SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-262
District Docket No. XIV-08-045E

IN THE MATTER OF	
JAMES O. ROBERSON, JR.	
AN ATTORNEY AT LAW	

Decision

Argued: November 17, 2011

Decided: December 20, 2011

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

Wendy Klein appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline filed by Special Master Arthur Minuskin, J.S.C. (retired). The complaint charged respondent with violating RPC 1.15(a) (failure to safeguard client or third party funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or

misrepresentation), and the principles of In re Wilson, 81 N.J. 451 (1979), arising from respondent's handling of a real estate transaction.

The special master recommended that respondent be disbarred for knowing misappropriation. The Office of Attorney Ethics (OAE) urged us to disbar respondent. For the reasons detailed below, we determine to dismiss the complaint.

This matter has an unusual procedural history. At our November 2007 session, we considered allegations against respondent, arising out of the same real estate transaction now under review. Specifically, we found that respondent violated RPC 1.15(b) (failure to promptly deliver funds to a third party), RPC 3.3(a) (lack of candor to a tribunal), RPC 8.1(b) (failure to cooperate with disciplinary authorities), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Respondent received a three-year suspension. In re Roberson, 194 N.J. 557 (2008) (Roberson I).

In our decision, we suggested that the facts raised the specter of knowing misappropriation. In the Matter of James O. Roberson, Jr., DRB 07-207 (December 20, 2007) (slip op. at 23).

The OAE then filed a second complaint against respondent, arising out of the same set of facts.[1] It is the outcome of the hearing on the second complaint that was before us (Roberson II).

Respondent and the OAE agreed that the facts are undisputed, but for the knowing misappropriation issue. The OAE presented no witnesses and relied on the record introduced at the prior hearing (Roberson I) to support its case.

Respondent was admitted to the New Jersey bar in 1986 and to the New York bar in 1987.

In April 2002, respondent was temporarily suspended for his lack of cooperation with the OAE in a disciplinary investigation. In re Roberson, 172 N.J. 30 (2002).

In May 2006, respondent received a six-month suspension for gross neglect in a real estate transaction, improperly taking a jurat on a mortgage document, and inflating his fee. In

[1] During the hearing in Roberson I, the OAE made a motion to amend its complaint to charge respondent with knowing misappropriation. Subsequently, the OAE learned that its amendment application at that stage of the disciplinary process ran afoul of the United States Supreme Court ruling in In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). The OAE then withdrew its motion.

addition, he failed to communicate with his clients to ensure that they understood the transaction and essentially abandoned them by sending the mortgage banker, who had a conflict of interest, to complete the closing. In re Roberson, 187 N.J. 2 (2006). The Court's order, dated May 23, 2006, directed that no application for reinstatement would be entertained before all pending matters against respondent were concluded and before he complied with three prior Court orders.

In 2008, respondent was suspended for three years for misconduct in connection with a real estate transaction (Roberson I).[2] There, he failed to satisfy the seller's mortgage. Instead, he paid the monies designated for that pay-off to his client (the seller) and to himself, in repayment of a prior loan that he had made to his client. Respondent misrepresented, on the RESPA, that the lien had been satisfied, thus defrauding the lender. Respondent was also guilty of failure to cooperate with disciplinary authorities. In related litigation, respondent was guilty of misleading a court. In re Roberson, supra, 194 N.J. 557. The Court reiterated that

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[2] The suspension was retroactive to November 25, 2006, the expiration of respondent's six-month suspension.

respondent would not be reinstated until all pending ethics matters against him had been concluded and until he complied with all prior Court orders.

Respondent has been ineligible to practice law, since September 2001, for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection. He currently lives in Washington, D.C.

The facts in this matter are as follows:[3]

On November 24, 1999, respondent represented Spiros Pollatos (Pollatos) in the sale of real property to Athanasios Pollatos, Spiros' father.[4] Respondent had a professional relationship with Pollatos, allegedly a mortgage banker.[5]

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[3] The underlying facts necessary for our consideration of the transaction in question were not fully developed during the hearing through testimony. Rather, the facts were taken from the record exhibits in Roberson II and from our decision in Roberson I (Exhibit 33). We have supplemented the facts with information from Roberson II.

[4] Pollatos was unwilling to cooperate with the OAE's investigation of this matter.

