SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-388 and 97-433

IN THE MATTER OF	:	
PATRICK DIMARTINI,	:	Decision
AN ATTORNEY AT LAW	:	

Argued: December 18, 1997

Decided: June 29, 1998

Spencer N. Miller appeared on behalf of the District VI Ethics Committee ("DEC").

John J. Curley appeared on behalf of respondent.

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

These matters were before the Board based on a recommendation for discipline filed by the District VI Ethics Committee ("DEC"). The complaints alleged that respondent acted in a deceitful and reckless manner in his representation of several different clients.

Respondent was admitted to the New Jersey bar in 1958 and maintains a law office in Jersey City, Hudson County. Respondent has no prior ethics history.

The Kuty Matter

The fifteen-count complaint charged respondent with violations of RPC 1.15 (safekeeping property); RPC 1.2 (scope of representation); RPC 1.4(a) (failure to communicate); RPC 1.6(confidentiality of information); RPC 1.7(conflict of interest); RPC 1.9(conflict of interest); RPC 4.1(truthfulness in statements to others); and RPC 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation). The allegations arose out of a series of three real estate transactions involving a two-family dwelling in Jersey City.

In or about 1973 Krystine Kuty, the grievant in this matter, married John Perretta (the couple was divorced in September 1993). In March 1972 Perretta's sister, Carol Perretta Pollack, took title to a two-family dwelling located at 105 Oakland Avenue, Jersey City. Carol obtained a first mortgage with Elysian Savings and Loan and a second mortgage from the developer, Better Built Homes. Respondent represented Carol in the transaction.

On May 18, 1988 title to the property was transferred from Carol and her husband, Melvin Pollack, to Krystine for the purported sum of $73,000 ("the first closing"). Respondent claimed in his answer and during his testimony before the DEC that he represented both Carol, as seller, and Krystine, as buyer, in the first closing. According to Krystine, however, she was completely unaware of the first closing. She testified that she did not know of or authorize the use of her name as the buyer. Krystine further testified that no one involved advised her about that transaction. Krystine maintained that it was not until

many years later, when the Internal Revenue Service contacted her about capital gains taxes in connection with the transaction, that she first learned of the use of her name for the transaction. Krystine denied signing a power-of-attorney or otherwise authorizing anyone to act as her agent. She also denied authorizing or retaining respondent to represent her.

Barely one month later, on June 16, 1988, title to the property was transferred yet again from Krystine to a third party, Mr. and Mrs. Dy, for the purported amount of $170,000. The deed for that sale was admittedly prepared by respondent and bore the purported signature of Krystine, as seller.

Krystine testified that she similarly had no knowledge of that second transaction until the IRS questioned her about it. As with the first closing, Krystine denied any participation in the transaction or authorizing respondent to represent her. According to Krystine, she was in Florida at the time of both the first and second closings. Krystine also testified that her purported signatures on numerous closing documents from both the first and second closings, including the affidavit of title, the settlement statements, and IRS forms 1099B, were forgeries. In fact, respondent admitted that he saw Perretta sign Krystine's name on the closing documents, but claimed that, as Krystine's husband, Perretta had the right to do so. Respondent himself signed Krystine's name on the RESPA statement in the transaction from Pollack to Krystine, citing his status as Krystine's attorney as the source for this authority.

On June 16, 1988, the day of the second closing, respondent drafted four checks from his trust account, payable jointly to Krystine and her husband, John Perretta, despite the fact

that Perretta was not a party to any of the real estate transactions.[1] The checks represented the proceeds alleged to be due to Krystine from the Dys. The checks were made as follows:

a.) Check number 2586 in the amount of $25,000, dated June 16, 1988;

b.) Check number 2591 in the amount of $15,000, dated June 16, 1988;

c.) Check number 2587 in the amount of $6,060.50, dated June 16, 1988

d.) Certified check vouchers (103488 and 103489) in the amount of $40,000 and $15,000, dated June 16, 1988.

Perretta cashed the $15,000 check and the $40,000 check voucher on the same day that they were issued, June 16, 1988. Those checks showed the purported endorsement of Krystine and Perretta on their reverse side. The $25,000 and $6,060.50 checks were negotiated on June 17, 1988. Apparently, after Perretta unsuccessfully attempted to negotiate these checks on June 16, 1988, he returned them to respondent's office the next day so that respondent could add his signature in order to "certify" the checks. The reverse side of both checks contained Krystine's purported endorsement and bore the notation "OK to cash," followed by respondent's signature over Krystine's. According to the complaint, however, respondent validated Krystine's signature by assuring the bank that the signature was genuine. Krystine denied signing these checks or authorizing anyone to act in her behalf. She claimed that she was unaware of the transaction and, in fact, was in Florida at the time.

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[1]Krystine's name appears on the checks as "Christy Perretta." According to Krystine, John Perretta preferred this spelling of her name and often used that spelling. Krystine testified that she did not like her first name spelled in this manner and never signed as "Christy Perretta."

Krystine has never maintained that any of the proceeds from either transaction belonged to her.

