IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT SCOTT KAUFMAN,

Respondent,

_____/

Supreme Court Case
No. 83,985

FILED
SID J. WHITE
SEP 5 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

On Petition for Review

REPLY BRIEF OF COMPLAINANT

Respectfully Submitted,

ROBERT S. KAUFMAN, Respondent

1020 Country Club Prado

Coral Gables, FL 33134

(305) 262-1671

TFB # 041723

(Legal & Technical support were provided by John Weiss, Esq.; the tight time line prevented his final review, etc., and appearance, before filing. Oral argument, if granted, will be solely controlled by him as lead co-counsel).

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REPLY BRIEF

RESPONSE AND REBUTTAL

The Respondent has filed his Main Brief, which sets forth what he considers to be some of the major errors committed by the referee which resulted in the oppressive Report of Referee which is under review.

PRELIMINARY STATEMENT REGARDING THE CHILLING AND UNSETTLING LONG-SECRET "DRY-RUN" EX-PARTE FIRST DECEMBER 5, 1994 DEFAULT JUDGMENT HEARING

Complainant's Answer Brief, Pg. 24, A.12, states that there were "Transcripts of proceeding at hearing held on December 5, 1994." This is a grave and astounding misnomer. Rather, Respondent's side, by sheer chance, discovered, on about Aug. 1, 1996, that there were **two (2)** proceedings at **two (2)** separate hearings on December 5, 1994. (A. A). Neither is in the Record.

(1) **Fact:** apparently the court reporter was instructed by someone to use the unique and apparently the instructive and ominous same time, to wit: "... at or about 10 A.M.,"[1] on the face page of each December 5, 1994 transcript.

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[1]The first 12-5-94 hearing apparently began and ended minutes before Respondent's appearance. The second, 12-5-94 hearing, with Respondent finally present, began at 10:15 AM. The second transcript is silent about the first 12-5-94 hearing. Bar Counsel Ms. Lazarus & the referee didn't break the secrecy, even

This appears unseemly and is unauthorized. The exact time is always used. The hearing was scheduled for 10 AM.

(2) **Fact:** A. A also contains, as available, the April 10, 1995 correspondence Respondent used to secure a copy of the 10-11-94 hearing and of the second hearing on 12-5-94, transcripts, from Bar Counsel Ms. Lazarus. The long-secret transcript of 10 pages, of the first long-secret December 5, 1994 hearing, is buried, non chronologically, and unobtrusively, behind the second, December 5, 1994 hearing of 25 pages. It normally might have gone unnoticed, as the Kaufman side already had marked copies of what it naturally thought were all the transcripts. A. A, the Bar letter, denies two (2) hearings.

MAIN POINT I ON APPEAL

The Referee's Entry of a default judgment striking all Respondent's defenses was an abuse of discretion. (Restated)

A.C, belatedly found in Tallahassee, is the two (2) line Dec. 5, 1994 contested Referee Donner ruling, the Default

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off the record. Composite B cases decry such apparent conduct. Had there been no such apparent concealment, the Referee could have been promptly disqualified. Pg. 3, L3 & L4, of the transcript of the second Hearing, is revealing. It states that at 10 AM minus 10 minutes, strangely, no one would answer the busy Referee's telephone. Also, no one made a common courtesy call to Respondent's office. Hurricane-like weather, and an expressway accident, forced Respondent onto the streets, with the resultant minor delay.

Judgment Order signed and entered because of a minor discovery violation.[2] Respondent, unintentionally and long unknowingly ran a red light and was given the death penalty. There are no express written findings set forth in any written, signed and entered order of the court. Rather the subject order simply states, in its paragraph #1, "that ... Entry of Default Judgment is granted."[3] It was sent, ex parte, to the referee, with no correspondence and copy to Respondent.

The Complainant urges the notion that portions of the confusing and inconsistent Record be somehow bootstrapped into a legally deficient order. Controlling Commonwealth Federal Savings & Loan Association v. Tubero, 569 So.2d 1271, 1272 & 1273 (Fla.1990), rejected such complainant notion. At Pg. 1273, Commonwealth approved the following, at Pg. 1272: "Relying upon several of its previous decisions, the district court of appeal held 'that an **order** granting a dismissal or default under rule 1.380 for failure to provide discovery **must**

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[2]The Answer Brief, at A.13, gave the Default Judgment a different title (The R. Kaufman medical report mentioned at A.13 is Respondents A.D).

[3]Respondent filed a Dec. 15, 1994 Motion to Vacate this Dec. 5, 1994 Default Judgment as there are meritorious defenses; April 13, 1994, the Referee summarily, without a hearing, denied this motion, though it was specifically calendared to be heard April 17, 1994. A. H, the Civility Rules, Pages 3 & 4, ¶s 1, 8, 9. 10, 11, 12 & 13 were routinely violated by Bar Counsel, apparently, in complicity with the Referee.

make an express written finding that appellant's conduct was a willful or deliberate violation of the discovery orders." [Emphasis supplied] Accord, Ziegler v. Huston, 626 So. 2d 1046 (Fla. 4th DCA 1993); Accord Smith v. Spitale, 675 So. 2d 207, 209 (Fla. 2d DCA 1996):

> "Florida Rule of Civil Procedure 1.380(b) allows sanctions to be imposed for failure to obey discovery orders. However, the sanction of dismissal is a drastic remedy which should be used only in extreme situations. Momenah v. Ammache, 616 So.2d 121 (Fla. 2d DCA 1993). **Furthermore, any order of dismissal must contain an explicit finding of willful noncompliance.** Commonwealth Fed. Sav. and Loan Ass'n v. Tubero, 569 So.2d 1271 (Fla. 1990)." [Emphasis supplied]

The Complainant essentially admits that the Bar cases don't countenance disciplining a lawyer without giving him his day in court. Please see the first long-secret December 5, 1994 Hearing Transcript, page 7, wherein the court says: "Have you found any cases dealing with a Bar [discovery] response? Ms. Lazarus states: "No..." This naturally is because the standard of proof in judging a lawyer for discipline cases is "clear & convincing" per landmark The Florida Bar v. Rayman,

238 So. 2d 594 (Fla. 1970). Also, the time lines are directory not mandatory, and there was absolutely no claim, by Bar Counsel, Ms. Lazarus, of prejudice whatsoever to complainant. The absence of any claiming of prejudice by Complainant is even more **important** (and indispensable) than Complainant's claim of wilfulness. Please see the Bright Line case W.G.C., Inc., v. Man, 360 So. 2d 1152, 1153 (Fla. 3d DCA 1978). However, **such non-compliance is not shown to have been willful nor, more importantly,** does either side claim **prejudice** as a result. Indeed, both sides seek reversal of the order of dismissal. [Emphasis supplied]

Finally, Hanft v. Church, 671 So. 2d 249, 250 (Fla. 3d DCA 1996) states:

> **"Florida's longstanding public policy favors adjudication of lawsuits on the merits.** See North Shore Hospital, Inc. v. Barber, 143 So.2d 849, 853 (Fla. 1962). Thus, " ... if there bey any reasonable doubt in the matter [of vacating a default], it should be resolved in favor of granting the application and allowing a trial upon the merits of the case ..." Id. (citations omitted." [Emphasis supplied]

A. G contains the latest August 14, 1995 Criminal Contempt Motion-Affidavit now **pending** in Circuit Court vs. Ms. Lazarus's "interested" witnesses Somberg & Klein et al. A. G also contains the George Vega 10-13-93 State Attorney's Office

transcript. Somberg et al. are justly afraid. Respondent's Initial Brief A.1 & A.38 must be read in para materii with A. G.

CONCLUSION

Complainant, at its Page 15, miscites totally factually different Marr v. State Dept. of Trans., 620 So.2d 761 (Fla. 2d DCA 1993), e.g. the losing party suffering the dismissal **never** over eight (8) months answered many interrogatories, party and expert; refused to even appear at the two hearings; totally ignored **two** 30 day and 10 day discovery orders. Indeed Complainant, unlike Marr **never** filed motions to compel; Respondent fully complied with the **first order** except for unintentionally reading the time line incorrectly which simply required a three day extension.

Complainant, at its Page 16, also clearly miscites factually different Riley v. Gustinger, 235 So.2d 364, 366 (Fla. 3d DCA 1970). Therein a default was entered only after the defaulted party over months totally ignored **three (3) discovery orders.**

Complainant at first Pg. 16 miscites Urbanek v. Schmaltz, Inc., 573 So.2d 107, 108 (Fla. 4th DCA 1991). Oral judicial

findings found in any transcript are no longer acceptable, to wit:

> The issue is whether or not an order granting a default must contain a written finding of willful disregard or deliberate violation of the discovery orders or whether such a finding contained in the transcript will be sufficient. Until recently the cases from this district could be interpreted as permitting either a written or an oral finding. That is no longer the law. In Tubero v. Chapnich, 552 So.2d 932 (Fla. 4th DCA 1989), we held:
>
> We do not think it too great a task to require the trial count to make a written finding of the essential facts which supports the imposition of the most severe sanction, and, in line with Stoner, we hold that an order granting a dismissal or default under rule 1.380 for failure to provide discovery must make an express written finding that appellant's conduct was a willful or deliberate violation of the discovery orders.
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> Id. at 935. In Commonwealth Fed. Savs. & Loan Ass'n v. Tubero, 569 So.2d 1271 (Fla. 1990), the Supreme Court recently approved this court's Tubero opinion.

