IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,766

THE FLORIDA BAR,

Complainant,

vs.

YVONNE E. REED,

Respondent.
_____/

REPLY BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR REVIEW

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ARGUMENT

I

THE REFEREE ERRED IN RECOMMENDING ANYTHING BUT THE SLIGHTEST DISCIPLINE ON COUNT I BECAUSE THE RESPONDENT ACTED IN GOOD FAITH AND TOOK THE ONLY RATIONAL, PRUDENT PATH THAT WOULD PROTECT ALL PARTIES.

The Bar has adopted an extremely myopic and crabbed view of the material facts.

The Bar attempts to distinguish *The Florida Bar v. Lumley*, 517 So.2d 13 (Fla. 1987), by referring to this Court's holding that there was "no intent to deprive the clients of their money". 517 So.2d at 14. Here, the Bar asserts, without any foundation, that the Respondent's conduct is dissimilar. The Bar blandly asserts, in an egregiously misleading statement, that the Respondent purposely spent approximately $28,000.00 of disputed monies on a home that she owned. However, the Referee specifically found that:

> "...The disbursements of over $28,000.00 began on November 16, 1990 *with the intent of conserving the property*. At this time Respondent was the title owner to the property." (RR,¶28) (Emphasis Added)

The Bar also ignores the very important finding of the Referee that:

> "29. Respondent paid these monies, as well as using her own money for contractors and for building materials. *She paid off the mortgages and the expenses incurred in the maintenance of the property as well as recovering approximately $31,000.00 for the benefit of the Bank of New York, which was $2,000.00, more than if the account had been turned over to that bank on September 21, 1990....*" (RR, ¶29) (Emphasis Added)

The Bar also wilfully ignores the Referee's finding that:

> "...Respondent took the prudent course of conduct to expend the monies only to conserve the property when it was confirmed the monies were available." (RR,¶30)

The Bar also wilfully ignores the incontestable finding by the Referee that:

> "...Respondent took the only rational path that would conserve the property and would reduce the exposure of all parties. Respondent's actions ensured that the least harm would come to the most people from a situation for which she was neither responsible for, nor did she promote." (RR,p.12)

The Bar disagrees with the Referee's finding that the Respondent's actions were only a technical violation of the Rules. First, the Bar is wrong and cites no evidence to the contrary. Second, the Bar did not file a cross petition and thus is precluded from contesting this finding.

The Bar cites *The Florida Bar v. Wilson*, 599 So.2d 100 (Fla. 1992), and *The Florida Bar v. Breed*, 378 So.2d 783 (Fla. 1979), for the unremarkable proposition that trust account violations are serious transgressions, regardless of no client being injured. However, again, what the Bar wilfully refuses to address is that the Referee found that the Respondent acted in good faith and without even the intent to harm anyone.

The Bar's citation of *The Florida Bar v. Weiss*, 586 So.2d 1051 (Fla. 1991), and *The Florida Bar v. Simring*, 612 So.2d 561 (Fla. 1993), to show the distinction between the negligent handling of a trust account and the intentional misuse of a trust account totally misses the mark. Again, although the Bar refuses to address it, the Referee found that the Respondent acted in good faith and without even the intent to harm anyone.

This Court must reject the Referee's recommendation and impose, at worst, a public reprimand.

II

THE REFEREE ERRED IN RECOMMENDING ANYTHING BUT THE SLIGHTEST DISCIPLINE ON COUNT III BECAUSE THE RESPONDENT ACTED IN GOOD FAITH AND ANY PREJUDICE WAS EPHEMERAL, AT WORST, AND NOT HER FAULT.

The Bar once again avoids the material facts and findings of the Referee.

The Respondent testified that she did not tell the Hellers that she was able to represent them as an attorney (T.343-344). She told them that if they had a problem with her representing Carol Sullivan at the closing she would withdraw and have someone else do it (T.344). Mr. Heller said "I owned a Century 21 franchise. I have been through these closings hundreds of times. That is not necessary." (T.344). Mr. Heller started talking about the title documents (T.344). The Respondent said "I will not be able to represent you at the closing if you are giving me permission to represent Carol." (T.344).

