SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-435
District Docket No. XIV-2009-217E

IN THE MATTER OF

DENNIS J. BARRETT

AN ATTORNEY AT LAW

Decision

Argued: March 17, 2011

Decided: June 3, 2011

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

Brian Boyle appeared on behalf of respondent.

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

This matter came before us on a disciplinary stipulation between respondent and the Office of Attorney Ethics (OAE). The OAE recommends the imposition of either a reprimand or a censure for respondent's stipulated violation of RPC 8.4(c) (conduct

involving dishonesty, fraud, deceit or misrepresentation). We determined to impose a reprimand on respondent for this violation.

Respondent was admitted to the New Jersey bar in 1977 and to the New York bar in 1983. At the relevant times, he maintained an office for the practice of law in Avon-by-the-Sea. He has no disciplinary history.

According to the stipulation, Linda and Robert Mulewski owned a property at 413 Devon Street, in Forked River (the property). After the property went into foreclosure, they turned to Ivy Mortgage, a/k/a Gateway Funding, to help them save their home.

The Mulewskis decided to sell their home to an investor, who, in turn, would lease the property to them for twelve-to-fourteen months, during which time they would seek to repair their credit. At the expiration of the lease, the Mulewskis would purchase the property from the investor at a pre-determined price.

A mortgage broker, Camille Racz-Marotta, located an investor named Paul Buscher. The September 10, 2006 contract, which Marotta prepared, provided that Buscher would buy the

Mulewskis' property for $296,000. The contract further provided that Buscher would make a $29,600 down payment and obtain a $266,400 mortgage.

On an unidentified date, the contract was revised to reflect a $318,000 purchase price, a $19,080 seller's concession, a $1000 deposit to be refunded to Buscher at the closing, and a $286,200 mortgage loan.

Subtracting the $19,080 in concessions from the $318,000 purchase price, and viewing the $1000 deposit as a "wash," there remained a $298,920 balance to be paid by Buscher, or $12,720 more than the $286,200 mortgage. The stipulation does not account for this difference. No copy of the RESPA has been included in the record.

Marotta referred Buscher to respondent for representation at the closing, which took place on November 13, 2006. According to the stipulation, "[r]espondent did not structure the transaction and, in fact, only became involved in the matter approximately two weeks prior to the date of closing."

The Mulewskis were unrepresented, despite respondent's advice to them that they retain counsel. Nevertheless,

respondent prepared the deed and affidavit of title on the Mulewskis' behalf and charged them a fee for doing so.[1]

According to the stipulation, respondent failed in his duty to disburse the funds at closing in accordance with the RESPA. Specifically, he falsely certified on the RESPA that the Mulewskis had received $60,992.54 at the closing when, in fact, he had disbursed only $8700 to them. Respondent also falsely certified that Buscher had brought $29,346 to the closing when, in fact, he had brought no money. Finally, although respondent disbursed $18,418.24 to Buscher and $6487 to a credit repair company owned by Marotta, the RESPA did not list these disbursements.

Based on these facts, the parties stipulated to respondent's violation of RPC 8.4(c). In mitigation, the stipulation cites respondent's unblemished disciplinary history,

---

[1] We note that respondent's preparation of the affidavit of title and deed on behalf of the sellers raises the specter of an RPC 1.7(a) concurrent conflict of interest. However, no conflict was stipulated. Moreover, it is possible that the OAE's investigation revealed that respondent had complied with the requirements of RPC 1.7(b) and had obtained valid waivers of the conflict from the parties to the transaction.

his cooperation with the OAE, and the fact that his misconduct was limited to one transaction.

Following a review of the record, we are satisfied that the stipulation clearly and convincingly establishes that respondent's conduct was unethical.

Although the stipulation is silent on the issue, a suspicion arises that this transaction involved a sale/lease-back fraud. In this type of transaction, the broker usually finds an "investor" to purchase the distressed property, with no actual money down. To the contrary, the "investor" usually walks away from the purchase with cash in his or her pocket, while the sellers are left with little to no money from the "sale" of their home. After the closing, the sellers remain in the property and lease it for about a year or so until their credit is restored, at which point they re-purchase the property from the "investor." That usually never happens because the "sellers" (the former owners) are still not able to keep up with the costs of the property, which put it into foreclosure in the first place.

We note that the stipulation states only that respondent "did not structure the transaction." It is not clear whether the "structure of the transaction" includes the preparation of

the RESPA. It is not clear whether respondent prepared the RESPA or whether it was given to him to simply sign off on at the closing. Nevertheless, the stipulated facts allow the conclusion that, even if respondent did not know that the transaction was fraudulent, he certainly facilitated the transaction by his recklessness at the closing, where he exercised no independent judgment, in light of the obvious inaccuracies on the RESPA.

First, the RESPA reflected the payment of nearly $61,000 to the Mulewskis, whereas respondent disbursed only $8700 to them. Second, the RESPA reflected Buscher's payment of more than $29,000 at closing, when, in fact, he paid nothing. Third, two disbursements, totaling more than $24,000, were left off the RESPA altogether. One of these payments was to Buscher; the other was to a company owned by Marotta, the broker. How any of these discrepancies could not have raised a red flag in respondent's mind is not explained.

