IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant,

v.

MADSEN MARCELLUS, JR.,

Respondent/Appellee.
_____/

Supreme Court Case
No. SC16-1773

The Florida Bar File
No. 2012-70,012(11E)

RESPONDENT'S REPLY BRIEF ON CROSS APPEAL

KEVIN P. TYNAN, #710822
RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300

TABLE OF CONTENTS

Page(s)

TABLE OF CASES AND CITATIONS

PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "The Bar" or "The Florida Bar." Madsen Marcellus, Jr., Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the Final Report of Referee. The symbol "TT" followed by a page number will be used to designate the transcript of the final hearing which is contained in three volumes but consecutively numbered. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

SUMMARY OF THE ARGUMENT

At issue in this case are the facts and circumstances that arose during the Respondent's personal post-divorce proceedings, wherein the Referee, to some extent, agrees that the Respondent's decision making was clouded by those proceedings. This Respondent has never previously been disciplined and, yet a Referee wants to impose a year suspension; that the Bar seeks to enhance to an eighteen-month suspension, which proposed sanction does not fit any of the relevant case law, including a matter resolved by this Court earlier this year.

As this Court will see, this Respondent, who was represented by counsel, for most of the period under review, got in trouble with a trial court for not timely complying with discovery, but escaped serious sanction by the trial court. Further, we have a significant lapse in judgment, in allowing a friend to sign a document for his ex-spouse, with the friend then notarizing that signature. The testimony at trial, as supported by one other witness, but denied by that ex-spouse was that she had given permission for the signature. That would still not forgive the notary issue and the Respondent admitted same at trial and does so herein.

Respectfully, however, these transgressions warrant less than a rehabilitative suspension and the Court is asked to reject the year suspension recommended by the Referee and instead impose a suspension of 90 days or less.

ARGUMENT

I. THE RECORD IS DEVOID OF CLEAR AND CONVINCING EVIDENCE THAT THE RESPONDENT SHOULD BE FOUND GUILTY OF ALL RULE VIOLATIONS REFERENCED IN THE REPORT OF REFEREE.

As was noted in the Respondent's Answer Brief, the Bar, in this case, seeks to discipline a lawyer for actions taken in the Respondent's own personal divorce proceeding, wherein he was represented by other counsel during part of the proceeding. The Respondent has candidly admitted and accepted responsibility for certain actions, but he respectfully disagrees with other findings made by the Referee and firmly believes that the clear and convincing evidence in this case does not support the Referee's factual findings relative to all of the violations of the Rules Regulating The Florida Bar found by the Referee. In his Answer Brief the Respondent sets forth the rationale for why the Referee's findings should be overturned in certain areas and he will not reargue those issues herein, but will instead address on a limited basis the arguments raised by the Bar in its Reply/Answer Brief on the Cross Appeal (hereinafter "Bar's Answer Brief").

The parties have extensively briefed their positions on the factual disputes herein[1] and therefore this Reply Brief will only focus on limited factual concerns.

---

[1] The Bar even did a second Statement of the Case in their Reply/Answer Brief on the Cross Appeal after having done so in their Initial Brief. See Fla. R. App. Pro. 9.210 (c) & (d).

The Bar's complaint concerned two distinct issues and they are: (1) did the Respondent engage in unethical activity relative to his compliance with a court order, in his own post-divorce proceeding, concerning the disposition of the marital home wherein a mortgage modification application was used even though a friend of the Respondent's had signed his spouses signature and then notarized same on that form and (2) did the Respondent engage in unethical activity relative to his compliance in discovery requests in said post-divorce proceeding where he came dangerously close to being held in contempt, but was ultimately not held in contempt.

Rather than focus their attention on these two main themes, as plead in their complaint, the Bar wants the Court to look at what opposing counsel in the divorce proceeding believed and what the Respondent's ex-spouse believed about issues not plead in that complaint.

In this case, at the very first hearing after Gudger retained counsel in the post-divorce proceeding, her lawyer tried to make a point that the Respondent was already engaging in discovery delay when the case had only been reopened for 30 days at that juncture. See TFB Ex. 8. The testimony at trial revealed that as soon as the wife retained counsel, the Respondent realized he was doing a poor job representing himself and asked his partner to provide assistance. However, discovery compliance, even if the request was of a harassing or trivial nature,

became a problem and motions to compel started to be filed. While we would agree with The Florida Bar the fact that the Respondent escaped serious sanction from the trial court is not dispositive of the overall issue, we disagree with the Bar's belief that the outcome of the dispute has no bearing on the case as this fact is very relevant in determining how the trial court felt about the discovery issues. Further, as is discussed in the sanction portion of this Brief, the lack of a contempt citation is important to the severity of the matters at issue.

