IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

KOKO HEAD,

Respondent.

Supreme Court Case No.SC10-1175

TFB File Nos. 2009-31,193 (4C)
2010-30,043 (4C)
2010-30,467 (4C)

RESPONDENT'S ANSWER BRIEF AND INITIAL BRIEF ON CROSS-PETITION FOR REVIEW

LAW OFFICE OF KOKO HEAD, P.A.

Koko Head, Esq., *Pro Se*
Florida Bar No. 475701
100 State Road 13 N., Suite D
St. Johns, Florida 32259
Telephone: (904) 535-0642
Facsimile: (904) 814-8725

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

REFERENCES

Complainant, The Florida Bar, will be referred to herein as "TFB".

Respondent, Koko Head, will be referred to herein as "Mr. Head".

The Initial Brief of Complainant TFB will be referred to herein as ["TFB Brief, p.___"].

Respondent Mr. Head's Appendix to his Answer Brief will be referred to herein as ["Mr. Head's Appendix, Tab ___"].

Citations to specific pleadings, references to the transcript of the final hearing and TFB's Exhibits will follow the format used in the Initial Brief.

Citations to Respondent Mr. Head's Exhibits will be referred to herein as ["Mr. Head's Ex. ___"].

STANDARD OF REVIEW

Respondent Mr. Head adopts the Standard of Review as set forth in TFB's Brief, p. 17 as the correct standard for this Honorable Court to follow regarding the Report of Referee in this case.

STATEMENT OF THE CASE

Respondent agrees with the chronology set forth in TFB's Statement of the Case as set forth in TFB Brief, p. 2 to 8, but wishes to emphasis the importance of the testimony of Judge J. Michael Traynor, the Circuit Court judge before whom the ongoing landlord/tenant litigation is proceeding.[1] Respondent's bumbled and untimely attempts to coordinate and take Judge Traynor's deposition was addressed by the Referee and Respondent has taken full responsibility for the same[2].

[1] *James O. Lucas, et al vs. Nations Fence, Inc. , et al,* Case No. CA-09-0900, Div. 55, Circuit Court, St. Johns County, FL where both Margaret Wharton and Christopher Johnson (both of whom filed Bar Complaints against Respondent during the course of the landlord/tenant litigation) are respectively counsel of record for defendant tenants and Mr. Johnson who unsuccessfully attempted to intervene in the landlord/tenant action individually and on behalf of his company. Additionally, Judge Traynor was the sitting Circuit Court Judge in the action styled *Tastan v. Julian LeCraw & Company, LLC,* Case No. CA08-2054, Div. 55, Circuit Court, St. Johns County, Florida where Respondent's former client Murat Tastan (who also filed a Bar Complaint against Respondent) was a party. The Florida Bar's Complaint is based upon the bar complaints filed against Respondent by Wharton, Johnson and Tastan.

[2] Respondent's failure to promptly coordinate and schedule Judge Traynor's deposition until the week of the final hearing created inconvenience and scheduling problems for Bar Counsel Carlos Leon, Esq. as he was involved in handling other matters for TFB. The inconvenience and delay was solely the responsibility of Respondent who has accepted responsibility for it. TFB moved for sanctions as a result of the inconvenience to its Bar Counsel which the Referee granted and ordered Respondent Mr. Head to

STATEMENT OF THE FACTS

Count I of TFB's Complaint is based upon the bar complaints filed against Respondent by Margaret Wharton, Esq. ("Ms. Wharton") who is Respondent's opposing counsel and her non-party litigant client Christopher Johnson ("Mr. Johnson") – both of whom are or were involved in the ongoing landlord/tenant litigation brought by Respondent on behalf of his landlord clients the Lucases ("Landlords") in *James O. Lucas, et al vs. Nations Fence, Inc. , et al,* Case No. CA-09-0900, Div. 55, Circuit Court, St. Johns County, Florida (the "landlord/tenant action").

The events that give rise to the allegations in Count I occurred on Thursday, March 19, 2009 at the premises Nations Fence, Inc. ("Nations") leased from the Landlords. The other allegations of Count I occurred in connection with the release of Nations' old and current job files that occurred on April 1, 2009 at the lease premises where Respondent and Mrs. Nancy Allen were present. It is the opposing affidavits filed in the landlord/tenant action regarding the Landlord's compliance with the Court's Order directing the turnover of Nations' business records that makes up the remaining allegations against Respondent.

---

pay $500.00 to TFB's Client Security Fund. Respondent has already paid the amount and is not appealing this part of the Report of Referee.

Mr. Johnson (and his company Superior Fence), in addition to seeking to intervene as a party to the landlord/tenant action, filed a "Counterclaim" through his attorney Ms. Wharton against the Landlords *and* against Respondent individually as well as Respondent's teenage daughter who was a former employee of Nations. However, Mr. Johnson's "Counterclaim" was short lived because Judge Traynor ruled from the bench September 8, 2009 that he would grant Landlords' Motion to Severe Mr. Johnson's "Counterclaim" and would deny Mr. Johnson and Superior's Motion to Intervene in the landlord/tenant action. Judge Traynor entered his written Order on October 10, 2009 granting Landlords' Motion and denying Mr. Johnson' Motion in which he found that Johnson and Superior were not proper parties [Head Ex. 3]. Judge Traynor's Order was upheld by the Fifth Circuit Court of Appeal in *Superior Fence & Rail Of North Fla. v. Lucas, 35 So.3d 104 (5th DCA 2010)* [Head Ex. 18].

