IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT SCOTT KAUFMAN,

Respondent.
_____/

Supreme Court Case
No. 83,985

097

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On Petition for Review

ANSWER BRIEF OF COMPLAINANT

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INTRODUCTION

For the purposes of this brief, The Florida Bar will be referred to as "The Florida Bar", "the Bar" or "Complainant". ROBERT SCOTT KAUFMAN will be referred to as "Respondent" or "Mr. Kaufman" or "Robert S. Kaufman".

Abbreviations utilized in this Brief are as follows:

TR. Will refer to the transcript of the final hearing as to discipline held on September 13, 1995.

A. Will refer to the appendix.

A* The titles of those items containing an asterisk have been modified to promote easier reading for the Court.

STATEMENT OF THE CASE AND OF THE FACTS

On July 11, 1994, The Florida Bar filed its complaint charging the respondent with misconduct which arose from his intentional concealment of his own assets sought in a civil judgment. These events culminated in an order issued by the presiding circuit court judge finding that the respondent had engaged in fraud, perjury and deception. (A. 1) The Florida Bar's request for admissions was served on July 8, 1994. On July 21, 1994, the Honorable Gerald Hubbart, a judge from the eleventh judicial circuit was appointed as the referee. On August 4, 1994, The Florida Bar served the respondent with interrogatories and requests to produce. The respondent filed motions dated August 28, 1994, requesting that a referee outside of the eleventh judicial circuit be appointed, that the undersigned should be disqualified and a request for an extension of time until October 1, 1994, to respond to the bar filings. (A. 2,3*) The chief judge of the eleventh judicial circuit denied the respondent's request that a referee of another circuit should be appointed on August 31, 1994. (A. 4) Thereafter, the Honorable Gerald Hubbart disqualified himself from acting as referee and on September 19, 1994, the Honorable Amy Steele Donner, a judge of the eleventh judicial circuit was appointed to hear this matter.

A status conference was held on October 11, 1994 at which The Florida Bar served the respondent with its Motion for Entry of Default Judgment and Motion for Order Deeming Matters Admitted since the respondent had not responded to The Florida Bar's complaint or request for admissions. The respondent, however, presented The Florida Bar with his answers and responses to admissions at the hearing and both motions were denied. The referee also heard argument on the respondent's request to disqualify the undersigned, and denied said motion. At the October status conference, The Florida Bar also advised the referee that the respondent had failed to respond to discovery propounded by The Florida Bar on August 4, 1994. The referee ruled that the respondent was required to respond in ten days and requested that The Florida Bar prepare an order reflecting that ruling. The referee remarked that the time between August 8, 1994 and October 21, 1994 was a reasonable time in which to respond. (A. 5, p. 28) The referee also indicated that the matter would be set for final hearing on December 14, 1994. (A. 5, p. 32)

On the day of the status conference and pursuant to the referee's directive The Florida Bar forwarded a proposed order for the referee's signature, with a copy to the respondent. (A. 6) The referee executed the order requiring the respondent to respond to

The Florida Bar's outstanding discovery requests by October 21, 1994. (A. 7) Despite the referee's order, the responses were delivered on October 24, 1994. The Florida Bar filed its Second Request for Entry of a Default Judgment on November 7, 1994. It was argued therein that the respondent had engaged in a pattern of non-compliance with deadlines mandated by the Rules Regulating The Florida Bar and the Florida Rules of Civil Procedure culminating in his late filing of answers to interrogatories and requests to produce where the referee had granted him additional time. In fact, his responses were in excess of 30 days late. (A. 8) The respondent filed a response in which he argued, among other things, that despite the plain language of Judge Donner's order he had until October 24, 1994 to respond to The Florida Bar. (A. 9)

A hearing was held before the Referee on December 5, 1994. The respondent filed a second motion to disqualify the undersigned and a motion to continue the final hearing scheduled for December 14, 1994 since respondent suffered from an "Ear-Caused Disability". In support thereof, the respondent attached a letter from a physician dated May 24, 1991. (A. 10,11*) At that hearing, the referee granted The Florida Bar's Second Request for Entry of a Default Judgment and stated the following:

The Court hereby grants the Motion for Entry

> of Default. Mr. Kaufman believes that the Rules Regulating The Florida Bar are just technical. He doesn't understand why they have to be followed. There is nothing unusual in the Court Order. It gave a date certain. The Court signs orders like it daily, and Mr. Kaufman did not seem to feel it was necessary to set down a motion to extend the time when the Rules Regulating The Florida Bar and the case law clearly provides it. Without same, this is summarily denied.
>
> (A. 12)

