Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-467
District Docket No. XIV-2017-0262E

In the Matter of	:
Karl A. Fenske	:
An Attorney at Law	:

Dissent

Decided: November 23, 2020

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

The majority has found insufficient evidence to support a finding that respondent knowingly misappropriated escrow funds, but has voted to impose a censure for his related, deceitful conduct in respect of the real estate transaction. For the reasons set forth below, we dissent from the majority, find clear and convincing evidence that respondent knowingly misappropriated escrow funds, and recommend to the Court that he be disbarred.

We adopt and rely on the recitation of facts set forth in the majority decision, and concur both with the majority's decision regarding respondent's violations of RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and the majority's determination to dismiss several charges of the complaint.

We, however, diverge from the majority's decision by finding that the record is replete with evidence that respondent knowingly misappropriated escrow funds, in violation of Hollendonner, which requires his disbarment.

To give context to respondent's conduct, we consider his previous discipline for the improper disbursement of escrow funds and, thus, find that he should have had a heightened awareness of his fiduciary duties in his acknowledged role as the escrow agent for the transaction.

The crux of this case is respondent's violation of Hollendonner. Contrary to the special master's finding that respondent did not knowingly misappropriate a portion of the Initial Deposit, the clear and convincing evidence demonstrates that respondent did exactly that. Respondent's disbursement of a portion of the Initial Deposit funds, for the benefit of himself and the other sellers, prior to the fulfillment of the preconditions of the escrow expressly set forth in the Contract, and without the buyers' authorization, violated his admitted fiduciary duty to the buyers. That fiduciary duty was rooted in the express escrow arrangement

set forth in the Contract. Respondent himself admitted that, as a New Jersey attorney who had agreed to serve as the escrow agent for those Initial Deposit funds, he was bound by his fiduciary duty to maintain those funds.

In that vein, we concur with the findings of the trial court, as affirmed by the Appellate Division, that respondent did not have a reasonable, good faith belief that Sims and Gershwin had a legal partnership and, thus, that respondent did not, and indeed, could not, have a reasonable, good faith belief that the effective date of the Contract was prior to February 16, 2016. To the contrary, the record is replete with evidence that, through January 2016, the parties were actively negotiating the material elements of the Contract, including the length of the Due Diligence Period and the amount of the Initial Deposit. That evidence includes respondent's own words to Sims, in a December 31, 2015 e-mail: "sorry I have not gotten back to you. I will look at your suggested changes [to the Contract] and questions and try to respond next week. Maybe we can sign the damn thing next week at lunch," which cut directly against his position in this regard. As further evidence of the continuing contractual negotiations, in a January 8, 2016 e-mail to Sims, respondent provided responses to four questions that Sims had asked in October 2015. Finally, Sims' February 18, 2016 e-mail to respondent, wherein Sims simply attached the Contract, conclusively

establishes that there was no meeting of the minds until Gershwin's February 16, 2016 execution of the Contract.

During the ethics hearing, respondent himself conceded that "[a]ny contract requires a meeting of the minds." Despite this acknowledgement, he continues to claim, without any legal authority, that the Contract was final and enforceable prior to its execution by all the parties, and that the December 2015 and January 2016 e-mails were not evidence of continued negotiations of the final, enforceable Contract. In our view, that position, which respondent failed to assert prior to his use of a portion of the Initial Deposit funds, is not reasonable, and the record contains clear and convincing evidence to support the findings of the trial court, as affirmed by the Appellate Division.

Further evidence of the hollowness of respondent's position are the inapposite positions he has taken in respect of the purported legal partnership between Sims and Gershwin. Where it benefitted him, he argued that Sims had the ability to bind Gershwin and, thus, continued to assert that the latest effective date for the Contract is January 14, 2016, the date he claims Sims signed it. Where it negatively impacted him, he argued that Sims had no authority to terminate the Contract in behalf of both buyers, and that he, thus, should escape disbarment. As the principal drafter of the Contract, he had no explanation for his inclusion of two separate entities as the buyers, two signature blocks for the

buyers, and the language that expressly stated that once "signed," or, upon "full execution," the buyers would post the $25,000 Initial Deposit.

In Wilson, the Court described knowing misappropriation of client trust funds as follows:

> Unless the context indicates otherwise, 'misappropriation' as used in this opinion means any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.
>
> [In re Wilson, 81 N.J. 455 n.1.]

Six years later, the Court elaborated:

> The misappropriation that will trigger automatic disbarment under In re Wilson, 81 N.J. 451 (1979), disbarment that is 'almost invariable' . . . consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of Wilson is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment . . . . The presence of 'good

> character and fitness,' the absence of 'dishonesty, venality or immorality' – all are irrelevant.
>
> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, the presenter must produce clear and convincing evidence that the attorney used trust funds, knowing that they belonged to the client and knowing that the client had not authorized him or her to do so.

This principle also applies to other funds that the attorney is to hold inviolate, such as escrow funds. In re Hollendonner, 102 N.J. 21 (1985).

In Hollendonner, the Court extended the Wilson disbarment rule to cases involving the knowing misappropriation of escrow funds. The Court noted the "obvious parallel" between client funds and escrow funds, holding that "[s]o akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the [Wilson] disbarment rule . . . ." In re Hollendonner, 102 N.J. at 28-29.

In our view, any argument that there was no escrow agreement governing the distribution of the Initial Deposit funds fails, as the language in the Contract clearly filled that role. See In the Matter of Lyn P. Aaroe, DRB 19-219 (February 6, 2020) (slip op. at 46) in which we found that, collectively, the documents underlying the transaction functioned as an escrow agreement, because they bound the attorney to disburse the funds in a particular manner. Aaroe was

disbarred for his knowing misappropriation of the escrow funds. In re Aaroe, 241 N.J. 532 (2020). Moreover, here, respondent has admitted that he served as the escrow agent in respect of the transaction and fully understood the duties and potential perils of that role.

Furthermore, respondent's defense that he was not acting in his capacity as an attorney in respect of the transaction does not spare him from the consequences of Wilson and Hollendonner. The Court has held that, despite the elements required to prove RPC 1.15(a), the element of an attorney-client relationship is not a prerequisite for a finding of knowing misappropriation. In In re McCue, 153 N.J. 365 (1998), the attorney was appointed trustee of a trust valued at over one million dollars. Throughout his term as trustee, McCue neither gave the beneficiaries an accounting of the trust assets nor filed the fiduciary income tax returns for the trust, and he breached his fiduciary duties. In the Matter of William T. McCue, DRB 97-086 (February 17, 1998) (slip op. at 3-4). The beneficiaries petitioned a court in Virginia to remove McCue as trustee. Id. at 3. The court determined that the trust suffered a loss of $655,000 because of McCue's fraud and misappropriation. Id. at 4.

McCue subverted the OAE's investigation by refusing to provide his records, but it was established that, at a minimum, McCue had misused more than $500,000 of trust funds. Ibid. McCue transferred most of those funds by

issuing forty-three checks payable to a separate trust, unrelated to the first. Id. at 3. The matter was before us by way of default and McCue did not appear for the Order to Show Cause issued by the Court. In re McCue, 153 N.J. 365.

Similarly, an attorney appointed as the administrator of an estate, where the sole beneficiary was confined to a nursing home, was disbarred when he "misappropriated and wasted more than $308,000 in estate funds." In re Meenen, 156 N.J. 401 (1998). Meenen made a series of improper loans from the estate without security or documentation, invested $205,580 in limited partnerships and speculative companies that were either defunct at the time of the investment or went out of business shortly thereafter, and improperly advanced to himself fees of $39,000. In the Matter of Robert D. Meenen, DRB 97-406 (June 29, 1998) (slip op. at 3). Meenen was unable to substantiate his entitlement to the fees taken. He also failed to file appropriate tax returns on behalf of the estate until March 1996, during a tax amnesty period established by the State of New Jersey. Id. at 4.

We determined that, even though Meenen had served as administrator, rather than attorney, the appropriate discipline, in that matter alone, was disbarment. Id. at 5. Accordingly, for his theft from the estate, we recommended Meenen's disbarment. Id. at 6. As in McCue, the matter was before us by way

of default and Meenen did not appear for the Order to Show Cause issued by the Court. In re Meenen, 156 N.J. 401.

See also In re Purzycki, 167 N.J. 281 (2001) (attorney knowingly misappropriated funds from a partnership of which he was a partner; the funds had been entrusted to the attorney for partnership purposes) and In re Williamson, 162 N.J. 9 (1999) (attorney found guilty of knowing misappropriation of funds entrusted to him by investors in a business venture; despite absence of an attorney-client relationship, attorney had a fiduciary duty to keep the funds intact).

Here, respondent had no reasonable, although mistaken, belief that the release of the escrowed Initial Deposit funds was justified. Simply put, the positions he has advanced regarding the alternative effective dates of the Contract have no basis in either fact or law. Furthermore, respondent's repeated failure to notify the buyers of his disbursements of the Initial Deposit funds, combined with his avoidance behavior following those disbursements, provides compelling evidence of his mens rea – that he was aware that he was on dangerous ground by making those disbursements, and was delaying his disclosure of having spent a portion of the buyers' escrow funds. Respondent's transfer of the Initial Deposit funds to a personal checking account appears to have been a further attempt to sanitize his behavior and to remove his ATA and

fiduciary role from the facts of his conduct. Contrary to the majority's finding, respondent has advanced no reasonable, although mistaken, belief of entitlement which would spare him from the ultimate sanction of disbarment.

Unlike the cases discussed in the majority decision, In re De Clement, In re Holland, and In re Milstead, where premature disbursement, or disbursement under a colorable dispute occurred, the record in this case contains no scenario supporting such a mens rea on respondent's part.

To the contrary, respondent's conduct was neither reasonable nor mistaken, but, rather, was much more akin to that of attorneys who have been disbarred for the unauthorized use of escrow funds designated to satisfy a lien or other known, contractual obligation.

Accordingly, because respondent knowingly misappropriated escrow funds, disbarment is the only appropriate sanction, pursuant to the principles of Wilson and Hollendonner.

Disciplinary Review Board
Maurice J. Gallipoli, Vice-Chair
Regina Waynes Joseph, Esquire
Robert C. Zmirich, Member

By: **/s/ Ellen A. Brodsky**
Ellen A. Brodsky
Chief Counsel