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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-162

IN THE MATTER OF :
:
BENJAMIN A. SILBER, :
:
AN ATTORNEY AT LAW :
:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 21, 1994

Decided: January 5, 1995

Kyran W. Connor appeared on behalf of the District I Ethics Committee.

Angelo J. Falciani appeared on behalf of respondent.

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

This matter was before the Board on a recommendation for public discipline filed by the District I Ethics Committee ("DEC"). The formal complaint charged respondent with two violations of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 4.2 (communicating with a person represented by counsel).

Respondent was admitted to the New Jersey bar in 1976. He has no prior disciplinary history. The facts are as follows:

A. Jean Kates, previously known as Alma Jean Smith, the grievant herein, married Richard Smith in 1976. They first lived in Barrington, New Jersey and later moved to Carney's Point, New

Jersey, where they became acquainted with respondent. For approximately ten years, Smith managed a large apartment building, the Sandy Ridge Apartments, in Carney's Point. The building had approximately 400 units. Smith retained respondent to handle the legal matters relating to the building.

In November 1985, while still living in Carney's Point, Smith and Kates purchased a five-unit apartment complex at 223 North Second Street, Millville, in contemplation of their retirement. 1T32¹. Kates put down a \$10,000 deposit towards the purchase of the property from an inheritance she had received. The remainder was financed through a second mortgage held by the sellers of the property. Kates managed the finances of the property by paying the bills, taxes and mortgage.

In 1987, Smith and Kates moved to 234 West Main Street, a duplex in Millville, New Jersey. They jointly purchased a one-half interest of that unit. After the move to Millville, Kates stopped handling the finances of the 223 North Second Street property. Instead, Smith personally collected the rents from the rental units. Kates assumed that Smith was also taking care of the other financial aspects of the property. 1T34. However, she later learned otherwise, through legal notices in the local newspaper. Since she had stopped handling the finances of the North Street property, the tax payments had fallen into arrears. From the notices, Kates further learned that Smith and respondent were named as the owners of the property, rather than Smith and

¹ 1T denotes the transcript of the DEC hearing on August 11, 1993.

Kates. When Kates brought this information to her husband's attention, Smith explained to her that it must have been a mistake. However, the same notice appeared in the paper a second time. When Kates again questioned her husband regarding the situation, he refused to discuss the matter further.

During this time period, Smith and Kates were attempting to purchase another property, located at 210 North Eleventh Street, Millville. However, since Smith's credit was poor, respondent agreed to assist Smith and Kates in purchasing the property. Kates put down a deposit of \$10,000 or \$11,000 on the property. Respondent purchased the property individually and obtained a mortgage in his name alone. The deed to respondent was dated January 31, 1991. Respondent allowed Smith and Kates to live in the property, with the understanding that they were required to maintain the property and pay the mortgage and utilities. Upon the full satisfaction of the mortgage, respondent was to convey the property to Smith and Kates.

Kates conferred with both of her sons regarding the tax arrearages on 223 North Second Street and the fact that the property was in respondent's name, rather than hers. On the day of the closing on the 210 North Eleventh Street property, Kates received a telephone call from one of her sons, Thomas Kates, Jr. ("Tom"). Tom had discovered that, in fact, there was a recorded deed on file with the County Clerk, indicating that Kates had conveyed the 223 North Second Street property to respondent on July 21, 1989. Exhibit P-2.

Kates' signature on the deed conveying her interest to respondent had been forged by her husband and notarized by one of respondent's secretaries. Apparently, respondent had nothing to do with the notarization, since his secretary admitted performing the notarizations after Smith had stopped into respondent's office. Moreover, Smith had filed the mortgages, not respondent. Kates had never given Smith a power-of-attorney to sign the deed on her behalf. When Kates questioned Smith with respect to the forgery, he refused to discuss the matter with her. 1T43. Kates testified that she heard Smith admit that he had forged her signature on the deed in respondent's office. 1T73. Thereafter, Kates contacted respondent, who denied having any knowledge of the forgery. Neither Kates nor her son, Tom, were able to obtain any cooperation from respondent. Therefore, Kates contacted an attorney, John H.C. West, III, for assistance. After West contacted respondent on Kates' behalf, respondent telephoned Kates to express his surprise that she had called another attorney concerning the matter. 1T44.