During hearing the referee denied the second request to disqualify bar counsel. The referee also ordered that within ten days the respondent be psychiatrically evaluated to determine whether he was competent to proceed in the bar matter. The referee deferred the decision on respondent's request for a continuance, pending the outcome of the evaluation. (A. 13)

On December 15, 1994, the respondent filed a motion to set aside the default judgment, a motion to disqualify the referee and a motion for an extension of time to respond to October 13, 1994 order and resettlement of order (A. 14,15*) On February 17, 1995, the psychiatrist appointed by the referee issued his report in which he set forth his opinion that the respondent was competent to proceed in the bar matter. The respondent wrote to The Florida Bar on April 10, 1995, and advised of his unavailability for further proceedings until May 22, 1995. The Florida Bar in turn advised the

referee of same. (A. 16) On April 13, 1995, the referee denied the respondent's three pending motions. (A. 17,18) On April 17, 1995, the respondent filed a motion requesting that the Board of Governors terminate the proceedings. (A. 19*) The Bar responded on April 28, 1995. (A. 20*). The referee denied the motion on May 1, 1995. (A. 21) On May 17, 1995, the respondent moved the referee to reconsider the denial of his motion to vacate. (A. 22)

A final hearing as to discipline only was set for May 17, 1995. The hearing was rescheduled since The Florida Bar did not receive the notice of hearing. The respondent received notice and was present. On May 30, 1995 the referee rescheduled the final hearing for August 7, 1995. On July 29, 1995 the respondent requested and obtained a continuance. On August 4, 1995, the referee reset the final hearing for September 14, 1995 at 4:30 (A. 23) On September 7, 1995, the respondent requested another continuance of the final hearing. The respondent's second request to continue was not granted. On Monday, September 11, 1995 the referee's office contacted the parties and advised that the referee had an unexpected opening on September 13, 1995, a day prior to the scheduled date.

The final hearing as to discipline only commenced on September 13, 1995 at 1:00 p.m. The respondent did not appear. The referee

stated the following:

> For the record, Mr. Kaufman was notified that the hearing would be today at 1:00. He was notified Monday and he was notified -- well, Monday he was notified that the hearing would be changed and he was given the date I believe yesterday. He said that that wasn't enough time for him and he wasn't planning to be here. He was going to send us a fax. We asked him to do so before the hearing. He failed to do so.
>
> ***
>
> At all times except for one, Mr. Kaufman has moved this Referee to continue the hearings based upon his alleged physical infirmities. His claims have been unreasonable in that he claims illnesses which require three to six months delays in every proceeding that we have had. Mr. Kaufman has submitted to the Referee unsworn statements by his alleged doctors that he does suffer from a heart condition and that he has not been feeling well, but the recommendations of the doctors do not seem to coincide with Mr. Kaufman's; pleadings as to the relief he requests, including the one in which he requested that the Referee continue this case to some time in December when his flu should subside.
>
> (Tr. 3, 46)

The Florida Bar presented two members of The Florida Bar as witnesses in aggravation at the final hearing. The respondent's disciplinary history was also introduced. At the conclusion of the testimony and presentation of authority, The Florida Bar recommended that the referee disbar the respondent. The referee issued a finding that the respondent should be disbarred without

leave to reapply for ten years. (Tr. 47-48). The referee's report was issued subsequent to the final hearing. (A. 25) The testimony of the witnesses has not been detailed since the respondent has not challenged the findings of guilt or recommendation of discipline.

The respondent has petitioned for review and filed his initial brief. The Florida Bar's answer brief follows.

SUMMARY OF ARGUMENT

The respondent maintains that the referee wrongly granted The Florida Bar's Second Request for Entry of a Default Judgment. The respondent had evidenced a lack of diligence in responding to other Bar pleadings and expressed his belief that "deadlines were flexible" and "busy people" could not be expected to adhere to them. In granting the Bar's request, the referee expressly found that the respondent did not believe he had to adhere to the court's order which clearly established the due date of the already late responses. Thus, the referee did not err since the respondent's failure to respond was not a consequence of "excusable neglect or inadvertence," but rather one of deliberation and contumaciousness.

The respondent further posits that the referee wrongly declined to grant a continuance seven days prior to the commencement of the final hearing as to discipline only. Such action is within the discretion of the court. In this instance, the referee had previously continued the final hearing at the respondent's request and also stated that the documentation provided in support of the second request was not credible.

Last, the respondent asserts that although the final hearing was noticed forty days prior, he was deprived of his rights since

the referee advised the parties of an opening in her schedule on the day before the initially scheduled date. As a result, the respondent refused to attend the final hearing, which was held in his absence. The respondent at no time advised that the change of dates would cause him a problem in obtaining witnesses or producing evidence.

