IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GORDON B. SCOTT,

Respondent.
_____/

Case No. 73,211

RESPONDENT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Respondent has met his burden of showing that the Referee's findings of fact are **clearly erroneous or lacking in evidentiary support** as required in The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968).

The Bar has not proved by clear and convincing evidence that Respondent knew that Stanley Lowe transferred property to him in order to defraud creditors. The only evidence regarding this matter came from Lowe's ex-wife, Janice Lowe, who has contradicted herself while under oath, and from Mr. Lowe's ex-girlfriend, Claire Schwartz, whose testimony on the issue was vague.

There was no evidence before the Referee to support her finding that Respondent knew of the existence of quit-claim deeds that Mr. Lowe prepared at the time of the conveyances, that Mr. Lowe prepared them, or that Respondent had signed them.

The Referee found that Respondent's testimony was not **entirely truthful** as to the existence of the quit-claim deeds. (This was the only issue in which Respondent's testimony was found by the Referee to be lacking candor). This finding by the Referee was supported by no evidence.

There was no competent evidence before the Referee upon which she could base her conclusion that there was an attorney/client relationship between Stanley Lowe and Respondent at any time after December, 1977.

Should this Court find that Respondent has engaged in misconduct, it certainly does not warrant anything more than a public reprimand.

The Florida Bar argues in its Brief that the appropriate sanction to be imposed is that given in The Florida Bar v. Shupack, 523 So.2d 1139 (Fla. 1988). Mr. Shupack received a 91-day suspension, the same as recommended here, for misconduct that was far worse than in the instant case. Furthermore, Mr. Shupack had previously received a 30-day suspension for similar misconduct. Mr. Shugack was a recidivist and his second offense warranted harsher conduct than his first time around. (It should be noted that Mr. Shupack's first offense, for conduct similar to his second offense, warranted but a 30-day suspension).

ARGUMENT

POINT I

THE BAR DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT ENGAGED IN IMPROPER CONDUCT.

A. Respondent Did Not Know of Any Fraudulent Transfers.

As pointed out in Respondent's argument on page 10 of his Initial Brief, not all property conveyances without consideration are improper. Furthermore, property can be transferred to avoid creditors in legitimate matters.

Respondent asks this Court to note that in November, 1978, when Mr. Lowe conveyed the two parcels of property to Respondent, he owned at least two, and maybe four, other parcels of property. Ex. 7, TR 97, 98. If Mr. Lowe was transferring property in November, 1978 to defraud creditors, he certainly would have conveyed all of his property, not just two parcels. (The property conveyed on July 21, 1980, Ex. 7, was not deemed to be an improper transfer).

The issue of whether Mr. Lowe's conveyance to Respondent was for the purpose of defrauding a creditor has been litigated. Dr. Masten, the only creditor mentioned in these preceedings, interpleaded Respondent in the action he brought to execute on his judgment. That action was ultimately dismissed for failure to prosecute. There was no finding that the conveyance was for the purpose of defrauding a creditor.

Respondent submits that the Referee's finding that Respondent knew that the conveyances were improper was "clearly erroneous" and should be overturned. The Florida Bay V. Wagner, 212 So.2d So.2d 770, 772 (Fla. 1968).

The Bar's position as to Respondent's knowledge is supported by two witnesses, Stanley Lowe's ex-wife, Janice Lowe, and his girlfriend at the time of his death, Claire Schwartz.

Ms. Lowe has testified about Respondent's knowledge of the transfers being fraudulent in two different forums. First, she testified before the grievance committee in 1988 and then she testified before the Referee in 1989. Although under oath both times, Ms. Lowe's testimony was different.

