IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR — Sup. Ct. Case No, SC11-1780

Complainant, — TFB File #: 2010-70,709(11M)

vs.

JOSE CARLOS MARRERO,

Respondent.
_____/

AMENDED REPORT OF THE REFEREE

Jose Marrero was charged with violations of Rules 4-8.4(c)(engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and 5-1.1(b)(trust accounts) by complaint filed September 13, 2011. A trial was held before the undersigned Referee on April 19, 20, 27 and May 18, 2012. The Bar called as witnesses Ileana Gonzalez and Thomas Duarte, Esq. Respondent Jose Marrero testified in his own defense. On July 16, 2012, the undersigned Referee issued a Report of the Referee. The Referee sua sponte has reconsidered this Report and issues this Amended Report of the Referee in its place.

Findings of Fact[1]

The testimony adduced in these proceedings established the following.

[1] References to the transcript of these proceedings will appear as "T. ##)."

Complaining witness Ileana Gonzalez testified that she had an existing business relationship with a mortgage broker named Rick Pedrosa, in which she made cash loans to clients of Mr. Pedrosa (T. 32). Pedrosa and Respondent are officers of Weston Professional Title Group, Inc., and Respondent is the President and registered agent of Weston. (Complaint of the Florida Bar at 2.) As part of the transaction that generated this complaint against Respondent, Ms. Gonzalez agreed with Mr. Pedrosa that she would lend a client of his $200,000. She testified that Mr. Pedrosa told her that his clients, Karla Gutierrez and Carrero, would use the money to make improvements to a home that Gutierrez already owned. Ms. Gonzalez testified that at the time she lent the money, she believed that she was getting a second mortgage on a home already owned by Gutierrez. This belief was based on representations made to her by Pedrosa and not by Respondent.

Ms. Gonzalez testified that on December 13, 2005, Mr. Pedrosa called Respondent to come to his office to pick up the $200,000 check and that he signed, "received Marrero" on a copy of the check. Ms. Gonzalez further testified that Respondent made no representations to her about the loan. (T. 25). She also testified that the mortgage and note were created three weeks after the funds were disbursed to the borrowers, Gutierrez and Carrero.

Ms. Gonzalez further testified that she received the loan closing documents on January 11, 2006 but that the mortgage was not recorded until six months later. (T. 28). The Referee finds that Gonzalez's recollection comports with the evidence adduced at trial. The deed of mortgage introduced at trial was prepared by Respondent, executed by Gutierrez and Carrero, on January 11, 2006, and not recorded until June 22, 2006.

(The Florida Bar, Exhibit 2A). Gonzalez testified that she would not have lent the $200,000 to Gutierrez if she knew that it would be used to buy a house that Gutierrez did not own. (T. 43).

When Gutierrez stopped making payments on the loan, Gonzalez hired a lawyer, Mario Delgado, who filed suit against Pedrosa and Gutierrez. This case was dismissed for lack of prosecution. Gonzalez subsequently hired a different lawyer, Alex Borell, who prepared, not a complaint, but a letter on her behalf, complaining for the first time about Respondent. Gonzalez's lawyer sent this letter to The Florida Bar and to the Economic Crimes Division of the State Attorney's Office. The evidence adduced before this Referee does not indicate that the State Attorney's Office either followed up or investigated based on that letter.

The Bar next presented the testimony of its auditor, Thomas Duarte, Esquire. Mr. Duarte was qualified by the Referee as an expert in the review of financial transactions and auditing, (T. 89). Mr. Duarte testified that he reviewed the documents that memorialized the $200,000 loan made by Gonzalez to Gutierrez. He testified that Respondent was the agent in charge for Weston Professional Title, according to state records. (T. 120). Duarte testified that he reviewed the bank statements for Weston Professional Title, indicating a wire transfer of $200,000 on December 16, 2005, out of the Weston Professional Title account and to the order of Carrero and Gutierrez. (The Florida Bar Exhibits 8A and 8B). Duarte's testimony and the records of Weston Professional Title, establish that the $200,000 loaned by Gonzalez was disbursed to Carrero the day after Gonzalez tendered it. Taken together with Florida Bar Exhibit 2A (the deed of mortgage prepared January 11, 2006) and 2B (promissory note executed January

10, 2006) it is clear that Gonzalez's funds were disbursed to Gutierrez and Carrrero before the note and mortgage were prepared or signed.

