their scars when he photographed them and how the scars appeared in the photographs. The adjuster from the insurance company was present and was prepared to testify that if the company had been aware of the use of the make-up pencils there would have been no settlement based on such pictures.

Both The Florida Bar and Respondent in arguing the motion to dismiss contained in the trial brief submitted by counsel for Respondent proffered what evidence would be their

respective evidence. At no time were there facts stipulated to or affidavits presented to the Referee.

At the conclusion of arguments by both parties on Respondent's motion to dismiss the Referee granted the motion to dismiss and entered his order of October 7, 1988 dismissing the complaint herein with prejudice.

On November 29, 1988 The Florida Bar filed its Petition for Review.

SUMMARY OF THE ARGUMENT

The order of the Referee dismissing the Bar's complaint with prejudice was improper in that there was no evidentiary facts before the Referee upon which to dismiss the complaint. The sufficiency of the complaint was not at issue and there was present a genuine issue of material fact which would not provide for the matter to be disposed of on an argument for summary judgment.

The allegations set forth in the complaint against Respondent cannot be seen to stand merely on the presence of certain photographs and that only after hearing evidentiary testimony could a valid determination be made as to whether or not The Florida Bar had met is standard of proof.

ARGUMENT

THE ORDER OF THE REFEREE DISMISSING THE COMPLAINT WITH PREJUDICE WAS IMPROPER WITHOUT AN EVIDENTIARY HEARING.

Prior to the commencement of the final hearing on the complaint herein Respondent submitted a trial brief to the Referee that asserted the position that the charges against Respondent should be dismissed in light of the loss of certain physical evidence, namely certain photographs taken by Respondent. The argument raised by Respondent is that this evidence was crucial and without the photographs The Florida Bar could not meet its burden of proof that Respondent was guilty of the charges by clear and convincing evidence.

The photographs in question were only one aspect of the charges brought against Respondent. The actions of Respondent in preparing his clients for the photographs, the reason behind the photographs being requested by the insurance company and the insurance adjuster's subsequent reliance upon the photographs are all crucial aspects relating to the alleged charges of misconduct.

A review of the transcript of the proceeding below will disclose that there were no formal stipulations of facts by either party and that the crucial argument centered around the existence of the photographs in question.

Respondent's trial brief addressed several grounds for dismissal, both jurisdictional and to the merits. In such cases an order of dismissal with prejudice should indicate the reasons which motivated the actions of the court. May v. Holley, 59 So.2d 636 (Fla. 1952). In the instant case the Referee's order of dismissal is void of the reasoning upon which the complaint herein was dismissed with prejudice.

In Florida it is well understood that where there is evidence to support the findings of a referee his findings will not be disturbed by a reviewing court even though the evidence depends solely on the credibility of witnesses. McLeod v. Citizen's Bank of Live Oak, 61 Fla. 343, 56 So. 190 (Fla. 1911). In Bar disciplinary proceedings it is well established that the findings and conclusions of a referee are accorded substantial weight and they will not be overturned unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968).

Since the formal hearings conducted under the rules of The Florida Bar do not provide for a jury determination the most appropriate rule of civil procedure for such a dismissal as herein would be under Rule 1.420(b), Florida Rules of Civil Procedure. Under this rule, after a party seeking affirmative relief in an action tried by the court without a jury has completed the presentation of his evidence, any other party may move for a dismissal on the ground that on the facts and the

law the party seeking affirmative relief has shown no ground for relief.

The provision of Rule 1.420(b) of the Florida Rules of Civil Procedure permitting involuntary dismissal only after the party seeking affirmative relief has completed the presentation of his evidence has been said to be too clear and unambiguous to need judicial construction. Sapp v. Redding, 178 So.2d 204 (1st DCA 1965). In Sapp the court held that the involuntary dismissal of a plaintiff's cause at a trial because of insufficiency of evidence, before he had completed the presentation of his evidence, would constitute reversible error as being contrary to due process of law and to fundamental principles of the administration of justice. The court further held that the plaintiff is entitled to present admissible evidence in an attempt to prove the cause of action he has alleged, even though the testimony of his first witness may indicate that he has a weak case or none at all.

The requirement that the plaintiff shall have completed the presentation of his evidence is a condition of the court's entry of an involuntary dismissal. Dodge v. Weiss, 191 So.2d 71 (1st DCA 1966).

In the instant case the complaint was dismissed without the Bar having been able to call a witness. Even without the photographs the Bar should have been afforded the opportunity

to present testimony as to the events that transpired in regards to the alleged misconduct in an attempt to establish the alleged violations. Such an opportunity would allow the Referee to judge the full facts and the credibility of the witnesses. A dismissal in this circumstance only presupposes that the Complainant was unable to meet its burden of proof.

While it is abundantly clear that an involuntary dismissal was inappropriate in this matter it also cannot be argued that the order of the referee was in the form of a summary judgment for the Respondent. The provisions of Rule 1.510 of the Rules of Civil Procedure as to time restraints and affidavits were not complied with and no formal motion for such relief was made. A review of the Respondent's answer and responses to the request for admissions also demonstrate the existence of disputable facts which would also prohibit the entry of such a judgment.

It is clear from the record that there was no formal stipulation of facts or testimony that would take the place of the Complainant's right to present evidence and testimony in support of the allegations contained in its formal complaint. While the absence of certain evidence may bear on the question of whether the burden of proof required of Complainant has been met such absence in and of itself should not preclude the taking of testimony in an attempt to prove the charges set forth in the formal complaint.

CONCLUSION

The involuntary dismissal of the complaint against Respondent without the taking of evidence in support of the charges was in error and the order of dismissal should be reversed with directions for an evidentiary hearing on the formal complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been forwarded by certified mail # P 978 505 623, return receipt requested, to L. EDWARD MCCLELLAN, JR., ESQUIRE, Counsel for Respondent, at his record Bar address of Post Office Box 2530, Ocala, Florida 32678, this 29th day of December 1988.

JAMES N. WATSON, JR.