During direct examination before the Referee in the instant proceedings, Ms. Lowe testified as follows:

BY MR. GREENBERG:

Q. Do you recall approximately when you spoke to Mr. Lowe in reference to the purpose of the transfer to Mr. Scott?

A. Yes. It was in 1978 shortly after te quitclaim deed was filed. I spoke to Mr. Lowe and Mr. Scott was present.

Q. We, let me show you Bar's Exhibit Number 1 and ask if you have ever seen this document?

A. Yes, I have.

Q. Bar's Exhibit 1 refers to lots 2 and 3 of Magnolia Park Subdivision being transferred on November 3, 1978. Was your conversation with Mr. Lowe after November 1978?

A. Yes. It was when I found out about it.

Q. And was -- please, tell us what Mr. Lowe told you in reference to the purpose of this transfer.

A. Well, I asked why he transferred it, and he said because of Dr. Matsen's (sic) claim that he had filed against him. They were -- you know, they were trying to get out of paying that, so he transferred the property.

Q. Was Mr. Scott present when that statement was made?

A. Many times Mr. Scott was present when we talked, yes.

Q. At any time did Mr. Scott say anything in reference to the transaction referred to in Bar's Exhibit Number 1?

A. Did he say --

Q. Did he made any statement in reference to the purpose of the transfer?

A. Yes. They talked very openly about it.

Q. And what did Mr. Scott say?

A. He also said that he had to protect us.

. . . .

(Objections and rules omitted)

Q. Go ahead and tell us what Mr. Scott said about this transfer.

A. He just said that he had to protect the property and that it was for my benefit to which it wasn't because my half was claimed to me. It didn't do anything to protect me. (TR 15-17).

On cross-examination, Ms. Lowe acknowledged testifying before the grievance committee on July 21, 1988. (TR 31). She testified there as follows:

Q: Did you ever hear Mr. Lowe say that he was -- say the purpose for transferring his interest in the properties over to Mr. Scott's name?

A: Yes. He told me it was to avoid creditors.

Q: Was Mr. Scott ever present when Mr. Lowe made that statement?

A: I don't really know if he ever was. There were times when I talked to Stan when he was there but I can't remember exact dates or what we talked about but I know that Stan said that it was to avoid creditors. At that time it was Dr. Masten's claim that he was transferring it for originally. (TR 32).

. . . .

Q: By Mr. Greenberg: Did Mr. Scott ever tell that you (sic) he knew that Mr. Lowe made the transfers to avoid creditors?

A: We talked about it in the same circles, but he never just said to me, I know this is why he's doing it. (TR 33).

Claire Schwartz' testimony was even more inconclusive. The following dialogue took place during the Bar's presentation of evidence.

BY MR. GREENBERG:

Q. During the time that you lived with Mr. Lowe did you become aware of Mr. Lowe transferring any property to Mr. Scott?

A. Only in conversation that I heard in the house when I walking around cooking or whatever I was doing as to quit-claim deeds on the house regards Mr. Lowe being in trouble with lawsuits.

(Objection and ruling omitted)

Q. Do you recall approximately when these conversations took place?

(Comment omitted)

A. The Witness: One second. '80, around about in that area. May '80. In April we -- it had to be around May or June. I can't remember specific dates.

By Mr. Greenberg: Was Mr. Scott ever present during these conversations?

A. Mr. Scott, Mr. White, other people, yes.

(Comment omitted)

The Witness: Mr. Scott and Mr. White and other people were in the house too but I don't remember who.

There were conversations between people -- we had people over and things were being said. I can't remember who was there or specific dates.

BY MR. GREENBERG:

Q. Do you remember who said particular things?

A. No I can't remember that.

Q. Did Mr. Lowe have any discussions with you personally?

A. No. (TR 49-51),

Ms. Lowe's testimony is inconsistent and, therefore, unbelievable. Her testimony should not form the basis for a finding that Respondent knew that Stanley Lowe was transferring property for the purpose of defrauding creditors.

Ms. Schwartz' testimony certainly cannot form the basis for a finding that the November, 1978 transfers (the July, 1980 transfer was not found to have been done with the purpose of defrauding creditors) was for the purpose of defrauding a creditor. First, she cannot identify which transaction was being discussed. Secondly, she was never a party to the conversation. Finally, she only remembers

overhearing a conversation; she cannot remember who was

present. Perhaps it was Mr. White, Mr. Lowe's lawyer. Perhaps it was somebody else.