The Respondent's Answer Brief discussed the various discovery items that were in dispute to also demonstrate the lack of severity of the discovery dispute. The Bar's Brief does not seem to challenge this aspect of the Respondent's position but only wants this Court to focus on the fact that discovery was late, rather than to concentrate on the "fishing expedition" being engaged in by opposing counsel. It is respectfully contended that the nature of the discovery requests and the ultimate responses filed by the Respondent's new counsel are what prevented a contempt citation and therefore both facts should be important to the disposition of this case.

While the issue related to the Respondent's decision not to attend the Rule to Show Cause Hearing has been fully briefed, the Respondent needs to point out that the Bar fails to recognize that the Respondent's counsel attended the hearing for him and that had he failed to attend to the client matters scheduled in a different

county, inclusive of the start of a criminal trial, that he would be facing a Bar complaint for not attending to these particular client matters when he was protecting himself at a different proceeding. There was no good course of conduct available for the Respondent, because his counsel did not give him timely notice of the contempt proceeding (there is no evidence in the record to refute this point). Having made the decision to risk further personal sanction instead of neglecting client court proceedings, the Respondent understood there could be ramifications to him but ensured that there were no ramifications to his clients.

Lastly, in rebuttal to the Bar's Brief on the issue of compliance with the divorce court relative to the title of the marital home and the Bar's focus that the foreclosure case was still pending and there was no final resolution, at the time of trial, regarding title to the marital home. However, the Bar continues to ignore the fact that the Respondent's personal bankruptcy (pending at the time of the final hearing) had delayed said resolution. Further, the failure to remove Gudger from the mortgage, resulted in the Respondent being required to pay Gudger the sum of $2,500.00, but no other action was taken against him relative to this particular issue. See TFB Ex. 18 at para. 12.

The Respondent would rely upon the arguments set forth in his Answer Brief regarding all other factual disputes between the parties.

II. A ONE YEAR SUSPENSION IS AN INAPPROPRIATE SANCTION UNDER THE FACTS OF THIS CASE FOR A FOURTEEN YEAR LAWYER, WHO HAS NEVER PREVIOUSLY BEEN DISCIPLINED.

Both parties herein appeal the Referee's sanction recommendation. While the Bar argues that the Referee should be relied upon for his factual findings, they contend that his rejection of the Bar's sanction argument should not be relied upon. After listening to closing arguments, the Referee in this case specifically addressed the Bar's request and asked the Bar to submit any case law, other than what had been argued that day, to support its position of an 18-month suspension. TT 357. However, the Bar provided the Referee with no additional precedent than that argued in closing and is the same case law argued herein. The Respondent has consistently contended that the precedent presented by the Bar is much worse on the facts than that found in this case, even if the Court does find the Respondent guilty of some of the contested issues.

This Court has consistently held that it has a broad discretion when reviewing a sanction recommendation, because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997). The Court should exercise its discretion in finding the Referee's proposed sanctions legally unsupported and too harsh under the facts of this case.

A. Mitigation and Aggravation.

The parties have both discussed the mitigation and aggravation that is found in this case in their previously filed briefs. While the Respondent fully acknowledges that ". . . a referee's findings of mitigation and aggravation carry a presumption of correctness . . .",[2] this Court still needs to do its own evaluation of the merits of each such claimed item of mitigation or aggravation. In the case at hand the Bar relies heavily on matters not plead in its complaint (i.e. allegations of underreported income and who moved out of the marital abode first), many of which were objected to on relevance grounds. The Bar then extrapolates from these facts, not relevant in any manner to the issues charged in its complaint, that the Respondent was dishonest in his responses to these questions because his former wife (who would certainly not be biased against him in any way) testified in a different fashion. Putting aside the due process concerns of a lack of notice[3] as to these supposed aggravating factors, it is evident that these issues had no relevance to the two issues being tried (whether the Respondent violated a court

---

[2] See *The Florida Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007).

[3] The Bar was asked in discovery to (1) provide a list of the items it planned on introducing on aggravation and (2) for a factual basis for each such claimed item of aggravation and the response provided by the Bar for such factual basis was that it "was set forth in the complaint of The Florida Bar". See TFB Answers to the Respondent's First Set of Interrogatories Number 7 and 8. The Bar's 13 paragraph complaint makes no reference to the matters that the Bar now urges should be used as aggravation.

order regarding the sale of the marital home and whether the Respondent failed to give proper discovery in his divorce proceeding).