Respondent presented his version of the events surrounding the transactions. According to respondent, the property was one of six two-family houses built between 1971 and 1972, in which John Perretta had a hand:

> John and his father did the electrical. They wired the six houses. The builder of the property was Sal Venmini. And they did all the electrical work for the houses.
>
> At that time John was separated from his wife, Mary. He had five children with Mary. He had a deal with Sal Venmini where he used his sweat equity as a down payment for a house so that he would be able to furnish a place for Mary and him to live. That is what happened.
>
> The house was purchased — it was not purchased in John's name because in order to purchase he would of needed [sic] a mortgage. He had no credit whatsoever and there was, as I said, a family problem with his children and his wife so his sister, Carol, agreed to take title to the property. Got a mortgage for the property and John moved his family in again using his sweat equity as a down payment for the purchase of the property.
>
> [T4/25/97 101][2]

Respondent acknowledged that he prepared both deeds for the two transactions involving Krystine. Respondent contended that Perretta's sister, Carol, and her husband Melvin Pollack were

> . . .the title owners of the property. John and [Krystine] were living in Morris Plains, New Jersey. John found a purchaser for

[2]T refers to the transcript of the April 25, 1997 DEC hearing.

> the property. Because of their financial circumstances, he had to get out of Morris Plains and he was going to live with his mother in Jacksonville. And he found a buyer for the property, Mr. and Mrs. Dy. And he asked me to prepare a contract for the sale of the property to the purchaser which I did, which is the contract dated March 31, 1988.
>
> [T4/25/97 101]
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> * * *
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> Well, what happened is that the Pollack's [sic] had purchased the property. It was in effect — I sort of felt that they were holding it in trust for John Perretta. It was really his property. They bought it in their name because John could not get a mortgage and they were holding it for them. I prepared a deed and a closing statement which would basically constitute a washed transaction.
>
> The purchase price was the amount that they had paid for the property and I didn't want — I felt that they should not make a profit — show a profit on the transaction because they were not getting the benefit of any profit. The benefit of any profit would go to John and [Krystine].
>
> [T4/25/97 108]

Respondent alleged that the first closing was simply a "paper transaction" designed to buy the Pollacks' interest with no tax liability to them and no profit going to them and to protect what respondent viewed as Perretta's interests. Respondent admitted that, although the settlement statement for the first closing included purported disbursements to pay off the two mortgages and other settlement costs, no funds were generated from this "sale" and no disbursements were made. According to respondent, the disbursements to pay off the mortgages and other costs associated with the transfer of title to the premises would come from the bona fide purchase under which the Dys took title.

Respondent further contended that Krystine was aware of and signed the original contract for sale from the Pollacks to Krystine and her husband dated March 31, 1988. Respondent characterized the transaction that resulted in the first closing as "a family transaction between Krystine and her husband and her sister-in-law and brother-in-law." Indeed, the later contract of sale to the Dys named both Krystine and Perretta as sellers. Respondent later deleted Perretta's name as seller because of numerous judgments against him. Respondent explained that his intent was to "protect" the proceeds from Perretta's creditors.

Respondent admitted that Krystine did not attend the first or second closings and that he and Perretta signed various documents in Krystine's behalf. As noted earlier, respondent claimed that Perretta had the implied authority to do so as Krystine's husband and that respondent had the implied authority to do so as Krystine's attorney.[3] According to respondent, Krystine signed two documents in his presence, the deed and the affidavit of title in the sale to the Dys. Respondent had no recollection of when or where the documents were signed. Respondent added that, although he had dated the deed and affidavit of title June 16, 1988, Krystine must have signed them in his presence prior to the closing; he had filled in the closing date later because Krystine was not present at the closing.

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[3]Respondent's counsel argued that respondent had represented the "family" for years and that, therefore, no conflicts existed. In effect, he argued in favor of a "family" exception to the conflicts rules.

Finally, respondent presented the testimony of a handwriting expert, Karl Schaffenberger, in support of his contention that Krystine had signed the deed and the affidavit of title. Despite Schaffenberger's nearly ninety pages of testimony and his opinion that Krystine's signatures were genuine, he acknowledged, in effect, that they could have been expertly forged.

The Essmaeil Matter

The complaint charged respondent with a violation of RPC 1.15 (safekeeping property) for issuing three trust account checks against uncertified funds.

In or about September 1991 respondent represented Patricia Najjar. On September 11, 1991, Najjar gave respondent a personal and uncertified check for $12,500 from Hassan Essmaeil, who had a bank account in New York. Respondent deposited the Essmaeil check into his attorney trust account on September 12, 1991. The day before, September 11, 1991, respondent issued three checks from his attorney trust account, all dated September 12, 1991. The checks were in the amount of $4,000 (check no. 5623), $7,000 (check no. 5625) and $1,500 (check no. 5626). All three checks were payable to Najjar. Najjar subsequently negotiated all three of the checks, which were honored by respondent's bank.