The record does not clearly explain the actual relationship between respondent and Smith. In respondent's answer to the complaint, he claimed that he had a close relationship with Smith, which originated from their dealings over the Sandy Ridge Apartment. Thereafter, the relationship extended into a social relationship with Smith and Kates. Kates, however, denied having a social relationship with respondent. The record is clear, though, that respondent and Smith had business relations that extended beyond the Sandy Ridge Apartments. Respondent owned

several properties for which Smith worked as the maintenance man. In addition, Smith testified that he and respondent owned ten to twelve buildings together. 1T224. However, this particular claim was not confirmed by respondent.

According to Smith, the events leading to the conveyance of Kates' interest in the 223 North Second Street property to respondent unfolded as follows: Smith was experiencing financial difficulties. Therefore, he and respondent decided to borrow \$60,000 from United Jersey Bank (UJB). Smith testified that \$10,000 was to go towards their partnership (the existence of which respondent apparently denied) and each was to receive \$25,000. Smith arranged to put up four of his properties, which he owned individually, as collateral for the loan. However, because there was very little equity in the four properties, respondent and Smith agreed that the 223 North Street property, which Smith owned jointly with his wife, would also be used as collateral. The North Street property contained the bulk of the equity to be used as collateral. Apparently to facilitate obtaining the loan, it was to be placed in respondent's name alone. Therefore, the two agreed that the five properties should be in respondent's and Smith's names. Respondent prepared five deeds: four deeds conveyed Smith's property to Smith and respondent. The fifth deed, on 223 North Second Street, conveyed the property from Smith and Kates to Smith and respondent. The conveyances to respondent recited a nominal consideration. The deeds were dated July 21, 1989 and recorded on

August 2, 1989. On July 21, 1989, respondent received a \$60,000 check from the mortgage-bank.

Prior to this loan, respondent had co-signed a note with Smith for a \$25,000 line of credit from Security Savings & Loan Association. Presumably, this line of credit was to assist Smith in starting a construction business.

Smith unequivocally admitted forging his ex-wife's signature on the deed. 1T209. He denied that respondent had knowledge of his wrongdoing at any time before the bank granted the loan. He testified that, after the loan was obtained, he advised respondent of the forgery, "when no one else was around." 1T211. Smith felt that respondent should be so informed, in case a problem arose. According to Smith, respondent was surprised by the information; however, respondent advised Smith to "just sit on it for a while" and to "let it ride we'll see what develops." 1T222,212. Respondent was, thus, allegedly already aware of the situation at the time he was confronted by Kates and her son. Respondent, nevertheless, denied that the conversation with Smith regarding the forgery ever occurred. 2T336. He contended that he only became aware of the forgery when contacted by Tom in early 1991.

After the forgery came to light, Smith and respondent had a number of conversations on how to resolve the problem. Smith testified that he told respondent to "get rid of the problem, whatever it is do it, I'll go in and be the first witness against myself if we could do it logically and get it out of my hair." 1T219. According to Smith, respondent went to a friend, an

attorney who was also a municipal court judge, for advice on how to handle the situation. Smith added that, subsequently, respondent told him to "play it cool," "work it out" and "get it done."

Tom Kates testified that, within twenty-four hours of learning about the forgery, on or about February 1, 1991, he tried to contact respondent. He called respondent approximately six to eight times. Each time he was told his calls would be returned. They were not, however. Thereafter, Tom contacted West.

In late 1990 or early 1991, after the improper conveyance to respondent, Smith was discharged from his position as manager of the Sandy Ridge Apartments at Carney's Point. 2T314.² Apparently, the owner of the complex became aware that Smith had ordered some appliances, purportedly for use in the apartments. Smith had, however, used the appliances for his own properties. Even though Smith's position was terminated, respondent continued to do legal work for the partnership that owned Sandy Ridge Apartments. For a period of time after Smith's termination from the Sandy Ridge Apartments, he continued doing maintenance work on respondent's properties.

