Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-271

IN THE MATTER OF :
:
PETER P. FRUNZI, JR. :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 16, 1992

Decided: November 5, 1992

Jamie S. Perri appeared on behalf of the District IX Ethics Committee.

John T. Mullaney, Jr. 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 on a recommendation for public discipline filed by the District IX Ethics Committee (DEC). The complaint charged respondent with failure to disclose the existence of a second mortgage executed prior to the closing of title on real property and failure to disclose that the buyer had not made a deposit payment, in violation of RPC 1.2(d) (assisting a client in conduct that the lawyer knows is illegal, criminal or fraudulent), RPC 8.4(a) (violating a disciplinary rule), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1966. He maintains a law office in Red Bank, Monmouth County.

In September 1989, Glen J. Derevjanik signed a contract with R.P.T. Developers, Inc. (hereinafter "R.P.T.") to purchase a piece of residential real estate located at 2 Richards Way, Holmdel, New Jersey. Derevjanik was represented by Frederick R. Dunne, Jr., while R.P.T. was represented by respondent. Richard P. Tolas was the sole shareholder of R.P.T., also known as Richard P. Tolas Development, Inc., and of another corporation known as Brothers Investment Group, Inc. The contract of sale, dated September 18, 1989, listed a $598,000 purchase price. It also provided for a $60,000 deposit, a $350,000 mortgage and an additional cash payment of $188,000 at the closing. Exhibit P-2.

Consistent with the terms of the transaction, Derevjanik set out to obtain first mortgage financing in the amount of $350,000. Because of a credit problem, however, he was unsuccessful. He eventually turned to Morgan Carlton Financial Corporation (hereinafter "Morgan Carlton"), a licensed mortgage banker and broker. When Derevjanik was unable to obtain financing through Morgan Carlton, the latter referred him to Kearny Federal Savings and Loan Association (hereinafter "Kearney Federal"), an entity that frequently granted mortgage loans to individuals with credit problems. At Morgan Carlton's suggestion, Derevjanik retained Dunne as his attorney because of Dunne's long-standing business relationship with Kearny Federal and of his status as one of Kearny Federal's approved attorneys.[1] Derevjanik hired Dunne to assist

[1] Derevjanik had been represented by Abraham J. Zager in the initial stages of the transaction. Dunne was not involved in the contract negotiations or its execution.

him in obtaining the mortgage loan and to represent him in connection with the purchase of the property. Through Morgan Carlton, Dunne obtained a copy of the contract of sale providing for a $598,000 purchase price, a $350,000 mortgage, a $60,000 deposit and a cash payment of $188,000 at closing. It was Dunne's understanding, at the time he received the contract, that the $60,000 deposit had been tendered to Tolas. He had been so informed by Derevjanik and also by a principal at Morgan Carlton, who served as an intermediary between Dunne and Derevjanik because of the distance between Dunne's office in Hudson County and Derevjanik's residence in Holmdel. In fact, Dunne and Derevjanik did not meet face-to-face until the date of closing.

After Derevjanik filled out an application and submitted a copy of the contract to Kearny Federal, on February 16, 1990 that institution issued a mortgage commitment to Derevjanik for a loan in the amount of $350,000. The commitment provided, in part, that the loan was to be secured by a first mortgage. It did not prohibit additional mortgages on the property. Although the record contains a letter signed by Tolas on January 18, 1990, addressed "to whom it may concern" (Exhibit D-10) and acknowledging receipt of the $60,000 deposit, it is not clear whether Kearny Federal asked for or even received a verification of the deposit. Indeed, at the DEC hearing, Dunne testified that, based on his experience in dealing with Kearny Federal, the latter never required a verification of deposit.

On March 21, 1990, respondent, Tolas and Derevjanik were

present at Dunne's office for the purpose of closing the transaction. Respondent knew that Derevjanik was represented by counsel. This knowledge notwithstanding, while in the waiting room of Dunne's law office, respondent presented a mortgage and a note in the amount of $248,000 for Derevjanik's signature. Derevjanik executed both documents naming Brothers Investment Group, Inc., a corporation of which Tolas was the sole shareholder, as the mortgagee. Exhibit D-4. Derevjanik signed the documents outside of Dunne's presence. Thereafter, Tolas, Derevjanik and respondent proceeded to Dunne's office for the actual closing of title.