Mr. Johnson testified before Judge Traynor that he had not yet purchased the personal property and was present at the leased premises on March 19, 2009 as Nations' authorized representative. [Mr. Head's Ex.15, p. 62, lines 7–25, p. 63, lines 1– 9]. Yet Mr. Johnson testified before the Referee that "My position was I had authority to be there and *I wanted to get my property.*"(Emphasis added) [TR II, p. 220, lines 6 to 70]. Additionally, in Respondent's short telephone

conversation with Mr. Johnson's attorney (i.e., Mrs. Wharton) on March 19, 2009, she made it clear that Mr. Johnson also wanted to remove the current job files that he claimed he purchased from Nations. [TR IV, p. 443, lines 21 to 25, p. 444, lines 1 to 3].

In his testimony before the Referee, Mr. Johnson repeated the allegations of his bar complaint that Respondent "lied to a civil court judge (i.e., Judge Traynor) in open court and in an affidavit to the court regarding his denying Ms. Nancy Allen access to the property to obtain the records she needed for a sales tax audit." [TFB Ex. D, p. 4]. However, when asked on cross examination before the Referee, Mr. Johnson could not cite any instance in which he claimed that Respondent lied in open court to Judge Traynor [TR II, p. 245, lines 16-25, p. 246, lines 1-25, p. 247, lines 1-25]. Further, on cross examination Mr. Johnson testified that he wasn't worried about whether the affidavits of Ms. Allen and Respondent conflicted regarding which files could be release and which could not, because he was ignoring the affidavits which he didn't care about them and was not using Ms. Allen's affidavit as support for Respondent's alleged lie to Judge Traynor [TR II, p. 242, lines 5-25, p.243, lines 1-22, p. 244, lines 1-5]. Mr. Johnson's basis for Respondent's alleged "lie" to Judge Traynor was his claim that Respondent never gave the "files" to Ms. Allen [TR, II, p. 241, lines 19-20] which is curious because

Mr. Johnson had just testified on direct that he wasn't interested in the files. [TR, II, p. 215, lines 23-25, p. 216, lines 1-9]. Mr. Johnson's testimony was contracted by Ms. Allen who testified that she picked up both the old job files and the current job files on April 1, 2009 [TR II, p. 208, lines 4-7, 23-25, p. 209, lines 1-25, p. 210, line 1]. Finally, Mr. Johnson – who testified that he was denied access to the leased premises first by the landlord Mr. Lucas and later by Respondent – also falsely testified that he *saw* Respondent "deny [Ms. Allen] access to those files. . . . " further undermining his credibility. [TR II, p. 223, lines 16-18].

Mrs. Allen testified that she told Respondent's landlord client Mr. Lucas that she needed the old 2008 job files for a sales tax audit which was to occur the next day on March 20, 2009. However, on cross examination, when confronted with a video tape of her conversation with Mr. Lucas and her sworn deposition testimony, she admitted that she lied to Mr. Lucas in the hopes of gaining access to *all the files* – both old and current. Mrs. Allen signed an affidavit dated March 27, 2009 (prepared by Mrs. Wharton) claiming that she "pleaded with . . . Koko Head, to allow [her] to obtain possession of the books and records and [he] refused. [He] refused to allow me to enter the Leased Premises (except to use its restroom facilities, and then [he] escorted my in and out." [Mr. Head's Appendix, Tab 3]. Respondent filed his Affidavit of Compliance with Court's March 27, 2009 Order

confirming Landlords' compliance with the Court's Order requiring the Landlords to "make arrangements through counsel to return an financial books and records . . . ." [Mr. Head's Appendix, Tabs 1 & 2]. It is paragraphs 4 and 5 of Respondent's Affidavit that are the basis for the alleged "lie" because they differ somewhat with the Mrs. Allen's Affidavit to the effect that Respondent prevented her from taking the "books and records" and denied her access to the leased premises. Mrs. Allen's Affidavit (prepared by Mrs. Wharton) conveniently makes no distinction between *current books and records* which she was told she could not take and the *old books and records* (purportedly for a sales tax audit she claim was the next day) which she was told she could take as set forth in Respondent's Affidavit [Mr. Head's Appendix Tab 2, p. 1, 2]. It is this so-called difference that comprised the "lie" according to TFB's Count I.

Respondent's daughter Kaitlynn Head[3], and the former branch manager, William Willard, in testimony before the Referee and deposition testimony respectively confirmed that Mrs. Allen was allowed into the office and warehouse at the leased premises to locate the old files she claimed she needed for the sales tax audit and was told by Respondent that she could take those old job files with

[3] Kaitie, as she is affectionately called, was Nations' receptionist who was hired by and friends with Mrs. Allen, along with Respondent's wife Donna who was the former office manager for Nations at

her. [TR II, p. 147, lines 20 to 25, p. 148, lines 1 to 25, p. 149, lines 1 to 8, 13 to 25, TR III, p. 412, lines 15 to 25, p. 413, lines 25, p. 414, lines 25, p. 415, lines 1 to 8]. Respondent testified that when Mrs. Allen asked if she could also take the current job files, Respondent told her she could not take those files because Mr. Johnson's attorney claimed that they belonged to him. [TR IV, p.447, lines 3 to 17, p. 448, lines 10 to 25, p. 449, lines 1 to 10]. Respondent told Mrs. Allen that she could take the old job files and testified to the same before the Referee [TR IV, p. 450, lines 3 to 17]. On cross examination, Ms. Allen admitted that she didn't know what Respondent told her regarding the old job files she could take and the current files she could not take because, as she stated, "It went right over my head because I was just furious." [TR II, p. 194, lines 4-14].