On or about February 14, 1991, West arranged for a meeting at Kates' home in order to resolve the problem with the property at 223 North Second Street, Millville. Respondent, Kates, Smith, West and Tom Kates all attended the meeting. At that point, West would not permit respondent to simply reconvey the property at 223 North Second Street to Kates, as it had been used as collateral for the

² 2T denotes the transcript of the DEC hearing on September 10, 1993.

\$60,000 loan, along with four other properties. Because the \$60,000 had already been disbursed, the lien against the property would have rendered it nearly without any equity.

At the February 14, 1991 meeting, respondent assured Kates that the problem with the property would be resolved within two weeks. The day after the meeting, Smith and Kates together moved into the property located at 210 Eleventh Street. However, because of the forgery and other marital difficulties, by April 1991 Smith and Kates were separated and Smith had moved out of the property. 1T45.

Initially, Kates had wanted the 223 North Second Street property restored to her without any liens. Respondent suggested that Kates' name be put on the deed and that Tom take over the management of the building because respondent no longer trusted Smith. In March 1991, a deed was executed conveying the property to Kates and respondent, but it was not recorded until October 1991, when West was assured that Kates would be reimbursed. Beginning February 14, 1991, Tom took over the management of the property. Kates assisted him by paying the bills for the property. Tom soon discovered that the property had fallen into complete disrepair. The building had been cited for forty-two state violations and twenty city violations. 1T90. According to Tom, the mortgages on the property were four to five months in arrears, taxes were two years in arrears and the city sewer and water bills were also overdue. Practically no maintenance had been done on the property.

Through the entire summer, respondent promised Kates and Tom that the problem would be rectified. Nothing was accomplished, despite the fact that respondent led the Kateses to believe that he was attempting to reach a resolution. For instance, respondent requested Tom to take pictures of the property for the mortgage company from which he was supposed to try to obtain funds. However, Kates did not receive any funds during this period. Nevertheless, during this period, Tom continued to manage the property for respondent. Eventually, it became clear that, without an immediate infusion of cash into the property, Tom would not be able to make the apartments a viable enterprise. It appears that Tom, nevertheless, continued to manage the property until a settlement was reached in October 1991. 1T96.

Tom testified that, in June or July of 1991, he had a telephone conversation with respondent, at which time respondent informed Tom that he had had time to think about the matter and was offering Kates \$20,000 to settle the matter. According to Tom, respondent made it clear that this was his final offer and they could "take it or leave it," "if you don't like it he said I can put your mom out on the street." 1T95.

The record is clear that respondent and Kates made telephone calls to one another regarding the status of respondent's efforts to resolve the problem. Kates testified that, on several occasions she told respondent to speak directly to her attorney. Notwithstanding Kates' request, respondent persisted in his telephone calls to her. 1T51. The conversations continued from

February 1991 to September 1991, approximately once very two weeks.
1T50.

Tom also testified that respondent called his mother many times from March through September or October 1991. Tom would advise his mother to hang up and to tell respondent to contact West. Tom noted that, although his mother would relay the message to respondent, the latter would continue talking to her. Eventually, Kates would just "hang up on him." 1T98.

Kates' attorney, West, testified that, when he initially contacted respondent in early February 1991, there was very little dialogue with respondent. Thereafter, West received a number of inadequate settlement proposals, including proposals to deed other properties to Kates that were in varying states of disrepair and worthless. Respondent suggested deeding those properties to Kates either individually or in conjunction with her original property. However, Kates' property was worth very little with the mortgagee's lien against it.

According to West, respondent failed to communicate with him on a number of occasions. There was little or no communication near the end of March or early April 1991 throughout the summer. Respondent would not answer West's telephone calls or certified letters. 1T158. Instead, respondent communicated directly with Kates and her son. West felt that respondent was trying to undermine his efforts by calling Kates directly. Despite West's requests that respondent stop calling his client, the calls continued. 1T129.

