IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

JOHN P. FITZGERALD,

Respondent-Appellee.
_____/

Supreme Court Case No. 71,348

The Florida Bar File No.
86-20,045 (15D)

REPLY BRIEF OF APPELLANT, THE FLORIDA BAR

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APPELLEE'S BRIEF IN NO WAY NEGATES THE REFEREE'S FINDINGS.

By his answer and cross-petition brief, appellee has chosen to regard his many relationships and actions involving his client, Silvio Giannetti, as one, large transaction. This simply is not the case. Like Gaul, appellee's misconduct had many parts, each separate, distinct and creating singular consequences.

Appellee fails to address his embezzlement of the $191,800.00 net cash proceeds generated by his mortgaging and sale of the partnership asset. There simply is no credible explanation. Careful examination of appellee's argument reveals no hint, by inference or otherwise, which negates the bar's charges or the referee's findings.

For instance, appellee recites that he had Mr. Giannetti's permission to enter into a contract (emphasis supplied). The fact is, that Mr. Giannetti had approved a prior contract, not the Oceanside contract. The prior contract (bar's exhibit 5 in evidence) hardly evidences an agreement whereby appellee was to retain all cash and Mr. Giannetti was to receive mortgage obligations. The November 17, 1980 letter enclosing the prior contract (60)* clearly recites:

> We will be getting at closing approximately $117,000.00 ... We will then also be receiving 15% interest on $180,000.00...

There is nothing in the prior contract to indicate that appellee was to pocket the cash. There is nothing in the prior contract to indicate loans from profit to appellee's sidekicks. There is nothing in the prior contract to indicate an increased burden of subordination on the purchase money mortgage.

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* All page references are to transcript of final hearing.

Appellee is less than candid with the court in suggesting by reference to page 298 of the trial transcript that Mr. Giannetti may have received a copy of the Oceanside contract. On the very next page (299) appellee's own counsel dispelled any confusion regarding which contract had been supplied to Mr. Giannetti. Appellee, himself, had testified that no correspondence was directed to his client from the onset of the Oceanside transaction. He conceded:

> Q. As a matter of fact, from the outset of the Oceanside transaction when Harney came to you with the deposit receipt, from that time forward you did not correspond with Mr. Giannetti pertaining to that transaction at all; isn't that accurate?
> A. Correspond in writing?
> Q. Yes.
> A. I believe that to be true, yes (103).

Appellee refers to an answer appearing at page 280 of the transcript which is taken completely out of context in an attempt to establish that Mr. Giannetti approved the Oceanside sale. When questioned concerning the complaint drafted in his civil litigation against appellee, Mr. Giannetti and his attorney both testified that reference to an approval of the sale was in error. Mr. Giannetti explained in the bar proceeding that he approved a sale of the subject premises for $420,000.00 to anyone. Thus, when appellee's counsel queried Mr. Giannetti regarding the civil complaint, the following colloquy ensued:

> Q. So, when this complaint filed in your behalf stated that you approved the sale, that was not true?
> A. I approved the sale. I approved the sale to John for $420,000.00. That was Oceanside or whatever.
> Q. Mr. Giannetti, paragraph 10 is not true according to you; is that right?
>
> (intervening colloquy).
>
> The witness; my attorney made that up. I didn't even notice that (280).

Save for appellee's assertion that he orally informed his client of the details of the Oceanside transaction there is not one scintilla of evidence to indicate any knowledge by Mr. Giannetti that he was not to receive any cash, that the burden of subordination of the purchase money mortgage as well as the principal amount of such mortgage would be increased to whatever level the purchaser required and that profit would be given to appellee's sidekicks against third position mortgages. It is most respectfully submitted that if this court imposed a burden upon Florida attorneys to document full disclosure of the conflicts and ramifications of client representation in a conflict milieu (The Florida Bar v. Ward, 472 So.2d 1162 (Fla. 1985)), then there certainly must be an absolute necessity to meticulously document a transaction with a client, partner and cestui que trust where all spoils go to the attorney and all spoliation to the client.

While appellee recognizes, in his statement of the case and of the facts, that there was evidence upon which the referee could predicate a finding that Mr. Giannetti had no prior knowledge of and did not consent to the Oceanside sale, that issue is hardly the underpinning of this disciplinary proceeding. Even had appellee been presented with a copy of the Oceanside contract (and approved it) he would not thereby have seen any indication that his attorney was to appropriate all cash from the sale. He would not have seen that the purchase money mortgage to be taken back was to be taken in the principal sum of $170,000.00. The contract specified $120,000.00. He could not have known that the burden of subordination would be increased from $100,000.00 to $270,000.00. And he certainly could not have guessed that his attorney and partner intended to give $17,200.00 from the closing proceeds to the lawyer's sidekicks against third position mortgages.

