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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOSE CARLOS MARRERO,

Respondent.

_____/

Supreme Court Case
No. SC11-1780

The Florida Bar File
No. 2010-70,709 (11D)

REPLY BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

For the purpose of this brief, Jose Carlos Marrero may be referred to as "Respondent". The Florida Bar may be referred to as "The Florida Bar" or the "Bar". The referee may be referred to as the "Referee". Additionally, the Rules Regulating the Florida Bar may be referred to as the "Rules" and the Florida Standards for Imposing Lawyer Sanctions may be referred to as the "Standards".

References to the Report of Referee will be by the symbol "ROR" followed by the corresponding page number(s). References to the transcripts of the final hearing held on April 19, 20, and 27, 2012 will be by the symbol "TR" followed by the corresponding page number(s).

References to The Florida Bar's exhibits will be by TFB Ex., followed by the exhibit number. References to Respondent's exhibits will be by R Ex., followed by the exhibit number).

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar adopts and reincorporates its Statement of the Case and Facts previously submitted in its Initial Brief on Appeal. The Bar submits the following additions and corrections in response to the Statement of the Case and Facts contained in Respondent's Answer Brief.

Respondent asserts that Ms. Gonzalez's practice was to disburse loan funds *to the borrowers* prior to a formal closing. (Answer Brief, p. 3-4). There is no evidence in the Record to support this assertion, and the Record evidence specifically refutes same. Gonzalez at all times testified consistently that she provided the loan funds *to Respondent*, not to the borrowers, for deposit into the trust account prior to the closing on the loan, and that the funds would not be disbursed to the borrowers until after the documents were properly executed and the loan closed. (T. 54, 57, 253). This is how Respondent and Pedrosa conducted the loan transactions in the past, and it was how she believed the transaction would occur in the instant case. (T. 54, 57, 253, 255, 268).

Respondent asserts, in several places throughout the Statement of the Facts and in his Argument, that Gonzalez instructed him to disburse the funds immediately because she wanted to begin earning interest right away. (T. 4). He avers that in this manner, Respondent was merely following Gonzalez's instructions

when he disbursed the funds to the borrowers the day after they were received, at a time prior to the execution of any documents securing the loan. However, the Record evidence established that Gonzalez always began earning interest from the first day that she provided the loan funds to Respondent, both in the prior transactions she conducted with Pedrosa and Respondent, and in the underlying transaction. (T 54-55). Thus, Gonzalez would have begun receiving interest payments from the date she provided the funds, irrespective of when the funds were disbursed to the borrowers pursuant to a valid closing on the loan.

Respondent asserts that this position, that the standard course of practice was for Gonzalez to begin earning interest from the first day she provided the loan funds to Respondent, is inconsistent with the Bar's argument that Gonzalez expected Respondent to hold the loan funds until a closing occurred. (Answer Brief, p. 6). However, there is no inconsistency in the evidence presented. Ms. Gonzalez testified that it was their standard practice to receive interest from day one, and that also, the funds were always held until there was a closing. (T. 54-55, 57, 253). Staff Auditor Duarte confirmed from the prior loan documents and records that Respondent always held the funds until a closing occurred in their prior transactions. (T. 253, 255, 268). As Respondent noted on several occasions throughout his Answer Brief, these were not conventional loans and the parties

were essentially able to make up their own rules and terms. Therefore, there is no inconsistency in the fact that the borrowers agreed to pay interest from the first day the monies to fund the loan were provided to Respondent, rather than from the date of the loan closing.

Respondent asserts, in his Statement of the Facts, as well as in the Argument portion of his Answer Brief, that the loan began as an unsecured loan, which was guaranteed by Rick Pedrosa, and that when Pedrosa no longer wished to guarantee the loan, *Gonzalez* instructed Respondent to prepare a second mortgage. (Answer Brief, p. 7). However, the undisputed Record evidence established that Respondent did not have any further conversations with Gonzalez after receiving the funds, and that it was actually Rick Pedrosa who instructed him to prepare the second mortgage. Respondent's own trial testimony irrefutably established same. (T. 391-393). Additionally, in his initial response to the Bar Grievance, Respondent admitted that the loan funds were given to fund a second mortgage.

