

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,279

THE FLORIDA BAR,
Complainant,

vs.

HERMAN COHEN,
Respondent.

FILED
SUPREME COURT

JUL 7 2008

CLERK OF SUPREME COURT

By _____
Deputy Clerk

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ON PETITION FOR REVIEW TO THE RECOMMENDATIONS OF THE REFEREE
HON, HARRY G. HINCKLEY, JUDGE

RESPONDENT'S REPLY BRIEF

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SHALLE STEPHEN FINE
ATTORNEY AT LAW

Replying to the position of The Florida Bar as taken in its brief, Respondent first calls to the Court's attention that the assertion of The Florida Bar that the mortgage in question was bogus is entirely without foundation. The mortgage was perfectly genuine. It was executed by the appropriate parties, it burdened the correct property and it set forth its terms with clarity and precision. That the mortgage is genuine and not bogus is, we believe, beyond debate. However, the mortgage at the time that it was placed on the property was considered to be unfunded by Mr. Cohen and Mr. Von Zamft. There is no doubt this is true. There is no doubt that the referee could so find. There has never been any dispute about this. It is equally clear from the statute that the parties were entitled to place this unfunded mortgage on the property.

There is also no dispute that this mortgage was never used or asserted in any way, shape or form, whether funded, partially funded or unfunded against any creditor.

We respectfully suggest that these parties were perfectly free to place this mortgage on the property unfunded as a mortgage for future advances. If a creditor had asserted some right as against the property and the parties had asserted vis a vis that creditor that the mortgage was funded when it was not, that might have been fraud. However, that never happened.

What did happen was that the mortgage became funded with

\$30,000.00 of it being owed to Mr. Von Zamft as he testified (hearing before Judge Gordon, Page 32 et seq.). Cohen had advanced monies for the benefit of the venture and in addition to that he had expended time, effort and energy in the management of the project. The record is unrebutted as to this. We respectfully suggest that at the time Mr. Cohen made the Affidavit the mortgage was a funded mortgage to the extent of the \$60,000.00.

A great todo has been made over the fact that no cash passed hands at the time the mortgage was recorded. That is true and we respectfully suggest so what?

The Bar takes the position that there was no consideration for the mortgage. However, the very case that they cite and rely upon Kremser vs. Tonokaboni, 356 So.² 1331 (3 DCA FL 1978) correctly states the principle that if at the mortgagor's request any detriment or loss is sustained by the mortgagee, or any advantage or benefit accrues to the mortgagor, there is sufficient consideration to support the mortgage. Here, there was an advancement of cash by Cohen which is unrebutted in the record as well as an advancement of time, effort and labor. Clearly, there was consideration for the mortgage and if this case were being tried inter se between the parties, there could be no question of consideration.

With respect to Florida Bar vs. Breed relied upon by The Bar, that is a case where Breed took his client's money and

then made restitution. The Court indicated that in such cases they would consider disciplinary action as appropriate. That may be true but what has it to do with the case at bar?

The essence of The Bar's position is contained in their Summary of Argument,

"The Florida Bar argues that the mortgage note and promissory note were bogus and merely filed for the purpose of preventing potential claimants from collecting money, in the event they were injured on the property and obtained a judgment."

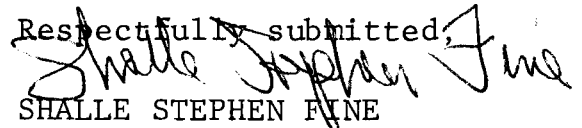
In fact, if this mortgage were placed on the property and were subsequently funded to the extent that it was funded, it would be a first claim. That would be a valid and legitimate purpose for the mortgage is to protect the interest of the mortgagees to the extent that they had funded the mortgage. Even though it never happened, it cannot be said that this is improper conduct. It is, in fact, conduct sanctioned by statute and case law in Florida. That is the purpose of a mortgage to preserve the interest of the mortgagee as against the mortgaged property.

We would point out that the Bar's premises cannot stand examination since the mortgagor, N.I. Meats, Inc., on the unrebutted record has a piece of property in the case at bar for which they were offered \$260,000.00 by Dade County in eminent domain (T. 35) and which they refused. Since there was a \$60,000.00 first mortgage on the property, if the \$60,000.00 mortgage placed on the property by Messrs Cohen and Von Zamft were fully funded, there would still be \$140,000.00 in equity in the property, together with the other

equities of N. I. Meats, Inc. (T. 126, 127). The idea that this \$60,000.00 mortgage was placed on the property to insulate anyone from liability is absurd when compared with the equities enjoyed by N. I. Meats, Inc.

The Bar on Page 12 of its brief cites for its cumulative effect a finding by the Circuit Court in Case No. 76-16246 FC (26) respecting Herman Cohen. Herman Cohen was not a party in that case and, of course, did not appear and defend against the charges made in that case and we respectfully suggest that the findings of that Court cannot be used as evidence against him in this case.

We respectfully suggest and urge that our position taken in our main brief is correct and that the referee's findings are not only justified by the record but are affirmatively refuted by the record. The referee's finding of the fact that the mortgage was unfunded when placed and his refusal to recognize that the mortgage was funded when foreclosed, which is unrebutted in the record, cannot be twisted together to justify his conclusion of law that the mortgage was in some unspecified way designed to be fraudulent as against some non-existent creditors.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to Paul A. Gross, Esq., The Florida Bar, Miami Office, St. 211, Rivergate Plaza, 444 Brickell Avenue, Miami, FL 33131 this 5 day of July, 1988.


SHALLE STEPHEN FINE