W00A 847

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case Number: 73,905

v

THOMAS R. ROGERS,

Respondent.

RESPONDENT'S REPLY BRIEF ON CROSS-APPEAL

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SYMBOLS AND REFERENCES

The Complainant, The Florida Bar, shall be referred to as the Bar.

The transcript of the final hearing held on December 18, 1989, shall be referred to as TI.

The transcript of the final hearing held on December 19, 1989, shall be referred to as TII.

The transcript of the final hearing held on December 20, 1989, shall be referred to as TIII.

Bar exhibits shall be referred to as B-Ex.

Respondent's exhibits shall be referred to as R-Ex.

The Report of Referee dated April 27,1990, shall be referred to as RR.

SUMMARY OF ARGUMENT

The Referee's findings of fact which form the basis of his recommendations of guilt are clearly erroneous and lack evidentiary support. Those findings are exclusively based on testimony of the Bar's witnesses and ignore the exhibits. The exhibits show that the proof presented is not "clear and convincing" and that the testimony of the Bar's witnesses is not credible. It is not necessary for the Court to substitute its opinion for the Referee as to any credibility contest or to reweigh the evidence. The Court need only review the record and compare it with the exhibits.

The Referee's recommendations that the Respondent be found guilty are improper. Integration Rule 11.02 is not applicable to this case because no funds were entrusted to Respondent as an attorney. Though complete and adequate accountings were rendered to Gorman and Mitzi, the Integration Rule did not require that accounting statements be rendered.

There is no argument about the accounting of funds of Gorman and Mitzi. The concern pertains to a portion of Respondent's contributions of partnership capital with services in lieu of cash. The services were accrued expenses of the partnership and were not shown on some of the accountings because the partnership agreement required financial statements to be prepared on a "cash basis". Nevertheless, Respondent disclosed the accruals on accountings and ledger cards made available to Gorman and Mitzi.

Respondent submits disclosure was not required under Disciplinary Rules 5-101(A) and 5-104(A). Respondent's interests were not adverse to Gorman and Mitzi nor was Respondent's judgment affected by any interest he may have had in the partnership.

Should the Court be of the opinion that there was a violation, Respondent would submit that it was only technical and not done with a corrupt motive (RR V). Respondent would also ask the Court to keep in mind that no dishonesty, fraud, deceit or misrepresentation was charged or proven.

POINTS I AND II (CROSS-APPEAL)

THE REFEREE'S FINDINGS OF FACT ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND THOSE WHICH FORM THE BASIS OF HIS RECOMMENDATIONS OF GUILT ARE CLEARLY ERRONEOUS OR LACK EVIDENTIARY SUPPORT.

Those findings used by the Referee to support his recommendations of guilt are clearly erroneous and lack evidentiary support. They do not match up with the documentary evidence. They do not even correspond to testimony of the Bar's witnesses, who contradicted each other and themselves and whose testimony was admittedly confused. It is not precise or accurate. They admit not recalling matters that were explained precisely by Respondent.

This case is not like cases cited by the Bar in its Answer Brief on the Cross-Appeal where the Referee boiled down conflicting testimony in a "swearing contest" and found in favor

of the complaining witness or Respondent. Respondent is not asking the Court to substitute its opinion for the Referee's as to the credibility of the witnesses. The documentary evidence conclusively shows that Bar's witnesses are not credible. For example, documentary evidence rebutted Mitzi's testimony. He admitted to receiving 18 additional accountings after he swore that the five submitted by Bar were all that he ever received. The Partnership Agreements show how confused his testimony was as to who the partners were and how they contributed.

Respondent's timeslip, verifying there was disclosure about conflict of interest, dispelled Mitzi's testimony that it was never discussed at any time with him by Respondent. And not only did Gorman and Files contradict Mitzi's testimony about his contributions to the M-R Trust, but Mitzi's own testimony contradicted itself as addressed in Respondent's Initial Brief.