ARGUMENT

I. IN REPLY TO POINT I OF RESPONDENT'S ANSWER BRIEF: THE UNDISPUTED FACTS AND RECORD EVIDENCE ESTABLISHED THAT RESPONDENT HIMSELF DRAFTED, EXECUTED, AND WITNESSED A FRAUDULENT MORTGAGE DOCUMENT. THEREFORE BASED ON HIS OWN ACTIONS, AND NOT THOSE OF ANOTHER EMPLOYEE, RESPONDENT ENGAGED IN MORTGAGE FRAUD AND IS GUILTY AS A MATTER OF LAW OF VIOLATING RULE 4-8.4(C). FURTHER, THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE FRAUD PERPETRATED ON COUNTRY WIDE BANK WERE NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AND SHOULD THEREFORE BE REJECTED BY THIS COURT.

In its Initial Brief on Appeal, the Florida Bar presented its argument regarding the fraudulent "second mortgage" prepared by Respondent, himself, as Argument I. The Bar demonstrated that the facts surrounding the preparation, execution, and closing of the fraudulent second mortgage loan documents were not in dispute, and therefore, this Court would review this issue of law *de novo*. By contrast, the Bar presented its argument regarding the remainder of the Referee's factual findings and conclusions of law as Argument II. In his Answer Brief, Respondent created his own issues and incorporated portions of the Bar's Arguments I and II into his Pointe I. For the limited purposes of this Reply Brief, the Bar will attempt to reply to Respondent's argument using the Pointes he identified in his Answer Brief. The Bar adopts and incorporates herein all the

arguments it previously raised in its Arguments I and II in the Initial Brief on Appeal.

Respondent throughout his argument in Point I starts from the premise that the Florida Bar is proceeding against Respondent based solely on the actions of others; actions of which he contends he was not aware and for which he should not be held responsible. Respondent's argument must fail because it is based on a false premise. The Bar is proceeding against Respondent primarily for his own actions, actions which he cannot attribute to others. Based on actions that he, and he alone took, he committed mortgage fraud when he, himself, drafted a purported "Second" mortgage document which attached a piece of property as collateral or security that no signatory to the agreement had any authority to encumber. He, with full knowledge of these facts and the parties involved, then presented this fraudulent document to the parties for execution, and further he signed as a witness to the execution of same. Respondent has never presented an explanation for why he would take these actions, except to indicate that Rick Pedrosa instructed him to prepare the document. He further has never denied his intimate familiarity with the parties involved, or his knowledge that the borrowers had not yet purchased the Weston property when he drafted, presented for execution, witnessed and closed the loan on the fraudulent "second" mortgage. The Referee in the underlying

proceedings either overlooked, or chose to ignore, these critical facts. However, these facts are not in dispute, are admitted and acknowledged by Respondent, and cannot lead to any other conclusion but that Respondent engaged in dishonest and fraudulent conduct when he drafted and closed this fraudulent loan. Because these facts are not in dispute, on this issue alone, this Court will review this question of law *de novo*.[1] *The Florida Bar v. Brownstein*, 953 So.2d 502, 510 (Fla. 2007).