To convict a lawyer for fraudulent conduct there must be more than conjecture. There must be clear and convincing evidence that he knowingly participated in a fraudulent scheme. That evidence is lacking in the case at Bar.

B. The Quit-Claim Deeds.

The Referee's finding that Respondent knew about the existence of quit-claim deeds, that they were prepared by Stanley Lowe at the same time that the conveyances to Respondent took place, and that Respondent had signed them, is premised upon the following dialogue during the direct examination of Ms. Lowe. The questioning is by Bar Counsel.

> Q. Now, tell us about the conversation that you had with Mr. Lowe in June, 1981?
>
> A. I said to him, God forbid if something happens to you, what about the property?
> And he said, oh, don't worry about that. And he had in his briefcase in the back credenza, he had quit-claim deeds back from Gordon to himself, and he said, if anything ever happens file these.
>
> Q. Did you actually see the documents?
>
> A. Yes, I did.
>
> Q. Was Mr. Scott present when these deeds were shown to you?
>
> A. No, he wasn't.
>
> Q. At any time did you have any discussion with Mr. Scott as to the existence of the deeds transferring the property back from Mr. Scott to Mr. Lowe?
> A. No. Most of the conversations that I had with Mr. Scott was just, don't worry about it. I

> will take care of everything. I will make sure that it goes to where he wants it to go. (TR 21, 22).

From that testimony, the Referee concluded on page two of her report that:

> At the time of the transfers mentioned above (November, 1978) Mr. Lowe prepared quit-claim deeds whereby Respondent was to transfer the properties back to Mr. Lowe at Mr. Lowe's request. At the final hearing in this matter, Respondent denied that any such quit-claim deeds were ever prepared. I find that the Respondent was not being entirely truthful in his testimony.
>
> ....
>
> On July 21, 1980, Mr. Lowe transferred to Respondent the property described in Exhibit 7 (Pirate's Table back parcel). At the time of this transfer, Mr. Lowe prepared a quit-claim deed whereby Respondent was to transfer the property back to Mr. Lowe at Mr. Lowe's request. Respondent paid no consideration to Mr. Lowe for the aforementioned transaction. At the final hearing in this matter, Respondent testified that no quit-claim deed existed for this transfer. The Respondent's testimony is found to be less than entirely truthful in regard to this issue.

Based upon the sparse testimony of Ms. Lowe, a hostile witness, the Referee concluded that:

(1) at the time of the transfers in November, 1978 and July, 1980, quit-claim deeds were prepared;

(2) Mr. Lowe prepared the deeds; and, most importantly,

(3) Respondent was being less than truthful when he denied the existence of the deeds.

There is no evidence to support the Referee's findings as to the above-mentioned three points. The only evidence before her on the issue of the quit-claim deeds was that there were such documents in existence. Ms. Lowe did not testify when

they were prepared, who prepared them, and whether Respondent knew of them.

Since the deeds were never produced, we can only speculate about their existence. If they did exist, it is probable that they were prepared not by Mr. Lowe, but by the lawyers that handle the conveyances for Mr. Lowe. But, most importantly, there is no evidence, none, that Respondent knew of the existence of those quit-claim deeds.

As pointed out on page 19 of Respondent's Initial Brief, if such a quit-claim deed existed, then why was it necessary for Respondent to execute a warranty deed when the Island Estates property was sold almost a year after the initial conveyance? Respondent had to prepare a warranty deed because no such quit-claim deeds existed.

C. Attorney/Client Relationship.

The Referee's conclusion that an attorney/client relationship existed is not supported by any evidence.

Reference was made during final hearing of the fact that twice during civil litigation Respondent's lawyer asserted the attorney/client relationship in refusing to answer certain questions. TR 70. This Court is well aware that at times such objections are made during discovery to preserve issues. Furthermore, it was not Respondent that invoked the rule. Finally, it was not specified what issue the invocation of the privilege was pertaining to.