Moreover, as established by Duarte's testimony and The Florida Bar Exhibit 12, borrowers Gutierrez and Carrero did not own the property located at 19164 N. Hibiscus Street, Weston, FL, until January 17, 2006. That is the date a loan was settled between lender Countrywide Bank and the borrowers. This establishes beyond dispute that Gutierrez and Carrero did not own the property when they borrowed the $200,000 from Gonzalez for the alleged "home improvements."

Duarte's testimony further establishes that the warranty deed conveying the Hibiscus Street property to Gutierrez and Carrero, was executed that same day, January 17, 2006 and was recorded on January 19, 2006. (The Florida Bar Exhibit 22A). Duarte's testimony further establishes that the mortgage loan application executed by Carrero in order to obtain the Countrywide loan fails to disclose the $200,000 Gonzalez loan as a liability. (The Florida Bar Exhibit 14).

Mr. Duarte additionally opined that on a title search prior to the closing of the January 17, 2006 loan to Gutierrez and Cipriano, the $200,000 loan from Gonzalez did not show up, since it had not yet been recorded.

Mr. Duarte also testified with regard to the "compliance awareness" form, the "additional closing instructions" form and the "important information regarding funds for primary residence refi's" form and the 25-page "closing instructions" form. (The Florida Bar Composite Exhibit 15). The first three forms were prepared by Weston Title and signed by Maggie Azoy, a non-lawyer employee of Respondent, as "closing

agent." The last form, the 25 page closing instructions, were prepared and signed by Ms. Azoy as "settlement agent." Mr. Duarte opined that the title company acted as fiduciary for the lender, Countrywide. (T. 146). Mr. Duarte observed that the compliance form failed to disclose the $200,000 Gonzalez loan, which he referred to as the "silent second." (T. 152). Mr. Duarte concluded that this failure was a breach of Respondent's fiduciary duty.

Mr. Duarte next testified with regard to the title insurance commitment (The Florida Bar Exhibit 17). This document likewise did not disclose the $200,000 Gonzalez loan. Mr. Duarte testified that this disclosure would properly have been made in the "exceptions" section of the document, Schedule B II. (T. 165). The Referee notes that this document was prepared by an employee of Weston Title and signed by Respondent. Mr. Duarte next testified with regard to The Florida Bar Exhibit 18, the title insurance loan policy signed by Respondent. He testified that schedule B of the policy similarly fails to list the $200,000 Gonzalez loan in the exceptions section. Likewise with regard to The Florida Bar Exhibit 19, the Owner's Policy of Title Insurance, reflects the Countrywide Mortgage in Schedule B, but not the $200,000 Gonzalez loan.

It was Mr. Duarte's opinion, based on the review of the above documents, that the failure to disclose the Gonzalez loan was a breach of Respondent's fiduciary duty. Also, that the failure to record the Gonzalez loan until after the Countrywide loan closed was likewise a violation of Respondent's fiduciary duty. He bases this conclusion on the fact that Respondent prepared and witnessed the second mortgage, Respondent's title company closed the loan and Respondent signed the title policy. Mr. Duarte's opinion is that Respondent's conduct

constituted dishonesty, fraud, deceit or misrepresentation, as violative of Rule 4-8.4(c).

The Referee also heard testimony from Respondent, who testified that he did not prepare any of the documents that were the subject of this case (T. 365); except that he drafted a promissory note and second mortgage for the Gonzalez loan based on Pedrosa's instructions (T. 370); and that he recorded the second mortgage in June, 2006, which was six months after preparing the note and mortgage, because he did not have recording instructions (T. 371). Perhaps most significant to this Referee is Respondent's testimony that, while he was the president of Weston Title and would sign checks, title policies and title commitments, that he had "no training" on how to perform closings or title work. (T. 377).

Standard of Review:

To sustain a disciplinary decision against respondent, the evidence must be clear and convincing. The Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978). This standard is higher than the civil standard of preponderance of the evidence, and lower than the criminal standard of "beyond a reasonable doubt." Id at 706; The Florida Bar v. Rayman, 238 So. 2d 594, 598 (Fla. 1970).

