SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-068
District Docket No. XIV-2009-437E

IN THE MATTER OF

MICHAEL ROBERT GIDRO

AN ATTORNEY AT LAW

Decision

Argued: July 21, 2011

Decided: August 15, 2011

Melissa A. Czartoryski appeared on behalf of the Office of Attorney Ethics.

Gerard E. Hanlon 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 recommendation for disbarment filed by Special Master Kenneth J. Cesta, Esq., based on respondent's knowing misappropriation of a $24,000 deposit in

a real estate transaction. For the reasons set forth below, we agree with the special master that disbarment is required.

Respondent was admitted to the New Jersey and New York bars in 1987. At the relevant times, he maintained an office for the practice of law in Teaneck.

Respondent has no disciplinary history. However, on January 31, 2011, he was temporarily suspended by the Supreme Court, effective March 31, 2011, for failure to comply with the determination of a fee arbitration committee. In re Gidro, 205 N.J. 236 (2011). He was reinstated on June 6, 2011. In re Gidro, 206 N.J. 104 (2011).

In September 2010, the special master presided over a two-day hearing in this matter. He received testimony from attorney Robert F. McManus, OAE investigator Barbara M. Galati, and respondent.

Respondent testified that, in 1994, he inherited a property on Greenwood Lake in New York State (the Greenwood Lake property). He described the property as "a long, skinny piece of property along a main road that borders Greenwood Lake and has two little structures on it."

In 1998, respondent moved into one of the structures and remained there until 2001, when the septic system collapsed. He

claimed that the municipality would not permit him to repair or replace the septic system because a survey had uncovered a road that ran through the middle of both structures on the property. Thus, in 2001, respondent purchased another residential property and moved to that location, leaving the Greenwood Lake property essentially abandoned. He eventually put the property up for sale.

On an unspecified date in September 2008, respondent, as seller, and Dennis Pilliteri, as buyer, entered into a contract of sale for the Greenwood Lake property. New York attorney Robert F. McManus represented the buyer.

According to respondent, at the time that the parties entered into the contract of sale, Pilliteri was aware of the multiple problems with the Greenwood Lake property, which included condemnation of the structures, thereby precluding occupancy, and a highway easement, in favor of the State, running through the property and the structures. As respondent summarized: "If there was anything that could be wrong with this property, it was wrong with this property."

Several provisions of the contract of sale are relevant to this matter. First, the contract identified respondent as both the seller and the seller's attorney. Respondent acknowledged

receipt of Pilliteri's deposit and agreed "to act in accordance with the provisions of paragraph 6" of the contract. The title of paragraph 6 is "Downpayment in Escrow." Under that provision, respondent, as attorney for the seller, was designated "escrowee," and, as such, was required to hold Pilliteri's deposit "in escrow in a segregated bank account . . . until Closing or sooner termination of this contract and shall pay over or apply the Downpayment in accordance with the terms of this paragraph." Further, the deposit was to be held "in a(n) non interest-bearing account for the benefit of the parties." The paragraph continued, in pertinent part:

> At Closing, the Downpayment shall be paid by Escrowee to Seller. If for any reason Closing does not occur and either party gives Notice . . . to Escrowee demanding payment of the Downpayment, Escrowee shall give prompt Notice to the other party of such demand. If Escrowee does not receive Notice of objection from such other party to the proposed payment within 10 business days after the giving of such Notice, Escrowee is hereby authorized and directed to make such payment. If Escrowee does receive such Notice of objection within such 10 day period or if for any other reason Escrowee in good faith shall elect not to make such payment, Escrowee shall continue to hold such amount until otherwise directed by Notice from the parties to this contract or a final, nonappealable judgment, order or decree of a court. However, Escrowee shall have the right at any time to deposit the

> Downpayment and the interest thereon with the clerk of a court in the county in which the Premises are located and shall give Notice of such deposit to Seller and Purchaser. Upon such deposit or other disbursement in accordance with the terms of this paragraph, Escrowee shall be relieved and discharged of all further obligations and responsibilities hereunder.
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> [Ex.OAE1p.2.][1]

Paragraph 13 of the contract provided:

> Insurable Title. Seller shall give and Purchaser shall accept such title as any reputable title insurance or abstract company licensed to do business in the state of New York shall be willing to approve and insure in accordance with its standard form of title policy approved by the New York State Insurance Department, subject only to matters provided for in this contract.
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> [Ex.OAE1p.5.]

