

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

vs .

WILLIAM A. BORJA,

Respondent.

Case No. 72,962

TFB No. 86-16,453(06A)



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1986

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RESPONDENT'S, WILLIAM A. BORJA, REPLY BRIEF .

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LS AND REFERENCES

In this Brief, the Appellee, WILLIAM A. BORJA, will be referred to as "the Respondent". The Appellant, THE FLORIDA BAR, will be referred to as "The Florida Bar" or "The Bar". "TR" will denote the transcript of the Final Hearing held on December 15, 1988.

STATEMENT OF THE FACTS AND OF THE CASE

On May 6, 1985, the Respondent as attorney and Personal Representative of The Estate of Frank Libertini issued check number 2750, made payable to the Internal Revenue Service, for \$10,000.00, on his trust account. (TR-18).

The Respondent, on June 10, 1985, realized he made a mistake by issuing the check from his trust account. On June 10, 1985 he deposited, in his trust account, \$10,000.00 from the estate account. (TR-78).

The Bar auditor stated that a reasonable person would believe this was a mistake. (TR-54). Funds were always available in the estate account to pay the Internal Revenue Service the \$10,000.00.

An attorney representing minor children of the Estate of Frank Libertini was present in the Respondent's office when he made the mistake in May of 1985 and saw that the check was written on the trust account. (TR-77).

Approximately one (1) year later this attorney threatened to report the error The Florida Bar. The purpose was to cause the Respondent to reduce his attorney's fee in representing the Estate. (TR-80).

It was reported to The Florida Bar and the Respondent explained to Steve Rushing, of The Florida Bar, the mistake and was told to give copies of the bank statements to show that the funds were in the estate account. The Bar would accept the fact

that the Respondent had made a mistake. (TR-81).

However, in June, 1987, The Florida Bar auditor subpoenaed the Respondent's records. (TR-81).

When the auditor came to the attorney's office in June of 1987, the 3" x 5" cards that the Respondent used for trust accounting, for the year 1985, were in the possession of Jim Williams, the accountant who was doing the Respondent's tax returns. (TR-83).

The Respondent has been unable to get the records from the accountant. (TR-84). The accountant had a mental breakdown. (TR-84).

Bob Bennett, another accountant, was present when the account balances as of December 31, 1985 were given to the Respondent by Jim Williams in a telephone conversation. (TR-84).

Bob Bennett testified he was present when the former accountant gave the Respondent the December 31, 1985 balances of the accounts. (TR-66) (Respondent's Exhibit #1). He further testified, using the balances as of December 31, 1985 given by Jim Williams, that there would be no negative balances. (TR-69). Bob Bennett further testified that for 1986 and 1987 the Respondent's trust account was in substantial compliance with the Florida Bar rules of accounting. (TR-68).

The Respondent testified that every month he removes any earned attorney's fees from the trust account. (TR-87).

The Respondent further testified that in June of 1987, The Florida Bar auditor said that the Respondent was in substantial

compliance. (TR-87).

The auditor for The Bar had identified that the DiGuiccio account was in violation of the rules. (TR-24). The alleged violation was that the Respondent had kept his fees in the DiGuiccio ledger card. (TR-28). In November, 1985, The Bar auditor said there was a shortage in the DiGuiccio ledger account. (TR-29).

Denise DiGuiccio testified that in 1974 she gave the Respondent \$5,000.00 for the purpose of satisfying a judgment (TR-71). She considered the money left after satisfying the judgment to be the Respondent's money (TR-72). The Respondent, after satisfying the judgment, returned the balance to DiGuiccio. (TR-86).

The Referee after hearing the testimony and considering the exhibits found that the Respondent's trust accounts were in substantial compliance with the trust accounting rules of The Florida Bar.

SUMMARY OF ARGUMENT

The Referee found that the Respondent was in substantial compliance with The Florida Bar's trust accounting rules.

There is testimony and evidence to support this finding. The definition of Substantial Performance in Black's Law Dictionary, page 1597 is in part as follows:

"Substantial Performance. Exists where there has been no willful departure from the terms of contract, and no omission in essential points, and the contract has been honestly and faithfully performed in its material and substantial particulars, and the only variance from the strict and literal performance consists of technical or unimportant omissions or defects."

The testimony of The Bar auditor was that the \$10,000.00 check written on the trust account in May of 1985 was a mistake and not intentional. (TR-57).

The Respondent's accountant, Bob Bennett, testified that if you used the December 31, 1985 balances furnished by Jim Williams, the former accountant, there would be no negative balances. (TR-69)

(Respondent Exhibit #1). Bob Bennett further testified that from January 1, 1986 until 1987 there was a substantial compliance with the rules of trust accounting of The Florida Bar. (TR-68).

The Respondent testified that he did nothing wrong. If he made a mistake he corrected it. (TR 80-81).

There is sufficient testimony to justify the finding of the Referee that the Respondent was in Substantial Compliance.