Gorman's Affidavit (R-Ex VV) rebutted his testimony that Respondent never disclosed the issue of conflict of interest with him, regardless of the date on the affidavit or the nature of the transaction. If Gorman cannot remember his own 1985 affidavit addressing disclosure and consent, then it is understandable that he would not remember other discussions on the same matter that occurred previous to 1985.

Gorman readily admitted his lack of memory. He admitted making false statements under oath pertaining to his attendance

at the Sun Bay dual closing on Townhouse 8 and Condominium 236. How can a witness "forget" that he flew down to Florida from Michigan to attend closings on two units? Gorman admitted his confusion and lack of recall even as to factual issues. As pointed out in the initial brief of Respondent, there is plenty of documentary evidence, such as R-Ex DD, HH, K, L and YYY, which contradicts Gorman's testimony. Gorman even contradicted his own testimony (e.g. his understanding of authority granted under a Power of Attorney).

Documentary evidence discounted Attorney Files' testimony. Files' testimony about not getting an opportunity to inspect records and accountings is contradicted by R-Ex BBBB, the letter from Respondent offering him the opportunity to inspect.

The documentary evidence, which cannot lie, irrefutably rebuts the testimony of the complainants' testimony. There was no swearing contest.

Not surprisingly, the Bar admits that some of the Referee's findings of fact are clearly erroneous; however, it alleges that the errors are not material. Unfortunately space limitation does not allow a complete listing of all errors made by the Referee. Nevertheless, the cited errors are very material. For example, in paragraph 9 of the Referee's findings, he states that Respondent charged $3965 in management fees for both Sun Bay units from October 1986 through October 1988. The $3965 were

condominium assessments paid to the association, not Respondent's management fees. The Bar admits this, but says Respondent charged $2438 for management services for this period. This is not correct and there is no evidence to support it. As pointed out on page 8 of Respondent's Initial Brief, Respondent neither charged nor received credit for any management fee after Gorman took over the management in August 1986.

Even though Respondent obtained tenants for Gorman and Mitzi to rent both Sun Bay units, no management fee was charged by or credited to Respondent from October 1986 through October 1988. This is just one example that shows Respondent did not take advantage of the situation as the Bar alleges.

The Moorings transaction was specifically addressed with appropriate references on pages 4 and 6-9 of Respondent's Initial Brief. It would be improper to conclude Respondent believes the evidence supports the Referee's findings with that transaction. Again, there is substantial documentary proof and testimony from the Bar's witnesses to show that the findings as to Count II of the Complaint are in error.

Paragraph 20. The Referee's finding that Respondent decided to purchase the Moorings condominium as an individual is contradicted by documentary evidence and the testimony of Bar's witnesses. Gorman and Mitzi instructed Respondent (Respondent did not make the decision) to purchase condominiums (TII 28, 31),

provided funds with which to do so (TII 14, 158-9) and authorized Respondent to do so by Power of Attorneys (B-Ex, 2, 4, 24, R-Ex CC) and a Trust Agreement (B-Ex 1). Mitzi specifically desired investments be made in secrecy and provided in the M-R Trust Agreement that Respondent need not designate his capacity as Trustee when making investments. The addendum to the purchase contract is signed "Thomas R. Rogers, as Trustee" for the Purchaser (B-Ex 8). The Seller's affidavit (R-Ex DDDD) verifies that Respondent was acting on behalf of others. Respondent wrote a letter to Gorman advising Gorman of the Purchase AGreement (R-Ex AAAA).

Paragraph 21. The Referee's finding that the Moorings Purchase Agreement was non-assignable is clearly in error. Documentary evidence refutes this finding. Paragraph 14 of the Agreement provides it is assignable with consent of Seller (B-Ex 8). Seller's Affidavit (R-Ex DDDD) verifies consent was given.

Paragraph 22. The Referee's finding that Respondent made the decision to make an initial deposit without notifying his clients is directly contradictory to Gorman's testimony and documentary evidence.

