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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-436

IN THE MATTER OF

PHILIP F. BLANCH,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: April 20, 1994

Decided: October 10, 1994

David M. Paris appeared on behalf of the District VC Ethics Committee.

Diana Coppola appeared on behalf of respondent.

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

This matter was originally before the Board based upon a recommendation for a private reprimand filed by the District VC Ethics Committee (DEC), which the Board considered at its February 10, 1994 meeting. At that time, the Board determined to hear the matter as a recommendation for public discipline. The complaint charged respondent with violations of RPC 1.7 (conflict of interest), RPC 4.1 (making a false statement of fact), and RPC 8.4. No subsections were specified.

The presenter was unable to contact the grievants by telephone. They were notified of the date and location of the DEC hearing by regular and certified mail, but failed to appear.

Respondent was admitted to the practice of law in New Jersey in 1967. He maintains an office in Fairfield, Essex County.

James F. and Kathryn Crawford, the grievants herein, were the purchasers of property owned by several individuals, including Jeffrey Lattimer, a real estate agent. The Crawfords had been tenants in the two-family house for approximately two years. On or about January 29, 1988, prior to respondent's involvement in this matter, the Crawfords entered into a contract to purchase the house. Lattimer gave the Crawfords the names of several attorneys who could represent them, including respondent's (T12, 30, 48).[1] The Crawfords selected respondent apparently because of his proximity to Lattimer's office, which was located in the same building as Lattimer's real estate office (T30). The sellers were not represented by counsel in this transaction (T51).

Respondent testified that he had informed the Crawfords that he had represented Lattimer and the other sellers in the purchase of the property. He offered to provide the names of other attorneys, if the Crawfords were uncomfortable with his representation (T31). The Crawfords, however, elected to proceed with the representation. Lattimer testified that he, too, had informed the Crawfords of respondent's prior representation at the time of the purchase of the property (T48).

Respondent had no financial interest in the sale of the property, other than the fee he would receive as the closing

[1] T refers to the transcript of the hearing before the DEC on August 19, 1993.

attorney (T33). Respondent testified that he had represented other people referred to him by Lattimer.

Neither respondent nor Lattimer, however, disclosed to the Crawfords that they were co-owners of the building where their offices were located (T32). According to respondent, he never thought that his co-ownership of the building posed a conflict of interest (T33). The building is a cape-cod style house, formerly used as a one-family residence. There is a shared common area. Both Lattimer's and respondent's names are on the sign outside of the building. Respondent claimed that, given the arrangement of the offices, it should be clear to all that there was some sort of business arrangement between them.

As noted above, prior to respondent's involvement with the Crawfords, the parties had already agreed on the contract terms as well as on the primary and secondary financing. An arrangement had been made for the sellers to take back a second mortgage of $67,500. Lattimer had prepared the formal contract. Respondent testified that he had reviewed the contract and had advised the Crawfords that it did not provide for a second mortgage (T35). According to respondent, when he advised the Crawfords that they would be unable to enforce the agreement, they had indicated that they were not concerned and did not want the secondary financing mentioned in the contract (Answer at 5). Respondent also discussed with the Crawfords their financial situation and suggested that an inspection clause be added to the contract. According to respondent, the Crawfords indicated that, since they had lived in

the house and since Mr. Crawford worked as a carpenter and as an electrician and had done work on the house, they were aware of its condition and did not need to incur the expense of an inspection (T35). Respondent also discussed with them the existence of an illegal third floor apartment and the removal of a second floor tenant (T36). Lastly, respondent inquired whether the Crawfords had discussed the secondary financing with the first mortgagee, Travelers Mortgage Company ("Travelers") and they replied that they had done so (T37).

The original contract of sale, dated January 29, 1988, was signed by the Crawfords, as buyers, and Vincent and Joanna Catanzaro, as sellers. There was an oversight when the contract was originally drafted, in that the Catanzaros were not the only sellers that needed to be listed. Another contract was prepared, with the names of all of the sellers (Exhibits D and D-1). The purchase price was listed as $270,000, with a cash deposit of $500 and an additional cash deposit of $26,500 within fourteen days, a mortgage in the amount of $202,500 and the balance of $40,500 due on or before closing. As noted above, in reality, the Crawfords were to obtain financing for the entire purchase price: $202,500 from Travelers and a second mortgage from the sellers for $67,500.