The parties disagree on whether the Respondents former spouse, a practicing attorney and litigator, should be considered a "vulnerable victim" in aggravation. See Standard 9.22(h). The Bar contends that *The Florida Bar v. Arcia,* 848 So.2d 296 (Fla. 2003), supports their position. However, the only comment made as to this aggravation standard, referenced in the list of aggravating factors found by the referee in that case, was as follows: "(4) vulnerability of victim, noting that the firm trusted Arcia and provided him with access to its clients". This one comment fails to support the Bar's position herein and does not refute that Gudger, the former spouse, attorney and litigator, who had knowledge of the events in question for more than 14 months prior to using the modification application as a weapon to hammer the Respondent in their post-divorce proceeding.

B. Precedent.

Both parties have pointed to different Standards in trying to assist the Court in evaluating a proper sanction. However, the Standards do not discuss the length of the suspension that should be imposed (the real dispute herein) and therefore we must look to case law to support the proper length of suspension that should be meted out.

As is noted in the Respondent's Answer Brief, and elsewhere herein, the parties primarily rely upon the same case law for their respective positions. Three of the Bar's cases state that a one-year suspension was appropriate for the conduct found therein. *The Florida Bar v. Whitney*, 132 So. 2d 1095 (Fla. 2013); *The Florida Bar v. Rosenberg*, 169 So. 3d 1155 (Fla. 2015); and *The Florida Bar v. Bischoff*, 212 So. 3rd 312 (Fla. 2017). The other two cases referenced by the parties resulted in 91-day suspensions. *The Florida Bar v. Baker*, 810 So. 2d 876 (Fla. 2002), and *The Florida Bar v. Cibula*, 725 So. 2d 360 (Fla. 1988). For all the reasons set forth in the Respondent's Answer Brief, the facts of this case are closer to, but not as egregious as, the referenced 91-day suspension cases and not the referenced one-year suspension cases. As is noted in the Respondent's Answer Brief, the *Cibula* Court made the following findings relative to the facts of that case:

> The Former Husband misrepresented his income in 1991 in order to induce the Former Wife to agree to modify the alimony. The true facts would have justified the modification in 1991. The Court finds that the Former Wife never really believed the Former Husband in any event. The Former Husband's misrepresentations have resulted in additional time and expense in attorney's fees for which he should be held responsible. *Id.* at 361-362.

There is no such finding in this case. At most you have testimony in the Bar hearing by opposing counsel stating that he believed the income was being understated and there is no underlying judicial finding by the divorce trial court

were there was a full record developed. In fact, the hearing transcript (TFB Ex. 8) introduced into evidence clearly shows that the Respondent, because the hearing did not finish, never presented his side of the case, so there could be no balanced presentation or ruling on the issue by the trial court. At most you have a belief by opposing counsel and not a finding.

As is noted above this Court, in *The Florida Bar v. Kelly*, 813 So.2d 85 (Fla. 2002), provided criteria to select an appropriate discipline [Fairness to both the public and the accused; sufficient harshness in the sanction to punish the violation and encourage reformation; and the severity must be appropriate to function as deterrent to others]. In balancing all of these concerns, including the fact that these actions arise from personal conduct clouded by a matrimonial dispute and not while representing a client by a lawyer who has never previously been disciplined that a suspension less than that found in *Cibula* is warranted.

CONCLUSION

As is set forth herein and in the Respondent's Answer Brief, the Respondent strongly believes that the evidence in this case does not support a guilty finding on many of these charges and that if the Court approves some or all of the factual findings of the Referee these findings do not support the imposition of a rehabilitative suspension.

WHEREFORE the Respondent, MADSEN MARCELLUS, JR., respectfully requests that he be found not guilty, that the Referee's sanction recommendations be rejected and that any suspension that is order be for less than 91 days and that the Court grant any other relief that is deemed reasonable and just.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via electronic mail only on this 2nd day of January, 2018 to Jennifer Falcone, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131 (jfalcone@flabar.org); Adria E. Quintela, Staff Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323 (aquintel@flabar.org).

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 brief forwarded to the Court has been scanned and found to be free of viruses, by ESET Nod 32.

Respectfully submitted,

RICHARDSON & TYNAN, P.L.C.
Attorneys for Respondent
8142 North University Drive
Tamarac, FL 33321
954-721-7300
ktynan@rtlawoffice.com

By: _____
KEVIN P. TYNAN, ESQ.
TFB No. 710822