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MAR 3 1992
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

COMPLAINANT

VS.

SHALLE STEPHEN FINE,

RESPONDENT

Supreme Court Case
No. 76,584

FBN 24694

ON PETITION FOR REVIEW AND CROSS PETITION FOR REVIEW OF THE FINDINGS AND RECOMMENDATIONS OF THE HON. J. LEONARD FLEET, REFEREE

REPLY BRIEF OF RESPONDENT AND MAIN BRIEF OF CROSS PETITIONER

Shalle Stephen Fine, In Pro Per
Respondent and Cross Petitioner
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CITATIONS

STATEMENT OF THE CASE

This cause comes here on Petition for Review by The Florida Bar and Cross Petition for Review by Respondent Shalle Stephen Fine directed to the report and Recommendations of Honorable J. Leonard Fleet, Referee. References to the parties will be made in this brief by proper name or by standing here or below as appropriate. References to the Report of the Referee will be made by use of the symbol "RR". references to the Record will be made by use of the symbol "R" with appropriate page number. References to transcripts will identify the transcript with appropriate page number.

STATEMENT OF FACTS

The relevant facts were largely explicated by the referee in his report, and are unchallenged by either party, and are consequently restated here for the convenience of the Court, supplemented by editors notes based on the record as appropriate:

> "The Florida Bar filed a complaint against Shalle Steven Fine, pursuant to Chapter 3, Rules Regulating The Florida Bar. Specifically, the Florida Bar, in its original complaint, charged Respondent with violating Rule 4-1.15(a) [a lawyer shall hold a client's property in trust separate from his own funds] and Rule 4-8.4(c) [conduct involving dishonesty, fraud, deceit or misrepresentation]. upon completion of all testimony, the referee granted The Florida Bar's motion to amend the pleadings to include allegations of violation of Rules 3-4.3 [misconduct and minor misconduct] and Rule 5-1.1 [general rules regulating trust accounts].
>
> A joint pretrial stipulation was filed with your referee establishing certain matters as a result of Respondent's answer to the complaint and Complainant's

request for admissions. The joint pre-trial stipulation provides:

1. Respondent was admitted to practice law in Florida on or about May 20, 1956 and has been, and is, at all material times, a member of the Florida Bar subject to the Disciplinary Rules of the Florida Supreme Court.

2. Anthony Mosca, a resident of Dade County, Florida, died approximately 10 years prior to the filing of the complaint herein against Respondent. The son of Anthony Mosca, one Jerry Mosca, an attorney [practicing in Florida-ed.] was appointed personal representative of Anthony Mosca's estate. Anthony Mosca's estate was administered and closed prior to the death of Jerry Mosca.

3. Jerry Mosca died intestate leaving a widow and two children as the sole beneficiaries of his estate.

4. On October 23, 1981, through and including August 31, 1988, Respondent served as personal representative for the estate of Jerry Mosca. Respondent performed these services without fee or other compensation.

5. In 1986, Respondent was contacted by Mr. D. Schroeder, an individual whose business was finding lost assets. Based upon the information furnished by Mr. Schroeder, Respondent [acting through counsel-ed.] caused the estate of Anthony Mosca to be reopened [and respondent appointed as personal representative thereof-ed.] in order to recover an asset [of Anthony Mosca's-ed.] located by Mr. Schroeder.

6. On or about January 23, 1987, respondent received a check drawn upon the Barnett Bank of Tallahassee, Florida from Mr. Schroeder in the amount of $9,386.13. This check was made payable to the Estate of Anthony Mosca. Respondent admits receipt of the aforesaid check and the authenticity thereof.

7. On or about January 23, Respondent obtained from the Barnett Bank a bank check payable to himself and deposited said check into his trust account at United National Bank of Miami. The photographic reproductions of the aforesaid official bank check and deposit slip relevant thereto offered by Complainant as exhibits are of such poor quality as to not justify their inclusion herein. Respondent, it is to be noted, admits the accuracy of the allegation.

8. On January 23, 1987, respondent issued check no.

218 payable to "UNBM" (United National Bank of Miami) in the amount of $7250 from his trust account located in said institution. Respondent admits the authenticity of this allegation.

9. Respondent admits he, on or about January 23, 1987, obtained from United National Bank of Miami a cashier's check in the amount of $7250, the payee of which was respondent.

10. On or about January 23, 1987, Respondent deposited the above described cashier's check into his operation account at Commercial Bank and Trust Company. Although the exhibit offered by Complainant on this particular transaction is of such poor quality as to be almost indecipherable, Respondent acknowledges the transactions and admits the allegation.

11. On January 29, 1987, respondent issued his trust account check no 220, drawn upon the United National Bank of Miami in the amount of $1200; the payee of said check was himself. This check was deposited into the operating account of Respondent, located at Commercial Bank and Trust Company. In spite of the poor quality of the exhibits offered by the Complainant, respondent acknowledges the occurrence of the transactions an the accuracy of the allegations.