POINTS ON APPEAL

I

WHETHER THE REFEREE'S ENTRY OF A DEFAULT JUDGMENT WAS AN ABUSE OF DISCRETION? (RESTATED)

II

WHETHER THE REFEREE ERRED IN CONDUCTING THE FINAL HEARING IN THE RESPONDENT'S ABSENCE? (RESTATED)

I

THE REFEREE'S ENTRY OF A DEFAULT JUDGMENT WAS NOT AN ABUSE OF DISCRETION (Restated)

A court has discretion to order a default against a party for that party's failure to comply with discovery requirements. The standard by which such order shall be reviewed is whether there was an abuse of discretion Commonwealth Federal Savings and Loan v. Tubero, 569 So.2d 1271 (Fla. 1990). In the instant case, there was not an abuse of discretion based on the totality of the circumstances.

The granting of The Florida Bar's Second Request for an Entry of a Default Judgment must not be viewed in a vacuum. The respondent was served with the complaint and request for admissions on July 8, 1994. The respondent did not obtain an extension of time to respond. The respondent's answer to the complaint and request for admissions was provided to The Florida Bar on October 11, 1994. During the time that the respondent failed to file timely responses to the complaint and request for admissions he was busy filing the following:

> Respondent's Motion Directed to Hon. Leonard Rivkind to: A. Depoliticize these Proceedings; B. Vacate his 7-21-94 Exh. 1 Order Appointing Judge G. Hubbart as Referee Herein, (if Judge Hubbart has not already recused

himself, per (Exh. 2) in Formal Motion, as he was a trial level, ancillary Proceedings Judge in the Underlying Civil Cause herein); C. Appoint as Successor Referee, a Judge from without the 11th Judicial Circuit, as Permitted by his July 18, 1994 "Designations" and Custom dated August 28, 1994. (A. 2)

I. Respondent RSK's (Kaufman) Good Faith Motion to Disqualify Bar Counsel Ms. Lazarus (Lazarus) from Representing The Florida Bar Herein. II. Respondents Motion to Extend to 10-1-94 the Filing Date of his Responses to the Bar filings, because the impending death of his 100+ year old natural mother mandates his travel, now to Phila., PA. dated August 28, 1994. (A. 3)

Although in the second filing, the respondent requests additional time to respond to the Bar's filings, he neither set the motion for hearing or otherwise attempted to obtain a ruling. Interestingly, in the second document the respondent alleged, as a basis for his request for additional time, that his mother was terminally ill and he therefore could not respond. Yet, the respondent was able to file the aforementioned two documents requesting affirmative relief dispite his mother's illness.

As a result of the respondent's failure to respond to the complaint and request for admissions, The Florida Bar filed its first Motion for Entry of Default Judgment and Motion to Deem Matters Admitted on October 11, 1994, the date of a status conference before the referee. At that hearing, the respondent handed The Florida Bar his answers. The referee addressed the

issue of the respondent's lack of timeliness at the hearing. The respondent stated the following:

> You know and Ms. Lazarus knows and I know that in all litigation -- I haven't been handling major litigation for fifteen years, but these times are flexible. People are busy. They don't have time. They are out of time or --to meet these deadlines.
>
> Also, it says right in the Rules of Discipline that any times herein are not jurisdictional; they are only directory; in other words, do it on a best effort basis.
>
> To follow Ms. Lazarus' reasoning would gridlock the entire courts and cause injustice throughout the entire judicial system, because no one can meet these times if you are a busy person.
>
> She is talking about some person who is a dilettante.
>
> (A. 5, p. 9)

Thus, respondent made it quite clear that he did not believe that the Rules Regulating The Florida Bar should be followed and that he was governed by deadlines.

At the October 11, 1994 hearing, The Florida Bar advised the referee that the respondent had failed to timely respond to interrogatories and requests to produce. The referee in the respondent's presence stated that the answers had to be delivered by October 21, 1994. (A. 5, p. 28) The Florida Bar prepared the

order, pursuant to the court's directive with a copy to the respondent. The respondent did not object nor did he express any confusion about the intent of the order. Any such expression would have surely been remarkable since the order simply said:

> Respondent is FURTHER ORDERED to respond to The Florida Bar's Interrogatories and Request to Produce by October 21, 1994.
>
> (A. 7)

The respondent faithful to his belief that he was not governed by deadlines provided his responses three days after the due date. The respondent has not alleged, nor could he, that he requested additional time from the referee or The Florida Bar. The respondent maintains in his brief that the October 13, 1994 written order stated that the respondent's answers must be filed in ten days. He added that he did not notice the due date. The order which was forwarded to the respondent prior to its execution by the referee set forth a date certain of October 21, 1994 which echoed the referee's oral pronouncement. Respondent further states that he did not notice that the order started running on October 11, 1994.