The Charged Violation of Rule 4-8.4(c)

To sustain a violation of the Bar Rule prohibiting attorneys from engaging in dishonesty, fraud, deceit, or misrepresentation, the attorney must have acted intentionally. West's F.S.A. Bar Rule 4–8.4(c); The Florida Bar v. Head, 2012 WL 851045 (Fla. 2012).

There is no evidence that Respondent's acts were intentional; on the contrary, there is evidence that they were negligent. The Referee is aware of the holding in Head that the element of intent can be satisfied merely by showing that Respondent's conduct was deliberate or knowing. See also The Florida Bar v. Watson, 76 So. 3d 915, 922 (Fla. 2011) (wherein the Florida Supreme Court held that "if the record shows that Respondent deliberately or knowingly engaged in the acts, his conduct was intentional" and thereby violative of Rule 4-8.4(c).) Notwithstanding, the Referee finds the case at bar factually distinguishable from the facts presented in Head and Watson. In Head, the Referee specifically found that the conduct of the attorney, who created a letter with a fraudulent case number and posted it on the premises to prevent access to the property was a deliberate and knowing act performed for the purpose of obtaining a tactical advantage for his client in an eviction action. The Florida Supreme Court agreed that the "intent" element was thereby satisfied.

Similarly, in Watson, the Referee's findings supported the specific conclusion that Watson's conduct was intentional and violative of 4-8.4(c). The conduct detailed by the Referee in Watson included Watson's use of his firm letterhead to prepare, sign and send letters addressed to potential investors. These letters falsely indicated that other individuals had invested money in a development project. The purpose of these letters was to induce other potential investors to invest in the project. The Referee found that Watson knew that these individuals had not invested money in the project. The Florida Supreme Court held that Watson's actions, which were done with knowledge of their falsity, constituted dishonesty, fraud, deceit, or misrepresentation within the meaning of the rule.

In contrast, in the case at bar, with regard to the Gonzalez

loan, it is undisputed that Respondent made no representations at all to Gonzalez, let alone misrepresentations. The Referee finds that the record does not support that any misrepresentation, deceit, dishonesty or fraud which was attributable to Respondent.

The Bar argues that Respondent committed fraud as a result of his part in the transaction in which Gonzalez gave the $200,000 to fund a second mortgage when, at the time, no first mortgage existed. However, Respondent did not make any representations to Gonzalez about the $200,000 loan; instead, by Gonzalez's own testimony, Respondent's only contact with her in the transaction was picking up the check and signing "received" on a copy of it. The testimony of both Gonzalez and Respondent established that it was Pedrosa, the mortgage broker, who represented to Gonzalez that she would be getting what was essentially a second mortgage. It should be noted that even if Respondent had represented to Gonzalez that the loan to Gutierrez and Carrero was for home improvements, this would not have been a misrepresentation, as a home improvement loan would customarily be in second position. This loan, which was initially an unsecured loan, became a second mortgage when the Countrywide mortgage closed on January 19, 2006, and the Gonzalez mortgage was then recorded on June 22, 2006, Gonzalez was in second position. The record is clear that Gonzalez ultimately had a recorded second mortgage, which was subordinate to the Countrywide loan.

Moreover, with regard to the Countrywide loan, there was no showing that Respondent knew of the misrepresentations contained in the documents he signed; quite the contrary, his testimony indicates that he did not know how to prepare or read the HUD-1 settlement statement,

title commitment, title policies and the documents contained in the Bar's Composite Exhibit 15, and instead, that he merely relied on the "loan processors" and his employee Maggie Azoy to prepare them. Accordingly this Referee finds that the evidence in the case at bar does not support a finding, as it did in Head and Watson, of any deliberate or knowing conduct on the part of Respondent which would meet the element of intent. Accordingly the Referee finds that the Bar has not met the "clear and convincing" burden of proof that Respondent violated this Rule, and finds the Respondent not guilty of this violation.

With regard to the Countrywide loan, Respondent did sign documents prepared by people in his title company that contained inaccuracies, but there is no showing that he knew they were inaccurate, or that he instructed his employees to make misrepresentations or omissions on any of the documents. On the contrary, Respondent's testimony indicates that he did not know how to prepare or read any of these. No testimony was adduced to indicate that he willfully held back and failed to record the Gonzalez mortgage, or that he instructed anyone in his employ to do so. The Bar has shown no actual knowledge on the part of Respondent that there was a fraud being committed or that there were errors in the document.