Respondent had no contact with Travelers until shortly before the closing, at which time the secondary financing was discussed. The following exchange took place before the DEC:

Q. Now, as the closing drew near did you have occasion to speak with the representative of the mortgage company?

A. Well, it was -- I would again -- I have to go as the timing, the day before, maybe the day of the closing, when I was preparing the documents it came to my attention again that there was not -- that there was not going to be money at the closing that there was going to be secondary financing at that time I close [sic] -- called the closing department I speak to their -- there were three women in the closing department that I spoke to really which I -- I don't know if -- whether it was Nancy Hicks, Agnes and I forget the name of the third woman. Agnes and Nancy Hicks. I said, hey are you aware of their secondary financing or second mortgage and they weren't and whether they answered me right away or called me back I don't know, but the response was that it is okay go ahead with it.

We did a lot of business with them at that time -- don't show anything on the documentation because if you don't [sic] then we are going to have to redo some paperwork and it is going to hold everything up.

The Crawfords called and they were anxious to close.

The mortgage company is telling me there is no problem I realize now I shouldn't had I realized that was a mistake but it was a -- you know something that was done at the moment.

Q. Was it your impression when you executed the documents that you had the mortgage company's authorization for the secondary financing?

A. Yes. Yes, I did.

Q. Was it your intention in any way to mislead or misrepresent the mortgage company with respect to the secondary financing?

A. Absolutely not. Absolutely not.

I dealt with these people on a regular basis. I had no reason to foul up a great relationship.

Q. In executing the attorney certification where you indicate that you closed to loans in compliance with their instructions and the settlement instructions are given to me orally did you believe at the time that you were closing it in compliance with their instructions both written and oral?

A. Absolutely.

Q. But you do concede that other closing documents were silent as to existence of secondary financing?

A. That is true and that again was in accordance with their instructions.

Q. You realize now that those documents or allowing those documents to be executed was an error in your judgment, on your part?

A. It certainly was an error in judgment.

Q. But again the purpose, as far as you were concerned, the company was not relying upon that because orally you had advised them of the existence of the secondary financing?

A. That's correct.

[T38-40]

Respondent testified that he had called Travelers to advise it of the second mortgage because he had general knowledge that "mortgage companies may have a problem with secondary financing" (T41). Respondent explained that his concern "was more with the contract not stating it and [his] clients not being able to enforce it" (T42). Respondent added that, although he could not recall the name of the individual who had given him verbal authorization for the secondary financing, he had proceeded with the transaction in reliance on that verbal approval. Respondent admitted that he had made "a mistake" in not memorializing Travelers' consent (T39).

The closing of title took place on March 30, 1988. Respondent prepared a mortgage and a mortgage note, bearing that date and reflecting the $67,500 second mortgage (Exhibit F). He also prepared the HUD settlement statement (Exhibit H), which did not disclose the secondary financing but, rather, referred to the deposit money and the additional cash needed from the buyers.

Similarly, none of the documents received from Travelers reflected the secondary financing.

As the DEC noted, Travelers' mortgage commitment stated that "[n]o secondary financing is permitted without the express written approval of TMS" (Exhibit E). Yet, in Exhibit J, the closing attorney's certification, respondent certified that the loan was settled in accordance with Travelers' instructions (T18). Further, although the affidavit of the buyers and sellers (Exhibit G), stated that the Crawfords gave $67,500 in cash, this was not true. The affidavit made no mention of a second mortgage.