Mr. Heller asked the Respondent if she would prepare his closing documents (T.345). He said it would be much cheaper than his having to have an attorney there (T.345). Mr. Heller was looking for the cheapest, fastest way out (T.345).

The Referee found that:

> "39. Testimony from both Panton and Respondent was that on August 12, 1990 at the Heller residence, Respondent advised Mr. Heller that she was the attorney for the Purchasers, *and could not represent the Hellers.* Subsequently, she advised, that if the Hellers wished, she would prepare the closing documents in this closing. Since it would be cheaper, *and Mr. Heller wanted to avoid any costs whatsoever*, he agreed that she do so. Respondent did prepare the closing documents for the Hellers." (RR,¶39) (Emphasis Added)

After Mr. Heller learned that it would not be an all cash closing, he spoke to his attorney, Joseph Hubert (T.358). Mr. Heller then insisted on closing (T.359). Joanna

Youngblood testified that she had several telephone calls with Mr. Heller (T.165). Mr. Heller said: "We've got to close." (T.165). They said that they had reviewed the problems with their attorney, Joseph Hubert if the mortgages were not paid off at the closing(T.165;167).

When she realized that they would have to close subject to the mortgage on the property, all of that was reviewed with the Hellers (T.170). Mr. Heller insisted on closing (T.170), Ms. Youngblood reviewed with Mr. Heller the time that he would have to wait to see if the mortgages would be paid off (T.170). Mr. Heller insisted on closing (170).

The entire Addendum, which was the agreement of the parties (RR,¶38), and which fully explained the situation with the mortgage, was reviewed with the Hellers (T.185-190).

After it became apparent that Sullivan and Garcia were not going to be able to come up with the remainder of the purchase price in cash, Mr. Panton refused to go to the closing because he did not think it was in the best interests of the Hellers to close with somebody from whom they did not have guaranteed funds (T.129). He told that to the Hellers (T.129). The Hellers insisted on closing (T.129). Mr. Panton advised the Hellers not to close (T.130-131).

The Referee found that Mr. Heller had advised the parties, as early as August 12, 1990, and as late as the first closing itself on August 30, 1990, that he was represented by attorney Joseph Hubert. A November 5, 1990, letter from Mr. Hubert sent to the Respondent confirmed that the Hellers were "my (Hubert's) clients" (Defendant's Exhibit 1). The Referee further found that contrary to Mr. Heller's testimony that he had never seen the letters accompanying the unexecuted addendum (which were sent to his wife's

business address), several witnesses testified that it was fully discussed with him, and Bar counsel conceded in his summation that he believed Mr. Heller had probably seen it, and that it was the agreement of the parties (RR,¶38).

The Referee found that Mr. Heller's testimony that he considered the Respondent to be "his attorney" simply was not credible in light of all the other testimony and *since disclosures were made* (RR,¶40). However, she found that the Respondent represented both sides in the Heller to Sullivan and Garcia transaction *to a very limited extent* (RR,¶36).

As shown *supra* and in the Respondent's initial brief, the Hellers were *fully* informed of the difficulty that might arise because of the lack of all cash at the closing. They were informed by their attorney, Mr. Hubert, by Ms. Youngblood, by Mr. Panton, and by the Respondent, through the addendum which she prepared. Moreover, Mr. Heller is a realtor. He was very familiar with mortgages. He went to the closing with his eyes open and fully aware of all contingencies. There is nothing more the Respondent could have told the Hellers.