Gorman admitted there were consultations with Respondent about the down payment (TI 140 Line 13) prior to Respondent entering into the contract. TI 151 Lines 29-22. Respondent notified Gorman by letter of the purchase contract. R-Ex AAAA. Gorman instructed Respondent to purchase condominiums and

authorized Respondent to do so under his Power of Attorney (R-Ex CC). Respondent was acting under the Power of Attorney as Gorman's "attorney-in-fact" as opposed to an attorney at law. Gorman was not Respondent's client. It is noteworthy that once Respondent was authorized to act under a Power of Attorney (or under the M-R Trust in Mitzi's case) there was no requirement that notification be made before action was taken.

The Bar alleges in its Answer Brief that Respondent used partnership funds to make a down payment on the Moorings condominium on September 2, 1983. Neither the R-M-G or the G-M Partnership were created until October 31, 1983. B-Ex 3, 5. As such, partnership funds were not used to make the down payment.

Paragraph 26. The Referee's finding that Respondent denied that the reduction of Respondent's interest in R--M-G Partnership was intended to cover the return of Gorman's deposit on the Moorings is clearly erroneous and is conclusively refuted by documentary evidence. Respondent admitted the reduction of Respondent's interest in R-M-G Partnership was in exchange for Gorman's equity in the Moorings in Response 1 MMM to Request for Admissions J-Ex 1. Respondent disclosed reduction of his equity in R-M-G Partnership and the exchange in B-Ex 17, 18, R-Ex CCC, EEEE, FFFF.

The only CPA to testify in the case was J. Michael Morgan. He found Respondent exchanged equities and returned Gorman's down payment TII 161.

There is no record evidence to support the Referee's finding that Respondent made the above denial.

Paragraph 28. The Referee's finding that Gorman decided against the Moorings investment in August 1985 and then requested Respondent return in cash his portion of the total down payments made from his funds is clearly erroneous.

Documentary evidence and testimony of Gorman refute this finding. In late 1984 and early 1985, Mitzi advised Respondent he wanted to "retract" from the Moorings Investment and left the decision up to Gorman as to what to do about the investment. TI 127-128. Shortly thereafter, Gorman decided not to be involved further with the Moorings (TI 153; TII 25-26, 180; R-Ex SSS). Gorman was about to retire (RII 29-30) and he did not want the additional responsibility of negative cash flow on a third condo (TI 153, 180). Respondent offered to take over the responsibility of the investment in the Moorings Condo and give up an equal portion of Respondent's interest in Sun Bay Townhouse 8 for Gorman and Mitzi's interest in the Moorings Condo. R-Ex SSS. Gorman accepted Respondent's offer. TII 26; R-Ex L.

Respondent signed the contract for the Moorings in the fall of 1983. At that time he had no intention to live there. Two years later, when it was completed, Mitzi and Gorman wanted no part of the deal. The options available to Respondent were to (1) forfeit the investors' down payment, or (2) buy it himself.

He chose the latter with the other investors' consent. Rather than losing their investment, the other investors got a valuable credit on their share of one of the Sun Bay units.

When the Moorings Condo was completed, Respondent proceeded to finance the purchase. B-Ex 9; R-Ex L, SSS. At this time, Gorman reconsidered his decision to pull out of the investment and Respondent gave him the opportunity to get back in. TII 7, 25-36; R-Ex SSS. Shortly before the closing, Gorman reaffirmed his decision to opt out of the Moorings and to make the equity exchange. TII 33-34. With Gorman's consent, Respondent purchased the Moorings Condo on June 12, 1985. B-Ex 9. Respondent moved to the Moorings and documented the exchange in the next accounting provided to Mitzi and Gorman. B-Ex 17, 18, R-Ex CCC, EEEE, FFFF.

In August 1986, over a year after the exchange, during one telephone conversation with Respondent, Gorman asked for a cash refund of the funds he had initially deposited on the Moorings (RRII, para 32). This request was made even though Gorman had agreed in 1985 to exchange the same for equity in Sun Bay Townhouse 8. Respondent and Gorman discussed the situation during that phone call (TII 91-95) and Respondent never heard anything further from Gorman on that subject again.