The competing requests for the current job files created a factual issue as to who was entitled to them and Respondent was unwilling to place Landlords in a "catch 22" by releasing files to the wrong person or entity (i.e., Mrs. Allen or Mr. Johnson). Respondent spoke to Nations' president Walter Lehmann (who was not represented by Ms. Wharton at that time) on March 19, 2009 using Mrs. Allen's cell phone in an attempt to resolve the landlord/tenant dispute and non-payment of

---

the leased premises before quitting at the end of February, 2009 upon learning that Nations cancelled its group health insurance without letting its employees know.

rent issues. [TR IV, p. 441, lines 14 to 21]. Respondent asked Mr. Lehmann to revoke the authority he had given Mr. Johnson to act as his "agent" so the dispute would not escalate and confirmed this to Mr. Lehmann by e-mail sent on March 19, 2009 at 2:26 p.m. indicating "I am working with Nancy to gather the files she needs." [Mr. Head's Appendix, Tab 8]. Respondent testified that he left the leased premises and drove to the St. Johns County Judicial Center to file the landlord/tenant action and obtain the Distress Writ and that when he returned Mrs. Allen had left without taking any of the old job files she claimed she needed for the sales tax audit the next day [TR IV, p. 450, lines 18 to 25, p. 451, lines 24 to 25, p. 452, lines 1 to 4]. Respondent sent an e-mail to Mrs. Allen on March 19, 2009 at 4:58 p.m. which contained a typographical error in that Respondent left out the word "not" from the sentence "I will [not] allow them [i.e., the files] to be held hostage so long as Walter is in charge of Nations Fence, Inc. rather than Johnson as it relates to the branch." [Mr. Head's Appendix, Tab 9] Respondent testified that he never intended in his e-mail to imply that the old job files would be "held hostage" [TR IV, p. 442, lines 20 to 25, p. 443, lines 1 to 16] as further evidenced by the fact that Respondent was present at the leased premises on two occasion – March 27, 2009 and March 31, 2009 – to meet Mrs. Allen to oversee the transfer of all the old and current job files. Respondent testified that no one from Nations

appeared to retrieve the files which was confirmed by Mrs. Allen's testimony [TR II, p. 208, lines 23-25, p. 209, lines 1-16]. Finally, on April 1, 2009 at 5:00 p.m. Respondent met Mrs. Allen and her crew at the leased premises and observed them load Nations' old and current job files were loaded on Nations' truck and removed from the leased premise under the supervision of Respondent and Mrs. Allen [TR II, p. 209, lines 17 to 24].

Mr. Johnson testified consistent with his bar complaint (and his Affidavit prepared by Mrs. Wharton) that Respondent "falsified a case number on a document he created expressly for the purpose of giving it to local law enforcement with the specific intent that they would rely on it when he knew that no such case with that number or any related case had been filed at that time." [TR II, p. 255, lines 3 to 4]. Mr. Johnson is the only witness who testified that Respondent was present when the St. Johns County Sheriff deputies were present and that Respondent handed the Notice to the deputy [Mr. Head's Appendix, Tab 4, p. 4, TRII, p. 255, lines 21 to 25, p. 256, lines 1 to 7, 24 to 25, p. 257, lines 1 to 5, 24 to 25, p. 258, lines 1 to 12]. Mr. Johnson's testimony was contradicted by the testimony of Mrs. Allen, Ms. Head , Mr. Lucas and most importantly Deputy Cory Harp – one of the deputies who was present at the leased premises – all of whom testified that Respondent was not present when the deputies were present [TR III,

p. 408, 8 to 15, TR II, p. 147, p. 4 to 13, TR III, p. 405, lines 2 to 7, Mr. Head's Appendix, Tab 5[4]]. Respondent unequivocally testified that when he arrived at the leased premises at little after 2:00 p.m. on March 19, 2009, there were no deputies present and that he never provided the Notice to anyone other that the Landlords to post on the door. [TR IV, p. 459, lines 16, p. 462, lines 13 to 23. P. 480, lines 21 to 25, p. 481, lines 1 to 5]. Based upon the foregoing, testimony, the Referee found that "Respondent was not present when the deputies were present." [ROR, p. 18].

Respondent testified that he filed the lawsuit at approximately 3:00 p.m on March 19, 2009 and upon returning to the leased premises, discovered that the Notice prepared by his secretary (his wife Donna Lynn Head) contained an erroneous case number and he changed the case number in the reference line on his file copy and the copy that was posted on the door at leased premises which was the only place the Notice was published [TR IV, p. 453, lines 6 to 18, p. 458, lines 9 to 12]. Respondent's first correspondence to Ms. Wharton on March 20, 2009 containing the Distress Writ issued by Judge Traynor and all subsequent correspondence and pleadings contained the corrected case number [Mr. Head's Appendix, Tab 10, 11, & 14]. Respondent took immediate action to correct the

[4] The St. Johns County Sheriff's Office Call History Record shows that deputies arrived at the leased premises at 1:17 p.m. and left at 1:45 p.m. on March 19, 2009.

case number error and there was no testimony that either Ms. Wharton or her clients were mislead by the erroneous case number on the Notice posted on the door to the leased premises. The Referee concluded that "it does not appear that the letter with the nonexistent case number played any role in preventing Mr. Johnson or Ms. Allen from removing property from the leased premises." [ROR, p. 18].