Further, Respondent's misconduct in drafting and closing the mortgage loan prior to the borrowers' actual purchase of the property in question, facilitated and assisted the borrowers to commit another fraud on Country Wide Bank. The purchasers used the funds borrowed from the Gonzalez "second mortgage" to fund the down payment and closing costs necessary to purchase the home that was listed as collateral on the previously executed "second mortgage." Based on the documents submitted at the Country Wide closing, the bank was clearly not informed of these critical details. But for Respondent's own actions, the fraud against Country Wide could not have occurred as it did. Additionally, Respondent

[1] In his Answer Brief, at p. 20, footnote 8, Respondent asserts that this Court should not review the matter *de novo* because the Bar does not accept all of the Referee's findings of fact. Respondent misapprehends the standard. *De novo* review is appropriate on this limited issue because neither party disputes the facts on which the issue relies. The Referee did not actually make any findings of fact concerning this limited issue, and instead confined her findings to Respondent's lack of

himself prepared and signed the title insurance policies issued after the Country Wide closing, in which he omitted the prior Gonzalez loan as an encumbrance on the property. Therefore, it is clear that the Bar is proceeding against Respondent based on his own actions and conduct, and not solely based on the conduct of others.

Respondent's contention that the Bar failed to establish the necessary intent to commit a violation of Rule 4-8.4(c) is without merit. As was clearly presented in the Florida Bar's Argument I in its Initial Brief on Appeal, the undisputed facts surrounding the creation and execution and closing of the fraudulent "second mortgage" are more than sufficient to demonstrate deliberate conduct sufficient to establish the requisite intent and establish a violation of Rule 4-8.4(c).

In response to specific statements and arguments raised by Respondent in Point I: Respondent asserts that there is no evidence in the Record to support the fact that Respondent concealed or failed to disclose information to Gonzalez. Contrary to Respondent's assertions, his own argument supports this fact as he set forth cites in the Record of Gonzalez's testimony that Marrero made no representations to her. (Answer Brief, p. 14). Additionally, Gonzalez gave direct testimony of this fact at the Final Hearing. She testified, "[Respondent] didn't tell

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knowledge concerning conventional loan closings and failure to adequately

me anything about the loan; that he didn't tell me anything that [Gutierrez] didn't own the property. And at the time, he knew she didn't own the property." (T. 58).

Respondent next asserts that the undisputed testimony establishes that Gonzalez instructed Respondent to prepare a second mortgage after Pedrosa decided he no longer wished to secure the loan. Contrary to Respondent's assertions, there is absolutely no record evidence to support this contention, and in fact, the Record evidence refutes same. The undisputed Record evidence established that Gonzalez always believed the loan was for a second mortgage, and accordingly, she always anticipated that she would be receiving loan documents and so there would be no need for such instructions. Further, Gonzalez had no conversations with Respondent following his receipt of the loan funds on December 15, 2005, and therefore could not have given him any instructions to prepare a second mortgage. Finally, by his own testimony, Respondent established that it was purportedly Rick Pedrosa who instructed him one month after he disbursed the loan funds to prepare the second mortgage. Moreover, Respondent himself admitted in his initial response to the Florida Bar grievance that Gonzalez provided the monies to fund a second mortgage.

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supervise his employees in regard to the Country Wide closing.

Further, Respondent contends that the Bar misled the Court when it argued that Respondent took this position, that the loan began as an unsecured loan rather than a second mortgage, for the first time at his deposition, two and a half years into the Bar's investigation. Respondent asserts that the Bar could have deposed Respondent earlier in the process, and that the Bar failed to speak to the Investigating Member of the Grievance Committee, to whom Respondent first relayed this information. Contrary to Respondent's assertions, the Bar did not mislead the Court on this point. First, Respondent had numerous opportunities to present this information to Bar Counsel throughout the investigative process, and he failed to do so. All Respondents are asked to respond to a grievance at staff level, and are again placed on notice that they may present a written statement to the Grievance Committee to be included with the materials the Committee will consider when it votes on the matter. Respondent did respond in writing to the grievance at staff level, but in that submission he admitted the monies were provided to fund a second mortgage. There is no written submission in which Respondent set forth his entirely new defense that the loan began as an unsecured loan. Further, there is no evidence in the Record to indicate what statements, if any, Respondent made to the Investigating Member, and certainly no record evidence to suggest that Bar Counsel did not speak with the Investigating Member. Indeed, Bar Counsel was present at

the hearing in which the Investigating Member presented the details of his investigation to the Committee prior to its vote. Moreover, when asked on cross examination at the Final Hearing whether he ever previously mentioned this defense to the Bar, Respondent replied that he could not recall. (T. 388). He admitted that he could not produce any document in which he presented this information to the Bar. (T. 388). The Bar did not mislead the Court on this point, rather it was Respondent who is attempting to mislead the Court on this issue.