The Bar argues that Respondent failed to adequately disclose his conflicting interest. It appears the Bar now admits that

disclosure was made as the Referee found, but that the disclosure was not quite adequate.

The Referee found Respondent did not discuss fully his conflicting interest because Mitzi and Gorman said they did not understand. Respondent previously pointed out in his Initial Brief on Cross-Appeal the reasons why the evidence on this issue was not "clear and convincing" upon which to base the finding.

Mitzi and Gorman both testified there were lengthy meetings with Respondent where they felt satisfied with Respondent's explanations and that they did not ask questions. This led Respondent to believe they understood his explanations. Now they say they did not understand.

Respondent had discussions with them on a frequent basis and made himself available whenever they requested. They were sophisticated investors. If they did not understand any concept, they should have asked Respondent to explain it again. How is Respondent to know whether they understood his explanations if neither of them indicated that they did not understand?

POINT III

THE REFEREE'S FINDINGS OF GUILT WERE IMPROPER.

The Bar submits Rule 11.02(4) is applicable because Respondent was acting as attorney for the partnerships and as a partner in R-M-G Partnership. Respondent was not acting as attorney for the partnerships nor was Respondent a partner in R-

M-G Partnership when funds were provided in July 1983. The partnerships were both formed October 31, 1983 (B-Ex 3, 5).

Gorman was not a client of Respondent's. In July 1983, Gorman wired the funds to Respondent with no specific instructions other than to invest the funds in real estate. The money was neither solicited nor expected by Respondent. TII 14, 15, 158-9. Gorman authorized Respondent to act on his behalf under Gorman's Power of Attorneys which were dated August 10, September 6, and October 31, 1983. R-Ex CC, B-Ex 4, 24. Mitzi authorized Respondent to act on his behalf under Mitzi's Power of Attorney dated February 15, 1982 (B-Ex 2) and the M-R Trust which was created on February 18, 1982 (B-Ex 2). The funds were disbursed on various investments by the time the partnerships were formed. Thereafter, funds were provided to the partnerships as expenses came due. As such, money was not entrusted to Respondent as an attorney.

The Bar alleges broadly that Respondent did not provide sufficient accountings to Gorman and Mitzi to comply with Integration Rule 11.02(4). The Bar does not state, however, in what way the accountings do not comply. The Rule does not require accountings. It provides procedures for maintaining records but it does not provide that accounting statements must be provided to clients. Nevertheless, Respondent provided Gorman and Mitzi regular accountings (See Appendix B--Listing of

Accounting Exhibits) and he maintained the records. Those records were always available to Gorman and Mitzi for inspection. Mitzi testified he never made a request for an accounting. TI 48. Gorman testified he received everything he requested (TI 196) through the time he received the files and records at the end of 1986 (TI 140).

The Bar submits that the accountings were inadequate because Respondent obscured that he elected to contribute services in lieu of cash. First, there is no finding of fact to support that submission. Next, the type of accountings to be provided were stipulated in the partnership agreements. B-Ex 3, 5. The books were to be maintained on the "cash basis" of accounting in accordance with accounting practices for federal income tax purposes. The books were so maintained.

CPA Morgan examined the accounting records and found them to be complete and in accordance with the requirements set out in the partnership agreements. TII 151-153. The "cash basis" of accounting does not allow the showing of accrued expenses (i.e. expenses incurred but not paid) on financial statements and tax returns. Therefore, the accrued expenses were shown separately. Likewise, financial statements and tax returns were required to be kept in the manner that they were presented. Respondent was not obscuring his election to contribute services in lieu of cash. Respondent's services were being accrued to help with the

negative cash flow. There is documentary evidence that Respondent intended to contribute services. See the flow charts provided (B-Ex 10, 11, 13). Accruals were also shown as non-cash contributions on exhibits B-Ex 12, 17. Accrual entries were also listed on the ledger cards as CPA Morgan found. TII 153 Line 24.

The R-M-G Partnership Agreement contained the precise language "cash contributions or its equivalent" rather than only "cash contributions" as was stated in the GM Partnership Agreement (in which Respondent was not a partner). Respondent explained the significance of the added three words.

Both Mitzi and Gorman were aware that Respondent would be providing services and that he intended to contribute some services in lieu of cash for his contribution to the R--M-G Partnership. TI 135, 171, TII 19. Neither one ever questioned Respondent about the non-cash contributions shown.

The Bar submits that had the accountings been adequate, there would have been no question as to (a) how much rent Respondent paid on Sun Bay Townhouse 8 and (b) how much credit was to be provided for Respondent's management services. As stated above, the partnership agreements required the accountings be kept on a "cash basis". Accrued expenses can not be shown on financial statements maintained on the cash basis. Therefore, the management fees which were being accrued were not shown on financial statements or tax returns. The partnership agreements

clearly provided that the management fees were 20% of the gross rents. As such, the management fee was simply the rents shown on the tax returns times 20%. This was disclosed to Mitzi and Gorman. See B-Ex 12, 13, 17, 23, R-Ex TT. The rent the Respondent paid was shown on the tax returns and financial statements. R-Ex JJJ, FFFF.

The Bar alleges that if Respondent's accountings had been adequate, the analysis by the CPA firm of Campos and Stratis (B-Ex 25), hereafter Campos, would not have been necessary. The analysis verified the accountings provided were adequate. Campos examined all of the financial records of the partnership. The purpose of that examination was to determine if the records were complete, whether funds were commingled and whether there was any indication of any wrong doing. They did not have to prepare any "missing" financial data. They just reported on what was already in existence. Everything provided to Campos was available to Gorman and Mitzi.

The Campos report, similar to an audit, verified that there was no commingling or wrong doing. It also showed that Respondent's records were complete.

The Bar argues that Disciplinary Rules 5-101(A) and 5-104(A) do apply to Respondent's case and cites The Florida Bar v Adams, 453 So.2d 818 (Fla. 1984). Adams is distinguishable from Respondent's case. In Adams, the accused completely failed to

disclose essential matters of the business transaction (i.e. the sale of property and an accounting of the funds received from the sale). Respondent made constant disclosures of the business transactions to Gorman and Mitzi (See Appendix A--Chronological Listing of Exhibits) and rendered regular and periodic accountings on a timely basis (See Appendix B--Listing of Accounting Exhibits).

The Bar argues that The Florida Bar v Bennett, 276 So.2d 481 (Fla. 1973) is applicable. The case is quite distinguishable. Though Bennett acted as a Trustee and there was no attorney-client relationship, Bennett made gross misrepresentations and failed to pay taxes with money sent to him by his principals for that purpose. In the case at bar, there is no finding of any misrepresentation by Respondent.

Finally, the Bar cites The Florida Bar v Bern, 425, So.2d 526 (Fla. 1982). Mr. Bern failed 1) to maintain complete records, 2) to provide an accounting and 3) to return funds due the client from the sale of property that he joint ventured. He completely ignored his fiduciary duties. Respondent has maintained complete records, provided accountings, and refunded Gorman's and Mitzi's equity.

In addition to the reasons previously cited in Respondent's Initial Brief, Respondent submits that the Referee's recommendations of guilt are improper.

CONCLUSION

The findings of the Referee should not be upheld and the charges against Respondent should be dismissed. A lawyer's good name is far too important to have the Court enter a sanction based on evidence which is not clear and convincing as to a specific finding of wrong doing. If any violations are found, the Court should consider that it was not motivated by any corrupt motive and adopt the Referee's recommendation of a public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief has been mailed to DAVID G. MCGUNEGLE, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, florida 32801 this 2nd day of November, 1990.

JOHN A. WEISS
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