ARGUMENT

ISSUE:

IS THERE EVIDENCE TO SUPPORT THE REFEREE'S FINDING THAT THE RESPONDENT'S TRUST ACCOUNT WAS IN SUBSTANTIAL COMPLIANCE WITH THE TRUST ACCOUNT RULES OF THE FLORIDA BAR?

The following cases stand for the proposition that the Referee's finding of fact will be upheld if there is evidence to support the finding:

The Florida Bar v. Hooper, 507 So2d 1078 (Fla. 1987),

The Florida Bar v. Stalnaker, 485 So2d 815 (Fla. 1986),

The Florida Bar v. Neely, 502 So2d 1237 (Fla. 1987)

The Referee found the Respondent in substantial compliance with The Florida Bar's rules on trust accounting. The definition of Substantial Compliance found in Black's Law Dictionary, page 1597 is analogous:

"Substantial Performance. Exists where there has been no willful departure from the terms of contract, and no omission in essential points, and the contract has been honestly and faithfully performed in its material and substantial particulars, and the only variance from the strict and literal performance consists of technical or unimportant omissions or defects."

The testimony of Bob Bennett (TR 65-70) and Respondent's Exhibit #1 was introduced by the Respondent for the purpose of showing that the account balance as of December 31, 1985 as furnished by Jim Williams (Respondent's Exhibit #1) showed that there was no shortage in any account. Bob Bennett further testified that for the years 1986 and 1987 the Respondent was in

substantial compliance. (TR-68).

The Respondent testified that the auditor for The Florida Bar in June, 1987 told the Respondent that he was in substantial compliance. (TR-86).

One of the alleged violations was the fact the Respondent took his attorney's fees out every thirty days and therefore his money was commingling with the clients. (TR-45) The auditor did identify the deposit of DiGuiccio fee as a fee that was commingled for DiGuiccio (TR-49). The Bar auditor further stated as follows:

"Q. When do you consider a fee earned, when it goes into the account?

A. That would be depending on the agreement with the client."

Page 48, lines 15-18

* * * * *

However, Denise DiGuiccio testified that the money she deposited with the Respondent was the Respondent's after he satisfied the judgement. (TR-72).

The Respondent testified the money belonged to DiGuiccio (TR-93) and that he did pay the money to the DiGuiccio's.

The auditor for The Bar and The Bar's attorney believed that this was the Respondent's fee that he had left in the trust account for a period of time over thirty (30) days and was therefore a violation of the rules for trust accounting (TR-74).

However, the Respondent believed that it was his clients money that was in the trust account and it was returned to his client (TR-93).

If it was the client's money, there could be no commingling

of funds. The Respondent treated the balance remaining after satisfying the judgment **as** his client's money. The client, Denise DiGuicchio was certainly satisfied with this method of accounting.

The Respondent further testified that The Bar auditor, in June of 1987, said that he was in substantial compliance (TR-86).

The Respondent further testified that he had never written a bad check and that he had never had a client complaint as to his trust accounting (TR-87).

The Respondent testified that he had never intentionally written a check in a trust account when the account did not have the money in the account (TR-89).

Another violation that the Respondent was charged with was in regard to the failure to maintain certain accounting records for the year 1985.

The Respondent testified that he gave the trust account cards to his accountant, Jim Williams (TR-83). In 1987 when The Bar auditor came to the Respondent's office the accounting cards were still in the possession of Jim Williams (TR-83). The Respondent was never able to obtain the records from the accountant (TR-83). The Respondent testified that the accountant had a mental breakdown (TR-84). He did receive the balances indicated on the trust account cards as of December 31, 1985 (TR-85).

The Florida Bar's brief cites the following cases:

The Florida Bar v. Padino, 500 So2d 525 (Fla. 1987)

The Florida Bar v. Hosner, 513 So2d 1057 (Fla 1987)


In both cases the Respondent acknowledges that he was not in substantial compliance. In this instant case, the Referee found that the Defendant was in substantial compliance. There was ample evidence to support the finding of the Referee.

CONCLUSION

The evidence submitted by the Respondent was sufficient for the Referee to base his finding. The accountant, Bob Bennett, testified that the Respondent was in substantial compliance. The Respondent testified he was in substantial compliance and was told by The Bar auditor he was in substantial compliance.

The findings of the Referee should therefore be affirmed.

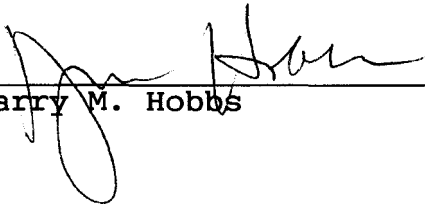
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has furnished by U.S. Mail to Bonnie L. Mahon, Esquire Assistance Staff Counsel, The Florida Bar, Tampa Airport Marriott, Suite C-49, Tampa, Florida 33607 and John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, Florida 32399-2300 this ___ day of July, 1989.



Harry M. Hobbs