According to Dunne's testimony, at the closing, Derevjanik and Tolas, in respondent's presence, represented to Dunne that Derevjanik had made a cash payment of $178,000[2] to Tolas the night before the closing. This was untrue. In fact, Derevjanik had paid nothing to Tolas, including the $60,000 deposit; hence the preparation of the $248,000 mortgage between Derevjanik and Brothers Investment Group, Inc. That sum represented the balance of the $598,000 purchase price after the deduction of the $350,000 mortgage.

Dunne was unaware that no monies whatsoever had changed hands in the transaction, i.e., that this was a one-hundred percent financed deal. He was also unaware of the execution of the

---

[2] The $10,000 difference between $188,000 and $178,000 is explained as follows: immediately prior to the closing, Tolas and Derevjanik had agreed that Derevjanik would execute a $10,000 mortgage in Tolas' favor on account of rent setoffs (Derevjanik had been living in the house before the closing). Dunne then prepared the $10,000 mortgage and note (Exhibit P-5) as well as a $6,500 mortgage and note in favor of Morgan Carlton for the payment of mortgage brokerage fees (Exhibit P-6).

$248,000 mortgage. It was his understanding that Derevjanik had paid Tolas $288,000 in cash ($60,000 for the deposit and $178,000 as an additional cash payment). According to Dunne's testimony, respondent made no attempt to correct Derevjanik's and Tolas' misrepresentation that Derevjanik had paid Tolas, before the closing, the $60,000 deposit as well as the sum of $178,000. Dunne then prepared a closing statement (Exhibit P-3), which both Derevjanik and Tolas signed and the closing was concluded.[3]

In his testimony, respondent categorically denied that Tolas and Derevjanik had made any representations in his presence about the payment of the $60,000 deposit and of the additional $178,000 sum. He swore that no one had asked any questions about those payments at the closing. In his own words, that issue "just didn't come up." T4/29/1992 154. He explained that the reason he had not asked any questions about those payments at the closing was that he had known, almost from the beginning of the transaction (as early as January 1990), that Tolas had agreed to take back a second mortgage from Derevjanik for $248,000, thus making the transaction fully financed through mortgages. Respondent testified that he had not participated in the negotiation of the terms of the transaction because, in every instance, that was accomplished by Tolas and the prospective buyer. He had not reviewed the contract between Tolas

---

[3] Dunne testified that he had not prepared a RESPA statement because of the constraints of time; the attendance of ten closings a week at that time made it impossible for him to fill out a RESPA statement in each transaction. He, therefore, would first prepare what he termed "an old-fashioned closing statement," containing the essential figures relating to the transaction, then obtain the parties' signatures on a blank RESPA statement form and, thereafter, have his father, a retired C.P.A., transpose the figures onto a RESPA statement. He followed the above described practice in the closing at hand.

and Derevjanik, which was signed in September 1989. Respondent testified that, in fact, he had not seen the contract until the discovery phase of these ethics proceedings. As respondent explained, however, this was of no consequence because he had been informed of the terms of the transaction by Tolas in January 1990. His reaction was that Tolas was "out of his mind." He strongly advised Tolas to reconsider taking back a mortgage for the entire balance of the purchase price after the deduction of the $350,000 mortgage. Tolas refused because he was in dire need of funds to eliminate a $36,000-a-year interest payment on a $300,000 construction loan. At Tolas' direction, respondent then prepared the $248,000 mortgage in January 1990, three months before the closing. That mortgage contained the following provision: "This mortgage is a second purchase money mortgage subject and subordinate to only a first purchase money mortgage in the face amount of $350,000 held by ." Exhibit D-4. Respondent added that he was not surprised by the fact that this was a fully financed deal; he explained that he had seen one-hundred percent financing before.

Respondent also denied any nefarious motives when he presented the $248,000 mortgage for Derevjanik's signature outside of Dunne's presence. He explained, that because Tolas did not trust Derevjanik, Tolas wanted the mortgage signed before the closing of title began. Respondent indicated that it was not his or anyone's intention to conceal the existence of that mortgage from Dunne. In fact, respondent added, he did not know that Dunne was unaware of

the mortgage.