As noted above, on March 7, 1991, respondent and Smith executed a deed conveying the property at 223 North Second Street to respondent and Kates. West, however, did not record the deed until October 29, 1991, after he was assured that his client would be reimbursed and that respondent would comply with the terms of West's letter-agreement, dated October 29, 1991, Exhibit P-7. The terms of the agreement were as follows: 1) Respondent was to immediately pay Kates \$45,000 and she was to sell to respondent the property free and clear; 2) respondent was to discharge all tax liens on the premises to protect Kates from any lawsuits; 3) the deed conveying the property from respondent and Smith to Kates and a subsequent quitclaim deed from Kates to respondent were to be filed in the Cumberland County Clerk's office; 4) Kates would refrain from filing and would dismiss any pending civil or criminal actions against respondent; respondent would assist Kates in any actions she would choose to pursue against Smith; 5) a third attorney would draft and review all releases and contracts, subject to West's review; 6) the October mortgage payment made on the Eleventh Street property was to be deducted from the \$45,000 owed to Kates; 7) of the \$45,000 settlement, \$10,000 was in exchange for Kates' \$11,000 equity in the Eleventh Street property. The property was to be placed on the market immediately because Kates had been unable to maintain the property since she and Smith had separated; and 8) Kates was to escrow \$4,000 to make future payments on the Eleventh Street property. If a tenant were located for the property, any amounts covered by the tenant would be

deducted from the escrow. In no event would Kates' obligation on the property extend beyond five months. Upon the sale of the premises, Kates was to recoup any monies from the equity in the property expended from the escrow amount.

Apparently, questions over the use of the \$4,000 escrow and other factors led West to file a grievance against respondent. For example, Smith took possession of the premises at Eleventh Street in Millville, once Kates moved out. Smith remained there, thereby preventing another tenant and prospective purchaser, located by Tom Kates, to take possession of the property. Thereafter, since the agreement between respondent and Kates had been breached, West demanded the return of the escrow monies to Kates. Because respondent failed to reply to West's demands, letters and telephone calls, West was unsuccessful in his attempts to obtain an accounting of the escrow funds. 1T139.

Finally, with respect to the release signed by Kates, respondent claimed that he had conferred with an attorney about its contents. Apparently, the attorney advised respondent to pay Kates and obtain the release. That release states, in relevant part:

NOW THEREFORE, in consideration of \$45,000.00 paid to Jean Smith in funds and other credits, the said A. Jean Smith shall immediately turn over all rents, leases and other related documents for the property at 223 North Second Street, Millville, New Jersey, as well as property at 305 South Second Street, Millville, New Jersey, and does herein forever release any right, claim or action which she may have against Benjamin A. Silber, including any civil or criminal right, claim or action, as well as any ethics or disciplinary right, claim or action, concerning a Deed for the property located at 223 North Second Street, Millville, New Jersey. (emphasis supplied).

[Exhibit P-12]

Eventually, respondent borrowed an additional \$112,000 from another bank in order to pay Kates off and presumably to payoff the other liens on 223 North Street. The record indicates that respondent had only begun looking for refinancing in the fall of 1991. 2T398. This belies the fact that he had been trying to resolve the matter, in good faith, since February 1991. It appears that Kates only received \$39,000 from the settlement with respondent. Without an accounting of the escrow funds, it is not clear from the record whether these were the only funds Kates received or whether she was adequately compensated for her loss of the North Street property.

* * *

The DEC found that respondent's close dealings with Smith both as a partner and as his and Kates' attorney, when taken in the context of respondent's personal involvement in the real estate transaction, constituted a violation of RPC 8.4(c). Thus, the DEC found, by clear and convincing evidence, that respondent engaged in unethical conduct, as alleged in count one of the complaint, by receiving an interest in a property located in Millville for which no consideration had been paid and which had been fraudulently conveyed to him. The DEC also found clear and convincing evidence that respondent violated RPC 4.2 because respondent admittedly engaged in direct contact with Kates while she was represented by an attorney. Finally, the DEC found that the release drafted by respondent was contrary to the determination in In re Wallace, 104

N.J. 589, 594 (1986), as it attempted to insulate respondent from disciplinary proceedings. The DEC, thus, found clear and convincing evidence of a violation of RPC 8.4(c) in count three.

CONCLUSION AND RECOMMENDATION

Following a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent acted unethically is fully supported by the record.