It is ironic that appellee has chosen to commence his brief with a portrait of Silvio Giannetti as "an experienced businessman involved in the construction of public works projects in Florida and Michigan and the oil exploration business in Texas" (appellee's brief, page 1). The irony is that appellee having portrayed Mr. Giannetti as an experienced businessman, has to then dispel the incredible notion that this experienced businessman approved a deal whereby he received subordinated mortgages while his partner pocketed all cash.

The bar cannot grasp the significance of appellee's repeated references to the fact that the $100,000.00 Simon mortgage was discharged at the Oceanside closing. Appellee still retained the $100,000.00 he received and kept all the additional cash.

Appellee challenges the referee's finding that appellee violated the specific purpose rule (Fla. Bar Integr. Rule, article XI, Rule 11.02(4)) mandating that funds entrusted to an attorney for a specific purpose are received in trust and must be applied to such purpose. He urges that if Mr. Giannetti did not know about the transaction there could be no violation due to a lack of directions by client to attorney. It is respectfully submitted that a client's knowledge of the entrustment under such circumstances is irrelevant. Appellee received all proceeds as attorney, trustee and partner. His obligations were fixed by his fiduciary relationships and were not dependent to any degree upon client instructions. As a 50/50 partner appellee's obligation was absolute, viz., to receive all funds, in trust, for the specific purpose of applying the same in accordance with the parties' agreement. The fact that appellee successfully hid his embezzlement hardly constitutes a basis for him now to assert that so long as his

client did not expressly forbid him from stealing the client's funds, there was no violation of the specific purpose doctrine.

Appellee's embezzlement and deceit stemming from the sale and closing of the Oceanside transaction were completed prior to the separate and distinct pattern of misconduct that followed. The proof adduced in establishing appellee's theft in no way depended upon anything other than the testimony of appellee, Silvio Giannetti and the various exhibits received in evidence. The subsequent events relating to the forged satisfaction of the Giannetti mortgage and the loans from Mr. Giannetti to appellee played no part or role in appellee's theft. Appellee's attempt therefore to attribute the basis of appellee's woes to Judge Hurley or Fred Harney is misdirected. Appellee authored his own fate when he determined to betray his friend, client and partner to satisfy his unquestioned greed. Appellee charges that the bar employed unfair tactics in referring to and quoting from the opinion rendered in Sunrise Savings and Loan Association of Florida v. Giannetti, No. 4-86-1787 (Fla. 4th DCA April 6, 1988) received in evidence as the bar's exhibit 25. It was appellee's counsel, not bar counsel, who suggested that the court's opinion be received in evidence (328). Judge Glickstein's observations regarding appellee's victimization of his client are in absolute accord with the findings of the referee herein.

The bar relies upon its initial brief with regard to the loan transactions between appellee and his client. Appellee has offered no facts or explanation to distinguish his actions from those recited in The Florida Bar v. Tunsil, 513 So.2d 120 (Fla. 1987). There simply is no difference.

The balance of appellee's brief is devoted to his actions regarding the forged satisfaction of the Giannetti mortgage and discipline. With respect to the former, it is bewildering to the bar how appellee can, on the one hand, admit to notarizing and witnessing the satisfaction outside the presence of his clients and then dispute the referee's findings that he was grossly negligent making it possible for the satisfaction to be forged and recorded. The referee had the unique advantage to observe all witnesses and assess their credibility. He meticulously drafted his own report and took pains to recite his specific findings and the bases therefor. As appellee acknowledges, a referee's findings will be upheld unless they are clearly erroneous or lack evidentiary support. The Florida Bar v. Hooper, 507 So.2d 1078 (Fla. 1987). It is respectfully submitted that it is the referee's assessment of credibility of witnesses and not appellee's that must prevail.

The bar will rely on its initial brief regarding the issue of appropriate discipline. It most respectfully urges however that the court address in its opinion the "omerta" agreement of silence extracted by appellee as a price for settling the civil litigation. As previously urged, if such agreements are afforded any weight for any purpose then unscrupulous attorneys will demand such concessions whenever their defalcations are discovered. Thieves, knowing that their client-victims will likely agree to anything if losses can thereby be recouped in whole or in part, will enter into similar agreements thus placing themselves beyond the pale of the Rules of Professional Conduct. None of the parties to the omerta agreement came forward in this case. It was only

the additional civil litigation that removed the veil of secrecy and prompted a judicial direction that the bar be advised of appellee's misdeeds. A pronouncement of this court vitiating such agreement will free future victims from honoring dishonorable covenants. Neither the victims nor the victims' attorneys should ever be placed in the uncomfortable position of being coerced to silence in order to recover the victims' due.

CONCLUSION

For the reasons advanced in the bar's initial brief it is respectfully urged that appellee be disbarred and that the terms of his disbarment be enhanced due to his theft, fraud, deceit and other misconduct.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief of The Florida Bar was furnished to Terence J. Watterson, Esquire, attorney for respondent-appellee, 11380 Prosperity Farms Road, Suite 112, Palm Beach Gardens, FL 33410 by regular mail on this 9th day of November, 1988.

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