12. The combined effect of the withdrawal of the $7250 and the $1200, each of which sums were deposited into respondent's operating account, was to reduce the net balance of Respondent's trust account to the sum of $1257.08 as of February 1, 1987. Respondent acknowledges the accuracy of this conclusion.

13. By order of Honorable Moie Tendrich, entered into on or about April 5, 1988, attorney Warren M. Salomon was appointed conservator for the estate of Jerry Mosca. Respondent remained as personal representative for the estate of Jerry Mosca.

14. At all times material hereto, Warren H. Salomon had acted as attorney for the estate of Jerry Musca while respondent served as the personal representative thereof.

15. Prior to the receipt by Respondent of the check from Mr. Schroeder in the amount of $9,386.13, Respondent had received a check from Mr. Schroeder in the amount of $1700. The check for $1700 had been endorsed by Respondent to Mr. Salomon and said proceeds were reposing in the trust account of Mr. Salomon. [Where, on the unrebutted record, they reposed for months prior to

(and after) the receipt of the $9386.13, drawing no interest, while the heirs squabbled among themselves.-ed.]

16. On or about May 13, 1988, acting in response to a request from Mr. Salornon for the sum of $9,386.13 to be delivered to him for appropriate distribution to the beneficiaries of the estate of Jerry Mosca (the sole beneficiary of the estate of Anthony Musca), Respondent deposited the sum of $10,116.53 with Shearson, Lehman Brothers (the source of which is not clear from the record). On the same date, Respondent received a check from Shearson, Lehman Brothers in the exact same amount, the payee thereof being "Shalle Steven Fine, trustee". This check was then endorsed "pay to the order of Warren M. Salomon, Shalle Steven Fine, Trustee" and delivered to Mr. Salomon by respondent. Respondent admits the transactions occurred and the accuracy of the allegation.

17. On August 31, 1988, the estate of Jerry Mosca was closed, the accounts were approved, and Mr. Salomon and respondent were discharged by the court. The funds were distributed, there were no shortages in any account and no client lost any funds. (On the unrebutted record in this case, even though the heirs were acrimonious toward each other and the administrators, and were all represented by counsel, no objection was filed by anyone to the accounting and discharges in the estates.-ed.]..."

Respondent was a close personal friend and associate of the late Jerry Mosca, a member of the Bar who committed suicide in the parking lot of the Third District Court of Appeal some years ago. Respondent served as Personal Representative for Mr. Mosca. During the course of administration, rifts developed between the members of the Mosca family, and Mr. Salomon (who testified at the hearing in this cause), was unable to get them to sign off for the distributions they had received so that the estate could be closed, In the midst of this a Mr. Schroeder contacted the Respondent about some stock held in the name of Anthony Mosca, Jerry's father. Jerry had been the Personal Representative and sole heir of his father,

who had died years before, and whose estate had been closed. The Respondent, with the assistance of Mr. Salomon (who practices in the area of probate administration; that is not an area of respondent's expertise, as he testified) had the estate of Anthony Mosca reopened and himself appointed as Personal Representative thereof (again without fee) to receive the proceeds of the stock. Mr. Schroeder deliveredthose proceeds to Respondent in two checks. The first, for $1700, was endorsed to Mr. Salomon's trust account, where it languished while the heirs squabbled. The second, in the amount of $9,386.13, was exchanged by Respondent for a cashiers check of that amount, deposited in Respondent's Trust Account, and withdrawn therefrom virtually immediately. Immediately upon Mr. Salomon calling for those funds for distribution, the funds with interest were obtained from Shearson in a check made to Respondent as trustee and endorsed to Mr. Salomon. Respondent was unable to testify from recollection and does not have the records showing how the account was handled from the time of deposit to disbursement. At the time of these events the Respondent was not only practicing law, but was actively engaged in real estate development in Dade County for his own account, both individually and in association with others; he was under a substantial pressure of work, and he was handling many transactions and checks in a multitude of accounts every day. Those records are not available because respondent fell ill in 1989, and his office was closed and his case load absorbed by friends during the four months he was out; Respondent had been in an auto an auto accident in November, 1985

which disabled him for 6 months; he went through a chapter 11 proceeding in 1988. As a result of the records examinations and office closings and moves attendant on these events, Respondent's records and files have essentially been lost or destroyed. The referee remarks on the fact that the Respondents testimony on these points is unsupported by independent evidence. Respondent points out that it is unchallenged in the record. Irrespective of that point, the Referee, a Judge with many years experience on the bench, found no intent. The circumstances in this case are at least equally consistent with the Respondents's position that the funds were lent to one of the ventures or otherwise similarly invested. There is no contention that at the time these were not suitable investments.