TFB alleged that Respondent improperly advised Landlords to refuse to allow Mr. Johnson access to the leased premises and personally participated in a "lock-out" or "self-help" eviction of Nations in violation of Florida law – in essence TFB sided with Mrs. Wharton and her clients in the ongoing landlord/tenant action. However, Respondent's qualified expert witness, Mr. J. Stephen Alexander, Esq., testified that the advice provided by Respondent to his landlord clients on March 19, 2009 regarding their refusal to allow Mr. Johnson – on behalf of himself individually or as an agent of the defendant tenant – to remove business files and personal property from the leased premise based upon the existence of the statutory landlord's lien was based upon meritorious facts and law – even though the landlord/tenant action was not filed until approximately an hour after Respondent first arrived at the leased premises on March 19, 2009. The subsequent perfecting of the landlord's lien occurred when Judge Traynor issued

the Distress Writ on the morning of March 20, 2009 and the Landlords' posted the required Distress Writ bond at that same time. Mr. Alexander testified that based on Judge Traynor's Order finding "The Amended Verified Complaint states sufficient allegations to invoke the jurisdiction of this Court. The Amended Distress Writ Bond is in sufficient form to comply with Florida Statutes." [Mr. Head's Ex. 4] Additionally, the Order denying Nations' Motion to Dismiss and requiring that it file its answer and affirmative defenses demonstrated a sufficiently meritorious claim based upon the facts and law existing at the time for Respondent's landlord clients' to assert their statutory landlord's lien and secure the personal property at the leased premises the landlord's lien could be perfected [Mr. Head's Ex. 14].

Finally, the deposition testimony of Judge Traynor makes it clear that he has never made any findings that Respondent's Affidavit of Compliance was false or inaccurate, has never made any findings that Respondent or his clients locked out or performed a self-help eviction of defendant tenants, has never made any findings that Respondent offered evidence that Respondent believed or knew that was false, has never made any findings that Respondent unlawfully obstructed defendant tenants from access to evidence, has never made any findings that Respondent fabricated evidence or assisted a witness to testify falsely, has never

made any findings that Respondent knowingly disobeyed and obligation under the Florida Rules of Civil Procedure or one of Judge Traynor's Orders, has never made an finding that Respondent has engaged in conduct that involved dishonesty, fraud, deceit, or misrepresentation to the Court, has never made any findings that Respondent's conduct before him has been prejudicial to the administration of justice and that he has never sanctioned Respondent or his landlord clients in the landlord/tenant action. [Mr. Head's Appendix, Tab 14].

Count II of TFB's Complaint is not based upon the bar complaint filed against Respondent by his former client Murat Tastan because TFB closed its file on said bar complaint and notified Mr. Tastan in its letter dated June 5, 2009 that "The Supreme Court of Florida . . . in the case of *TFB v. Winn*, 208 So. 2d 809 (Fla. 1968) . . . held that controversies concerning the reasonableness of fees charged to and paid by clients are matter which by the very nature of the controversy should be left to the civil courts in proper proceedings for determination. . . . In light of the foregoing, continued disciplinary proceedings in this matter are inappropriate and our file has been closed." [Mr. Head's Appendix, Tab 15, p. 2]. TFB determined it to be a "fee dispute." However, TFB's Bar Counsel chose to reopen Mr. Tastan bar complaint based upon Respondent's August 11, 2009 settlement letter proposing a resolution to the ongoing *fee dispute*

which included a proposed mutual general release [Mr. Head's Appendix, Tab 17]. It is Respondent's letter and the release that provides the sole basis for the alleged violation contained in Count II of TFB's Complaint.

At the final hearing, the testimony of Mr. Tastan and Respondent made it clear that a fee dispute had arisen between them – resulting in Respondent withdrawing as Mr. Tastan's attorney of record in his case *Murat Tastan v. Julian LeCraw & Company, LLC, et al* ,Case No. CA08-2084, Div. 55, Circuit Court, St. Johns County, Florida. Respondent twice offered to go to fee arbitration with Mr. Tastan, however he refused and filed his bar complaint instead. [TR I, p. 54, lines 17 to 24, p. 55, lines 1 to 8]. After TFB closed its file pursuant to its letter to Mr. Tastan dated June 5, 2009, Mr. Tastan filed an Application to participate in The Florida Bar's Fee Arbitration program listing as his attorney Brad Hughes, Esq. [Mr. Head's Appendix, Tab 16]. Respondent testified that he received a copy of the Application from TFB, but declined to participate in light of Mr. Tastan's refusal to participate in the said program before filing his bar complaint [TR IV, p. 476, lines 11 to 15, 20, 21, p. 477, lines 9 to 11].

At the final hearing, there was no testimony by Mr. Tastan or any other witness that Respondent has committed malpractice while representing Mr. Tastan or that any of Respondent's actions while representing Mr. Tastan had damaged his

case in any way. In fact Mr. Tastan testified that his attorney Mr. Hughes settled his case (from which Respondent withdrew) in Mr. Tastan's favor. [TR I, p.51, lines 16 to 25, p. 52, lines 1 to 2]. Mr. Tastan also testified that he did not accept Respondent's settlement proposal or sign the Mutual General Release. [TR I, p. 50, lines 6 to 12, 18]. Respondent testified that since there was no malpractice claim that had been made against him, the purpose of the August 11, 2009 letter was to settle the fee dispute only [TR IV, p. 478, lines 4 to 6, 16 to 20].

SUMMARY OF ARGUMENT

TFB has exceeded its mandate of regulating lawyer conduct in this case because it has essentially chosen sides (the losing side by the way) in an ongoing landlord/tenant dispute where those who filed the initial bar complaints are opposing counsel and her client. TFB has accepted at fact value the sworn bar complaint, affidavit and testimony under oath by Mr. Johnson that is at best merely the opinion of a non-party and at worst blatant perjury. TFB has allowed opposing counsel Mrs. Wharton and her client Mr. Johnson to pervert the Florida Supreme Court's disciplinary frame work from a self-policing process into an offensive weapon to collaterally attack Respondent personally and by extension his Landlord clients in an ongoing landlord/tenant action.

