SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-359
District Docket No. VA-2010-0010E

IN THE MATTER OF	
IRVIN L. SOLONDZ	
AN ATTORNEY AT LAW	

Decision

Argued: January 19, 2012

Decided: April 17, 2012

Arnold L. Natali, Jr. appeared on behalf of the District VA Ethics Committee.

Waldron Kraemer 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 (censure) filed by the District VA Ethics Committee (DEC). Respondent was charged with having violated RPC 1.15(b) (failure to promptly deliver funds to third party). We determine to dismiss the complaint.

Respondent was admitted to the New Jersey bar in 1962. He has no prior discipline.

On January 27, 1999, Alice Burdge, the grievant, executed a real estate broker's contract of sale to Nuncio and Eduardo Esposito, who were purchasing Burdge's half of a duplex located at 435 Hudson Street, Newark. The initial purchase price was $29,000. Ten years later, in February 2010, Burdge filed the ethics grievance against respondent, claiming that she did not receive sale funds to which she was entitled.

The facts are as follows:

The Esposito brothers sought the property in order to protect their adjoining half of the residential building. They gave respondent $22,500 toward the purchase price, which respondent placed into his trust account. Respondent testified that Burdge's property was in deplorable condition and inhabited by vagrants:

> Even though it was in -- it was not in good shape, [the Espositos] wanted to acquire it. They owned the property next door. This is very unusual. This property's 15 feet wide. It's part of a combined building. It's a frame building. It's just the parting [sic] wall down the center, and then they owned the other, I call it half of the structure, which they had updated and modernized and they were now having problems with this half. It was in deplorable condition.

> Apparently it was being utilized by the homeless or by drug addicts in and out and they were in a position where they thought that one or two things might have -- were gonna' [sic] occur. Their own tenant on the other side was gonna' [sic] move out because of problems emanating from the other half, including vermin filth, people going in and out, and they thought that their insurance was not gonna' [sic] be renewed because it was a supposed fire hazard. There was no electric and gas on in [Burdge's] half. Apparently the people that were illegally using the property were using candles.
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> [T8-2 to 23.][1]

By letter dated May 20, 1999, respondent wrote to Burdge's attorneys, at the law firm of Love and Randall, about the condition of the premises. The letter sought a reduced sale price of $25,000 and required that all personal property and debris be removed prior to closing, that it be exterminated, and that it be delivered vacant and "broom clean." By return letter from her attorneys dated November 1, 1999, Burdge agreed to the new terms.

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[1] "T" refers to the transcript of the May 12, 2011 DEC hearing.

In his brief to us, respondent urged that the May 20, 1999 letter was significant, in that it reduced the purchase price to $25,000 due to the deplorable condition of the premises and

> entitled the Espositos to a credit for the cost of cleaning up the premises, as Burdge never "did a clean up," thereby entitling Buyer to a further credit against the nonexistent surplus proceeds and further demonstration that Seller was not entitled to any money. Buyer never took the credit as there were no funds to offset.
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> [Rb3.][2]

After the price reduction, respondent conducted a title search, which disclosed numerous liens that far exceeded the purchase price: a first mortgage of $24,000, plus arrears; a second mortgage of $15,000, plus arrears; an insurance fraud judgment against Burdge for $11,114.43, plus interest; a $5,000 "civil penalty" judgment for her participation in an insurance fraud in Essex County; and tax and water liens of $5,198.48. In all, Burdge's property was encumbered by over $55,000 in liens.

In addition, paragraph twenty-four of the contract of sale called for Burdge's real estate broker to receive a commission

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[2] "Rb" refers to respondent's January 3, 2012 brief to us.

of $4,000 from seller's funds, making the total exposure on the property over $59,000.

In order to reflect the new nature of the transaction as a "short sale," respondent added further contractual obligations in the deed, as follows: "Grantor and Grantee are aware that there are 2 Mortgages open of record as well as Tax Sale Certificates. Any sums in excess of the amounts due on the said Liens are to be paid by the Grantees (not the Grantor)."

On March 16, 2000, respondent sent Love and Randall another letter, in which he advised Burdge of his request and the City of Newark's agreement to discharge its $15,000 second mortgage.[3] The letter also placed Burdge on notice that the liens still exceeded the "sale price"[4] of $25,000 and that the Espositos "will pay off the first mortgage and tax liens." Respondent testified that his clients also felt "morally obligated" to pay

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[3] At some time prior to March 2000, respondent had approached the City to obtain a discharge of its mortgage. The City performed a "windshield" assessment of the property and determined to discharge the mortgage. That was accomplished on June 27, 2000.