Complainant has omitted to state that the R. Kaufman side first appeared at 4 P.M. May 17, 1995 for the final hearing. Bar Counsel, at 4:45 PM canceled the hearing. No reason has ever been given by anyone. Complainant, at Pgs. 19, and 20, again miscites the facts and/or the law, e.g. granting continuances is within the **"sound"**, not **"sole"** discretion of

the trial court. Furthermore, at Pg. 20, the cited Florida Bar v. Lipman case[4] is inapposite as the final hearing in Lipman had been set for five (5) months, serious health issues were not an issue, (he had just hired a lawyer) and the Referee herein cancelled the Sept. 14, 1995 hearing sua sponte and independently of Respondent's motion for same. Finally, at Page 19 the Bar Counsel Ms. Lazarus misstates the facts. In addition to Respondent's health issues, it is common sense that **no one** can have their very busy lawyer and judges and ex-judge, and other witnesses ready, on 20 hours notice, for such a final hearing. Maria, orally 9-11-95 & 9-12-95 was so advised. Referee Donner at the 9-13-95 hearing transcript, Pg. 3, admits, essentially, that she knew all this on 9-11-95. Respondent, **repeating** his oral statements to Maria, **did** file a Fax (A.E). It states that it arrived before the hearing began.

There are many, many meritorious defenses in this cause. We recite just a very few, e.g. A. F has found examples of monies from one (1) spendthrift trust, receivable by Respondent every quarter. There are four (4) other spendthrift trusts. Social Security is additional. Such monies can be and were apparently **lawfully "concealed"** from creditors as they are not

[4]497 So. 2d 1165 (Fla. 1986)

leviable. On 4-21-92 Judge Bloom agreed. A. F also has witness Missirlian's (Respondent's fiancee) 5-22-92 letter decrying the April 22, 1992 seizure of **her** money, etc., from this joint account. The record shows she had received thousands from this account. Regarding 18 months of collection effort A. F also shows that this was false, e.g, A. F also has a partial **March 19, 1992** hearing transcript showing that the two depos. of **June, 1991** still had not been typed; the judge barred further depositions until they had been transcribed. A. F also contains J. Sutton, Esq. 2-12-92 motion again showing that allegations of 18 months collection effort was ridiculously false. The August 6, 1992 order was ex parte and Judge Bloom complained to the Bar that he had signed it without reading it and Fox had improperly tried to steal 52K with it. Further, Somberg, retained about Feb. 2, 1992, was collection counsel, not Fox. This obviously botched case must be reversed and fully and lawfully and properly heard, and adjudicated on the merits, and always with the decent and proper lawful notice. It should not now be tried de novo, like at trial, in this very busy honorable Supreme Court of Florida.

Respectfully Submitted,

ROBERT S. KAUFMAN

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Coral Gables, FL 33134

(305) 262-1671

Bar # 041723

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that the original and 7 copies of Respondent's attached papers were _____ mailed, _____ hand delivered, ✓ Fed expressed to the Supreme Court ofFlorida, Tallahassee, Florida, and a copy each was _____ hand delivered, ✓ mailed to Bar Counsel (444 Brickell Avenue, #M-100, Miami, FL 33131) and Staff Counsel, (650 Apalachee Parkway, Tallahassee, FL 32399-2300), this 6th day of Sept, 1995.

Robert S. Kaufman

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INDEX TO APPENDIX

A.1 Dec. 5, 1994 Hearing Transcripts

A.2 Controlling Clayton and Rose cases (Florida) decrying ex parte contact.

A.C Dec. 5, 1994 Default Judgment order.

A.D Dr. S. Jacobson 2-17-95 medical report.

A.E Respondent to referee Fax of Sept. 13, 1995.

A. F Trust fund statements(Respondent); M. Missirlian letter to Judge Bloom, 5-2-92; March 19, 1992 Hearing Transcript(Somberg may have no depos. until transcribes prior depositions,John Sutton 2-12-92

A.G Criminal Contempt Motion-Affidavit (8-14-95 and thus most current) vs. perpetrators Somberg, Klein etc.; Oct. 13, 1993 George Vega government deposition.

A.H Florida Bar and Supreme Court of Florida approved Guidelines for Professional Conduct.