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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 95-003

IN THE MATTER OF

MARK V. SILVERBERG,

AN ATTORNEY AT LAW

Decision of the
Disciplinary Review Board

Argued: March 15, 1995

Decided: June 13, 1995

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Robert D. Thuring appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board based upon a recommendation for public discipline filed by the District VIII Ethics Committee (DEC). The complaint charged respondent with a violation of RPC 8.4(b) (commission of a criminal act), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), N.J.S.A. 2C:21-4(a) (uttering a false document) and 18 U.S.C. 1001 and 1010 (false statement). During the hearing, the presenter amended the complaint to include allegations of violations of RPC 1.1(a) (gross neglect) and RPC 1.3 (lack of diligence).

Respondent was admitted to the practice of law in New Jersey in 1983. At the time of the within misconduct, he maintained an office in East Brunswick, Middlesex County. He has no history of discipline.

The essential facts in this matter were stipulated by respondent's counsel and the Office of Attorney Ethics (OAE) during the DEC hearing.

Respondent represented Efrim G. Hanna and Michael Sidoti ("buyers") in their purchase of a four-family house. The buyers were referred to respondent by James Saunders, a real estate agent and mortgage broker. Closing on the property took place on May 1, 1989. Respondent prepared a RESPA statement prior to the closing. According to the RESPA, in addition to the mortgage proceeds, $65,537.28 in cash was due from the buyers at closing. Total cash due to the sellers was $81,522.19. At the closing, the buyers, respondent's clients, signed the RESPA. The sellers' attorney, Ken Levenson, Esq., signed as their agent.

At the closing, when respondent sought to collect the funds due, he was informed by Mr. Saunders that a $37,500 credit for repairs had been given to the buyers. Respondent was provided with a document reflecting that credit (C-2, Exhibit A). Respondent was unable to ask his clients about the credit because he had been led to believe that they did not speak English and that Mr. Saunders had been interpreting for them. (It was later learned that the "clients" were impostors and that they spoke English.) Respondent inquired of Mr. Levenson whether the credit had been issued; Mr. Levenson confirmed that it had. Respondent, however, did not document the credit on the RESPA.

At the closing, Mr. Saunders also told respondent that the balance of the cash due from the buyers after the deduction of the

$37,500 credit, or $28,037.28, had been previously paid to the sellers outside of the closing and would not be given to respondent to disburse. Again, respondent inquired of Mr. Levenson if that had been the case and was assured that it had.

Furthermore, although the amount of the real estate commission was reflected on the RESPA as $18,750, respondent disbursed only $15,000. The record contains a copy of a commission statement given to respondent reflecting the reduction in the commission.

Despite the representations to the contrary on the RESPA, as a result of these changes, only $19,734.91 was disbursed to the sellers at the closing (the difference between what the buyers were to bring to the closing and what was due to the sellers plus the additional funds from the real estate commission).

Respondent contended that, at the time of the closing, he believed the circumstances to be as they had been represented to him by Messrs. Saunders and Levenson. Respondent did not question the changes. Despite respondent's knowledge that the payments were not correctly reflected on the RESPA, he forwarded the RESPA to the lender and other recipients, without correcting the discrepancies. Respondent was asked, during the DEC hearing, why he had not corrected the RESPA upon learning of the credit for repairs. He replied as follows:

> [b]ecause I didn't do it by hand, I should have, I had a pile of documents and I should have given it to my secretary to prepare a new one or an addendum or something of that nature and I didn't. I wish I could give, you know, a good, reasonable explanation, the only explanation that I can give is that I got sidetracked on something and didn't do it.
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> [T10/21/94 41]

Later in the proceeding, when asked if he had ever intended to make the corrections, respondent admitted, "I don't think so, I never really thought about it" (T10/21/94 52).

In evidence is a copy of respondent's trust account ledger sheet for this closing. Of interest is a note at the bottom of the page that reads, "[a]t closing was given note about a repair credit of $37,500.00 after I requested check. Also was told by Jim Saunders that balance owed to sellers per HUD was paid by Buyer – Buyer did not speak english [sic] so could not confirm" (C-1, Exhibit-B).

In addition to the above discrepancies on the RESPA, there were other less serious questions raised about respondent's handling of this closing. Respondent explained that a $100 water and sewer escrow kept at closing from the seller's proceeds was not reflected on the ledger card because the funds were accidentally placed in his business account. Respondent further revealed that the differences between the flood certification cost and recording fees, as reflected on the RESPA, and the amounts actually disbursed represented other administrative charges. In addition, while the RESPA states that two notices of settlement were filed for $70.00, the trust account ledger does not reflect a disbursement for that amount. Respondent explained that, because the notices were recorded prior to the closing, there were no client funds to utilize and the amount had been paid from his business account.

Another discrepancy between respondent's fee reflected on the RESPA, $1100, and the amount on his ledger card, $1439.50, was

explained as reflecting his fee plus funds collected for the notices of settlement, "Federal Express" charges, the water escrow (mistakenly) and the above mentioned administrative charges.