Next, Respondent seeks to distract this Court from the actual facts in this case, by making personal attacks on the Bar's Staff Auditor. Respondent utilized the same strategy at trial. Contrary to Respondent's assertions, Staff Auditor Duarte testified to each and every fact and detail that established evidence of the two instances of mortgage fraud at issue in the underlying case. Staff Auditor Duarte's testimony was clear and convincing. He indicated that there was substantial evidence of fraud associated with the "Second mortgage" prepared and executed by Respondent. These facts and details included the fact that the funds were disbursed prior to the execution of the mortgage documents, that the "second mortgage" was executed at a time that no signatory to the document had the legal right or authority to encumber the property at issue, that a second mortgage cannot be executed prior to the execution of a "first mortgage," and that the purported

"second mortgage" was not recorded until approximately six months later, well after any title search would reveal the existence of same. Further, Respondent did not include the existence of the purported "second mortgage" in any of the title policies he issued, nor was the encumbrance included in any of the documents for the Country Wide mortgage which was used by the borrowers to actually purchase the home. As it relates to the Country Wide loan, Staff Auditor Duarte described the numerous omissions of the Gonzalez loan from the closing documents for the Country Wide loan and the title policies issued thereon. He further demonstrated that Country Wide would have found this information relevant by reference to the closing instructions provided to the closing agent. While Staff Auditor Duarte did make note of the fact that all the parties knew each other, it was mentioned as merely one more fact in a plethora of circumstances that give rise to an indication of fraud, not the sole basis for his conclusion of same. Specifically, Duarte explained that all of the relevant participants surrounding the transactions were inter-related friends and relatives of Pedrosa and/or the borrowers. This made it easier to commit the mortgage fraud, as there was no independent player to put a stop to the fraudulent transactions.

Finally, Respondent asserts that the Referee accepted his testimony that he had no knowledge or skill relevant to real estate closings and that therefore, he was

not aware of the fraud occurring in these transactions. Contrary to Respondent's assertions, such statements are so lacking in credibility that they cannot be considered competent and substantial evidence in this case. Respondent would have this Court believe that he could not read and understand a HUD-1, despite the facts that he was the Owner and Operating Partner in charge of a Title Agency, and despite the fact that his primary area of his legal practice was real estate. He testified that he had no idea what was happening and that he would merely rely on others to do the work and he would simply sign where they indicated, and make out checks as instructed. Even if that testimony could be believed, such actions were so grossly negligent that it is sufficient to infer intentional conduct. See *Rowe v. Willie*, 415 So.2d 79 (4th DCA 1982); *Sanchez-Velasco v. State*, 570 So.2d 908 (Fla. 1990). Moreover, the testimony itself was contradicted by Respondent's own testimony that he would become involved in closings when it was necessary for him to assist the closers with complex title issues. Clearly, if he was unable to read a simple HUD-1, he would not be able to assist with complex issues that arose at the closing table.

For all of the reasons and authorities cited in the Bar's Initial Brief on Appeal, as well as presented in the instant Reply, it is clear after a *de novo* review of the undisputed facts surrounding the preparation, execution and witnessing of the

fraudulent "second mortgage" that Respondent is guilty of engaging in fraudulent and dishonest conduct as a matter of law, and is therefore in violation of Rule 4-8.4(c). Additionally, the remainder of the Referee's findings of fact and conclusions of law are not supported by competent and substantial record evidence, and should not be adopted by this Court.