[5] The OAE's brief in Roberson I states that an October 2007 search of the internet-based licensee lists of the New Jersey Real Estate Commission and the New Jersey Department of Banking and Insurance revealed no licensee named Pollatos. Exhibit R20, a Department of Law and Public Safety news release dated February 20, 2009, reveals that Pollatos lost his mortgage

(footnote cont'd on next page)

Respondent testified that, at the time in question, his practice focused almost exclusively on real estate matters, fifty percent of which came from Pollatos. Pollatos was also respondent's landlord.

The Pollatos real estate transaction was financed by Accredited Home Lenders (Accredited), which wired $330,024.47 into respondent's trust account for the closing.[6] As closing agent, respondent was required to satisfy a mortgage lien of $269,400.78 held by Delta Funding Corp. (Delta). Delta had filed a lis pendens on the property.

Line 506 of the HUD-1 form (RESPA) that respondent prepared listed an amount of $269,400.78 due to Delta. According to respondent, on the day of the closing, Pollatos informed him that he was negotiating a "short-pay" with Delta, whereby Delta would agree to reduce the amount due. At Pollatos' instruction,

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(footnote cont'd)

broker's license in 2001, after pleading guilty to theft in a mortgage fraud scheme. As of the day of the hearing before the special master, Pollatos was serving a prison sentence. Pollatos was the individual involved in the matter that led to respondent's six-month suspension.

[6] The mortgage was assigned to EquiCredit Corp. of America.

respondent disbursed to Delta only $7,939.17, the outstanding interest due on the mortgage, to prevent a foreclosure. Pollatos also told respondent that a second mortgage held by Mildred Cambria, a mortgage not reflected on the RESPA, had been paid off. Respondent testified that the information on the RESPA was correct as of the date of the closing, based on the information that he had received.

At the DEC hearing in Roberson I, the presenter asked respondent about the Delta entry on the RESPA:

> . . . on Exhibit C-7, line 506, you indicate that you paid Delta the full amount, or $269,400.78 didn't you?
>
> A. I didn't show that I was going to – that I paid that amount. That's the amount that was owed.
>
> [2T63-19 to 24.][7]

There is no reference to a "short-pay" on the RESPA, the closing instructions, or the title documents. Pollatos told respondent that he would receive confirmation of the "short-pay" "in a few days" and that respondent would receive a satisfaction of a mortgage from Cambria. Respondent never contacted Delta to

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[7] 2T refers to the transcript of the DEC hearing in Roberson I on June 22, 2006.

confirm the existence of the "short-pay" agreement and did not notify the title company or Accredited of the "short-pay."

Respondent explained that he did not prepare an amended RESPA reflecting the "short-pay" because, in his experience, that was not the practice and was not required. According to respondent, he accepted Pollatos' representation about the "short-pay," based on their professional relationship, on the fact that Pollatos was a licensed mortgage broker with a $150,000 surety bond, and on prior transactions with Pollatos, when "short-pays" were involved, with no incidents.

At the DEC hearing in Roberson I, the following exchange took place between the presenter and respondent:

> Q. So you sent Accredited Home Lenders a post closing package, correct?
>
> A. Yes.
>
> Q. I assume, then, you sent them the RESPA, R-7?
>
> A. Yes.
>
> Q. And I assume you sent them copies of signed deeds and mortgages, correct?
>
> A. Yes.
>
> Q. And you sent them on November 26, 1999, two days after the closing?
>
> A. Yes.

Q. This is Exhibit C-32. The letter is from you, to Delta, dated November 26, 1999. Am I correct?

A. Yes.

Q. You sent Delta a check that day for $7,939.18, certified check, correct?

A. Yup.

Q. According to one of those pages, last page, I believe, of the document, that is the exact amount of interest that Mr. Pollatos owed Delta from July 23, 1999 through November 29, 1999; am I correct?

A. Yup.

Q. So what you sent Delta after the closing was merely the interest that Mr. Pollatos had outstanding on the mortgage, correct?

A. Yes.

Q. The same mortgage on which Delta had filed a lis pendens, correct?

A. Yes.

Q. And you told Delta in your letter, "The proposed refinance did not occur as planned but we are still trying. We will keep you posted about future a [sic] closing."
That's what you wrote.

A. Uh-huh. Yes.

Q. So you sent a closing package to Accredited with R-7, the RESPA, among other documents, correct?

A. Yes.

Q. But you told Delta that the deal didn't go through?

A. Yes.

Q. And over the course of November 1999 to May 2000, you sent Delta a series of checks that came from the proceeds of the Accredited loan, correct?