The finding of the Referee is inescapable:

> "...Although the complainants in this cause, the Hellers, were the driving force in creating this problem by their insistence to close this real estate deal, despite the warnings signs that were beginning to appear, it is the Hellers whose financial interests were completely resolved both on August 31, 1990, and later when the mortgages were paid off in the Reed to Martino sale in January, 1991." (RR,¶29)

The Bar argues, at p.12, that it was the Respondent's representation of the Hellers insofar as completing their closing documents, and as their realtor, which caused her to be obligated to accede to the Hellers' request to close. The Bar wilfully ignores the overwhelming uncontradicted testimony of the witnesses and the finding of the Referee that

the Hellers were fully informed of any difficulty that might arise by closing without all cash and that they absolutely, positively, *insisted* on closing. The Bar's speculation, at p.12, that "perhaps" if the Respondent had only one master she would not have felt compelled to close is sheer rubbish. The Respondent, and everyone else, was trying to help the Hellers who were in terrible financial shape and were adamant about closing. The Bar's snide comment, at p.12, that if the deal had not closed the Respondent's real estate commission could have been forfeited, is a low blow, which is totally unsupported by even a syllable of testimony.

The Bar also argues that the Hellers were adversely affected because they remained liable for one of the mortgages on the property. However, as has been shown, the Hellers were very aware of that liability, they nevertheless insisted on closing, and the mortgage was satisfied. The problem arose when Sullivan and Garcia did not meet their commitment to come up with all cash at the closing.

The Bar argues that this case is different from *The Florida Bar v. Teitelman*, 261 So.2d 140 (Fla. 1972), because the Respondent was also the Hellers' realtor. The Bar then asserts that the Respondent should have suggested that the Hellers have someone else prepare their closing documents. The Bar wilfully overlooks the fact that the Hellers were insistent on closing. Moreover, the Referee found that:

> "39. Testimony from both Panton and Respondent was that on August 12, 1990 at the Heller residence, Respondent advised Mr. Heller that she was the attorney for the Purchasers, that if the Hellers wished, she would prepare the closing documents in this closing. *Since it would be cheaper, and Mr. Heller wanted to avoid any costs whatsoever, he agreed that she do so....*" (Emphasis Added)

The Bar's reliance upon *The Florida Bar v. Mastrilli*, 614 So.2d 1081 (Fla. 1993), is misplaced. This Court characterized the attorney's conflict in *Mastrilli* as one in which the

attorney: "...filed suit against his own client *in the same matter* for which he had been retained...." 614 So.2d at 1082 (Emphasis Added). That is not the situation here. Nor is it the situation as regards the Respondent's eviction of Sullivan and Garcia.

This Court must reject the Referee's recommendation and impose no more than an admonishment.

III

THE REFEREE ERRED IN RECOMMENDING ANYTHING BUT THE SLIGHTEST DISCIPLINE ON COUNT IV BECAUSE THE RESPONDENT ACTED IN GOOD FAITH, ANY PREJUDICE WAS EPHEMERAL, AT WORST, AND SHE SAVED THE PROPERTY.

The Bar again wilfully overlooks the material facts and findings of the Referee.

The evidence overwhelming establishes a lack of bad faith on the part of the Respondent and that she acted most responsibly. The Referee held that the Respondent:

> "...took the only rational path that would conserve the property and would reduce the exposure of all parties. Respondent's actions ensured that the least harm would come to the most people from a situation for which she neither responsible for, nor did she promote." (RR,p.12)

Ms. Sullivan suffered no harm whatsoever.

Ms. Sullivan realized that there were many problems and that she and Mr. Garcia were not going to be able to come up with the money to pay off the mortgages on the property (T.284). Ms. Sullivan asked the Respondent initially to remarket the property (T.284).

Ms. Youngblood tried to hold an auction to sell the property when it was still in Ms. Sullivan's name to pay off the mortgages (T.285). Mr. Garcia would not let people in to the house to see it (T.285). At that point, there was nothing else they could do (T.285). They

sat down and talked to Ms. Sullivan (T.285). They counseled with her and told her essentially that if she wanted to, she could quit claim the deed over to the Respondent and the Respondent could market it (T.285). The Respondent candidly admitted that she should have put "trustee" at the end of her name as the grantee on the quit claim deed (T.285). However, the Respondent acted at all times as trustee.