[4] The words were set off by quotation marks by respondent, in his letter.

the $4,000 real estate commission, even though it was the seller's obligation, under the contract.

According to respondent, once that letter made it apparent to Burdge and her attorneys that she would receive no funds at closing, Burdge left the Love and Randall law firm and continued pro se.

With Love and Randall no longer involved, respondent agreed to prepare a quitclaim deed from Burdge to the Espositos, who took the deed with liens of over $60,000 on the property.[5]

After the May 8, 2000 transfer of title, respondent negotiated with the first mortgagee, which agreed to accept $15,000 in satisfaction of its $24,000 mortgage. The discharge of mortgage was executed on June 30, 2000, over six weeks after the closing took place, and three days after the City of Newark delivered the discharge of its mortgage.

In early September 2000, respondent accounted to the Espositos for the distribution of their funds. As previously

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[5] $24,000 (first mortgage); $15,000 (although included here, the second mortgage was agreed to be discharged); $5,198 (tax/water liens); $11,000 (insurance fraud judgment); and $5,000 (insurance fraud penalty).

stated, respondent prepared a disbursement statement for the transaction and sent it to the parties. The statement also memorialized the Espositos' commitment to pay Burdge's $4,000 real estate commission, as follows: "NOTE: Real Estate brokers commission to be paid by Esposito directly."

Due to the passage of time, respondent was unable to provide proof to the DEC that the Espositos had paid the commission, but he pointed out that, under the strictest construction of events, the Espositos' expenditures were in excess of $25,000 ($22,174 of the Espositos' $22,500, plus $4,000 for the commission).

When the $25,000 purchase price was reduced by the amount actually expended for liens and expenses of the seller ($20,764), the amount remaining was $4,236. This is the amount that the DEC faulted respondent for not having turned over to Burdge. Respondent pointed out, however, that the $4,000 real estate commission reduced the amount ostensibly available to Burdge to $236, not including respondent's "compromised" fee of $1,500.

Respondent considered that the remaining funds in his escrow account, after distribution, belonged to his clients because Burdge had received the bargained-for benefit of having

been relieved of a $15,000 second mortgage, $9,000 of her obligation to the first mortgagee, and $5,198.48 in back taxes and water liens (a total of $29,198), without regard to the fact that at least two judgments totaling about $16,000 related to insurance fraud, remained on the property and that the real estate commission was paid by the Espositos.

As to the $1,500 fee that respondent took for the transaction, respondent stated that he took the fee believing that it had come from his clients' funds, because Burdge was never going to see a penny from the transaction. In fact, that is why he referred to his as a "compromised fee," a settled-upon amount with his clients.

Moreover, respondent argued, under normal circumstances of a short sale, the undertaking to obtain reduced pay-off amounts from lienholders would fall upon the seller's attorney. Here, once Love and Randall exited, respondent took it upon himself to obtain those reductions, which are "inextricably" intertwined with benefit to Burdge by his having undertaken them. Thus, respondent added, the $1,500 fee was "very modest considering the work [respondent] had done over several years to acquire the property for his client most particularly the efforts he made to

clear up Seller's title, a task usually left to a seller's lawyer."

Respondent was also faulted by the DEC for failing to prepare a HUD-1 settlement statement for the transaction. As such, according to the DEC, the only proof of disbursements made after the sale of the property is that set forth in the disbursement statement, which was prepared after the closing. Respondent was not separately charged with any ethics misconduct for this "failure."

Respondent countered that, because this was a private sale of real estate that did not involve a federally related mortgage loan, no HUD-1 was required under the Real Estate Settlement Procedure Act of 1974, 12 U.S.C. §2601 et seq.

Burdge testified briefly at the DEC hearing, but her testimony was alternately faltering or contrary to the established facts. For example, she denied having retained Love and Randall, although she obviously had been represented by them. She claimed that the signature on the deed was not her own, stating "I don't write like that. . . . I didn't

understand, because I don't make a letter like that." Yet, there is no inkling in the record that a forgery was committed.[6] Further, Burdge claimed to have had a $58,000 appraisal for the property (obtained at an undisclosed time), but it "burned up" in a house fire.