Kenneth Barash, a senior vice-president of Travelers during the time in question, testified on respondent's behalf. Barash had not been involved in the Crawford's mortgage application and had not reviewed the file. Barash testified that the standard mortgage commitment contained a prohibition against secondary financing. He added, however, that that language was standard and could be waived verbally by the company. In fact, according to Barash, verbal approval of secondary financing was given on a regular basis. Barash was not surprised by respondent's testimony that he had been given verbal approval for the secondary financing one to two days before closing but was told not to reveal it in the closing documents (T61). When asked if that was a common practice, Barash replied:

> The time frame that we are operating in briefly was a time frame of -- frame of the no documents era which unfortunately turned out to be not the best thing for the industry or the customers, which meant the verification of assets, in fact, were not tracked as long as the terms of the agreement were such that what was stated -- was

used in the documents, was accepted. The final documents used for the participants in the transaction depended on who they were, did not go any further, they were using that as the documentation.

So it is very possible that they would not bring that to anybody's attention based on that document.

Q. But that reaction from the mortgage company would not surprise you, would you tell us and the Panel?

A. That's correct.

[T62]

However, the following testimony from Barash is of interest:

Q. So if Travelers was aware that a purchase price of a piece of property was $270,000.00 and the purchaser was requesting a mortgage of $202,000.00 and the purchaser was not putting a penny of its own money towards the property. It is your testimony that Travelers probably would not have given that mortgage?

A. If the application was given in that regard, we would not have accepted the application.

Q. Not [sic] let's say at some point in time Travelers was advised that the application initially indicated that the purchaser was going to pay approximately $67,500.00 of the purchasers [sic] own money towards the $270,000 purchase price and although that was on the original application prior to closing Travelers was advised, again back in 1988, that now the purchasers were not putting a dime of their own money and instead that in addition to the $202,000.00 that they were borrowing from Travelers and additional $67,000.00 in order the [sic] make the totality of the purchase price, would Travelers have given that mortgage?

A. Probably not.

[T64-65]

Ultimately, the Crawfords defaulted on both the first and second mortgage payments. By letter, dated January 2, 1990, Travelers contacted a senior investigator with the State of New Jersey Department of Banking (Exhibit-I). In that letter,

Travelers stated that it had been unaware of any secondary financing arrangement between the sellers and the buyers (T19).

* * *

The DEC found respondent guilty of a violation of RPC 4.1 and RPC 8.4. As the DEC noted, respondent had closed other loans with Travelers and was aware of the prohibition against secondary financing. He presented no evidence to support his claim that he had received verbal approval for the secondary financing. The DEC pointed to Barash's testimony that, while verbal approval for secondary financing was given on occasion, approval for this particular mortgage would probably not have been given, if the secondary financing had been known to Travelers. Respondent's failure to indicate the secondary financing on any of the closing documents was noted.

The DEC did not find clear and convincing evidence of the alleged violation of RPC 1.7, reasoning that

> [d]ue to the failure of the grievants to appear at the hearing, the Panel was unable to question them regarding the purchase, the involvement or lack thereof by the respondent, the negotiation of the sale terms and the nature of disclosure regarding the respondent's prior representation of the sellers. The Panel did feel, however, that while the lack of other attorney involvement in this transaction, the fact that the respondent prepared the required documents for both purchasers and sellers, and the failure to disclose the joint ownership in the office building gives the "appearance" of a conflict of interest, we were not convinced the respondent's conduct and involvement in this transaction was clearly a violation of R.P.C. 1.7. We have considered the holding in In re Kamp, 40 N.J. 588 (1963) and interests and the duty to fully disclose to the client the scope of prior relationships. However, the lack of information/evidence from the grievants

> precludes the Panel from making a finding of unethical conduct or a violation of R.P.C. 1.7.
> [Hearing Panel Report at 5]

The DEC recommended the imposition of a private reprimand.

CONCLUSION AND RECOMMENDATION

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

The DEC found that respondent had violated RPC 4.1 and RPC 8.4. No violation of RPC 1.7 was found. The Board agrees with the dismissal of this last charge. Although, as the DEC noted, "[c]o-ownership of the property could not be determined solely by reviewing a sign and the office set up" [Hearing Panel Report at 3], respondent's belief that his co-ownership of the property would not affect his representation was not necessarily unreasonable. Of import is the fact that the contract terms were negotiated prior to respondent's involvement. See Opinion 243, 95 N.J.L.J. 1145 (1972).