Sometime after the closing, Mr. Saunders and Mr. Levenson were indicted. Apparently, this transaction had been part of an ongoing scam perpetrated by Messrs. Saunders and Levenson to purchase houses with one hundred percent bank financing. Respondent was also indicted. After he completed the Pre-Trial Intervention program (PTI), however, his record was purged. According to respondent, although he had no part in the scam, he was not psychologically or financially prepared to defend himself against the charges and accepted the PTI program as a way to end the matter without admitting guilt.

The record contains a 1990 report from respondent's then treating psychiatrist attesting to respondent's psychiatric problems and explaining respondent's inability to intentionally commit a dishonest act. Specifically, the report states as follows:

> In my opinion he has a borderline personality disorder with dependent, obsessive and compulsive features. In my opinion, with a high degree of medical certainty, this personality disorder causes him to be hyper-moral and/or ethical and precludes him from any intentional wrong-doing because of the guilt any such activity would provoke.
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> [Exhibit C-2 at 6]

Respondent voluntarily removed himself from the practice of law on September 15, 1990 as a result of this matter and has no intentions of returning to practice.

The DEC found respondent guilty of a violation of RPC 1.1(a) and RPC 1.3. The DEC added in its report that it had "grappled" with the issue of misrepresentation, that is, whether such misconduct had to be intentional and what the required proofs would be. The DEC, however, did not make a specific finding of a violation of that rule. The DEC made no mention of the alleged violations of N.J.S.A. 2C:21-4(a) or 18 U.S.C. 1001 and 1010.

* * *

After an independent, de novo review of the record, the Board is satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

The DEC did not make a finding with regard to the alleged violations of N.J.S.A. 2C:21-4(a) or 18 U.S.C. 1001 and 1010. Although there was no finding of guilt of criminal misconduct below due to respondent's entry into the PTI program, the conduct alleged, if as proved, would certainly constitute criminal conduct under the statutes charged. However, the Board does not consider itself to be the appropriate tribunal to make criminal findings and has, thus, refrained from making such a determination. See In re Pearson, 139 N.J. 230 (1995). The Board similarly determined not to find a violation of the criminal statutes cited or of RPC 8.4(b).

As noted above, over respondent's counsel's objection, the complaint was amended during the DEC hearing to allege a violation of RPC 1.1(a) and RPC 1.3. Indeed, there seems to be little doubt

that respondent was negligent in his unexplained failure to correct the RESPA. Respondent could easily have handwritten the changes on the form at the closing while the parties were still present to initial the changes. His statement that he was sidetracked during the closing does not explain his subsequent failure to prepare a new RESPA after the closing.

The DEC did not make a finding as to the alleged violation of RPC 8.4(c). It is clear, however, that, knowing that the RESPA was inaccurate, respondent allowed it to be distributed to the recipients without correcting it. He misrepresented to the lender and other involved institutions and, indeed, to the world that the facts of the transaction were as represented on the RESPA. The Board, therefore, found that respondent violated RPC 8.4(c).

It appears from this record that respondent was an innocent party in this scam perpetrated by Messrs. Saunders and Levenson. (Indeed, respondent testified that he did not realize that the $37,500 repair credit was ten percent of the purchase price until it was brought to his attention during the DEC hearing.) During the DEC hearing the presenter questioned respondent about the number of real estate transactions Mr. Saunders had brought to his office. The presenter alluded to the possibility that respondent realized what was happening at the closing, but looked the other way because Mr. Saunders was a continuing source of business for him. The presenter again raised this theory before the Board. Although this scenario is a troubling possibility, the Board found no clear and convincing evidence of this impropriety in the record.

In sum, respondent was guilty of gross neglect, lack of diligence and misrepresentation for failing to amend the RESPA statement to accurately reflect the terms of the transaction.

In a more egregious case, In re Labendz, 95 N.J. 273 (1984), the attorney was found guilty of knowing participation in an attempt to defraud a bank. Labendz submitted a false loan application to secure a mortgage for his clients. Although the contract provided for the purchase price of $100,000, the application falsely listed it as $107,000 to enable the clients to obtain a higher mortgage. The attorney was suspended for one year.

Labendz is far more grievous than the matter now before the Board. In the former, the conduct was specifically aimed at defrauding the lending institution. Here, although the lender was unaware of the true financial arrangements, respondent's misconduct was brought about by the criminal conduct of others. Respondent had no intent to mislead the financial institution. He simply did not make changes to an inaccurate RESPA. Respondent had no plausible explanation or excuse for his misconduct.

In determining the appropriate discipline in this matter, the Board considered the impact that these events have had on respondent personally, financially and professionally. As noted above, he no longer practices law and appears to have no plans to do so in the future. Respondent admitted his wrongdoing, cooperated with the DEC and has no history of discipline. Given these factors, the Board unanimously determined to impose a reprimand. Three members did not participate.

The Board further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 6/13/95 By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board