RPC 4.2 states, in relevant part, that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter" There is clear and convincing evidence in the record that respondent had improper communications with Kates after she retained West. Respondent admitted communicating with Kates, even though he tried to downplay the substance of their conversations. West, Kates and Kates' son testified that they had advised respondent to contact West, rather than discuss matters directly with Kates. Nevertheless, respondent's contacts with Kates persisted. While respondent was not representing a client during the course of the negotiations involving the North Street property, at the time that Kates retained West the relationship between respondent and Kates became adversarial. Kates was represented by counsel and respondent was representing himself. Moreover, despite repeated admonitions from

Kates, her son and West that respondent was to deal directly with West, respondent continued to contact Kates.

While perhaps technically respondent's conduct did not violate the letter of RPC 4.2, certainly the spirit of the rule has been violated. Respondent's attempts to bypass Kates' attorney and deal directly with Kates put her in an unequal bargaining position with respondent. His conduct in that regard was, therefore, unethical and in violation of RPC 4.2.

Respondent admitted drafting the release that attempted to insulate him from any disciplinary proceedings. Respondent's claim that he obtained the advice of another attorney and that West did not contest the objectionable language in the release does not absolve him of his wrongdoing. In another matter, the Court determined that an attorney's attempt to limit his liability for ethics violations exhibited an extreme indifference to the intent of the disciplinary rules. In In re Wallace, 104 N.J. 589, 594 (1986), the Court stated that "[p]ublic confidence in the legal profession would be seriously undermined if we were to permit an attorney to avoid discipline by purchasing the silence of complainants." The Court, therefore, found a violation of DR 6-102(A). Respondent's attempt to be released from any ethics responsibilities is similarly improper and violative of RPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice), not RPC 8.4(c), as charged in the complaint. The complaint is, therefore, deemed amended to conform to the proofs.

The most problematic charge against respondent was set forth at count one of the complaint. Smith admitted forging the deed conveying the property from himself and his ex-wife to himself and respondent. Smith further claimed that, shortly after he and respondent obtained the bank loan, he informed respondent of the forgery, in the event that any problems should arise. Respondent, however, claimed that he did not become aware of the forgery until January 1991, when he was contacted by Kates' son — almost one and one-half years after the forgery took place and the loan was obtained from the bank. Respondent added that he believed Kates was to benefit from Smith's share of the loan.

The DEC found the testimony of Kates, Thomas Kates, Jr. and Smith to be credible. It also found respondent to be less than candid.

Based on this record, however, there is no clear and convincing to support a finding that respondent was involved in the forgery of Kates's signature on the deed. The question as to when respondent became aware of the forgery is only relevant if respondent had a duty to disclose the forgery to either Kates or the bank. Because the Board finds Smith's testimony to be less than credible, it is unable to determine when respondent actually became aware of the forgery on the deed. Moreover, since respondent took steps to rectify the problem with the deed, the issue of whether respondent violated a duty to Kates or the Bank has been rendered moot.

Respondent's dealings with Smith, his willingness to enter into business transactions with Smith, a man with a poor credit history, to assist Smith and Kates in purchasing a home and co-sign for a line of credit for Smith, all lead one to question his motivation for his actions and his dealings with a somewhat nefarious individual. While there is a sense from the entire record that something more may have been going on between Smith and respondent, there is no evidence of a violation of RPC 8.4(c), as charged in count one of the complaint.

Had respondent merely violated RPC 4.2, an admonition (formerly a private reprimand) might have been appropriate. However, the fact that he attempted to avoid disciplinary proceedings elevates the seriousness of his conduct. Nevertheless, respondent's conduct was not as egregious as that of the attorney in In re Wallace, 104 N.J. 589 (1986) (six-month suspension for seriously deficient draftsmanship of a promissory note, failure to maintain adequate records while handling payments made on the promissory note to his client and attempts to settle an ethics complaint brought by the survivor of his client after the attorney's deficiencies in handling the matter were discovered). Accordingly, the Board unanimously recommends that respondent receive a public reprimand. Two members concurred with the level of discipline, but did not find a violation of RPC 4.2. In those

members' view, the rule requires that the conduct occur "in the representation of a client" and respondent was representing himself.

The Board further recommends that respondent be required to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: _____

1/5/1995

By: _____



Raymond R. Trombadore
Chair
Disciplinary Review Board