In the respondent's response to The Florida Bar's Second Request for Entry of Default Judgment, he stated that the date of compliance, the tenth day, fell on a Sunday, which is not a good day for service (A. 9, p. 2) Thus, the respondent intended to

deliver his responses on Monday, October 24, 1996. In that same response the respondent reiterates his sentiments that deadlines do not really apply by stating:

> We suggest that the opposition should realize that we all have a full plate ...
>
> (A. 9, p. 2)

In Marr v. State Department of Transportation, 620 So.2d 761 (Fla. 2nd DCA 1993) the plaintiff engaged in a pattern of failing to respond. Ultimately, the plaintiff failed to comply with an order compelling discovery and the complaint was dismissed with prejudice. The appellate court, in upholding the trial court's ruling relied in part on Tubero, supra. They said that a trial judge's finding of wilfulness may be based upon the record before him and his personal observations.

In the case sub judice the referee had already heard the respondent state that he is not governed by deadlines and that they are flexible. Further, the referee had previously heard the Florida Bar's First Request for Entry of a Default Judgment and Motion to Deem Matters Admitted wherein it was alleged that the respondent had failed to file an answer to the complaint and request for admissions three months subsequent to its service. Thus, respondent's failure to comply with the court ordered

deadline was not his first venture into the world of untimeliness.

In Riley v. Gustinger, 235 So.2d 364 (Fla. 3rd DCA 1970) a default was entered where extensions of time had been granted and the defendant failed to comply with the time limit to respond. Here, at the time of the October 11, 1994 hearing, the respondent's responses to the Bar's discovery were already late. The court issued an order giving the respondent additional time to respond. He failed to comply with the order.

In order for this tribunal to determine whether the trial court ruled correctly, a record is required. In Tubero, supra, it was held that an express written finding of a party's wilful or deliberate refusal to obey a court order directing compliance with a discovery request is necessary to support a default.[1] The

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[1] In Urbanek v. R.D. Schmaltz, Inc., 573 So.2d 107 (Fla. 4th DCA 1991) the Fourth District Court of Appeal held that an order granting a default must contain a written finding of wilful disregard or deliberate violation of discovery orders and making such finding orally is not sufficient. In that case the opinion does not reflect the existence of a transcript which memorializes the judge's intent and finding, as is present here. The rationale for "express written findings" is so that there will be added assurance that the trial Judge's determination is conscious, since in some cases the record, standing alone is subject to more than one interpretation. In this case the record includes a transcript of the hearing at which the referee rendered her decision and did set forth her express findings that the respondent's actions were wilful and deliberate.

referee's finding reduced to writing in the transcript of the hearing on The Florida Bar's Second Request for Entry of a Default Judgment does make such a finding and can be incorporated by reference.

> Mr. Kaufman believes that the Rules Regulating The Florida Bar are just technical. He doesn't understand why they have to be followed. There is nothing unusual in the Court Order. It gave a date certain. The Court signs orders like it daily, and Mr. Kaufman did not seem to feel it was necessary to set down a motion to extend the time when the Rules Regulating The Florida Bar and the case law clearly provides it. Without same, this is summarily denied.
>
> (A. 12)

The Referee found many things. First, she found that the respondent believed the Rules Regulating The Florida Bar do not need to be followed and therefore the respondent was deliberate and wilful in his failure to follow the referee's ruling. The referee's conclusion is based on Mr. Kaufman's statement at the October 11, 1994 hearing that "busy people cannot meet deadlines and that Rules Regulating The Florida Bar require responses on a best effort basis." (A. 5, p. 9) Second, the referee found that the order was not unusual and that the order contained a date certain. Third, the referee found that Mr. Kaufman did not seek to request additional time, but rather simply responded when he chose

to respond. The referee's decision to grant The Florida Bar's Second Request for Entry of a Default Judgment resulted from the respondent's contumacious behavior. This referee had, therefore, made a conscious determination that the non-compliance was more than mere excusable neglect or inadvertence. The referee therefore did not abuse her discretion in granting the default.

Last, the referee specifically found in her Report that although a default judgment was entered, The Florida Bar presented testimony through its witness, Reed Somberg, Esquire, which established by clear and convincing evidence, all charges in the complaint. (A. 25)

II

THE REFEREE DID NOT ERR IN CONDUCTING THE FINAL HEARING IN THE RESPONDENT'S ABSENCE (RESTATED)

There is no dispute that on August 4, 1995 the respondent was served with notice of the September 14, 1995 final hearing. The respondent has not alleged that forty days of notice is deficient. Rather, the respondent alleges that because the referee moved the hearing to the preceding date, due to an opening in her calendar, he was deprived of proper notice. The respondent has not maintained, nor did he advise the referee, that the change in date could prevent him from presenting certain witnesses or producing evidence. In fact, the referee when alerted that the respondent would be boycotting the final hearing stated that the respondent would be forwarding a facsimile. He did not. (Tr. 3)

The respondent also appears to argue that the referee abused her discretion by failing to grant his September 7, 1995 request to continue the September 14, 1995 final hearing. The granting of a motion for continuance is within the sole discretion of the trial court. In Re. Gregory, 313 So.2d 735 (Fla. 1975). This discretion was not abused. In fact, the final hearing was previously scheduled for August 7, 1995. On July 29, 1995, the respondent sought and obtained a continuance from the referee. At the

commencement of the final hearing, the referee stated her belief that information Mr. Kaufman provided to her from physicians did not coincide with his statements. (Tr. 46)

Further, the respondent's September 7, 1995 request to continue the September 14, 1995 hearing was filed at the eleventh hour. In The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986) the court held that the denial of a last minute request for a continuance by a referee does not constitute an abuse of discretion.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the referee's recommendation of a ten (10) year disbarment should be approved.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Complainant's Answer Brief was forwarded Via Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Robert Scott Kaufman, Respondent, at his record bar address of 1020 Country Club Prado, Coral Gables, Florida 33134, on this 23rd day of May, 1996.

RANDI KLAYMAN LAZARUS
Bar Counsel

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A. 10 Respondent's Emergency Motion to Continue Sine Die the 12-14-94 10 AM Final Hearing.

A. 11 Respondent's Emergency Good Faith Second Motion to Disqualify Ms. Lazarus (Lazarus) from Representing the Fla. Bar herein.

A. 12 Transcripts of proceeding at hearing held on December 5, 1994.

A. 13 Order directing respondent be evaluated by a psychiatrist dated December 5, 1994.

A. 14 Respondent's Good Faith Motion to Vacate the Default Judgment entered herein approximately 12-5-94; Respondent's Motion for Second Extension of Time to File Responses Ordered 10-13-94, or resettlement of the 10-13-94 Order dated December 15, 1994.

A. 15 Respondent Robert S. Kaufman's 12-94 Sworn Motion for Fla.R.Civ.P. and Statutory Disqualification of Circuit Judge Amy Steele Donner, acting as Referee herein dated December 15, 1994.

A. 16 The Florida Bar's letter directed to the referee dated April 11, 1995 enclosing proposed orders.

A. 17 Order denying Respondent's Good Faith Motion to Vacate the Default Judgment entered herein Approximately 12-5-94; Respondent's Motion for Second Extension of Time to File Responses Ordered 10-13-94 or Resettlement of the 10-13-94 order dated April 13, 1995.

A. 18 Order denying Respondent's Sworn Motion for Fla.R.Civ.P. and Statutory Disqualification of Circuit Judge Amy Steele Donner, Acting as Referee, dated April 13, 1995.

A. 19 Respondent's Robert Scott Kaufman's Good Faith Sworn Motion Per Rule 3-7.5(e), Rules Regulating The Florida Bar to terminate sine Die, proceedings of late pending before a Referee; (this motion is within the sole juris, of the Board of Gov. Of the Fla. Bar, and addressed to the Exec. Dir. Of the F.B. dated April 17, 1995.)

A. 20 The Florida Bar's response to Robert Scott Kaufman's Good Faith Sworn Motion per Rule 3-7.5(e), Rules Regulating The Florida Bar to terminate sine Die, proceedings of Late Pending before a Referee dated April 28, 1995.

A. 21 Order denying Respondent's Good Faith Sworn Motion per Rule 3-7.5(e), Rules Regulating The Florida Bar to terminate sine Die, proceedings of Late Pending before a Referee dated May 1, 1995.

A. 22 Respondent's I. Motion to Reconsider the Court's Denial of Kaufman's 12-15-94 Motion to Vacate and II. Notice of Filing Documents.

A. 23 Re-Notice of Hearing as to Discipline only dated August 4, 1995.

A. 24 Respondent's letter directed to the referee dated September 7, 1995 and attachment.

A. 25 Report of Referee dated September 21, 1995.