TFB's first two arguments that the Referee erred by finding that the landlord's lien is "possessory" and that Respondent's advice to his Landlord clients that they deny access to the leased premises to Mr. Johnson in whatever capacity he chose to assert at the time are not relevant to this dispute because Judge Traynor as the trier of fact and law has yet to rule on those issues. Respondent is not required to prove in this forum Landlords' theory of abandonment of the leased premises by Nations. That matter is before Judge Traynor who is the trier of fact and law in the landlord/tenant action. Respondent had only to demonstrate his good faith belief in the meritorious nature of his clients' legal position based upon the facts and the law that existed on March 19, 2009. The testimony of Respondent's expert showed that the advice provided by Respondent to his landlord clients on March 19, 2009 regarding their refusal to allow Mr. Johnson – on behalf of himself individually or as an agent of the defendant tenant – to remove current job files and personal property from the leased premise based upon the existence of the statutory landlord's lien was based upon meritorious facts and law.

ARGUMENT

I. THE REFEREE PROPERLY FOUND THAT RESPONDENT AND HIS LANDLORD CLIENT HAD A GOOD FAITH BELIEF THAT THE LANDLORD'S POSSESSORY LIEN ALLOWED THE LEASED PREMISES TO BE SECURED PENDING THE PERFECTION OF THE SAME BY MEANS OF THE ISSUANCE OF A DISTRESS WRIT IS SUPPORTED BY EXISTING FACTS AND LAW.

TFB incredibly asserts that the Referee erred by concluding that Respondent's advice to Landlords "prevented anyone from removing anything from the leased premises on [March 19, 2009]. The court sees no improper or unethical conduct by Respondent in preserving the status quo until the matter could be reviewed by a court." [ROR, p. 8]. TFB then cites case law for the proposition that Landlords should have allowed Mr. Johnson to remove Nations' furniture, fixtures, equipment and inventory ("F, F & E") under the guise as Nations' "authorized agent" even though TFB's direct examination of Mr. Johnson demonstrated what the parties to the landlord/tenant action have known since March 19, 2009 – that he routinely and simultaneously claimed to be acting as an agent of Nations and in the next breath as the owner/purchaser of Nations' F, F & E which he did no less than four times in a matter of mere minutes on direct (e.g., "I . . . purchase[d] the assets"; "I was there as his agent."; I . . . starte[d] moving my property off the premises"; I had the authority to be there and I wanted to get

my property." [TR II, p.214, lines 7 to 10, p. 215, lines 16 to 23, p. 217, lines 21 to 24, p. 220, lines 6 to 8]. It is a wonder that Mr. Johnson didn't experience whiplash! It is even a greater wonder that TFB has the *chutzpah* to argue that Respondent and Landlords were not "authorized to deny the tenant's agents access to the premises . . . " which TFB claims is "nothing more that 'self-help' eviction . . . ." [TFB Brief, p. 21]. Really? The Referee was spot on in finding that Respondent's conduct in making sure the F, F & E didn't fall into Mr. Johnson's hand wasn't improper or unethical. [ROR, p. 19].

II. THE REFEREE'S FINDINGS REGARDING ABANDONMENT AND ACCESS TO THE LEASED PROPERTY ARE NOT RELEVANT TO THIS PROCEEDING BECAUSE THEY LIE WITHIN THE PURVIEW OF THE TRIAL COURT THAT HAS YET TO RULE AS THE TRIER OF FACT AND LAW ON THOSE ISSUES IN THE UNDERLYING LANDLORD/TENANT ACTION.

TFB next asserts that the Referee erred in finding that it was unclear who had a superior interest to Nations' F, F & E located at the leased premises. However, the Fifth District Court of Appeal ("DCA") was *absolutely clear* that Mr. Johnson and his company Superior Fence had *no interest* in Nations' F, F & E and so stated holding "Having carefully reviewed the record, we find no error in the trial judge's determination that Superior and Johnson have no direct and

immediate legal interest in the underlying [landlord/tenant] litigation." [Mr. Head's Ex. 18]. Even Mr. Johnson admitted before the Referee when asked if the Fifth DCA *en banc* upheld Judge Traynor's Order denying his attempt to intervene "Yes, they did. Which we expected, frankly. We knew it was a long shot." [TR II, p. 254, lines 10 to 11]. Why then did TFB decide to carry Mr. Johnson's water and take up his fight in this disciplinary proceeding after he lost so convincingly at both the trial and appellate level?

TFB concedes that "the issue is not the lien itself. The existence of the landlord's lien is not in question." [TFB Brief, p. 22]. The real issue is whether the Landlords and Respondent believed that Nations abandoned the leased premises thereby allowing the Landlords to secure it and prevent the F, F & E from walking out the door courtesy of Mr. Johnson – the one with "no direct and immediate legal interest" – on the afternoon of March 19, 2009. The fact that Mr. Johnson's bar complaint is the one that cries wolf (a/ka "lock-out" or "self-help" eviction) would be amusing but for his complete misuse of this Honorable Court's disciplinary process to suit his own ends [TFB Ex. D, p. 3]. Respondent's actions in advising Landlords not to allow Mr. Johnson access to the leased premises and then perfecting Respondent's clients' landlord lien by filing the landlord/tenant action and obtaining a Distress Writ in less than 24 hours from the time the dispute arose

between Mr. Johnson and the Landlords was appropriate and the Referee saw "no problem with the Respondent coming to the aid of his client at his client's business premises." [ROR, p. 18]. This is especially true in an action involving a Distress Writ – the purpose of which is maintain the status quo and insure that the disposition of a tenant's F, F & E is determined by the courts, not individual parties engaging in self-help remedies.

Further, Respondent's settlement discussions on March 19, 2009 with Mr. Lehmann[5] regarding a plan for him to pay the past due rent and the status of the F, F & E at the leased premises while Mr. Lehmann sat in his office in Deland, Florida is evidence that the leased premises *had been* abandoned, not the contrary as TFB asserts. At some point in the ongoing landlord/tenant litigation, Judge Traynor will have an opportunity as the trier of fact and law to determine if Landlords' recovery of possession of the leased premises pursuant to F.S. §83.05(2)(c) – which states that "The landlord shall recover possession of rented premises only: (c) When the tenant has abandoned the rented premises" – was based on actual knowledge of Nations' abandonment. Such a good faith belief that Nations abandoned the leased premises alleviates Landlords' compliance with the

[5] Mr. Lehmann was the President of Nations Fence, Inc. and an individual leasee on the Leases.