Lastly, respondent testified that he had not reviewed the closing statement prepared by Dunne. He clarified that his role at all closings with Tolas was similar to that of a "delivery boy" and that his function was of an administrative nature. This was so because Tolas, not respondent, routinely reviewed the closing documents, having participated in more than eight hundred transactions.

In any event, the closing proceeded to its conclusion on March 21, 1990. One or two months thereafter, Dunne was informed by the title company that a $248,000 mortgage had been recorded ahead of Kearny Federal's. According to Dunne, he immediately telephoned respondent "in a rage," demanding that the $248,000 mortgage be discharged forthwith, which was done.

Respondent's testimony is at odds with Dunne's in this regard. He denied having ever received a telephone call from Dunne complaining of the $248,000 mortgage. He also dismissed any suggestions that he had contrived to record the $248,000 mortgage ahead of the $350,000 mortgage by Kearny Federal. He explained that he had sent the $248,500 mortgage for recording in the normal course of business, by preparing a cover letter and mailing both papers to the County Clerk's office. The mortgage was recorded on March 23, 1990, two days after the closing, while Kearny Federal's mortgage was recorded one week after the closing. Respondent vigorously denied any ill motives on his part in promptly recording the $248,000 mortgage. He pointed to the specific provision

contained in the mortgage, subordinating it to the $350,000 mortgage.

Respondent also recounted a different version of the events leading to the discharge of the $248,000 mortgage. It was not, he asserted, Dunne's telephone call that had precipitated the discharge of the mortgage, as claimed by Dunne; respondent denied having received such a call. Instead, the mortgage had been discharged at Tolas' insistence. According to respondent, one month after the closing, Tolas informed him that Derevjanik needed an additional $40,000 mortgage to pay off the $10,000 and $6,500 mortgages prepared at the closing, as well as some other debts unrelated to the transaction. Accordingly, Derevjanik had arranged for a mortgage loan from an entity known as Yegen Mortgage Company. First, however, the $248,000 had to be removed of record and then re-recorded as a third mortgage. Tolas then informed respondent that, in order to accommodate Derevjanik or, rather, to place Derevjanik in a position where he was able to pay Tolas, the latter had agreed to place the $248,000 mortgage in a third position, behind the Yegen mortgage.

Respondent's explanation for the discharging of the $248,000 mortgage is consistent with a letter signed by Derevjanik on April 27, 1990, setting forth the understanding between Derevjanik and Tolas and the circumstances requiring the discharge of that mortgage. That letter reads as follows:

Dear Mr. Tolas:

> This is to confirm that Brother's Investment Group, Inc. has agreed to discharge the above mortgage to enable me to place a second mortgage on the property in favor of Yegen Mortgage Company in the amount of $36,000.00. I understand that Brother's will file a new mortgage lien on record after the Yegen mortgage is recorded. I agree that no other lien, mortgage or judgment of any kind will be filed against the property which will supercede [sic] the mortgage of Brother's Investment Group, Inc., except the Yegen mortgage as described above. I further agree that if any other lien is placed upon the property which becomes a prior lien before the Brother's mortgage, I will be in default of the terms of the Brother's mortgage.
>
> Very truly yours,
>
> Glenn J. Derevjanik

[Exhibit D-6]

On April 26, 1990, respondent prepared a discharge of the mortgage and, on April 27, 1990, he prepared a new mortgage for $248,000, containing the following provision: "This mortgage is a third purchase money mortgage subject and subordinate to a first mortgage of Kearny Federal Savings and Loan Association of $350,000, a second mortgage of Yegen Mortgage Company of $40,000." Exhibit D-8.

* * *

At the conclusion of the hearing, the panel found that respondent had lied to it when he swore that he had not reviewed the closing statement at the closing and that he was unaware that the closing statement showed on its face alleged "payments"

totalling $238,000. The hearing panel report went on to say that "[b]ecause the respondent had already admitted the execution of the $248,000.00 note and second mortgage while in Mr. Dunne's waiting room and because the panel believed Mr. Dunne's testimony that a specific representation (as shown on the Title Closing Statement) had been made in respondent's presence concerning prior payment of $178,000.00, the panel again concluded that the respondent falsely swore that he did not know the terms of the closing as shown on the Title Closing Statement." Hearing Panel Report at 9.

Additionally, the panel found that, "[b]ased upon all of the testimony and documentary evidence presented to the panel in this matter, and the reasonable inferences to be drawn from the credible evidence. . . the buyer, Derevjanik and the seller, Tolas, had entered into a scheme to obtain a $350,000 mortgage from Kearny Federal by representing to the lender that the buyer was investing $248,000 of his own cash into the purchase. . . .[R]espondent was fully aware that Tolas and the buyer were deceiving the lender as well as Mr. Dunne at the time of closing and [] respondent knowingly assisted his client in that scheme. . . . [R]espondent was fully familiar with the true facts of the transaction between Tolas and the buyer, and [] respondent was aware that the parties had misrepresented the terms of the transaction to the lender and to Mr. Dunne." Hearing Panel Report at 11-12. Accordingly, the panel found that respondent had violated RPC 1.2(d), by assisting Tolas in conduct that respondent knew was illegal, criminal and fraudulent, by failing to disclose on the Title Closing Statement

and the RESPA Closing Statement the $248,000 second mortgage, and by allowing his client to execute closing statements that did not truly reflect the nature of the transaction, thereby assisting his client in committing a fraud against Kearny Federal.

The panel also found that respondent had violated RPC 8.4(a), in that he knowingly violated RPC 4.2 when he engaged in ex parte communications with Derevjanik, knowing that Derevjanik was represented by Dunne. The panel noted that this violation occurred when respondent submitted the $248,000 second mortgage to the Derevjanik, while in the waiting room of Dunne's office.

Lastly, the panel found that respondent had violated RPC 8.4(c) when, at the closing, he failed to disclose the existence of the $248,000 mortgage to Dunne and failed to reveal the existence of that mortgage on either of the closing statements. The panel concluded that this lack of disclosure, both to Dunne and to Kearny Federal, constituted misrepresentation, deceit, dishonesty and fraud upon Dunne and Kearny Federal.

CONCLUSION AND RECOMMENDATION

Following a de novo review of the record, the Board finds that the evidence clearly and convincingly support the DEC's conclusion that respondent's conduct was unethical, when he made an ex parte communication with Derevjanik, knowing that he was represented by counsel. The Board cannot concur, however, with the DEC's findings that respondent assisted Tolas in defrauding Kearny Federal, that he lied to the panel when he testified that he was unaware of the

contents of the closing statement, and that he engaged in conduct involving fraud, dishonesty, deceit or misrepresentation. When he did not disclose to Dunne the existence of the $248,000 mortgage. In the Board's view, the record does not establish, to a clear and convincing degree, that respondent is guilty of those violations.

The DEC found that respondent "falsely swore that he did not know the terms of the closing as shown on the Title Closing Statement." The DEC reasoned that, because respondent had admitted the execution of the $248,000 mortgage in the waiting room of Dunne's office, and because the panel believed Dunne's testimony that a specific representation concerning the prior payment of $178,000 had been made in respondent's presence, respondent had to know the terms of the transaction.

Respondent, however, never denied that he knew the terms of the transaction from its start. His testimony was unequivocal that, as early as January 1990, Tolas had informed him that he was taking back a $248,000 mortgage. There was no secret about that. All respondent told the panel was that he had not reviewed the closing statement at the closing; he passed it to Tolas, who looked at it and signed it. By saying that he was unaware that the closing statement showed payments totalling $238,000, respondent did not mean to say that he did not know the terms of the transaction; only that he did not review the closing statement and, therefore, did not know that it showed payments of $238,000. The DEC, however, reached a conclusion that, by testifying that he had not read the closing statement, respondent lied that he did not

know the terms of the deal. But the record is replete with statements from respondent saying that he knew, at all times, that Tolas was giving Derevjanik a $248,000 mortgage. Respondent never denied that he knew the terms of the transaction; he asserted only that he had not physically inspected the closing statement. Accordingly, the evidence does not clearly and convincingly support the DEC's conclusion in this regard.

Similarly, the Board was not persuaded that respondent assisted Tolas and Derevjanik in committing a fraud against Kearny Federal by failing to disclose on the closing statement the existence of the $248,000 mortgage and by allowing Tolas to sign closing statements that did not truly reflect the nature of the transaction.

There seems to be no doubt that Derevjanik intended to mislead Kearny Federal into believing that a $60,000 deposit had been made upon the signing of the contract and that $188,000 or $178,000 would be paid at closing. Indeed, Kearny Federal received a copy of the contract, which so stated, as well as the closing statement, which also so indicated. But the record does not support a finding of fraud, to a clear and convincing standard.

The five elements of fraud are well known: (1) material misrepresentation; (2) knowledge of tis falsity; (3) intention that the other party rely thereon; (4) reasonable reliance by the other party, and (5) detriment to trhat party. United Jersey Bank v. Wolosoff, 196 N.J. Super. 553 (App. Div. 1984). Even assuming, for argument's sake, that both Tolas and Derevjanik made a material

misrepresentation to Kearny Federal, that both were aware of the falsity of the contract terms, and that they intended Kearny Federl to rely on the contract terms to grant the $35,000 mortgage loan to Derevjanik, it has not been established that the bank relied on the contract when it issued the mortgage commitment.

No one from the bank testified at the DEC and Dunne testified that the bank did not care whether there were additional mortgages on the property, so long as the bank's loan did not exceed eighty percent of the price (eighty percent of $598,000 is $478,400) and had a first lien on the property. Indeed, the commitment does not contain any language prohibiting other mortgages; it only required that Kearny Federal be the first mortgagee. Dunne also testified that Kearny Federal be the first mortgagee. Dunne also testified that Kearny Federal never asked for a verification of the deposit. This statement is corroborated by the fact that there is no proof that the bank asked for a verification of the deposit.[4]

Even if one were to assume that the bank was defrauded, it has not been established by the requisite standard of clear and convincing evidence that Tolas participated in the fraud; or that respondent assisted him in the commission of the fraud. Too many questions remain unanswered. Did respondent have knowledge of Tolas' and Derevjanik's conduct? Did respondent know that the contract specifically provided for a $60,000 down payment and an additional cash payment of $188,000 at closing? Could respondent

---

[4] Although there is a letter to that effect signed by Tolas, it is not known whether it was submitted to the bank.

not have been under the impression that the contract called for a $248,000 second mortgage by Tolas, instead of a $60,000 deposit and a $188,000 cash payment? (Respondent testified that he never saw the contract until the ethics proceedings began).

In similar vein, the Board is unable to agree with the DEC's finding that respondent knew that the closing statement falsely showed a payment of $248,000. Respondent testified that he had not reviewed the closing statement but, instead, merely handed it to Tolas.

Lastly, the Board cannot agree with the DEC's conclusion that respondent made a misrepresentation, purportedly by silence, to Dunne and Kearny Federal when he did not disclose the existence of the $248,000 mortgage. In the Board's view, the evidence is in equipoise: on the one hand, there is Dunne's testimony that either Tolas or Derevjanik or both, in respondent's presence, misrepresented that a $178,000 cash payment had been made the day before the closing; on the other hand, there is respondent's testimony that no one asked about that payment at the closing and no one represented that the payment had been made, at least in his presence. The Board also considered that respondent might not have specifically discussed the $248,000 mortgage with Dunne because of respondent's stated belief that Dunne knew about the mortgage.

For all the foregoing reasons, the Board is unable to concur with the DEC's finding of misconduct in the specific instances discussed above. The Board recommends the dismissal of the charges of violations of RPC 1.2(d), RPC 8.4(a) and RPC 8.4(c). It is

undeniable, however, that respondent acted unethically when he submitted the $248,000 mortgage documents for Derevjanik's signature outside of Dunne's presence, in violation of RPC 4.2. The Board was not persuaded by respondent's explanation that he had meant no harm and that he was just following Tolas' instructions to obtain Derevjanik's signature before the closing. Respondent could has asked Derevjanik to sign the mortgage just before the closing of title started, in the same room where the closing took place and in Dunne's presence. Respondent's conduct was particularly troubling because Dunne was in the close proximity at the time, a circumstance that inevitably gives rise to an inference that the ex parte communication was intentional.

Respondent's conduct was unethical and in violation of RPC 4.2. As the Court remarked in In re Kent, 39 N.J. 119 (1963), where the attorney was reprimanded for ex parte communications with a judgment creditor of his client, "[t]he 'wise and beneficient' aims of Canon 9 are to shield the adverse party from improper approaches and to preserve the proper functioning of the legal profession." Id. at 119. The Board unanimously recommends that respondent be publicly reprimanded. Three members did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 11/5/92

By: Raymond R. Trombadore
Chair
Disciplinary Review Board