SUMMARY OF ARGUMENT

ON THE APPEAL

I. The findings of the referee on the charge of violating Rule 4-8.4(c) involving dishonesty are not only clearly erroneous, but are correct as a matter of fact and are required as a matter of law since the Bar did not carry its burden of proof.

II. The attack on the referees recommendation as to sanctions is based upon the attack on his findings as to the 4-8.4(c) finding. Since that finding is clearly correct, the attack on the recommended sanction ought fail, and in fact if any sanction is imposed it should be less than that recommended.

ON THE CROSS APPEAL

I. The charges made ought not be sustained as a matter of law based upon the facts of record.

ARGUMENT

ON THE PETITION

I. THE REFEREE'S FINDING AS TO VIOLATION OF RULE 4-8.4 (C) WAS NOT CLEARLY ERRONEOUS.

The question argued by the Bar is one of intent. It is undisputed that the Bar has the duty of proof of its allegations by clear and convincing evidence. They likewise have the burden here of showing that the referee's findings of fact are clearly erroneous, insofar as they challenge those findings. Intent is a question of fact and of circumstantial evidence. In a civil case, The Supreme Court of Florida held in Tucker Brothers Inc. vs. Menard, 90 So. 2nd 908 (1956) that:

> "An ultimate fact can be established by circumstantiual evidence in a civil action just as it can be done in a criminal case. The difference is the quantum of proof necessary to justify the inference that the ultimate fact existed. In a criminal case the rule is that the circumstantial evidence must point to guilt to the exclusion of any reasonable hypothesis of inncence. The rule in civil cases is not so burdensome. In a civil case when circumstantial evidence is relied upon to prove a fact essential to recovery, the particular inference of the existence of such fact arising from the circumstances established by the evidence must outweigh all contrarty inferences to the extent that it amounts to a preponderance of all reasonable inferences that might be drawn from the same circumstances. In other words, if the proved circumstances justify an inference pointing to the essential fact, which inference outweighs all reasonable inferences to the contrary, then it can be said that a conclusion as to the existence of the ultimate fact is justified by the circumstantial evidence."

In the case at bar, which is a civil penal proceeding where the standard of proof of the Bar is that of clear and convincing

evidence, their burden in regard to circumstantial evidence is naturally the same as their general burden of proof; that is they must establish the conclusion by circumstantial evidence which clearly and convincingly outweighs any other reasonable inference. In the case at bar, the conclusion that the funds were deposited in trust account and disbursed through Respondent as trustee theough some deep plan of concealment from a conservator who was tyotally unconcerned with the source of the funds is opposed to the earmarking of the funds through deposit and the reidentifying of them through the disbursement as funds acquired as a fiduciary and not the personal funds of Respondent. We suggest that as a matter of law intent is not established on this record; when there is added to that the judgement of the Referee as a matter of fact finding no intent, we suggest that the ruling cannot be attacked as clearly erroneous.

The Bar relies on its allegations of "machinations" with respect to these monies. Respondent has acknowledged at every stage of these proceedings that he was a fiduciary, and that he was obligated to exercise the duties and responsibilities of a fiduciary with respect to the funds. That he satisfactorily accounted for them is a question both attested to and foreclosed by his discharge in the probate. What is left as the legitimate subject of the Bar's inquiry in this matter is how the account was handled between receipt and disbursement, and how that affects the referee's findings with regard to Respondent's intent.

Respondent suggests that these monies were not received

as monies of a client. He received them as personal representative of the estate. As such, it was and is his understanding that the monies were to be invested in the type of investments which would be made by a reasonably prudent man, F.S. 518.11. To say that an attorney who is acting as Personal Representative, (clearly within the definition of Fiduciary under F. S. 518.10) must retain the funds which come to him in that capacity in his trust account either initially or over a period of time is, we suggest, contrary to reason and general practice and as well disqualifies the Bar at a stroke from the office of Fiduciary responsible for the management of monies of another. When acting as Fiduciary, the lawyer has the same responsibilities and must have the same discretion as any other Fiduciary, or he cannot fulfil his responsibilities. This is not to say that Respondent was free to do anything he wanted with the funds; nor does it relieve him of the responsibility of acting in a reasonable manner consistent with the responsibilities of a Fiduciary while he held them; but respondent does suggest that his actions with respect to them must be measured by the same standard applicable to others in that position; and if an abuse of those standards is alleged, then it must be proven and brought within the purview of the Rules by specific charge.

The deposit into the trust account clearly identified the funds as monies which were not the personal funds of Respondent, and the check out from Shearsan clearly identified the disbursement to Mr. Salomon as the funds received (plus interest). While there

were no doubt other ways of doing this, what was done clearly served to earmark the funds in and out as not being Respondents personal funds. The Bar has characterized this as machinations designed to conceal the source of the funds from the conservator. As the conservator testified in the case, he was not interested in the source of the funds, only in the fact that they were on hand when he called for them. As the respondent testified, he (the Respondent) was interested in identifying the disbursement as not being his personal funds, both to clear the balance on the receipt and to identify the transactions for accounting purposes. At any time from the moment of deposit, if the respondent had passed away a review of his trust account book would have identified the funds in, and after disbursement a check with Mr. Salomon would have established the funds out. That, parenthetically, is what happened in this case, fortunately without the necessity of Respondent's demise. The Bar audited his trust account in relation to a complaint which came to nothing (the Respondent had not accepted trust funds for administration for some time preceding these events) and found the deposit, and a check with Mr. Salomon produced the disbursement.

II. THE 90 DAY SUSPENSION RECOMMENDED BY THE REFEREE IS APPROPRIATE IF HIS LEGAL CONCLUSIONS ARE UPHELD OVER THE CROSS APPEAL.

The attack on the referee's recommendations is grounded on the assumption that his findings as to intent were clearly erroneous. Since the findings are not clearly erroneous as a matter of fact, as shown above; and since they are correct and required as a matter

of law, as also shown above; we would suggest that in the light of his conclusions the recommendation is, if anything, too severe, as we will urge post.

ON THE CROSS PETITION

I. AS A MATTER OF LAW THE FACTS ESTABLISHED DO NOT CONSTITUTE THE VIOLATIONS CHARGED.

A. As the Referee noted, the Bar first charged Respondent with violating Rule 4-1.15 (a), respecting a lawyer holding his client's property separate from his awn. That Rule applies in terms to funds received by a lawyer in connection with a representation of a client. In fact the respondent was a Personal representative. He was the title holder of the property, subject to his fiduciary responsibility to his appointing Court. He was in fact a client, not a lawyer representing a client in these transactions.

B. The Bar originally charged a violation of Rule 4-8.4 (c), relating to conduct involving fraud or dishonesty. Respondent was found not guilty of that charge and that forms the subject of the Bar Petition, treated above.

C. At the conclusion of the proceedings, the Bar amended to include a charge of violation of Rule 5-1.1 respecting trust accounts. In fact, that Rule specifically exempts personal representatives' accounts from trust accounting rule requirements in Rule 5-1.2(a). The Rule requires that the exempted account be subject to Court Supervision.

D. The Bar moved to include a charge of misconduct under Rule

3-4.3. This is a catchall rule. Respondent suggests that the evidence as adduced is clearly consistent with a finding of negligence on the part of respondent in that he cannot produce the records substantiating the actual transactions from the time of deposit to the time of disbursement. That this inability is due to factors beyond his control may not absolve him of the responsibility for that. The Supreme Court of Florida has held that a fiduciary must keep clear, distinct and accurate accounts, all presumptions are against him and all doubts are resolved against him, and if he loses his accounts he must bear any resultatnt damage; in other words he will be liable for the entire amount recfieved, without deducting any expenses. Benbow vs. Benbow, 157 So. 512 at 519 (Fla. 1934). In fact, in the case at bar, Respondent accounted for the entire sum received plus interest immediately on request therefor and was discharged by the Court from his responsibility therefore without objection (and while he was presumably in a much better position to answer questions about his administration) long before the Bar became aware of the matter. We would urge that on this record Respondent's negligence may have been established, but it ought not sustain the charge against him.

CONCLUSION

Respondent respectfully suggests and urges that the Referee was correct and not clearly erroneous in his findings of fact with respect to the Rule 4-8.4(c) charge and the Bar's Petition for review ought be denied. We further urge that his conclusions of

law ought not be upheld on the facts with respect to the charges of violation of Rule 5-1.1, 3-4.3 and 4-1.15. If, however, the referee is upheld, we suggest that the suspension recommended is the most severe that can be justified on the record. The respondent was acting as Personal representative for his friend without compensation. An asset was discovered which belonged to the estate and he accepted employment without compensation to get it and in fact received it. Having done so, he held part of it until it was called for and then immediately delivered it with interest, and subsequently his accounts were approved and he was discharged without objection. It is clear that he was a fiduciary; it appears that he cannot, because of circumstances, produce his records and papers with respect to the funds between the time of receipt and the time of disbursement. He does not practice in the area of Estate Administration and has never so practiced. In this state of the record , we suggest that at most the finding under Rule 3-4.3 can be sustained, and that an appropriate sanction if that charge were sustained would be a reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this brief was hand delivered to Paul Gross, Esq., The Florida Bar, Suite M-100, Miami, Fl. 33131 and mailed to John T. Berry, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Fl. 32399 on the 2nd day of March, 1992.

Shalle Stephen Fine