"presumption of abandonment" procedures outlined in subsection F.S. §83.05(3) et seq.

This disciplinary proceeding is an inappropriate forum for TFB to attempt to establish binding precedent as the surrogate for Mr. Johnson and his attorney Mrs. Wharton who are attempting to hamstring Judge Traynor as the trier of fact and law in the ongoing landlord/tenant action. It is a misuse and an abuse of the of the disciplinary process. If allowed, it will result in an unimaginable "end around" of established appellate procedure. Further, it just adds one more arrow in the quiver for counsel on the losing side in ongoing litigation to enlist TFB as "co-counsel" in order to sidetrack opposing counsel. This misuse of the disciplinary process should not be by this Honorable Court.

III. THE REFEREE ERRED IN RECOMMENDING THAT RESPONDENT BE FOUND GUILTY OF A VIOLATION OF RULE 4-8.4(C) BECAUSE THE REPORT OF REFEREE CONTAINS NO FINDINGS OF A VIOLATION AND THE FINDING OF A VIOLATION OF RULE 4-3.3 IS NOT SUPPORTED BY THE EVIDENCE.

The Referee stated that the "most serious allegation against the Respondent is that he violated Rule 4-3.3(a) dealing with candor toward the tribunal and 4-8.4(c) dealing with dishonesty, fraud, deceit or misconduct." [ROR, p. 8,9]. The Referee then goes on to examine the allegations that Respondent's Affidavit of

Compliance misrepresented that he made certain business records available to Mrs. Allen on March 19, 2009 when her Affidavit (prepared by Mrs. Wharton) appeared to contradict that of Respondent. The Referee concluded that "Respondent violated Rule 4-3.3 by filing an inaccurate and untruthful Affidavit with the court." [ROR, p. 11]. The Referee makes no mention of any violation of Rule 4-8.4(c) in connection with the competing Affidavits, nor does the Referee assert or make mention in the rest of the Report of Referee that any violation of said Rule has occurred. It is not until the Recommendations as to Guilt section that the Referee recommends that Respondent be found guilty of violating Rule 4-8.4(c) and thus the recommendation lacks a finding upon which is based. For these reasons, said recommendation should be disapproved.

Respondent contends that the totality of the testimony of Mrs. Allen, Ms. Head, Mr. Willard and Respondent demonstrate that Mrs. Allen was in fact allowed access to office and warehouse at the leased premises to locate Nations old job files that she claimed she needed for the sale tax audit the next day. Mrs. Allen admitted to the Referee that her statement to Mr. Lucas on March 19, 2009 (which was captured on videotape by Mr. Johnson) that "I have a Department of Revenue sales tax audit *tomorrow* and I just need the job files. I don't care about anything else." was in fact a lie [TR II, p. lines 13 to 25, p. 185, lines 1, 2]. Mrs. Allen

clarified for the Referee that the "job files" to which she referred were the old job files in the warehouse [TR II, p. 204, lines 19 to 25, p. 205, lines 1 to 9]. Mrs. Allen's Affidavit and testimony was that she was not allowed to take any files when she left between 2:30 and 3:00 p.m. on March 19, 2011[TR II, p. 198, lines 6 to 8]. Respondent left to file the landlord/tenant action and was not present at the leased premises when Mrs. Allen left – without taking the old job files she falsely claimed were need for the sales tax audit the next day. In fact Mrs. Allen chose to leave the old job files behind in the warehouse because she didn't need them since there *was no audit the next day!* When she learned from Respondent that she would not be allowed to take the current job files that she testified she "really wanted to get", she abandoned her efforts – not because Respondent (was even present when she left) turned her away empty handed, but because she chose to leave empty handed [TR II, p. 179, lines 4 to 7]. Mrs. Allen also testified before the Referee that she didn't know what Respondent told her regarding which files she could or couldn't take [TR II, p. 194, 11 to 14]. As a result the Affidavit she signed under oath (prepared by Mrs. Wharton) was intentionally misleading in that it asserted that Respondent refused her give her the "books and records" and that she was not allowed access to the leased premises when she testified that she was allowed to go to the warehouse with Ms. Head to determine which old jobs files

she wanted to take. As a result, the Referee's determination that Respondent's Affidavit of Compliance was inaccurate and untrue and that Mrs. Allen's Affidavit was by extension accurate and true is not supported by the evidence or testimony.

Respondent committed no fraud or misrepresentation in his Affidavit of Compliance [Mr. Head's Appendix, Tab 2] or in open court before Judge Traynor. TFB's key witness Mr. Johnson could point to no statements made in open court the constituted "lies" because there were none [TR II, p.245, lines 12 to 25, p. 246, lines 1 to 2]. Therefore, Respondent's Affidavit of Compliance that was found by the Referee to be "inaccurate and untrue" as to whether Mrs. Allen was denied access to the corporate books and records focused on the sentence that stated that Respondent "told her she could take all the files. However, the complete statement was: "I told her that she could take all the files *and business records with her except for the current contracts located within the office (as opposed to the warehouse where all the old records were stored) because Christopher Johnson and his company Superior Fence and Rail, through their attorney, had notified me ant the Lucases that all the current contracts had been assigned by Nations Fence, Inc. To them."* [Mr. Head's Appendix, Tab 2, p. 1]. The Affidavit of Mrs. Allen makes no distinction as to the "books and records" that Respondent refused to allow her to take – which were the current records, not the old records.