Ms. Sullivan was very emotional at the time (T.285-286). Ms. Sullivan realized that there were tremendous problems that were going on (T.286). She realized that the whole thing was costing everyone a tremendous amount of heartache (T.286). This was the way Ms. Sullivan wanted to handle it (T.286). The Respondent took title to the property in her own name (T.286). This was done in accordance with the addendum (Bar Exhibit "A") which was the agreement of the parties (RR,¶38). This was necessary to prevent foreclosure, which the Respondent did (RR,¶13). The Respondent requested a quit claim deed, in blank, on the day of the closing, disclosing that fact to everyone by the addendum which is Bar's Exhibit "A" pending satisfactory compliance with the agreement and the deposit and receipt contract (RR,¶38). The Respondent was forced to evict Ms. Sullivan and Mr. Garcia (T.286-287). The Respondent helped Ms. Sullivan move (T.288).

The Bar's tears for Ms. Sullivan and Mr. Garcia are crocodile. They did not meet their commitment to bring all the cash to the closing. They did not meet their commitment to pay off the mortgage. Foreclosure was imminent. They had passed the eleventh hour. They had neither the ability nor the inclination to protect the Hellers or the Bank of New York. Only the Respondent's swift action prevented disaster for everyone.

The Respondent sought advice from three attorneys as to what to do. They all told her that the money held in trust should be used to pay the mortgages and conserve the property (T.338-339;296;296-297). All the attorneys advised her to conserve the property (T.297). She was a conservator of the funds (T.340). She conserved the property or funds for whichever bank might be entitled to it (T.340).

The Bar's lament about the Hellers is misplaced. Yes, they were still liable for one of the mortgages. Yes, if the home had been foreclosed, it was the Hellers whose credit rating was at risk. However, it was the *Respondent* who prevented the foreclosure. "...Although the complainants in this cause, the Hellers, were the driving force in creating this problem by their insistence to close the real estate deal, despite the warning signs that were beginning to appear, it is the Hellers whose financial interests were completely resolved both on August 31, 1990, and later when the mortgages were paid off in the Reed to Martino sale in January, 1991." (RR,¶29).

The Bar's concern for the Bank of New York is unnecessary. The Bar conveniently ignores that:

> "29. Respondent paid these monies as well as using her own money for contractors and for building materials. She paid off the mortgages and the expenses incurred in the maintenance of the property as well as recovering approximately $31,000.00 for the benefit of the Bank of New York, *which was $2,000.00 more than if the account had been turned over to that bank on September 21, 1990....*" (RR,¶29)

The Bar's table at p.16 and its contention that the Respondent profited by $5,904.58 is egregiously misleading. The Referee disagreed:

> "The proceeds received from the Martino sale were reimbursements, and, *without contradiction by the Bar*, constituted a net loss to her from funds

expended to repair the property from her own monies...." (RR,¶35) (Emphasis Added)

The "profit" that the Bar refers to was the Respondent's fee. The Referee found the Respondent not guilty of charging an excessive fee (RR,p.12). The Bar did not seek review of that ruling. It is most disturbing that the Bar seeks to resurrect that dead issue in its brief.

The Bar's attempt to distinguish *The Florida Bar v. White*, 368 So.2d 1294 (Fla. 1979), fails. That no consideration was paid is immaterial, since the Respondent merely was acting as a conservator of the property. Foreclosure was imminent. She saved it from foreclosure. After selling the property she held the proceeds for the benefit of the Bank of New York.

The Bar's reliance upon *The Florida Bar v. Feige*, 596 So.2d 433 (Fla. 1992), is misplaced. In *Feige*, there was fraud. There is only good faith here. *Feige* involved an attorney representing a client and himself to protect the attorney's own interests. That simply is not present here.

This Court must reject the Referee's recommendation and impose an admonishment.

IV

THE MITIGATING FACTORS GREATLY OUTWEIGH ANY AGGRAVATING FACTORS AND COMPEL THE CONCLUSION THAT, AT WORST, A PUBLIC REPRIMAND IS THE APPROPRIATE DISCIPLINE.

The Bar does not contest the sterling testimony of the character witnesses. It can not. They included: "...attorneys, private citizens, a career police sergeant, an assistant state attorney and a circuit judge. These individuals attested to her compassion, integrity and honesty and are indicative of her credibility." (RR,¶18).

The Bar asserts that there was no absence of a dishonest or selfish motive. Standard 9.32(b). The Bar whines that the Respondent intended to make money from the real estate deal through her attorney's fees, a real estate commission, and a share of the title insurance premium. The Respondent must belabor the obvious. An attorney in private practice is entitled to earn those monies. There was no finding by the Referee of anything other than an intent by the Respondent to protect all parties to the fullest extent that she was able.

The Bar also disputes that the Respondent made a timely good faith effort to make restitution and to rectify the consequences of her misconduct. Standard 9.32(d). It contends that the Referee's finding that: "...Respondent took the only rational path that would conserve the property and would reduce the exposure of all parties...." RR,p.12, referred only to the technical trust account violations and not to the deeding of the property to the Respondent. While it is true that that finding appears under the Referee's recommendation as to Count I, it applies equally to all her actions throughout this matter.

The Bar asserts that there are six aggravating factors.

First it asserts the existence of a prior disciplinary offense. However, it concedes, as it must, that the Referee found the Respondent's prior private reprimand to be innocuous and found that it did not affect her recommendation on discipline. (RR,p.14).

The Bar asserts that the Respondent had a dishonest or selfish motive. That is flat out wrong. The Respondent acted in good faith throughout.

The Bar asserts that there are multiple offenses. However, they were only of the most minor sort. And, they all arose out of the same event.

The Bar asserts that there was a bad faith obstruction of the disciplinary proceeding. If there was, the blame lies with the Respondent's trial counsel, not with her.

The Bar asserts that the Respondent refused to acknowledge the wrongful nature of the conduct. Even if that were accurate, the many favorable findings by the Referee fully explain and excuse her failure to do so.

The Bar asserts that the Respondent has had substantial experience in the practice of law. However, she had not had substantial experience in the real estate area.

The Bar argues, at p.21, that the Respondent's actions were intentional and not negligent. The Bar conveniently overlooks that the Respondent's actions were in good faith and to protect all parties.

The Bar argues, at p.21, that the Hellers could have been injured in a foreclosure action. However, it was only through the actions of the Respondent that foreclosure was avoided.

The Bar argues, at pp.21-22, that the Respondent did not fully discuss with Sullivan the conflicts arising from her request for the property and that the Respondent should have made better disclosure to the Hellers. However, foreclosure was imminent. Sullivan had no means to forestall it. The Respondent's actions stopped foreclosure. The Hellers were fully informed of and aware of the difficulties of closing without all cash. They went into the deal fully informed and with their eyes totally wide open.

The Florida Bar v. Neely, 587 So.2d 465 (Fla. 1991), is not only not very similar to this case, it is of a different genre. In *Neely*, the attorney, through dishonest dealings, obtained title to and mortgaged his client's mother's property, failed to preserve funds that should

have been held in escrow for another client's treating physician, and made false representations about costs reimbursable by a third client. Here, the Respondent acted only in good faith.

Identically, *The Florida Bar v. Crabtree*, 595 So.2d 935 (Fla. 1992), is different in kind. There, the attorney not only represented two different people in the same transactions without informing one of his representation of the other, he took fees and an interest in the transactions without fully explaining his part and share in the transactions. Moreover, he wrote phoney letters to mislead anyone who was looking into the transactions. Here, the Respondent acted only in good faith.

The Bar argues in its conclusion that the Respondent frequently had to choose between her own interests and that of the client. That simply is not so. The evidence and findings of the Referee are uncontradicted that the Respondent acted in good faith to protect all parties.

CONCLUSION

The Bar exalts form over substance. This Court must not countenance such a position.

This Court must reject the Referee's recommendation and impose, at the worst, a public reprimand and admonishments on the Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Reply Brief of Respondent is Support of Petition for Review** was mailed to **KEVIN TYNAN, ESQ.**, The Florida Bar, Suite 835, 5900 North Andrews Avenue, Ft. Lauderdale, Florida 33309 this 13th day of June, 1994.

By: _____
Louis M. Jepeway, Jr.