The Charged Violation of Rule 5-1.1(b)

The Bar asserts that Gonzalez's testimony establishes that Respondent violated 5-1.1(b) of the Rules Regulating the Florida Bar.

With regard to Rule 5-1.1(b)(money or other property entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose), the Referee finds that the record is devoid of testimony which would support a trust accounting violation. For one, Mrs. Gonzalez testified that she gave the $200,000 check to Respondent to be disbursed to the borrowers, Gutierrez and Carrero. The testimony of Ms. Gonzalez, as well as that of the Respondent, establishes that that is exactly what Respondent did. Respondent also prepared a deed of mortgage, which was introduced at trial and which was executed by Gutierrez and Cipriano Carrero, on January 11, 2006. Ms. Gonzalez testified that she received this mortgage. Similarly, Mr. Duarte did not testify to any trust accounting violations. Instead, on cross-examination, Mr. Duarte stated that he could not testify that Respondent had misappropriated any funds from his trust account. (T. 223).

The Florida Supreme Court has found violations of Rule 5-1.1(b) in many situations. One is when a lawyer made representations that funds held in an escrow account would not be disbursed without permission, e.g., The Florida Bar v. Watson, 76 So. 3d 915, 919 (Fla. 2011). In the case at bar, there is no evidence that the funds were disbursed to Gutierrez without Gonzalez's permission. Another factual scenario where the Court has found a violation of this Rule is where an attorney makes unauthorized withdrawals of client funds from his trust account to cover attorney's fees without the client's written consent as to those fees, e.g. The Florida Bar v. Mirk, 64 So.3d 1180, 1185 (Fla. 2011). There is no such allegation in the case at bar, nor is there any evidence that Respondent engaged in such conduct.

In The Florida Bar v. Valentine-Miller, 974 So. 2d 333 (Fla. 2008), a lawyer who received settlements, took her fee and

then refused to give her clients their share, was found to be in violation of Rule 5-1.1(b). Respondent in the case at bar is accused of no such conduct. Respondent's conduct in the case at bar also cannot support the finding of a violation of Rule 5-1.1(b) as was found in the Florida Bar v. Martinez-Genova, 959 So. 2d 241 (Fla. 2007)(holding that attorney's misappropriating the funds placed in her trust account as down payment for a loan by converting a portion of them to her personal use violated the Rule).

In contrast, in the case at bar, neither Ms. Gonzalez nor Mr. Duarte testified that Respondent misappropriated any of the $200,000 to his own use. Nor is this assertion borne out by any of the exhibits introduced into evidence. In light of the foregoing, the Referee finds that that the Bar has not met its burden to prove by clear and convincing evidence that Respondent has violated Rule 5-1.1(b), and finds the Respondent not guilty of this violation.

Does the Evidence Support, and May the Referee Legally Find, the Respondent Guilty of an Uncharged Offense?

Although the Referee finds Respondent not guilty of the charged rule violations, a review of the facts could support a finding that, at the very least, Respondent is guilty of failing to adequately supervise his non-lawyer employees, a violation of Rule 4-5.3(b). The Florida Supreme Court has held that a Referee is permitted to make findings of violations of rules not charged in the complaint, where the conduct is either within the scope of the specific allegations of the complaint, or instead is specifically referred to in the complaint. The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999); The Florida Bar v. Nowacki, 697 So. 2d 828 (Fla. 1997). A review of the complaint

indicates that it charges Respondent with complicit misconduct regarding the disbursement of the $200,000 Gonzalez loan to Gutierrez, and the preparation of the Countrywide loan documents which failed to list the Gonzalez loan as a liability. Therefore, the specific allegations of the complaint involve charges of willful conduct on the part of Respondent.

While this Referee finds that the evidence shows the absence of any willful conduct on the part of Respondent, the Referee would also find that the question of whether Respondent negligently allowed his employees to prepare dishonest or fraudulent documents is within the scope of the specific allegations of the complaint.

As stated above, with regard to the Countrywide loan and the charged violation of Rule 4-8.4(c), Respondent did sign documents prepared by people in his title company that contained inaccuracies, but there has been no showing that he knew they were inaccurate, or that he instructed his employees to make misrepresentations or omissions on any of the documents. On the contrary, Respondent's testimony indicates that he did not know how to prepare or read any of these documents. No testimony was adduced to indicate that he willfully held back and failed to record the Gonzalez mortgage, or that he instructed anyone in his employ to do so. The Bar has shown no actual knowledge on the part of Respondent that there was a fraud being committed or that there were errors in the document.

