IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NUMBER 76,066

L. VAN STILLMAN,

Respondent.

RESPONDENT'S CROSS-REPLY BRIEF

John A. Weiss
Attorney Number 0185229
P. O. Box 1167
Tallahassee, FL 32302-1167
(904) 681-9010
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

ARGUMENT

THE PROPER DISCIPLINE FOR RESPONDENT'S MISCONDUCT, ALL OF WHICH TOOK PLACE DURING THE PERIOD NOVEMBER 1987 THROUGH AUGUST 1988, AND WHICH WAS NOT MOTIVATED BY PERSONAL GAIN OR GREED, AND WHICH IS UNLIKELY TO BE REPEATED, IS A 90 DAY SUSPENSION TO BE FOLLOWED BY TWO YEARS PROBATION.

Respondent has never, and does not now, argue that he should not be disciplined for his actions in the five transactions at issue in this case. He recognizes that discipline in the form of suspension is appropriate. Respondent argues that the appropriate discipline for his misconduct, however, is a 90 day suspension to be followed by two years of probation. Proof of rehabilitation is unwarranted under the circumstances of the case at Bar.

The referee in these proceedings recommended that Respondent be suspended far six months. RR 20. Respondent submits that the referee's recommended discipline does not give sufficient weight to the mitigating circumstances involved. Those circumstances show that a suspension requiring proof of rehabilitation, i.e., one lasting more than 90 days is unnecessary. This is particularly true in light of the referee's finding on page 20 that

> Neither personal gain nor greed was the motive for Respondent's misconduct and I further find it unlikely that any such conduct will be repeated. (Emphasis supplied).

Proof of rehabilitation should not be a punishment. It should be reserved for those cases where the protection of the public demands a showing by the lawyer that rehabilitation has occurred. In the case at Bar, no such showing is necessary. Not only has the referee specifically found that repeat misconduct is unlikely, but,

over three years has elapsed since the last act of misconduct. That factor, when coupled with the fact that Respondent has practiced law for eighteen years without any other disciplinary proceedings, removes this case from one in which proof of rehabilitation before reinstatement is necessary.

Respondent asks this Court to reject the Bar's argument that the borrowers in the five closings at issue had no "incentive and motivation" to continue making their mortgage payments after they closed their transaction. First, this statement is belied by the fact that two of the borrowers are still making payments. More significant, however, is the fact that housing is one of the fundamental necessities of life. The motivation and incentive for making their mortgage payments was directly tied to this need.

The primary position of Greater New York's mortgages was never jeopardized. They decided to lend 75% of the purchase price of the residences and to take back a first mortgage. Their position was secure. In fact, if anyone was taking a risk, it was the secondary lenders. Greater New York's mortgage was paramount, and there is no showing that they lost money on any of the transactions.

Respondent is not arguing that Greater New York should assume some of the blame for Respondent's lack of candor. He does assert, however, that Greater New York's approval of the lenders in question, before Respondent became involved, and without verifying that they had the capability of making the large cash down payments required, is a consideration for this Court to weigh in determining the effect, if any, of the misrepresentations on Greater New York.

Respondent had absolutely nothing to do with Greater New York's approval of any of the borrowers. The lender processed the applications for mortgages and did financial background checks before Respondent's participation in any of the transactions.

Respandent disagrees with the characterization of Greater New York as being "victimized shamelessly, intentionally and with premeditation.'' Greater New York's losses are speculative, at best. All of the money they lent was used to buy the residences listed in the closing documents.

Respondent emphatically denies the Bar's statement that Respondent "concealed" the three instances not originally charged until he was forced to reveal them. Respondent was initially charged with two acts of misconduct. He defended those charges. While the Bar had discovery procedures available to it, Respondent was never asked to reveal other instances. In fact, that information was not readily available to Respondent.

The Bar characterizes Respondent's failure to research his files for new counts for the Bar to plead as concealment. That is not true. Respondent is not obligated to give the Bar new allegations of misconduct. Particularly when that information is not readily available.

Respondent, during a brief period in his eighteen year history of practice, engaged in a series of closings for Greater New York, during five of which Respondent acted improperly, Respondent does not minimize his culpability. He does, however, urge this Court to look at the overall picture in imposing discipline. Respondent

is not a threat to the public. The referee specifically found that Respondent was not motivated by "personal gain" or "greed" and that it is "unlikely that any such conduct will be repeated". Respondent has learned his lesson, regardless of the discipline this Court imposes, and there is no fear that he will engage in wrongful conduct again.

Precedent dictates that Respondent's suspension be no longer than 90 days. As argued on pages 15 through 21 in Respondent's initial brief on cross-appeal, The Florida Bar v Beneke, 464 So.2d 548 (Fla. 1985); The Florida Bar v Nuckolls, 521 So.2d 1120 (Fla. 1988); and The Florida Bar v Siegel & Canter, 511 So.2d 995 (Fla. 1987) indicate that a 90 day suspension is the appropriate sanction to be imposed under the circumstances of this case. This is particularly true where, as here, the Respondent had nothing to gain from his misrepresentations to the financial institution.

The referee's recommendation that Respondent be suspended for six months is too harsh. Proof of rehabilitation is simply not necessary in the case at Bar. A 90 day suspension will punish Respondent for his misconduct and yet enable him to carry on his practice, which has been done for eighteen years without problems, without the devastating consequences of a long-term Suspension. Such a suspension comports with the requirement set forth in The Florida Bar v Pahules, 233 So.2d 130 (Fla.1970) at 132 that the sanction imposed should "encourage reformation and rehabilitation" without destroying a lawyer's career.

CONCLUSION

Respondent asks this Court to substitute for the referee's recommended discipline a suspension of 90 days to be followed by two years probation plus payment of costs.

Respectfully submitted,

John A. Weiss
Attorney Number 0185229
P. O. Box 1167
Tallahassee, Florida 32302-1167
(904) 681-9010
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Cross-Reply Brief was mailed to David M. Barnovitz, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309 this 21st day of October, 1991.

JOHN A. WEISS