Respondent arranged for and was personally present at the leased premises to meet Mrs. Allen so she could pick up the files on March 27, 2009 and March 30, 2009. However, she didn't show up as scheduled [Mr. Head's Appendix, Tab 12, p. 1] but did meet Respondent on April 1, 2009 to take all the files located on the leased premises – current and old – with her. Therefore, on the date that the Affidavit of Compliance was filed with the Court, the files were a moot point.

Even if this Honorable Court chooses not to disturb the Referee's finding, it that Respondent violated Rule 4-3.3 by filing his Affidavit of Compliance, it is clear that the discrepancy between the two affidavits was minor and ultimately irrelevant because Mrs. Allen picked up all the job files – current and old – from the leased premises on April 1, 2009 – three days before Respondent filed his Affidavit of Compliance. As a result, this Honorable Court should conclude that Respondent's statement that Mrs. Allen was offered the old job files was not an attempt to mislead Judge Traynor.

IV. THE REFEREE ERRED IN HIS INTERPRETATION OF RULE 4-1.8(H) WHERE HE FOUND THAT RESPONDENT WAS REQUIRED TO INCLUDE INDEPENDENT REPRESENTATION ADVICE TO HIS FORMER CLIENT IN RESPONDENT'S CORRESPONDENCE ATTEMPTING TO SETTLE A FEE DISPUTE.

The only issue raised in Count II of TFB's Complaint is whether Respondent's August 11, 2009 correspondence [see Mr. Head's Appendix, Tab 17] to his former client Mr. Murat Tastan proposing to settle their attorney's fee dispute was a *per se* violation of Rule 4.1-8(h) since it did not contain any language advising Mr. Tastan to seek "independent representation . . . in connection therewith." The Rule states:

> "A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. *A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.*" (Emphasis added)

The record and testimony show that there was no malpractice claim made by Mr. Tastan against Respondent, that Mr. Tastan was represented by attorney Brad Hughes, Esq. at the time Mr. Tastan received Respondent's letter and actually sought and obtain advice from Mr. Hughes regarding what to do with the fee dispute settlement proposal. [TR I, p. 42, lines 8 to 6, 22 to 25, p. 43, lines 1 to 12, p. 48, lines 9 to 18].

TFB's position as stated by Bar Counsel during the final hearing is "The issue in not whether [Mr. Tastan] was represented, the issue under the rule, Judge, is Mr. Head's duty to advise the client in writing of his right to be independently

represented." [TR I, p. 46, lines 13 to 16]. There is no dispute that Respondent's letter did not advise Mr. Tastan that "independent representation is appropriate" before he decided whether to accept Respondent's settlement proposal. The dispute is over the interpretation of the Rule and its application.

TFB's position is that it does not have to show that any claim or potential claim for malpractice exists or that a "claim for such liability (i.e., malpractice)" was actually settled by the attorney. TFB also asserts that it does not have to show that Respondent's former client was "unrepresented" before the requirement to include the "independent representation is appropriate" language must be included – regardless of the current language of the Rule. The Referee concurred with this interpretation finding that "Respondent has a duty to advise Mr. Tastan in writing that independent representation by counsel was appropriate when considering the mutual release and settlement." [ROR p. 22]. In essence, both TFB and the Referee read the second sentence of Rule 4-1.8(h) as if it said:

> A lawyer shall not settle a claim for such liability ***regardless of whether any malpractice liability exists or could possibly be imagined by the client or former client or attempt to settle any type of claim*** with an unrepresented client or former client ***whether they are represented by independent counsel or not*** without first ***always*** advising that person in writing that independent representation is appropriate in connection therewith." (Emphasis added)

As support, both TFB and the Referee rely on *The Florida Bar v. Jordan*, 705 S. 2d 1387, 1390 (Fla. 1998) where the Referee found:

> ". . . by clear and convincing evidence [a violation of] Rule 4-1.8(h), Rules Regulating The Florida Bar. The Respondent's meeting with Ms. Mitchell from August 1995 through January or February 1996 – numbering approximately ten (10) meetings – were an attempt to settle a potential claim for malpractice liability without first advising Ms. Mitchell in writing that she should seek independent representation in connection with such claim."

Id.

No similar facts are present in Respondent's case. To the contrary, Respondent never met with Mr. Tastan, but *merely attempted* to settle their ongoing *attorney fee dispute* by sending the August 11, 2009 letter to Respondent's former client who testified that he was *represented by independent counsel* (i.e., Brad Hughes, Esq.) and that he sought and *followed said independent advice* in refusing to accept Respondent's settlement proposal [TR I, p. 42, lines 9 to 24]. Since it is a fact that Mr. Tastan was represented at the time he received Respondent's settlement letter, Respondent had no "duty" to include the "independent representation is appropriate" language in his settlement proposal regarding their unresolved fee dispute. The Referee determined that "[s]uch violation was minor . . . ." and was in essence a technical violation since Mr. Tastan was represented by separate and independent counsel, consulted with his

counsel regarding the mutual release and was not damaged and did not sign the mutual release or agree to the settlement offer. [ROR, p. 22].

The Referee's interpretation of the Rule (as put forth by TFB) renders meaningless its language "limiting a lawyer's liability to a client for *malpractice*" and "settling a claim for such liability with an *unrepresented* client or former client" if it is intended to be a *per se* violation of the Rule regardless of whether there is any malpractice and even if the former client is represented. If that is the intended meaning of Rule 4-1.8(h) then the Rule should be revised to clearly state that a lawyer *is always required to advise* "that person in writing that independent representation is appropriate in connection therewith." This way the lattorney seeking to resolve fees disputes with his or her clients or former clients (which happens routinely in the real world) has a bright line that clearly delineates his or her responsibility to advise that independent representation is always appropriate before settlement any type of claim – whether malpractice or contractual attorney's fees owed by the client or former client. As written and as interpreted by the Referee, Rule 4-1.8(h) constitutes an unnecessary stumbling block waiting to trip up the unwary practitioner as it did in Respondent's case.