With regard to the remaining violations, respondent testified that he did not receive the fourth page of the mortgage commitment, where it was indicated that there was a restriction on secondary financing without written approval. It seems unlikely that an attorney active in real estate practice would be unaware of the constraints on secondary financing. Moreover, why would respondent have called Travelers, prior to closing, to bring the secondary

financing to its attention if he had not been aware of its prohibition? Regardless of respondent's awareness of the restrictions on the secondary financing, or his lack of awareness, however, the fact remains that he knowingly prepared documents that failed to disclose the existence of the subordinate financing. Respondent testified that Travelers was not relying on his closing documents because he had orally advised it of the secondary financing (T40). Although he might have been under the assumption that Travelers was aware of the arrangement and that he was not making a misrepresentation to that mortgage company, he nevertheless misrepresented to the world the true nature of the transaction.

Respondent conceded that he had made a mistake in this matter. In his closing statement, respondent's counsel argued that the documents respondent prepared did not affirmatively represent that there was no secondary financing. Rather, they were silent as to its existence (T72). However, "[i]n some situations, silence can be no less a misrepresentation than words." Crispen v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984).

Respondent clearly knew that he was making a misrepresentation, but seemed to be of the opinion that it was acceptable to do so because no one involved in the transaction was misled by it. This is distinct from In re Labendz, 95 N.J. 273 (1984) (one-year suspension for knowing participation in an attempt to defraud a bank by submitting a false loan application to secure a higher mortgage for his clients). The conduct in Labendz was

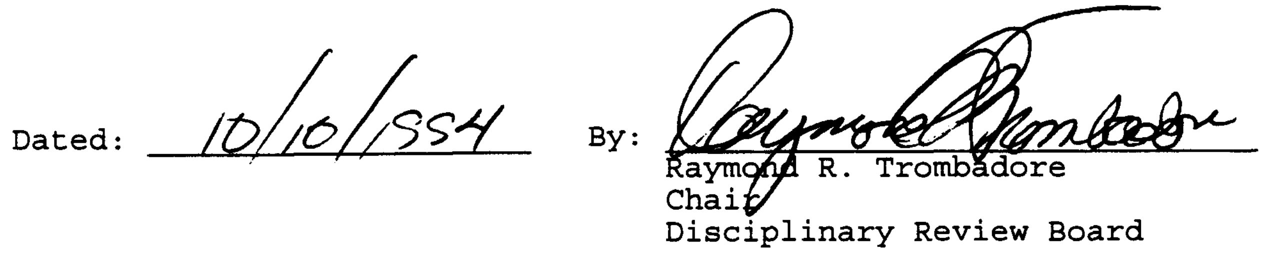
specifically aimed at defrauding the lending institution. In the case at hand, respondent apparently believed that he was misleading no one and, in fact, was acting at the lending institution's oral instruction. Although still improper, the conduct herein is thus less serious than that of Labendz.

The facts, as presented by respondent, could be accurate: he had a long-term relationship with Travelers and telephoned that company to determine if secondary financing would be approved in this transaction. One of three identified individuals authorized the second mortgage but instructed respondent not to so indicate on the closing documents and not to use her name, should a question arise. Since revealing secondary financing might impede the lending institution's ability to sell the mortgage on the secondary market, this factual scenario is credible. Likely, this situation occurs on a regular basis. However, that an attorney has authorization to misrepresent does not make it less of a misrepresentation. There is no question that respondent knew that the closing documents were not accurate. He simply believed that he had been given permission to lie, with impunity.

Respondent admitted that he made an error, cooperated with the DEC and had no history of discipline. In view of these mitigating factors, a public reprimand is sufficient discipline in this case.

The Board unanimously so recommends. One member did not participate.

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



Dated: 10/10/1994

By: Raymond R. Trombadore
Chair
Disciplinary Review Board