It must be emphasized that the conveyances in question,

both in 1978 and in 1980, were prepared by counsel other than Respondent.

There was no evidence rebutting Respondent's assertion that he had no attorney/client relationship with Mr. Lowe after December, 1977.

ARGUMENT

POINT II

THE REFEREE'S RECOMMENDATION THAT RESPONDENT RECEIVE A 91-DAY SUSPENSION IS INORDINATELY HARSH AND UNJUSTIFIED BY THE FACTS BEFORE THE COURT.

Respondent submits that this Court should find that he has engaged in no misconduct and that the issue of a sanction will thereby be rendered moot. However, should this Court find that misconduct occurred, the discipline imposed should be a public reprimand. Respondent has cited numerous cases in his Initial Brief supporting his proposition. He will not repeat them here.

The sole case cited by The Florida Bar in its argument relating to the appropriate sanction is The Florida Bar v. Shupack, 523 So.2d 1139 (Fla. 1988). Mr. Shupack received but a 91-day suspension for actively participating in a scheme to defraud the seller of property. Mr. Shupack knowingly warranted to counsel representing the sellers (Mr. Shupack represented the buyers) that they were receiving a first mortgage when, in fact, Mr. Shupack knew that they were receiving but a second mortgage. Furthermore, to cover up the scheme, Mr. Shupack falsified documentary stamps. For his offense, far more egregious than that at Bar, Mr. Shupack received a 91-day suspension.

Shupack is distinguishable from the case at Bar not only for the facts, but because it was Mr. Shupack's second

appearance before the Court for similar misconduct. In The Florida Rar v. Shupack, 453 So.2d 404 (Fla. 1984), Mr. Shupack received but a 30-day suspension for similar misconduct.

If Irving Shupack received a 91-day suspension for defrauding purchasers in his second appearance before the Bar, Respondent certainly should not receive a similar discipline in his first appearance before the Bar.

Respondent submits that the first discipline given to Mr. Shupack, a 30-day suspension, is more closely aligned to the appropriate discipline in the case at Bar.

In discussing Respondent's credibility, the Bar points to Respondent's argument that he would not benefit from any transfers to defraud creditors.

Respondent asserts to the Court that if, in fact, the only purpose of the conveyances to Respondent from Mr. Lowe was to defraud creditors, Respondent would not benefit from such a conveyance. Respondent fully acknowledges that if the purpose of the conveyances was to put property in Mr. Lowe's best friend's name and that if Mr. Lowe intended for Respondent to receive that property should he die, then certainly Respondent would benefit. In fact, that is what happened.

There is an insinuation throughout the Bar's case that Respondent stole the proceeds from the sale of the Island Estates property in May, 1979. Mr. Lowe was still alive then. If there was any irregularity in the handling of the proceeds

of the Island Estates property, one can rest assured that Mr. Lowe would not have deeded property to Respondent in July, 1980. Over one year after the $53,000 check was delivered, Mr. Lowe is still Respondent's best friend, still living with him, and still deeding property to him.

The Bar argues that it was a lack of candor when Respondent wrote Mr. Lowe's sons, whom he had not seen for ten years, and told them there was nothing in Mr. Lowe's estate. That was not untrue. Respondent was the owner of the two parcels of property that were left behind. Mr. Lowe wanted Respondent to have them, not the sons.

In essence, the sons gained a windfall, as so often happens, because their father, whom they had shunned, died intestate.

CONCLUSION

The Referee's findings of fact are clearly erroneous and unsupported by the evidence and should be overturned. Respondnet should be found to have committed no misconduct and this case should be dismissed without the imposition of discipline.

Should misconduct be found, the appropriate discipline to be imposed is a public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been mailed to DAVID R. RISTOFF, Bar Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607 on this 8th day of January, 1990.

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