But for the position advanced by the Florida Bar, infra, the Referee would conclude that the specific allegations of the complaint, together with the evidence adduced at the hearing,

would support the conclusion that the lesser charge of failure to supervise is within the scope of the specific allegations of the complaint.

Even if Respondent did not willfully or with knowledge do anything fraudulent, deceitful, dishonest or make any misrepresentations, he allowed those working for him to use the title company, for which he is agent in charge, to do so. Therefore, Respondent failed to supervise. In the absence of any intent to commit fraud or misrepresentation on the part of Respondent, this Referee would find that at the very least, Respondent had an obligation to learn how to prepare and read the complex financial documents that he was signing, so that he could adequately supervise his employees in their preparation. His failure to gain proficiency in this area, and his concomitant failure to adequately supervise Maggie Azoy, the employee in his office who prepared these title documents, constitutes a violation of Rule 4-5.3(b).

The Court finds that this case is factually similar to The Florida Bar v. Hines, 39 So. 3d 1196 (Fla. 2010). In Hines, the Florida Supreme Court found that a lawyer who allowed a non-lawyer employee to have signatory power over the lawyer's escrow account was guilty of violating Rule 4-5.3(b). Although the case at bar does not present a situation where Respondent allowed a non-lawyer to have signatory power over his escrow account, the Court's analysis is instructive here:

> "In this case, Hines' role in the transaction was as a title attorney, a closing agent, and an escrow agent. She was providing legal services and, as closing and escrow agent, owed a fiduciary duty to all of the principal parties involved. See Fla. Bar v. Joy, 679 So. 2d 1165, 1167 (Fla. 1996). This Court has stated

> that absent an express agreement, the law implies from the circumstances that an escrow agent undertakes "a legal obligation (1) to know the provisions and conditions of the principal agreement concerning the escrowed property, and (2) to exercise reasonable skill and ordinary diligence in holding and delivering possession of the escrowed property (i.e., to disburse the escrowed funds) in strict accordance with the principals' agreement." Id. Additionally, a closing agent has a duty to supervise the closing in a "reasonably prudent manner." Askew v. Allstate Title & Abstract Co., 603 So.2d 29, 31 (Fla. 2d DCA 1992)(quoting Fla. S. Abstract & Title Co. v. Bjellos, 346 So. 2d 635, 636 (Fla. 2d DCA 1977)(stating that a title insurance company acting as a closing agent has a duty to supervise a closing in a reasonably prudent manner)."

Similarly, in the case at bar, the Referee notes that Respondent's role in the Gonzalez and Countrywide transactions was as a title attorney, an escrow agent and a closing agent, possessed of the duty to supervise the closing in a reasonably prudent manner. Respondent's assertions that he did not know how to prepare HUD-1 statements or any of the other documents at issue in the Gonzalez and Countrywide loans establish that he did not possess the training and experience necessary to supervise the closings in a reasonably prudent manner. Accordingly, the Referee would find that the evidence supports a conclusion that the Bar has established, by clear and convincing proof, that Respondent violated Rule 4-5.3(b), and would find the Respondent guilty of this violation.

However, the Bar strenuously asserts that the violation of Rule 4-5.3(b) is an uncharged rule violation that may not be considered by the Referee, because it is outside the scope of the specific allegations of the complaint against Respondent. The Bar further argues that under Fredericks, supra, the Referee is required to look only to the facts charged in the complaint, and not to the evidence adduced at trial, in order to make a finding of guilt on an uncharged violation. Most significantly, the Bar asserts that it has failed to plead sufficient facts in the complaint for the undersigned Referee to make a recommendation of guilt for violation of Rule 4-5.3(b).

Accordingly, the Referee finds Respondent not guilty of the uncharged violation of Rule 4-5.3(b), as well as not guilty of the charged violations of Rules 4-8.4(c) and 5-1.1(b), as discussed, supra. Each party is to bear its own costs. The Florida Bar v. Williams, 734 So. 2d 417 (Fla. 1999).

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, this _____ day of August, 2012.

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JUDGE ABBY CYNAMON, REFEREE

Copies furnished to
Richard Marx, Esq.
Jennifer Moore, Esq.