V. RESPONDENT'S MISCONDUCT AS DETERMINED BY THE REFEREE WAS NOT DELIBERATE OR KNOWING AND INTENTIONAL, BUT RATHER WAS MINOR, OF NO CONSEQUENCE AND DEMONSTRATED MISJUDGMENT IN THE HEAT OF BATTLE NOT JUSTIFY THE ENHANCED DISCIPLINE SOUGHT BY TFB.

Respondent is most concerned about the Referee's finding that his Affidavit of Compliance filed with the Court "was inaccurate and untrue" and therefore "Respondent violated Rule 4-3.3. If this Honorable Court determines that the Referee's Finding of Fact are supported by the record and that the Referee's Recommendations as to Guilt on both Counts of the Complaint should be upheld, then the Referee's Recommendations as to Disciplinary Measures to be Applied should likewise be approved by this Honorable Court. TFB's assertion that because the actions of Respondent fall into certain categories of Rules violations, they of necessity must merit enhanced punishment is not supported by the totality of the facts established by the record. Respondent acknowledges that the scope of review by this Honorable Court, which is broader than just the Report of Referee, allows this Honorable Court to be the final arbiter of what sanctions are appropriate. *The Florida Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989).* However, the Referee's finding that "The conduct of the Respondent, viewed in light of all the evidence shows no more that minor misconduct and misjudgments .

. . .” [ROR, p. 19] is supported by the record on appeal which clearly demonstrates that Respondent never deliberately or knowingly or intentionally violated Rule 4-4.1, 4-3.3(a) or Rule 4-8.4(c) and therefore the Referee’s recommendation as to discipline should be adopted by this Honorable Court.

Perhaps the best evidence that Respondent’s conduct in the ongoing landlord/tenant action which is the primary subject of TFB’s Complaint is the deposition testimony of Judge Traynor. While the Referee chose to discount the importance of Judge Traynor’s testimony stating that “he had little to add concerning the issues in this matter” [ROR, p. 18], in fact Judge Traynor made it clear when asked by Respondent “To your knowledge, have I ever engaged in any conduct that involved dishonesty, fraud, deceit, or misrepresentation to the Court in this case?” that the answer was “No.” Judge Traynor then went on to point out that “to the extent that you both [i.e., Respondent and Mrs. Wharton] argue with one another, sometimes passionately, it is not – not a concern of mine in terms of, that I feel like you’re trying to be – you or she – you’re trying to affront the Court with any type of disrespect or to try to deceive me.” [Mr. Head’s Appendix, Tab 14, page 18, lines 12 to 24]. In every case cited by TFB for the proposition that Respondent violated Rule 4-4.1, 4-3.3(a) or Rule 4-8.4(c) there was *some finding* by the underlying tribunal that the attorney to be disciplined had misrepresented,

falsified, intentionally been dishonest with the tribunal in order to gain some advantage or "hide the ball." This key element in TFB case against Respondent is completely absence in the ongoing landlord/tenant action before Judge Traynor as his deposition testimony confirms.

CONCLUSION

For the reasons set forth above, Respondent Koko Head requests that this Honorable Court disapprove the Referee's recommendation that Respondent be found guilty of a violation of Rule 4-8.4(c) because the Referee never made any specific findings in the Report of Referee that Respondent has violated said Rule. Further, since a violation of Rule 4-3.3 is not supported by the evidence, this Honorable Court should disapprove of the Referee's recommendation that Respondent be found guilty of a violation of said Rule. The Referee's overall finding was that "The conduct of the Respondent, viewed in light of all of the evidence show no more than minor misconduct and misjudgment by Respondent." [ROR, p. 19]. Therefore, the recommended discipline for said minor misconduct is appropriate and this Honorable Court should not accept TFB's recommendations for enhanced discipline. In essence, TFB seeks to substitute its judgment in the place of Judge Traynor whose deposition testimony demonstrated that none of the allegations found in Count I of TFB's Complaint were committed by Respondent

in the current and ongoing landlord/tenant case. Finally, TFB should not be permitted to choose sides in ongoing, hotly litigated cases where opposing counsel and her client are attempting to collaterally attack Respondent and Landlords have been unsuccessful in the landlord/tenant action at the trial level and on appeal. Simply put, TFB's quixotic efforts as surrogate for Mr. Johnson and Mrs. Wharton in this disciplinary proceeding is misplaced.

Dated: July 12, 2011

LAW OFFICE OF KOKO HEAD, P. A.

By:_____

Koko Head, Esq., *Pro Se*
Florida Bar No. 475701
100 State Road 13N., Suite D
St. Johns, Florida 32259
Telephone: (904) 535-0642
Facsimile: (904) 814-8725

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of Respondent Koko Head, Esq.'s Answer Brief regarding Supreme Court Case No. SC10-175, TFB File No. 2009-31,193(4C), et al., was hand delivered to The Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, Supreme Court Building, 500 Duval Street, Tallahassee, FL 32399 and that a true and correct copy thereof was hand delivered to Carlos A. Leon, Esq. and Kenneth L. Marvin, Esq., The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 on July 12, 2011.

Koko Head, Esq., *Pro Se*

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

I HEREBY CERTIFY that this Answer Brief has been submitted in 14 point proportionately spaced Times New Roman font, and that said Answer Brief has been filed by e-mail in accord with the Court's Order dated October 1, 2004 and that the electronically filed version of this brief has been scanned and found to be free of viruses by Microsoft Windows anti-virus for Windows 7.

_____