In his answer to the complaint respondent admitted the above facts, adding that

> Respondent [sic] admits that the checks were negotiated but alleges that the check for $1,500 was deposited into the account of Patrick Appello, the son of Patricia Appello, who used her son's account for her personal bills. The check for $7,000 was endorsed to Yahia Najjar and deposited by him into his bank account on September 13, 1994.

Respondent asserted that his only intention was to assist his client. According to respondent, Najjar and Essmaeil had signed a contract for the sale of real estate owned by Najjar. Respondent testified that, although the contract, which he denied drafting, did not specify a deposit amount, Essmaeil's check was clearly a deposit against the purchase price. Respondent also explained why he drafted the trust account checks to Najjar:

> Mrs. Najjar asked me to issue checks to her because she was in - she had some financial problems at the time. I believe that a mortgage was being foreclosed upon her...she needed the money the next day.
>
> [T5/5/97 21]
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> * * *
>
> She begged me to issue her the checks. She recounted the fact that I had known her for some years, that I had represented her, that she had always met her obligations insofar as she and I were concerned...
>
> [T5/5/97 23]

Respondent could not recall if the foreclosure related to the property under contract. Respondent testified that he had called Essmaeil's bank to confirm that there were sufficient funds to cover the check and that, in the event there were insufficient funds in Essmaeil's account, he would have used his own funds to cover it. According to respondent, his only motive was to help his client, Najjar.

There is no evidence that any client's funds were invaded as a result of respondent's actions.

* * *

In Kuty, the DEC found that respondent violated RPC 1.2, because he had no basis to "utilize [Krystine] as a buyer or seller of the property", RPC 1.7, because he represented both the buyer and seller in a real estate transaction without disclosing the conflict to the parties or obtaining their waiver to the conflict; and RPC 8.4(c), because he signed Krystine's name to the RESPA statement at the second closing and attempted to perpetrate a fraud upon the IRS in the first closing. The DEC recommended that respondent be disbarred.

In Essmaeil, the DEC found a violation of RPC 1.15 for respondent's issuance of trust account checks against uncertified funds.

* * *

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

Respondent's practices in Kuty are disturbing. Respondent concocted the bogus first closing in an attempt to defraud the IRS through the avoidance of the payment of capital gains taxes due by the Pollacks. Respondent's goal was to obtain cash from the property for

Perretta, ostensibly to compensate him for electrical work performed in 1972. Respondent knew all along that Perretta had no legal interest in the property. He could have taken proper action to assert what he claimed to be Perretta's "equitable" interest in the property. Instead, respondent chose an unlawful path that revealed premeditation and connivance. Indeed, respondent actively participated — either by watching Perretta or by doing it himself — in the signing of documents that Krystine rightly characterized as forgeries. Respondent claimed a right to do so as respondent's attorney. Respondent was wrong. Not only was he not Krystine's attorney, but that status would not have empowered him to sign Krystine's name without a power-of-attorney. Moreover, respondent watched Perretta sign grievant's name without authority. Respondent's statement that Perretta had the implied authority to do so as Krystine's husband cannot be taken seriously.

Respondent's course of scheming continued when he issued trust account checks to Perretta and Krystine as co-payees, even though Perretta's name was not on the deed. Respondent knew that Perretta had no legal right to the funds. Respondent then helped Perretta cash those checks by "certifying" them under Krystine's forged signature to induce the bank to rely on the authenticity of the endorsement.

Respondent's conduct in this matter was nothing short of egregious and violative of RPC 8.4(c). Paling in comparison was respondent's violation of RPC 1.7. Respondent claimed that he represented both the buyer and seller in the first closing. Unaware of the transaction, Krystine could not have consented to a waiver of the conflict. The Board did not

consider respondent's argument that some sort of "family" representation existed that, in and of itself, washed away clear conflicts of interest between the parties.

In his answer to Essmaeil, respondent essentially admitted the charged violations. That respondent might have had his client's interests in mind did not diminish the fact that he put client funds at risk when he issued trust account checks against uncertified funds. Respondent's conduct in this regard violated RPC 1.15.

In sum, respondent's misconduct in these matters was extremely serious. See, e.g., In re Silberberg, 144 N.J. 215 (1996) (where the attorney received a two-year suspension for witnessing and notarizing at a real estate closing the "signature" of a man the attorney knew to be deceased and providing ethics authorities two false written statements regarding the case); and In re Weston, 118 N.J. 477 (1990) (where the attorney received a two-year suspension for signing a deed and affidavit of title in the name of a client without authorization and misrepresenting to the purchaser's attorney that the documents were genuine). Here, respondent's misconduct was aggravated by the fact that, although there is no indication of financial harm in Kuty, undeniably Krystine was subjected to an unwanted intrusion when the IRS conducted an investigation of her tax obligations.

For all of the foregoing reasons, the Board determined that a two-year suspension was the warranted discipline for respondent's serious ethics offenses. One member would have imposed a three-year suspension. Two members did not participate.

The Board also required that respondent reimburse the Disciplinary Oversight Committee for appropriate administrative costs.

Dated: 6/29/98

LEE M. HYMERLING
Chair
Disciplinary Review Board