A. Yes.

Q. And your purpose was merely to keep Pollatos out of foreclosure, correct?

A. Yes.

Q. So in other words, Mr. Roberson, this purchase and sale between the two Pollatoses was a dishonest transaction.

[Respondent's counsel]. Objection.

[Panel Chair]. Sustained.

[Presenter]. Therewith, I'll ask another question.

There was no intent, was there, for Anasthasios [sic] Pollatos to purchase the property from Spiros Pollatos; isn't that right?

A. No. That was accurate.

Q. Isn't it a fact, Mr. Roberson, the only reason this closing went through was so Spiros Pollatos could have enough money to stay off foreclosure for a few months?

A. I can't get into his intent for why he worked this transaction with this [sic] father.

Q. And didn't he tell you that was what he was going to do?

A. I don't recall that.

[2T93-5 to 2T96-2.]

During a period of three months after the closing, respondent issued checks to and for the benefit of Pollatos, using the funds still held in escrow. Among the payments was the $80,500 payment to respondent himself, in satisfaction of loans that he had made to Pollatos.

As it turned out, Pollatos was not truthful with respondent and was not in negotiations with Delta. Pollatos never gave respondent a copy of the "short-pay" agreement with Delta, the satisfaction of the Delta mortgage, or the satisfaction of the Cambria mortgage. According to respondent, in April or May 2000, when it became clear that Pollatos was not going to come up with the "short-pay" confirmation, respondent forwarded to Delta the balance of the funds that he was holding for the Delta pay-off.

Of the $269,400.78 that respondent originally held for Delta he disbursed $133,154.70 to Delta. The balance was disbursed to or for the benefit of Pollatos. Respondent

testified that the transaction had placed a strain on his relationship with Pollatos.[8] Indeed, respondent filed a complaint against Pollatos with the Department of Banking and Insurance.

Respondent argued that he did not misappropriate funds because Pollatos had authorized him to use funds to which Pollatos was entitled. According to respondent, Pollatos had approximately $70,000 in profit due to him from the sale. Pollatos was seeking additional funds for himself through the "short-pay." Respondent explained that, in a number of prior transactions, Pollatos had, in fact, negotiated a "short-pay" with a lender, and had presented him with a pay-off statement with a reduced sum. Respondent claimed that he reasonably expected, based on Pollatos' "past performance," that Pollatos would be successful in his negotiations and would reduce the amount due to Delta by at least $10,000. Respondent conceded

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[8] In respondent's answer in Roberson II, he stated that he disassociated himself from Pollatos and moved his office out of Pollatos' building, in May 2000.

that he should have contacted Delta to verify that the "short-pay" was being negotiated.[9]

As indicated previously, Pollatos was not in negotiations with Delta. As of the date of the hearing before the special master, Pollatos was serving a thirteen-and-a-half-year prison term for criminal activities not related to the within transaction.

The Delta mortgage ultimately went into foreclosure. It became the subject of a lawsuit that Chicago Title Insurance Company (Chicago Title) filed against respondent, Pollatos, Athanasios Pollatos, and Cambria. That litigation ended with a stipulation of settlement, in which the parties acknowledged that there were insufficient net proceeds to pay off (1) the mortgage encumbering the property, which was given to Accredited and later assigned to EquiCredit; (2) the outstanding judgments against Pollatos; and (3) the tax sale certificate encumbering the property.

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[9] Respondent noted that, in none of the prior transactions where Pollatos had negotiated a "short-pay," had he confirmed the negotiations with the lender.

To satisfy the outstanding liens against the property the parties agreed to the following: Spiros Pollatos was to pay all amounts necessary to satisfy the judgments against him and an additional $25,000; Athanasios Pollatos was to pay $5,000; and respondent and Chicago Title were to pay the remaining "short-fall" (sixty-five percent and thirty-five percent, respectively). The payments from respondent were to be made by him personally and by his malpractice carrier (the carrier paid $105,000). According to respondent, he wanted to proceed to trial to clear his name, but his malpractice carrier thought it a better business decision to pay the claim.

One year after the closing, Russell M. Finestein, the attorney for Chicago Title, reported to the OAE that respondent had not paid off the Delta lien and had not recorded the deed and mortgage. OAE investigator Robert Gudger investigated the matter, following the OAE's receipt of Finestein's letter.