Although letters from her own lawyers contradicted her version of events, Burdge recalled having refused to sell the property to the Esposito brothers for $25,000. She also denied that the house was in deplorable condition, despite the City of Newark's "windshield assessment" to the contrary:

> Because I done too much work here, in this place, it's my house, I worked on it, I built steps in the back, I built steps in the front, I put aluminum siding on it. It wasn't no junk in there. If it was any junk in the house they got in my house and did it. I had furniture in there. I'm a clean person. I had my house fixed up.
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> [T80-9 to 16.]

At the outset, we reject the somewhat alarming analysis of knowing misappropriation contained in the hearing panel report. Respondent was not

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[6] Upon hearing Burdge's statements, the presenter quickly acknowledged that there was no evidence of forgery, and that it was not an issue in the case.

charged with knowing misappropriation and the issue was not litigated at the hearing. Fortuitously, the DEC determined that, although respondent's was a "very close case," there was no clear and convincing evidence of knowing misappropriation.

The DEC found respondent guilty of "shoddy record-keeping" and "ambiguous drafting" of the deed, without identifying an RPC for the violation.

The DEC also found a violation of RPC 1.15(b), in that respondent failed to turn over funds that belonged to Burdge. Yet, the DEC found "no clear showing as to the precise terms of the real estate transaction, or that Respondent knew that funds should have been paid to Grievant once all liens on the Property were cleared."

The DEC failed to distill its RPC 1.15(b) finding into a concrete dollar amount, preferring instead a "range" of possibilities. The DEC determined that Burdge was entitled to as much as $4,801.52, or as little as $236, depending on different scenarios for the allocation of funds.[7] Thus, it found respondent guilty of having failed to promptly deliver funds to Burdge, a third party, in violation of RPC 1.15(b).

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[7] The DEC never took into account the $4,000 real estate fee, a seller's expense under the contract, and one that the Espositos explicitly absorbed in the disbursement statement.

Finally, although respondent was not charged with any misconduct in this regard, the DEC faulted him for not preparing a HUD-1 settlement statement for the transaction.

The DEC recommended the imposition of a censure, citing negligent misappropriation cases, another charge that is not a part of the complaint.

With regard to aggravation and mitigation, the DEC acknowledged, in passing, respondent's fifty-year career without prior incident and then juxtaposed it to the perceived aggravating factor of his "shoddy" recordkeeping and "seeming" cooperation in the investigation.

Upon a de novo review of the record, we are unable to agree with the DEC's conclusion that respondent's conduct was unethical.

This case is fraught with difficulties, beginning with the passage of time – ten years between the sale of the property and Burdge's decision to file an ethics grievance against respondent. Rather than commend respondent for pulling together a file in an old case, the DEC faulted him for "shoddy" recordkeeping, a charge not contained in the complaint. Respondent was only required to maintain documentation for seven years, roughly until May 2007. RPC 1.15(a). He never raised this

as a defense, as he could have. Rather, he diligently set about obtaining as many documents as he could to help unravel this decade-old sale.

Inexplicably, Burdge was never asked why she waited until February 2010 to file an ethics grievance. By that time, respondent was permitted to have destroyed all records related to the transaction. That respondent had less than a complete file cannot be held against him. We cannot agree with the presenter and the DEC, that respondent should be faulted for having less than a complete file.

We find that, even in the absence of a complete record, the documentation that respondent did obtain was sufficient to absolve him of the charged violation of RPC 1.15(b).

Burdge was represented by counsel for the transaction, beginning in 1999 and into March 2000. Originally, the deal called for a $29,000 sale price, less a $4,000 real estate commission to be paid by the seller.

The Espositos gave respondent $22,500 toward the purchase price but, when the title search revealed numerous liens, the parties agreed to reduce the sale price to $25,000. They also changed the terms from a bargain and sale to a quitclaim transaction. Burdge approved that change, which occurred while

she was still represented by Love and Randall. Burdge was also made aware, in March 2000, by letter from respondent to her lawyers, that the liens on the property exceeded the value of the property and that the Espositos would accept her quitclaim deed and pay the liens themselves. Stated differently, she knew that she would take no cash away from the sale of her dilapidated, fully encumbered property.[8]

Once Burdge was on her own, respondent was asked to prepare the quitclaim deed, ordinarily a seller's attorney function. The deed made clear two important points: (1) Burdge acknowledged that the Espositos' funds were to be held in escrow to pay off existing mortgages and tax liens and (2) Burdge and the Espositos were aware that there were two mortgages open of record and tax sale certificates. For Burdge's further protection, respondent added that "any sums in excess of the amounts due on said Liens are to be paid by the [Espositos], (not [Burdge])."