Despite the specter of fraud surrounding the transaction, the lack of detail in the stipulation prevents us from concluding anything other than that respondent misrepresented that the RESPA he signed was a complete and accurate account of the funds received and disbursed as part of the transaction. We

presume that the OAE's investigation did not uncover any further misconduct on respondent's part.

The discipline imposed for misrepresentations on closing documents ranges from a reprimand to a term of suspension, depending on the seriousness of the conduct, the presence of other ethics violations, the harm to the clients or third parties, the attorney's disciplinary history, and other mitigating or aggravating factors. See, e.g., In re Agrait, 171 N.J. 1 (2002) (reprimand for attorney who, despite being obligated to escrow a $16,000 deposit shown on a RESPA, failed to verify it and collect it; in granting the mortgage, the lender relied on the attorney's representation about the deposit; the attorney also failed to disclose the existence of a second mortgage prohibited by the lender; the attorney's misconduct included misrepresentation, gross neglect, and failure to communicate to the client, in writing, the basis or rate of his fee); In re Spector, 157 N.J. 530 (1999) (reprimand imposed on attorney who concealed secondary financing to the lender through the use of dual RESPA statements, "Fannie Mae" affidavits, and certifications); In re Sarsano, 153 N.J. 364 (1998) (attorney received reprimand for concealing secondary financing from the primary lender and preparing two different RESPA statements); In

re Blanch, 140 N.J. 519 (1995) (reprimand imposed on attorney who failed to disclose secondary financing to a mortgage company, contrary to its written instructions); In re Khorozian, 205 N.J. 5 (2011) (censure imposed on attorney who represented the buyer in a fraudulent transaction in which a "straw buyer" bought the seller's property in name only, with the understanding that the seller would continue to reside there and would buy back the property after one year; the attorney prepared four distinct RESPAs, two of which contained misrepresentations of some sort, such as concealing secondary financing or misstating the amount of funds that the buyer had contributed to the acquisition of the property; aggravating factors included the attorney's change of the entries on the forms after the parties had signed them); In re Scott, 192 N.J. 442 (2007) (censure for attorney who failed to review the real estate contract before the closing; failed to resolve liens and judgments encumbering the property; prepared a false RESPA misrepresenting the amount due to the seller, the existence of a deposit, the receipt of cash from the buyer, and the amount of her fee, which was disguised as disbursements to the title company; prepared a second RESPA listing a "Gift of Equity" of $41,210.10; issued checks totaling $20,000 to the buyer and to the

mortgage broker, based on undocumented loans and a repair credit, without obtaining the seller's written authorization; failed to submit the revised RESPA to the lender; failed to issue checks to the title company, despite entries on the RESPA indicating that she had done so; misrepresented to the mortgage broker that she was holding a deposit in escrow; and failed to disburse the balance of the closing proceeds to the seller; prior admonition and reprimand); In re Alum, 162 N.J. 313 (2000) (one-year suspended suspension for attorney who participated in five real estate transactions involving "silent seconds" and "fictitious credits;" the attorney either failed to disclose to the primary lender the existence of secondary financing or prepared and signed false RESPA statements showing repair credits allegedly due to the buyers; in this fashion, the clients were able to obtain one hundred percent financing from the lender; because the attorney's transgressions had occurred eleven years before and, in the intervening years, his record had remained unblemished, the one-year suspension was suspended); In re De La Carrera, 181 N.J. 296 (2004) (three-month suspension in a default case in which the attorney, in one real estate matter, failed to disclose to the lender or on the RESPA the existence of a secondary mortgage taken by the sellers from the buyers, a practice prohibited by

the lender; in two other matters, the attorney disbursed funds prior to receiving wire transfers, resulting in the negligent invasion of clients' trust funds); In re Nowak, 159 N.J. 520 (1999) (three-month suspension for attorney who prepared two settlement statements that failed to disclose secondary financing and misrepresented the sale price and other information; the attorney also engaged in a conflict of interest by arranging for a loan from one client to another and representing both the lender (holder of a second mortgage) and the buyers/borrowers); In re Fink, 141 N.J. 231 (1995) (six-month suspension for attorney who failed to disclose the existence of secondary financing in five residential real estate transactions, prepared and took the acknowledgment on false RESPA statements, affidavits of title, and Fannie Mae affidavits and agreements, and failed to witness a power of attorney); In re Newton, 157 N.J. 526 (1999) (one-year suspension for attorney who prepared false and misleading RESPA statements, took a false jurat, and engaged in multiple conflicts of interest in real estate transactions); and In re Frost, 156 N.J. 416 (1998) (two-year suspension for attorney who prepared misleading closing documents, including the note and mortgage, the Fannie Mae affidavit, the affidavit of title, and the settlement statement; the attorney also breached

an escrow agreement and failed to honor closing instructions; the attorney's ethics history included two private reprimands, a three-month suspension, and a six-month suspension).

Here, in the absence of detail that would clearly and convincingly support misconduct beyond falsely attesting to the accuracy of the RESPA, a reprimand is the appropriate form of discipline for respondent's violation of RPC 8.4(c).

Member Doremus did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: Isabel Frank
for Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Dennis J. Barrett
Docket No. DRB 10-435

Argued: March 17, 2011

Decided: June 3, 2011

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus						X
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1

By Isabel Frank
Julianne K. DeCore
Chief Counsel