II. IN REPLY TO POINT II OF RESPONDENT'S ANSWER BRIEF: THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO RULE 5-1.1(B) ARE NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AND SHOULD BE REJECTED BY THIS COURT.

Respondent presumes, for purposes of his argument, that the Bar would need to establish that Respondent was either "pilfering client funds, misappropriating funds for himself or using funds for his own use." (Answer Brief, p. 25). Contrary to Respondent's assertions, the Bar established a violation of this Rule by clear and convincing evidence. The facts that demonstrate the violation of this Rule are clearly set forth in Argument II of the Initial Brief on Appeal, and demonstrate that Respondent disbursed escrowed funds for purposes other than that for which they were provided. Specifically, the funds were provided to fund a second mortgage for the purpose of making home improvements on a property. Instead, they were disbursed prior to the borrowers purchase of the property in question, and were actually used to fund the down payment and closing costs for the borrower's purchase of the property. Rule 5-1.1(b) clearly states, "Money or other property

entrusted an attorney for a specific purpose . . . is held in trust and must be applied only to that purpose." By the plain language of the Rule, Respondent's conduct constitutes a violation of same.

Respondent asserts that this is not a case where money was disbursed without the client's permission or knowledge. (Answer Brief, p. 26). Indeed, that is exactly the case here. Gonzalez testified clearly that she would not have provided these funds if she had known for what purpose they were actually used. Further, she testified that she fully expected the funds to be deposited into escrow and held until a closing occurred. This did not happen. Rather, Respondent disbursed the funds within twenty-four hours of receipt, and the fraudulent second mortgage was not prepared until well after the disbursement.

Further, Gonzalez had the expectation and belief that Respondent would hold the funds until the borrowers closed on her mortgage note because that is exactly how their prior transactions occurred. Indeed, in those prior transactions she also began collecting interest on the loan funds from the day she provided them to Respondent. Accordingly, Respondent did not disburse the funds for the purpose for which they were entrusted to him, and he is therefore in violation of Rule 5-1.1(b). The Referee's findings to the contrary are unsupported by Record evidence and should be rejected by this Court.

III. IN REPLY TO POINT IV OF RESPONDENT'S ANSWER BRIEF: DISBARMENT IS THE APPROPRIATE SANCTION IN THE INSTANT CASE.

The Bar adopts and incorporates all of the arguments previously submitted in Argument III of the Initial Brief on Appeal. For all of the stated reasons, and based on the severity of the misconduct at issue in the instant case, disbarment is the appropriate sanction for Respondent. However, this Court of course has the authority and discretion to remand the matter to the Referee for additional evidence on the appropriate sanction to be imposed if it is so inclined.

CONCLUSION

In consideration of this Court's broad discretion as to discipline and based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Court reject the Referee's recommendation that Respondent be found not guilty of the charged rule violations, and make a finding of guilt as to Rules 4-8.4(c) and 5-1.1(b). Further the Florida Bar respectfully requests that this Court impose the sanction of disbarment. Additionally, in accordance with Rule 3-7.6(q)(3) of the Rules Regulating The Florida Bar, upon a finding of guilt in this matter, The Florida Bar respectfully requests this Court to assess the Bar's costs against the Respondent.

Jennifer R. Falcone Moore, Bar Counsel

CERTIFICATE OF SERVICE

I certify that this document has been E-Filed with The Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, using the E-Filing Portal; and that a copy has been furnished by United States Mail to Richard Benjamin Marx, Attorney for Respondent, 66 West Flagler Street, 2nd Floor, Miami, Florida 33130 (and emailed at crimlawmarx@aol.com and richardbmarx@lawyer.com); and emailed at kmarvin@flabar.org to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399; on this 4th day of June, 2013.

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

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this brief has been E-filed with The Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, using the E-Filing Portal. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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Jennifer R. Falcone Moore, Bar Counsel