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[8] We note that, if there had been any prospect of recovery, the City of Newark presumably would not have discharged its mortgage on the property.

At the time of the closing, existing mortgages and tax liens for which the Espositos were responsible amounted to $44,198 ($24,000 first mortgage + $15,000 second mortgage + $5,198 in tax and water liens).

The deed specifically stated that the parties were aware that the property was encumbered by the above liens and that the Espositos would also be responsible for paying any sums in excess of the $44,198 that might be required to extinguish the liens. This language undeniably benefited Burdge, who could then rely on the deed, that is, that going forward, she would be free of all of the liens and encumbrances on the property.

That the Espositos initially gave respondent $22,500 toward the purchase price, seemingly a factor deemed important below, is immaterial. Given the nature of the transaction in its final form (a quitclaim deed), the Espositos did not have to place any funds in escrow with respondent, in order to abide by the terms of the sale. Rather, they had bound themselves to pay all amounts necessary to clear title to the property. The $25,000 figure was now meaningless — a figure likely left over from an earlier letter amendment calling for a reduced price of $25,000 — done at a time when the parties still anticipated a bargain and sale deed. It should be recalled that, when the sale was to

be a bargain and sale transaction, the extent of the liens was still unknown.

When concluding that respondent violated RPC 1.15(b), the DEC made two errors. First, it failed to recognize that the deed required the Espositos to pay all of the liens on the property, regardless of how far those liens obviously exceeded the "purchase price." Instead, the DEC construed the deed to require respondent to pay Burdge any funds remaining after actually disbursing the $22,500, with no credit given to several facts known to the DEC: that Burdge knew that the liens exceeded the purchase price; that Burdge knew that she would receive no cash from the closing; and that the Espositos were now responsible to provide the Satisfaction benefit that Burdge would enjoy from the extinguishment of significant personal liabilities, in addition to the actual disbursements made. The additional benefits included $24,000 in discounts from the first and second mortgagees, the Espositos' payment of the $4,000 real estate commission, which was Burdge's obligation, and their agreement to rid in excess of $16,000 in judgments related to Burdge's own apparent insurance fraud conviction.

Second, it was inconsistent and improper for the DEC, on the one hand, to determine that there was "no clear showing as

to the precise terms of the real estate transaction, or that Respondent knew that funds should have been paid to Grievant once all liens on the Property were cleared," and to then turn around and find that he had failed to turn over funds belonging to Burdge, a supposed violation of RPC 1.15(b). If the evidence was not clear and convincing, the DEC should not have found that respondent violated the rule.

By contrast to the DEC's conclusion, the evidence shows that respondent diligently represented his clients in their purchase of Burdge's dilapidated property. He was also asked to prepare the quitclaim deed, once Burdge released her attorneys. That deed was not a product of "shoddy" draftsmanship. Rather, it provided extraordinary protections for Burdge, who was not his client. Respondent took on a role typically handled by a seller's attorney, working to have Burdge's personal financial obligations extinguished. Granted, he did so to clear the title for his clients, but Burdge benefited greatly from his efforts. Her "thank you" was an ethics grievance. In our view, Burdge received everything that she bargained for and more.

Finally, there is mitigation that was largely ignored by the DEC. Due to the passage of time, Burdge's halting recollection of events in the case was both vague and unhelpful.

Moreover, the passage of time placed respondent at a disadvantage, leaving him to cobble together a ten-year old file, three years after he could have destroyed those old records under the Court Rules. In addition, although the DEC barely acknowledged this fact, it is highly significant to us that respondent will, this year, celebrate his fiftieth unblemished year as a member of the New Jersey bar. For all of it, we determine to dismiss the complaint.

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 Irvin L. Solondz
Docket No. DRB 11-359

Argued: January 19, 2012

Decided: April 17, 2012

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:				8		

Julianne K. DeCore
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Chief Counsel