Gudger testified that, according to respondent, nothing untoward had occurred during the closing process. Respondent blamed the short-fall on the alleged "short-pay" that Pollatos had negotiated with Delta. Respondent contended that, until Finestein contacted him, he was unaware that the original deed

and mortgage for Accredited had not been filed. Respondent filed those documents on December 1, 2000.

When Gudger contacted a representative of Delta, he was informed that Delta had no knowledge of a "short-pay" negotiation. In fact, during the six months following the closing, respondent did not inform Delta that the property had been sold.

In finding respondent guilty of knowing misappropriation, the special master began by concluding that

> 1. [Pollatos'] interest in the funds received from Accredited at the Closing was equitable in nature and of an amount that had not yet been determined of the proceeds remaining after the discharge of the Delta mortgage. His direction not to pay prevented an assessment of the value of that interest, if any, dependent upon the closing having taken place. Until then, the proceeds belonged to Accredited.
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> 2. By the Respondent's admission at the hearing, the funds in his possession were insufficient to repay the Seller's debt to him – short by $10,000 – so that Respondent knew or should have known the payment he made to himself invaded funds owned by Accredited.
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> 3. The $330,000 sent to Respondent with instructions concerning its disbursement to satisfy its outstanding mortgage and issue a clear title to the purchaser belonged to Accrdited, not [Pollatos], at the time Respondent paid himself $80,500 from those funds.

> 4. Based on Respondent's contradicting statement whether a closing had or had not taken place, no such event occurred and none of the monies in Respondent's possession belonged to Respondent's client Spiro Pollatos.
>
> 5. It was not the funds of Respondent's client that were invaded, it was the funds of Accredited that were taken by Respondent to repay Spiro Pollatos' debt to Respondent.
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> [SMR3-SMR4.][10]

In essence, the special master concluded that respondent could not assert a defense that Pollatos had authorized the payment because they were not Pollatos' funds.

The special master found by clear and convincing evidence that respondent violated RPC 1.15(a) and RPC 8.4(c) by knowingly misappropriating "trust funds owned by Accredited," in violation of the principle set forth in In re Wilson, supra, 81 N.J. 451. The special master recommended that respondent be disbarred.

Upon a de novo review of the record, we are unable to agree with the special master's conclusion that respondent was guilty of knowing misappropriation.

Unquestionably, respondent was guilty of egregious misconduct in this transaction. His misleading of Delta and

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[10] SMR refers to the special master's report.

Accredited through contradictory communications and his failure to protect Accredited's interest in the closing funds as the settlement agent were troubling. He has, however, already been disciplined for that misconduct. He received a three-year suspension. Moreover, we cannot find, on this record, that he is guilty of knowing misappropriation.

In the special master's report, he stated that "[i]t was not the funds of Respondent's client that were invaded, it was the funds of Accredited that were taken by Respondent to repay Spiro Pollatos' debt to Respondent." The special master was correct that the funds were not client's funds. More properly, they were escrow funds. Here, respondent was charged with violating In re Wilson, supra, 81 N.J. 451, which addresses the knowing misappropriation of client funds, not escrow funds. It was only six years after Wilson, in In re Hollendonner, 102 N.J. 21 (1985), that the Court extended the Wilson rule to escrow funds.

Respondent was not charged with violating the Hollendonner rule, that is, with the knowing misappropriation of escrow funds. The defense to a Wilson violation can vary greatly from the defense to a Hollendonner violation. To discipline respondent for the knowing misappropriation of escrow funds,

based on the charge of knowing misappropriation of client funds would violate his due process rights. On that basis, the charge of knowing misappropriation must be dismissed.

Moreover, even if respondent had been charged with a Hollendonner violation, in our view the record does not clearly and convincingly establish that his failure to pay off the Delta mortgage constituted a knowing misappropriation of escrow funds. Based on past transactions with Pollatos, respondent had reason to believe Pollatos' representation that he was negotiating a "short-pay" agreement with Delta. Respondent had represented Pollatos in numerous transactions where Pollatos had successfully negotiated "short-pays" with the lender, coming away from the transactions with additional funds. Respondent's expectation that the same result would occur in this case was not unreasonable.

There is no question that respondent was reckless in his duties as settlement agent. He should have contacted Delta to confirm that the "short-pay" was being negotiated or should have left the funds in escrow until satisfied that there was a "short-pay" agreement. However, as previously noted, he has already been disciplined (and severely so) for those infractions.

An attorney whose conduct was similar to respondent's in Roberson I and Roberson II received a two-year suspension. In re Frost, 156 N.J. 416 (1998). Frost represented clients in a mortgage refinance. Among other debts, the clients owed a judgment of $14,500. The closing instructions required Frost to certify that the refinanced mortgage would be a valid first lien on the client's property and to either satisfy the judgment or to hold the funds in escrow. At the loan closing, Frost discovered that the amount of the loan was not sufficient to pay all of his clients' obligations and his $7,000 fee. Frost reduced his fee to $4,875.20 and took that amount from the closing proceeds. He did not, however, satisfy the $14,500 judgment or hold that amount in escrow. After disbursing the closing proceeds, Frost retained $7,500 on his clients' behalf.

Frost claimed that, after he realized that there were insufficient funds to satisfy the judgment, he reached a verbal settlement with the attorney for the judgment-creditor. According to Frost, the settlement required payment of $7,400from the closing proceeds and payment of the $7,100 balance over time, secured by a mortgage on other property that the clients owned.

As it turned out, the judgment-creditor's attorney denied the existence of such an agreement. Frost, however, claimed that he reasonably believed that he had reached an agreement for the payment of the judgment and that he was entitled to satisfy his fee from the closing proceeds.

Although the complaint charged Frost with knowing misappropriation, we found that there was no clear and convincing evidence to support that allegation. The record did not sufficiently establish the absence of an agreement between respondent and the judgment-creditors' attorney. We, thus, were unable to conclude that there was no agreement or that Frost could not have reasonably believed that there was such an agreement.

Frost's two-year suspension was based on his breach of the escrow agreement, failure to honor closing instructions, and preparation of misleading closing documents.

The similarities between the case at hand and Frost are plain to see. In both cases, there was a prior lien to be paid off from closing proceeds. Frost contended that it was his understanding that he had negotiated a settlement on the amount of the lien and that he could take his fee from the refinance

proceeds. Here, respondent thought his client was negotiating a "short-pay," whereby there would be funds remaining after closing to repay an earlier loan made by respondent. Frost was less culpable than respondent, as respondent relied only on the word of his client about the ongoing negotiations. When Frost took the funds, he thought that the deal had been struck. Here, when respondent took the funds, the deal was still allegedly being negotiated and was, thus, uncertain. In both cases, however, the attorneys had a reasonable belief that a deal was (or soon would be) in place, whereby funds owed to the attorneys (for a fee or in repayment of a loan) could be taken. That being so, no discipline is required here because respondent has already been severely disciplined for his conduct in the same transaction.

One more point warrants mention. The record contains two instances of additional support for respondent's position that he was not guilty of misappropriation. In his answer to the complaint, he stated that his malpractice insurance policy excluded coverage for "all thefts and misappropriations." As mentioned previously, the carrier paid the settlement in respondent's behalf ($105,000). Thus, the carrier, which

clearly had significant financial incentive to find that respondent had been guilty of dishonest conduct, did not do so.

In addition, Gudger's memo to his file (Exhibit R22), after a discussion with the grievant, Russell Finestein, states, in relevant part: "The general sense from Mr. Finestein is that Mr. Roberson 'did commit gross negligence but was not out to steal any money but instead was probably duped by his client.'"[11]

Although neither of these two factors is dispositive of the issue of knowing misappropriation, they help to tip the scale in respondent's favor.

In short, respondent's conduct in his representation of Pollatos was undoubtedly egregious, but he has already been properly disciplined for it. As to the issue of knowing misappropriation, respondent was not properly charged, he did not have an opportunity to defend himself against a Hollendonner charge, and the record does not provide clear and convincing evidence that his belief as to his use of the funds was

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[11] Finestein had expressed to the OAE an interest in withdrawing his grievance.

unreasonable. We, thus, determine to dismiss the complaint against him. Member Wissinger did not participate.

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 James O. Roberson, Jr.
Docket No. DRB 11-262

Argued: November 17, 2011

Decided: December 20, 2011

Disposition: Dismiss

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman				X		
Frost				X		
Baugh				X		
Clark				X		
Doremus				X		
Wissinger						X
Yamner				X		
Zmirich				X		
Total:				7		1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel