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AUG 5 1994

IN THE SUPREME COURT OF FLORIDA

CLERK SUPREME COURT

By _____
Chief Deputy Clerk

THE FLORIDA BAR,
Complainant,

Case No. 82,673
(TFB No. 93-10,983(13C))

v.

H. EUGENE JOHNSON,
Respondent.

_____ /

THE FLORIDA BAR'S REPLY BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Respondent, H. EUGENE JOHNSON, will be referred to as "Respondent". The Florida Bar will be referred to as "The Florida Bar" or "The Bar". The Florida Bar's Initial Brief will be referred to as "IB". The Respondent's Answer Brief, "AB". "R" will refer to the record. "Rule" or "Rules" will refer to the Rules Regulating The Florida Bar.

STATEMENT OF THE FACTS AND THE CASE

The Florida Bar adopts by reference its initial statement of the facts and of the case as contained in its Initial Brief.

SUMMARY OF ARGUMENT

The Referee's findings of fact and conclusions of law are contrary to the evidence in the record and are clearly erroneous.

The Florida Bar has based its case against Respondent almost entirely on the documentary evidence in the record and the testimony and prior statements of Respondent.

Respondent's argument in his Answer Brief is based on incorrect or inaccurate premises. Respondent argues that the trial court, in the prior civil case Bartholomew v. Johnson, No. 92-7907 LT (Fla. 13th Cir. Ct. August, 1992), made various findings of fact and rules on the merits of the case. The trial court, however, made findings of fact only as related to the issue of the standing of Bartholomew to file the action and granted defendant's Motion for Summary Judgment on the procedural basis of lack of standing, not on the substantive issues of the case.

Respondent off-handedly dismisses the case law presented by the Bar as "irrelevant" and misapplied but makes little or no attempt to factually distinguish the cases from the instant case or to refute the case law by offering contrary cases in support of his position.

Instead of arguing his position, Respondent chose to file his Answer Brief with rhetorical questions and literary quotations colored with sarcasm.

The findings and recommendations of the Referee should be rejected and Respondent should be found guilty of all of the charges of The Florida Bar, and appropriate discipline should be imposed by this Court.

ARGUMENT

Respondent concludes in his Answer Brief that The Florida Bar has based its case against him on the testimony of Joseph Bartholomew. To the contrary, The Bar's case is based almost wholly on the documentary evidence, such as the lease and affidavit, and the statements and sworn testimony of Respondent himself.

Respondent incorrectly states, in his Answer Brief, that the trial court, in the case Bartholomew v. Johnson, No. 92-7907 LT, denied that Respondent's "obligations to the bank in the affidavit also cured the defects in the lease as to Joseph Bartholomew." (AB p. 11). Respondent has continually argued throughout these proceedings that, in the civil case between Bartholomew and Respondent, the trial court made various findings and determinations as to the merits of the case. This is simply not true. The trial judge issued an order granting defendant's Motion for Summary Judgment not on any of the merits of the case but solely on the procedural issue of the plaintiff's lack of standing to sue due to his wife's failure to join in the lawsuit. The court addressed no other issues or facts in its order, specifically stating in the order that "defendant has moved for summary judgment, raising several points, only one of which requires discussion," that one being the issue and facts regarding plaintiff's lack of standing. (R, Respondent's Exh. #1).

In his Answer Brief, Respondent argues that the Bar has misapplied the ruling in Waterman Memorial Hosp. Ass'n, Inc. v. Division of Retirement, Dept. of Admin., 424 So. 2d 57 (Fla. 1st DCA 1982). It is Respondent, however, that has misunderstood the ruling of the Court in Waterman and has misapplied it to the facts of this case. The facts of the Waterman case are that the Waterman Memorial Hospital sought a declaratory judgment allowing it to withdraw from the State Retirement System and to have contributions reimbursed by the Division of Retirement.

The Division of Retirement resisted such a withdrawal and reimbursement of contributions by asserting that the Division may be stopped to deny certain employees of the hospital the right to participate in the system. The Court stated that the employees were not parties to the action and that the Division could not rely upon an estoppel against itself. The Division was not permitted to assert the estoppel rights of third parties (the employees) against it to justify its position in regards to another, the hospital.

The Waterman case is directly analogous to this case. In this disciplinary proceeding, Respondent (being in the Division's position) asserts that he may be estopped to deny the truth of facts contained in the Tenant's Affidavit by the Village Bank (not a party to this proceeding). Respondent seeks to use the bank's estoppel right in this proceeding to justify his position that, while his statements in the

Affidavit did not reflect the actual agreements between Respondent and Bartholomew, he may be estopped to deny the truth of the statements by a third party; therefore, he did not lie or misrepresent facts in violation of the Rules Regulating The Florida Bar.

Based on Waterman, Respondent may not properly assert the estoppel right of a third party in his own defense in this proceeding.

Respondent asks what else he "could have done to be fair to the bank and to be fair to his right to free occupancy of the suite." (AB p. 16). The simple, obvious and ethical response is that he could have refused to execute the lease and affidavit unless the documents accurately described the agreements between Respondent and the Bartholomew. Respondent acknowledged this option in his deposition on June 29, 1992. (R, Bar Ex. 6, p. 12, L. 25 through p. 13, L. 16). That would have been fair to the bank. Instead, Respondent misled the bank to believe that there existed a valid lease between Respondent and Bartholomew and that Bartholomew had \$751.33 per month worth of rental income from Respondent with which to pay his mortgage payment to Village Bank.

Finally, the Respondent's own statements again support the Bar's case. Respondent admits in his Answer Brief that making the lease "non-binding" was for his own protection and that "certainly it was self-serving." (AB, p. 18-19). Also, Respondent's pervasive sarcastic tone throughout his Answer

Brief only serves to further demonstrate Respondent's lack of respect for the legal system.

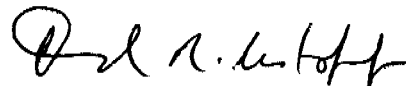
The findings and recommendations of the Referee should be rejected and Respondent should be found guilty of violating Rule 3-4.3, Rule 3-4.4, Rule 4-4.1(a) and (b), and Rule 4-8.4(a), (b), and (c) of the Rules Regulating The Florida Bar.

CONCLUSION

The documentary evidence and testimony and prior statements of Respondent, as well as other witnesses in this case, clearly establish Respondent's violation of the Rules Regulating The Florida Bar. Respondent has engaged in conduct involving fraud, misrepresentation, false swearing, and breach of duty owed to his client. Respondent has admitted that the lease was made "non-binding" for his own protection and that this was "self-serving." Respondent has demonstrated a lack of respect for these proceedings by taking an overtly sarcastic tone throughout his Answer Brief.

WHEREFORE, The Florida Bar respectfully requests this Court to reject the Referee's findings of fact and conclusions of law challenged by the Bar, specifically rejecting the Referee's recommendation that Respondent be found not guilty of violating Rule 3-4.3, Rule 3-4.4, Rule 4-4.1(a) and (b) and Rule 4-8.4(a), (b), and (c); find the Respondent guilty of violating the above rules; suspend Respondent from the practice of law for one (1) year; and assess the costs of the disciplinary proceedings to Respondent.

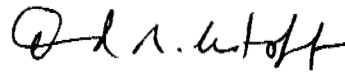
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF THE FLORIDA BAR has been furnished by ordinary U.S. Mail to H. Eugene Johnson, Respondent, at 715 E. Bird Street, Suite 409, Tampa, FL 33604-3109, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 4th day of August, 1994.



DAVID R. RISTOFF
Branch Staff Counsel