Further, paragraph 21 of the contract provided, in pertinent part:

> **Title Examination; Seller's Inability to Convey; Limitations of Liability.** (a) Purchaser shall order an examination of title in respect of the Premises from a title company licensed or authorized to issue title insurance by the New York State Insurance Department or any agent for such

[1] "Ex.OAE1" refers to the copy of the contract of sale.

title company promptly after the execution of this contract or, if this contract is subject to the mortgage contingency set forth in paragraph 8, after a mortgage commitment has been accepted by Purchaser. Purchaser shall cause a copy of the title report and of any additions thereto to be delivered to the attorney(s) for Seller promptly after receipt thereof.

(b)(i) If at the date of Closing Seller is unable to transfer title to Purchaser in accordance with this contract, or Purchaser has other valid grounds for refusing to close, whether by reason of liens, encumbrances or other objections to title or otherwise (herein collectively called "Defects"), other than those subject to which Purchaser is obligated to accept title hereunder or which Purchaser may have waived and other than those which Seller has herein expressly agreed to remove, remedy or discharge and if Purchaser shall be unwilling to waive the same and to close title without abatement of the purchase price, then, except as hereinafter set forth, Seller shall have the right, at Seller's sole election, either to take such action as Seller may deem advisable to remove, remedy, discharge or comply with such Defects or to cancel this contract; (ii) if Seller elects to take action to remove, remedy or comply with such Defects, Seller shall be entitled from time to time, upon Notice to Purchaser, to adjourn the date for Closing hereunder for a period or periods not exceeding 60 days in the aggregate (but not extending beyond the date upon which Purchaser's mortgage commitment, if any, shall expire), and the date for Closing shall be adjourned to a date specified by Seller not beyond such period. If for any reason whatsoever, Seller shall

> not have succeeded in removing, remedying or complying with such Defects at the expiration of such adjournment(s), and if Purchaser shall still be unwilling to waive the same and to close title without abatement of the purchase price, then either party may cancel this contract by Notice to the other given within 10 days after such adjourned date; (iii) notwithstanding the foregoing, the existing mortgage (unless this sale is subject to the same) and any matter created by Seller after the date hereof shall be released, discharged or otherwise cured by Seller at or prior to Closing.
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> (c) If this contract is cancelled pursuant to its terms, other than as a result of Purchaser's default, this contract shall terminate and come to an end, and neither party shall have any further rights, obligations or liabilities against or to the other hereunder or otherwise, except that: **(1) Seller shall promptly refund or cause the Escrowee to refund the Downpayment to Purchaser. . . .**
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> [Ex.OAE1p.7(emphasis added).]

The purchase price was $240,000, with a $24,000 deposit. Closing was scheduled to take place on September 30, 2008.

On September 12, 2008, Pilliteri issued a $24,000 personal check, payable to respondent, representing the deposit required under the terms of the contract. One week later, on September 19, 2008, respondent deposited Pilliteri's $24,000 check into his New Jersey attorney business account.

As stated previously, the contract required the deposit to be placed in a segregated account. OAE investigator Barbara Galati testified that Pilliteri's $24,000 was never deposited in respondent's trust account. According to Galati, an attorney's business account is not a segregated account because its purpose is limited to the deposit of fees and the payment of bills. Client and escrow funds are not to be placed into an attorney's business account.

On the day before the September 19, 2008 deposit, the balance in respondent's business account was $1,753.03. After the deposit, the balance was $24,753.03, as the account also was debited $1000 on that same date.

At about the same time that respondent deposited the $24,000 into his business account, he received a telephone call from a "Miss Morgan," from the New Jersey State Division of Taxation. At the time, respondent owed about $21,000 in either unpaid sales or payroll taxes for a Tenafly bar/restaurant that he owned.

During that conversation, Miss Morgan gave respondent "a matter of days" to pay the taxes. It was respondent's understanding that, unless the taxes were paid, the State would

seize and auction off his liquor license, which he valued at $350,000.

On September 23, 2008, four days after respondent deposited Pilliteri's $24,000 check in his business account and one week before the scheduled closing, he withdrew $21,542 from the business account, in the form of a cashier's check payable to the State of New Jersey Division of Taxation. This disbursement reduced the business account balance to $3,211.03. Two days later, an additional $1200 was withdrawn from the account, reducing the balance to $2,011.03. As of October 7, 2008, the balance in respondent's attorney business account was a mere $61.03. By that date, the closing still had not taken place.

McManus testified that, although his client knew that the property was being sold in "as is" condition, the property was "not insurable" through a title company. Notably, there was "a prior mortgage," an improperly-executed deed in the chain of title, and a foreclosure action and subsequent sale to a third party.

As seen above, under the terms of paragraph 21 of the contract of sale, the seller had sixty days to cure any title defects, or the purchaser could terminate the contract. McManus testified that, although respondent was aware of the title

defects, by May 2009, he still had not cured them. Thus, Pilliteri, who was unable to obtain title insurance on the property, wanted to terminate the contract and have his deposit refunded.

Respondent conceded that the contract required him to be able to convey good title, but insisted that he had that ability. He claimed that he had obtained two title policies on the property and three or four mortgages, while he was the record owner. He suggested that McManus had some kind of control over the title company chosen by Pilliteri, which was located in the same building as McManus's law office. McManus, in turn, testified that he had no financial interest in the title company, was not an officer of the company, and had no personal relationship with the owner of the company.

On November 14, 2008, respondent wrote to McManus and informed him that he had obtained a satisfaction of mortgage and that, according to the county clerk's office, "there is nothing wrong with the way title was conveyed" to respondent's mother, from whom he had inherited the property. In his letter, respondent declared that time was of the essence, claiming that the closing had to take place before Thanksgiving 2008. It did not.

McManus acknowledged that respondent had written him a "time of the essence" letter, but claimed that it was deficient because it did not set forth the place of closing and because respondent was "in no position to call for time of the essence," although he did not explain the reason underlying this particular claim.

On November 26, 2008, respondent wrote to McManus and advised him that an unidentified "objection" was without merit and suggested that McManus direct the title company to remove the exception and that McManus and his client proceed to closing, inasmuch as he could "indeed [convey] . . . marketable title."

The record is silent with respect to what transpired between the date of respondent's second letter and the next letter of record, which was written on May 26, 2009. On that date, McManus wrote to respondent, terminated the contract on his client's behalf, and requested the return of the $24,000 deposit, plus $465 in "net title charges incurred." Respondent did not reply to the letter and did not return McManus's multiple telephone calls.

On June 2, 2009, McManus wrote another letter to respondent, demanding that he return the deposit, together with

the title charges, immediately. McManus warned respondent that, if respondent did not comply with this demand, he would contact "the appropriate grievance committee(s)."

According to McManus, respondent called him the next day, June 3, 2009. At that time, respondent agreed to return Pilliteri's deposit and to pay the title expenses.

McManus claimed that, during that conversation, respondent never even suggested that he had no obligation to return the deposit; he never claimed that Pilliteri was in breach of the contract. McManus confirmed the conversation, in a letter written on that date.

Respondent, in turn, denied that he had told McManus that he would return the deposit and pay the charges. To the contrary, his recollection was that he had told McManus that it was McManus who had "caused the property to not be able . . . to be transferred."

On that same date, June 3, 2009, respondent wrote the following letter to McManus:

> I understand your client's frustration and would like to stop by your office tomorrow to discuss a possible resolution to the matter. I have court in the morning and should be done by 10:30 a.m. Please advise if you are available to meet as I believe I

> have a proposal that will be satisfactory to all parties.
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> [Ex.OAE12.][2]

McManus testified that respondent's letter surprised him, as he did not believe there was anything to discuss. Based on their conversation of that same date, McManus understood that respondent was supposed to return the deposit and reimburse Pilliteri for the title fees. In any event, respondent never did "stop by" McManus's office and did not contact McManus.

On June 10, 2009, McManus wrote another letter to respondent and informed him that, unless he received the monies by the following day, his client would file a grievance and a criminal complaint against respondent. Still, neither McManus nor his client received the funds.

McManus testified that his client, Pilliteri, never authorized respondent's use of the deposit. Respondent admitted that he never informed Pilliteri or McManus that he had spent the $24,000.

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[2] "Ex.OAE12" refers to the June 3, 2009 letter from respondent to McManus.

Galati testified that the $24,000 was never repaid. Indeed, respondent stipulated that from November 1, 2008 through June 30, 2009, the balance in his business account ranged from a low of $506.72 to a high of $5,478.04.

McManus's position was that the deposit should have been placed into an escrow account. He testified that he had relied on respondent's status as an attorney, in entrusting him with the deposit. For example, McManus "would never have agreed to allow [his] client's down payment to be held by anybody but an attorney for a real estate transaction." He added that, in his many years as a real estate attorney, he had never permitted an unrepresented non-lawyer to be the escrow agent in a real estate transaction.

For his part, respondent testified that he had told McManus that he was not using an attorney. He adamantly denied that he had acted, or held himself out, as an attorney in any capacity with respect to this transaction. Nevertheless, respondent conceded that he did not cross out the word "esquire" after his name, on page nine of the contract, where he acknowledged receipt of the deposit. Moreover, as to the requirement, in paragraph six, that the deposit be held in a segregated bank

account, respondent stated: "I don't believe I read paragraph six."

Furthermore, respondent argued that, because Pilliteri's check was made out to him personally, the matter was a "done deal." Therefore, he could use Pilliteri's funds. When asked if he had ever returned any of the monies to Pilliteri, respondent answered: "He's not entitled to it. He's never getting it back."

Based on the above, the OAE charged respondent with failure to safeguard funds (RPC 1.15(a)), for not depositing the funds in escrow, and knowing misappropriation of "trust funds and/or escrow funds," a violation of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and the principles of In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985).

At the ethics hearing, where respondent represented himself, he raised several defenses to the OAE's claim that he had knowingly misappropriated the $24,000 deposit. In essence, he argued that he was entitled to the immediate use of the money because (1) Pilliteri had no way out of the contract, and (2) the deposit check had been made out to him personally, not to his trust account. Nevertheless, he also testified that he may

have acted out of a sense of panic, when he took the funds, because the State was demanding that he pay the overdue taxes immediately and several other properties that he owned were in foreclosure: the Greenwood Lake property, his personal residence, and a personal residence that he had inherited from his parents. His only asset of value was the liquor license. Ultimately, he lost all of the residential properties to foreclosure.

As to his use of the deposit to pay the tax obligation, respondent never claimed that he had taken the funds because Pilliteri had breached the agreement. Instead, he claimed:

> The closing was supposed to be days away, and New Jersey, the State of New Jersey demanded payment of taxes. The money was used to pay taxes. It was not used for any nefarious or improper purpose. It was used for honest and legal purposes. I wasn't — if you perceived it as I was misusing someone's funds that they were entitled to have back, I didn't use them for anything other than payment to New Jersey on the tax obligations that they were demanding and threatening me with taking away my liquor license, which was valued at $350,000. . . . The fact that the monies were made from Mr. Pilliteri, were made payable to me, personally, I perceived that that's not attorney trust account funds. They weren't in my attorney trust account at any time and

> he wasn't my client. The closing was going to happen in 10 days.
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> [T18-2 to T19-4].[3]

Respondent denied any misuse of the funds, claiming that Pilliteri was not entitled to them: He testified:

> It was perceived that any -- it was a contract that the house — [Pilliteri] had the right to go forward, he had the right to inspect the property. The property was condemned. The property was vacant and was not allowed to be occupied. The property had an easement from the State Highway running right through the middle of both buildings, both structures, shows it was occupied by the State, so they had a right to it. I couldn't build on it. I couldn't fix it. I provided that survey to Mr. McManus. He and/or his client would have known that prior to signing the contract. If there was anything that could be wrong with this property, it was wrong with this property. It was in foreclosure, so the contract he put his client into had no outs. He had no way out of this contract unless he made something up with the -- which is what he did. The use of the funds was something that -- as I said, I wasn't acting as an attorney. It wasn't in my trust account.
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> [T19-4 to 24.]

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[3]"T" refers to the transcript of the hearing before the special master on September 21, 2010.

As it turned out, the transaction was not a "done deal." As indicated previously, respondent was unable to convey good title.

At the ethics hearing, McManus maintained that, under paragraph 21(b) and 21(c) of the contract, his client was justified in terminating the contract. Specifically, respondent, as seller, had sixty days to cure any objections to the title or any "marketability issues." If the seller could not do so, within the sixty days, either party had the right to terminate the contract.

In his defense, at the ethics hearing, respondent advanced a belief that the deposit was a non-refundable deposit. He continued:

> Well, I would just state that, yes, that my point is that I believed this contract was basically as is, where there is no inspections, no mortgage, no contingencies of any kind. This, in essence, was a non refundable deposit. There's no legitimate way that the client and the attorney, knowing all the problems with this property, that he would be entitled to its return. They knew it was in foreclosure. There was a sale date set. They knew it was condemned. They knew the road ran through it. They knew it had been – I had vacated it, because I live – at the time 612 Jersey Avenue, property which is the subject of the contract, it was about a mile from the

house. I had to move in because this one had been condemned and it couldn't be fixed.

[T31-17 to T32-23.]

Respondent testified that, over the years, he had bought and sold properties. Further, throughout the course of his legal career, he had handled about twenty northern New Jersey residential real estate transactions. He testified that he had limited experience with New York real estate matters, however. Nevertheless, he agreed that, if he had represented someone else in this real estate transaction, he could not have released a deposit unless he had the consent of the buyer and the seller. In this particular case, he conceded that, in retrospect, as the escrow agent, he would "probably do something differently than what [he] did at the time."

Finally, respondent argued that, under RPC 8.5, the New Jersey disciplinary system lacked jurisdiction over the matter because the property was located in New York, the contract of sale was a New York contract, and respondent resided in that state. Later, his attorney added that the buyer and his attorney also were in New York.

The special master found that respondent's use of the $24,000 deposit for his own purposes, including the satisfaction

of his outstanding tax liabilities, constituted knowing misappropriation of escrow funds. The special master rejected all of respondent's defenses: first, the deposit was not non-refundable, as nothing in the contract described it as such; second, respondent had a contractual obligation to deliver insurable title to Pilliteri and there was a dispute as to whether he had the ability to do so.

The special master found that, under the terms of the contract or otherwise, respondent had no right to use the $24,000 for his own benefit, four days after its deposit and without Pilliteri's authorization. The special master rejected respondent's claim that he believed that he was entitled to use the funds, pointing out that he is an experienced attorney and business owner, who had handled real estate matters in the past. The contract clearly outlined his obligations as escrowee. In short, the special master believed that respondent had used the funds to save his liquor license.

In addition, the special master noted, respondent did not acknowledge or reply to McManus's May 26, 2009 letter, canceling the contract and demanding the return of Pilliteri's deposit. Moreover, when respondent did contact McManus after McManus sent his June 2, 2009 letter, respondent said nothing about

Pilliteri's not being entitled to a refund of the deposit. The special master found credible McManus's testimony that, during his telephone conversation with respondent, respondent did not take the position that Pilliteri was not entitled to the return of the deposit. Rather, respondent stated that he would return the monies.

Furthermore, the special master rejected respondent's claim that he was entitled to the funds immediately because (1) he was acting in an individual capacity, rather than as an attorney, and (2) the deposit check was made out to him personally. According to the special master, under the terms of the contract, respondent did act as an attorney and also agreed to place the deposit monies in a segregated bank account.

Finally, the special master ruled that respondent may be disciplined in New Jersey for unethical conduct that occurred in New York State, under RPC 8.5(a). That rule provides, in pertinent part, that a lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs.

For respondent's violations of RPC 1.15(a) and RPC 8.4(c), the principle set forth in In re Hollendonner, supra, 102 N.J. at 26-27, and by comparison with In re Gifis, 156 N.J. 323

(1998), the special master recommended that respondent be disbarred.

Following a de novo review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

The special master was correct in his determination that respondent knowingly misappropriated escrow funds, when he used Pilliteri's $24,000 deposit for his own benefit, without Pilliteri's knowledge or consent. See In re Hollendonner, supra, 102 N.J. at 26-27. In Hollendonner, the attorney, a member of the Elks Lodge in Trenton, represented the lodge in negotiations with the buyer of its property. Id. at 22. Hollendonner accepted a $2000 deposit from the buyer's attorney, which was to be held in escrow, pending completion of the agreement of sale. Ibid.

At the time Hollendonner received the deposit, he wanted to buy a used car, but did not have sufficient funds. Ibid. He asked the lodge's officers if he could take the deposit monies as his fee. They agreed. Ibid.

Hollendonner did not anticipate any problems with the transaction and he considered the deposit non-refundable. Ibid.

He bought a car and used the remaining funds for his personal benefit. Id. at 23.

The Supreme Court noted that, when the parties to a transaction select the attorney for one of them to hold the deposit monies, the attorney receives those funds as an agent for both parties. Id. at 28. In this regard, the Court observed, there is an obvious "parallel between escrow funds and client funds." Ibid. The Court announced that, in the future, attorneys who knowingly misappropriated escrow funds would be disbarred. Id. at 28-29.

Hollendonner was not disbarred, however, because there was no clear and convincing evidence that he had invaded the escrow funds "with knowledge that the use of those funds was improper." Id. at 29. Moreover, his was a case of first impression. Ibid. Hollendonner received a one-year suspension.

Hollendonner mandates this respondent's disbarment. Its rule is well established: An attorney who receives deposit monies and is to hold the funds in escrow, pending an event, holds those monies on behalf of all parties to the transaction and may not release the funds either until the event takes place or the attorney obtains the consent of all parties to the transaction.

Here, the contract provided that respondent was to hold the funds in escrow until the closing. He failed to do so by placing the monies in his business account and by taking the monies, without the buyer's knowledge or consent, and using them for his personal benefit, that is, to save his liquor license.

We find that respondent's defenses are without merit. First, nowhere did the agreement of sale identify the deposit as non-refundable. Second, respondent is wrong in his assertion that the contract provided for "no outs," that it was, as his counsel described it, "ironclad." To the contrary, the contract clearly required the seller (that is, respondent) to provide the buyer with insurable title, which he was unable to do. Third, contrary to respondent's assertion, he did act as an attorney in the transaction. Thus, by agreeing to hold the deposit in escrow, respondent owed a fiduciary duty to Pilliteri and was required to safeguard the funds until the closing. In the event of an alleged breach on the part of Pilliteri, respondent was required to follow the provisions of paragraph six of the contract, before taking the monies as a form of alleged liquidated damages. Under the circumstances, respondent's use of the funds to satisfy a personal debt amounted to a knowing misappropriation of those funds.

In sum, nothing about the facts of this case would exempt respondent from disbarment. For example, at the time that respondent used the funds to pay his restaurant's overdue taxes, he had "no reasonable grounds to believe that the purposes of the escrow ha[d] been completed." In re Susser, 152 N.J. 37 (1997). See also In re Spizz, 140 N.J. 38 (1995) (attorney, against a court order, released to the client funds escrowed for a former attorney's fees and misrepresented to the court and to the former attorney that the funds remained in escrow; the attorney relied on a legal theory to argue that the former attorney had either waived or forfeited her claim for the fee). Indeed, the date for closing in this case was almost a week away, at the time that respondent spent the monies; there was no specter of any colorable claim of a breach on Pilliteri's part.

By way of further example, this was not a case where respondent spent funds that were escrowed for a particular purpose to carry out that purpose, when the other party failed to do it. See, e.g., In re Flayer, 130 N.J. 21 (1992) (at closing on residential real estate transaction, funds were placed in escrow as the result of unfinished worklist items, which the seller was to complete; as a result of the seller's failure to complete the repairs, the attorney, who represented

himself and his wife in the purchase of the home and who was unable to garner the cooperation of the seller, used the monies to do the work himself; the attorney received a (public) reprimand). Here, respondent did not use the monies for purposes related to the transaction. He used them to save his liquor license.

After respondent retained counsel to represent him in the matter before us, respondent's defenses appear to have undergone some changes. In counsel's first submission to us, the non-refundable deposit argument seems to have been abandoned. Instead, counsel asserted that, "[a]t all times," respondent "was entitled to the $24,000.00 as liquidated damages," presumably because of an alleged breach of contract. In counsel's second submission to us, the "non-refundable" deposit claim resurfaced. He contended that the agreement was "ironclad" and, that, therefore, Pilliteri could not have canceled it. Counsel asserted that, if the buyer believed that he was owed the money, then he should have filed a civil complaint. Finally, counsel contended that the New Jersey RPCs do not govern this case because the property was located in New York, and the contract of sale was executed in that State by parties who resided there.

Counsel's contention that respondent was entitled to the deposit as liquidated damages is without merit. Respondent did not take the monies after any alleged default on the part of Pilliteri or even after any controversy had developed. Rather, he took the monies within days of receiving them, which was a full week before the closing date. There was no specter of a "default" at that time. The fact remains that respondent simply needed the money to save his liquor license; so, he took it.

Moreover, it is entirely proper for New Jersey to subject respondent to a disciplinary proceeding in this state and to apply the New Jersey RPCs. RPC 8.5(b)(2) provides that, in a matter such as this, the applicable RPCs are those of the jurisdiction in which the lawyer's conduct occurred. In this case, respondent deposited Pilliteri's $24,000 into his New Jersey business account, and still in New Jersey, used the monies in that account to save his New Jersey liquor license. Clearly, thus, the New Jersey RPCs apply to this matter.

In counsel's second submission to us, he re-asserted what he had already stated before, namely, that respondent was not acting as an attorney, when he entered into the contract of sale with Pilliteri, and that the contract was "ironclad," thereby giving Pilliteri no choice but to "see it through." In other

words, counsel argued that the deposit was, for all intents and purposes, non-refundable. In addition, for the first time, counsel alluded to In re Margolis, 161 N.J. 139 (1999), in which a reprimand was imposed on an attorney who prematurely released escrow funds, without the authorization of both parties to the agreement. These assertions and counsel's reliance on Margolis were intended to persuade us that respondent's use of Pilliteri's $24,000 deposit was not a knowing misappropriation of escrow funds, under Hollendonner.

Margolis is distinguishable from this case. As stated in In re Susser, supra, 152 N.J. 37, If an attorney prematurely releases escrow funds to a party to the agreement, or with the reasonable, but mistaken, belief that the purposes of the agreement have been satisfied, the attorney will be found guilty of breach of an escrow agreement (in essence, failure to safeguard escrow funds), but not of knowing misappropriation of escrow funds. Obviously, if that same attorney disburses the funds to himself or herself without any claim of entitlement, the attorney will be found guilty of knowing misappropriation, under Hollendonner.

In Margolis, the attorney represented Jerome Diamond, who was involved in a civil action with his brother, Martin,

regarding jointly-owned businesses. In the Matter of Martin G. Margolis, DRB 98-346 (April 5, 1999) (slip op. at 2, 4). At one point, the case was settled. The following terms were placed on the record:

> Jerome Diamond will be paid the sum of $45,000 lump sum within seven days of the date hereof. That money will be paid to Mr. Diamond's counsel, Stuart Pobereskin.[4] It will be held in escrow by him pending delivery of a deed and other documents necessary to effectuate the transfers that are specified in the terms of this settlement hereinafter.
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> [Id. at 4.]

As it turned out, the settlement was not finalized within the agreed-upon seven days. On January 22, 1993, in an attempt to have the settlement concluded, Margolis hand-delivered to Martin's attorney, Charles Cohen, a stipulation of settlement, a general release signed by Jerome in Martin's favor, and copies of signed documents transferring Jerome's interest in certain corporations and real estate to Martin. Margolis also included a release for Martin to sign. Id. at 5, 6.

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[4] Pobereskin was affiliated with Margolis's law firm, which represented Jerome.

In his cover letter, Margolis repeated his understanding that, upon receipt of the documents, Cohen would provide the courier with a $45,000 trust account check to be held "in escrow awaiting an exchange of executed documentation, including the enclosed Stipulation of Settlement and release," which, Margolis emphasized, was to take place on that same day. That was because the terms of the settlement mandated that it be finalized by no later than January 20, 1993, or two days before. Margolis reiterated that Jerome had already signed the required deed and other related documents. Ibid.

Later in the day, Cohen sent the $45,000 check to Margolis, with a letter stating that the check should be held in escrow, "until final disposition of all unresolved issues and delivery of appropriate documentation." Id. at 7. On that same day, Margolis deposited the check in his trust account and disbursed $15,000 to his firm, on account of Jerome's legal fees. Ibid. The disbursement was made with Jerome's consent, but without the consent of either Martin or Cohen. Ibid.

Between January 27 and May 17, 1993, with the settlement still not finalized (seemingly because of some tax issues), Margolis disbursed an additional $11,000 for Jerome's fees, $4,000 for the fee owed to a fiscal agent involved in the

settlement between the Diamond brothers, and $15,000 to Jerome. All of the disbursements were made only with Jerome's consent. Ibid. Martin still had not signed the stipulation of settlement or the release in favor of Jerome. Ibid.

Margolis did not inform Cohen that he had already paid out some of the $45,000. Id. at 8. Moreover, by May 1993, Margolis had disbursed all of the $45,000, without the consent of either Martin or Cohen. Id. at 7. Cohen was unaware of those disbursements. Id. at 9. In that end, it took Martin more than a year to comply with the terms of the settlement. Id. at 14.

The OAE did not allege that Margolis had engaged in a knowing misappropriation. Id. at 3. Indeed, he was not found guilty of that offense, but only of breach of an escrow agreement. Although Margolis maintained that he had complied with the terms of the escrow agreement because he had delivered signed copies of the required documents to Cohen, we pointed out that he was obligated to deliver original documents, not copies. Id. at 14, 15.

As in Susser, we concluded that Margolis's conduct constituted a premature release of settlement funds to a client — a party to the escrow agreement — who, in turn, had authorized the attorney to keep a portion as his fee. Id. at

16. Essentially, we found that Margolis reasonably believed, although erroneously, that the requirements of the escrow agreement had been fulfilled. We also found that Margolis's disbursement of his legal fees did not constitute knowing misappropriation because it was undisputed that (1) he was entitled to the fees, and (2) Jerome had agreed that the fees were to be paid out of the settlement funds. Id. at 15. Margolis was reprimanded.

Respondent's actions are not comparable to those of Margolis. Yes, like Margolis, he released the escrow funds (the deposit) to a party to the agreement, himself. But the crucial difference here is that he was also acting as an attorney who took funds for himself and who could not have possibly believed, under the terms of the contract, that he was entitled to take the $24,000 within days of its deposit in his business account and before the closing. It is noteworthy that Margolis used the funds to make disbursements directly related to the settlement (fees to his firm, a fee to the fiscal agent, and the balance to his client), all based on a belief that the purposes of the escrow agreement had been satisfied — or at least substantially satisfied. After all, he had delivered signed copies of the required documents, thus proving that his client had fulfilled

his obligations under the terms of the settlement. Here, respondent took the deposit before the closing date and used the funds to pay overdue taxes on his liquor license on another property that he owned. As stated previously, respondent did not have "reasonable grounds to believe that the purposes of the escrow ha[d] been completed," at the time that he took the monies and spent them. In re Susser, supra, 152 N.J. 37.

As the special master observed, respondent's conduct was not unlike that of the attorney in In re Gifis, 156 N.J. 323 (1998). There, in one of the matters leading to Gifis's disbarment under Hollendonner, Gifis took a $51,000 deposit in a residential real estate transaction, which he was to hold in escrow until the closing, and used it for personal expenses. In the Matter of Steven H. Gifis, DRB 97-070 (June 10, 1998) (slip op. at 3, 5-6). Gifis claimed that, because the buyers had been pre-approved for a mortgage, he considered the matter a "cash transaction." Therefore, he claimed, the deposit was non-refundable. Id. at 3,7. As such, he argued, he was entitled to the monies, with his client's consent. Id. at 7. We noted that the buyers' lack of authorization to Gifis's taking of the funds, in and of itself, would have resulted in his disbarment. Id. at 43.

In light of all of the foregoing reasons, respondent's argument that his conduct paralleled that of Margolis must be rejected. Respondent knowingly misappropriated the $24,000 deposit when he used it to pay his outstanding tax obligation to the State of New Jersey and for purposes unrelated to the real estate transaction with Pilliteri. For his knowing misappropriating of escrow funds, respondent's disbarment is mandated. In re Hollendonner, supra, 102 N.J. at 26-27. We so recommend to the Court.

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: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael R. Gidro
Docket No. DRB 11-068

Argued: July 21, 2011

Decided: August 15, 2011

Disposition: Disbar

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:	9					

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel