SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-500

IN THE MATTER OF

SYLVIA BRANDON-PEREZ,

AN ATTORNEY AT LAW

Decision

Argued: April 17, 1996

Decided: October 15, 1996

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before the Board based on a recommendation for discipline filed by Special Master Terry P. Bottinelli. The formal complaint charged respondent with violations of RPC 1.15(b) (knowing misappropriation); RPC 8.4(a) (attempt to violate the Rules of Professional Conduct) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1976. By Order dated March 23, 1993, respondent was suspended from the practice of law for a period of three months for serious recordkeeping deficiencies, resulting in the negligent misappropriation of over $20,000 in client funds.

At some unidentified point prior to March 2, 1989, respondent applied for a mortgage from National Westminster Bank NJ (hereinafter "NATWEST") in the amount of $200,000. The purpose of that loan was to refinance the existing $200,000 mortgage debt on her Cliffside Park property known as 198-200 Palisades Avenue. On or about March 2, 1989, NATWEST issued a commitment letter granting the loan, subject to certain terms and conditions. Exhibit OAE-1. Among those conditions was a requirement that respondent execute a note and mortgage document and that NATWEST receive a first mortgage on the property. The commitment letter further required that the title binder indicate that all outstanding liens on the property "[were] satisfied or will be satisfied at the time of closing . . . ." Finally, in its commitment letter, NATWEST reserved its right to refuse to grant the loan if, at the time of closing, "there [was] a material difference in the facts set forth in [the] application, from the conditions then existing . . . ." Respondent's mortgage application was not made part of the record.

Closing on the loan was held on March 29, 1989 at the offices of Ira Starr, Esq., who represented NATWEST in the transaction. Although respondent had been representing herself up until that point, NATWEST had insisted that she be independently represented at the closing. Therefore, respondent telephoned her friend, Robert Pompliano, Esq., whose office was located nearby, and asked him to come to represent her at the closing.

During the course of the closing, Pompliano reviewed all of the relevant documents with respondent, who was well-versed in real

estate practices and procedures. Among the documents respondent reviewed and executed during the closing was a business purpose letter. Exhibit OAE-1A. That letter described the specific use of the loan proceeds: "to refinance existing mortgages on premises: 198-200 Palisade Avenue, Cliffside Park, N.J." The title binder (Exhibit OAE-3) identified all four existing mortgages on the premises as follows: a $60,000 mortgage in favor of Commercial Trust Company of New Jersey (a/k/a UJB); a $40,000 mortgage in favor of Meadowlands National Bank; a $25,000 mortgage in favor of John Szal and, finally, a $75,000 mortgage in favor of A.C. Castelli. These existing mortgages totalled $200,000, the amount of the NATWEST loan.

It is respondent's subsequent failure to satisfy the Castelli mortgage that forms the basis of the ethics complaint.

During the course of the closing, respondent executed and Pompliano acknowledged an affidavit of title, which respondent had prepared. That affidavit stated, in relevant part, that "all four mortgages of record are being paid off from the proceeds of this loan . . . . We make this affidavit in order to obtain the mortgage loan. We are aware that our lender will rely on our truthfulness and the statements made in this affidavit." Exhibit OAE-4.

Following the exchange and execution of all relevant documentation, Pompliano asked Starr when he should expect to receive the loan proceeds so that he could make the appropriate disbursements and record the appropriate documents. To his

surprise, Starr indicated that NATWEST intended to forward the check directly to respondent. When Pompliano looked at him quizzically, Starr reassured him, "it's O.K., it's her building, she's an attorney, it's all right, we're going to give the check to her." 2T78.[1] At the conclusion of the closing, Pompliano instructed respondent to send him a copy of her transmittal letters to all of the mortgagees. He reiterated that instruction three times.

After a week had passed, Pompliano still had not received copies of any such transmittal letters. Therefore, he initiated several conversations with respondent, through August 1989, about the status of the outstanding mortgages. On each one of those occasions, respondent reassured Pompliano that "it [was] all taken care of, don't worry about it . . . it's fine." 2T79. Pompliano understood respondent's reassurances to mean that respondent had satisfied all of the mortgages identified in the title binder. In fact, she had not.

On March 30, 1989, the day following the closing, respondent deposited the loan proceeds into her trust account. On that date, she issued a check in the amount of $23,898.02 to Commercial Trust (UJB) to satisfy that outstanding mortgage. Also on that date, respondent issued two checks totaling $25,000 to Goldman and Grandchildren trust to satisfy the Szal mortgage. Thereafter, between March 31, 1989 and September 5, 1989, respondent wrote to herself approximately nineteen checks from the loan proceeds,

[1] "2T" denotes the hearing transcript of March 7, 1995.

totalling approximately $132,100.[2] She had used only $73,698.72 of the NATWEST loan proceeds to satisfy outstanding mortgages on the property given as collateral for that loan. By September 5, 1989, both the Meadowlands National Bank mortgage and the Castelli mortgage remained unsatisfied. Respondent had not retained sufficient loan proceeds either in her trust account or in any other escrow account to satisfy both mortgages. That was so in spite of the fact that, after the satisfaction of all outstanding mortgages on the subject property, approximately $40,000 to $50,000 of the NATWEST loan proceeds would remain for disbursement to respondent herself.

Respondent maintained that she had not fully satisfied the Meadowlands mortgage because a dispute had developed over the amounts actually paid and those credited. It was not until sometime in 1992 that respondent completely satisfied that mortgage (and then not necessarily from the NATWEST loan proceeds.)

Respondent's explanation for her failure to satisfy the Castelli mortgage was somewhat more complicated. Specifically, respondent contended that, at some point prior to March 29, 1989 - perhaps as early as December 1988 - she had entered into negotiations with Stuart Kellner, Esq., a licensed mortgage broker and A.C. Castelli's representative, to substitute another piece of property as collateral for the mortgage held by Castelli on the

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[2] On or about June 15, 1989, respondent deposited $25,000 into her trust account, which she had received ostensibly as a result of another mortgage loan from a party named Milutin. Therefore, disbursements made by respondent after that date would have partially come from that source.

198-200 Palisades Avenue property. More simply stated, respondent had proposed that Castelli transfer his mortgage to a more valuable piece of property, a sixteen-unit condominium building appraised at over $1,000,000, with an outstanding mortgage of $300,000. Apparently without Castelli's express authorization, Keller indicated to respondent that the proposed substitution could be accomplished on several conditions. Specifically, respondent would have to reduce the $75,000 principal by a payment of $15,000 and, in addition to making a current interest payment on that mortgage, she would have to make an advance interest payment on a new and higher rate of interest.

Respondent agreed to these conditions and by April 18, 1989 made the required payments to Kellner, as Castelli's agent, from the NATWEST proceeds. Respondent also executed a mortgage and note (Exhibit R-5 and R-6) dated March 29, 1989 in Castelli's favor, transferring the reduced ($60,000) principal to the above cited condominium building, known as 2215 Grand Avenue, North Bergen. Although respondent forwarded the note and mortgage to Kellner, he did not record them. Nor did he execute or record a discharge of the Castelli mortgage on the 198-200 Palisades Avenue property. That was so, Kellner testified, because he had gotten "cold feet" at some undisclosed point during the renegotiations, because of a change in the law relating to condominium buildings that would have rendered the substituted property less valuable. For that reason, he refused to finalize the transaction. The effect, of course, was that, after respondent's satisfaction of all other mortgages on

that property, Castelli, not NATWEST, had a first lien. Aside from the "substitute" mortgage and note respondent had executed in Castelli's favor, there was no writing memorializing the proposed substitution.

According to respondent, it was not until approximately one week after the NATWEST loan closing that she learned from Kellner that the proposed substitution would not be accepted. By that point, however, respondent no longer had a sufficient amount of NATWEST proceeds in her trust account to satisfy the Castelli mortgage and to give NATWEST the first lien on the property, as NATWEST had required. Although, at that point, respondent and Kellner entered into some discussions about a subordination of Castelli's mortgage to NATWEST's mortgage, that proposal too, never materialized.

Respondent and Stuart Kellner had shared an unusual business relationship in the past. Although Kellner is a licensed attorney, he does not practice law. He is a private mortgage broker who has known and dealt with respondent for approximately twenty years. Not only has Kellner brokered mortgages in respondent's behalf, but he has also held mortgages on respondent's properties. Furthermore, both Kellner and respondent testified that they had, in the past, engaged in several transactions and novations to transactions, some of which were never reduced to writing and some of which Kellner consummated without his clients' specific authorization. This is relevant in the context of this transaction in order to validate respondent's claim that she had no reason to

doubt Kellner's representation that a substitution would be accepted. In fact, respondent testified that she and Kellner had entered into several substitutions of private mortgages in the past. Respondent referred to these substitutions as a product of the "era of creative financing." 3T14.[3]

Respondent admitted that she never disclosed to NATWEST, its attorney (Starr) or Pompliano her intention to enter into a substitution or subordination agreement with Castelli, instead of using the NATWEST proceeds to satisfy the Castelli mortgage, as indicated in the affidavit of title. Respondent further admitted that she knew NATWEST would rely on her affidavit of title in making the loan and that, in hindsight, she should have disclosed to NATWEST her intentions vis-à-vis the Castelli mortgage. Respondent steadfastly denied that her non-disclosure to NATWEST was predicated on an apprehension on her part that the bank would not grant the loan, had it known of the proposed substitution or subordination. NATWEST's attorney, Ira Starr, testified that such a proposed transaction would have been evaluated by the bank's underwriters to determine whether the continued existence of the mortgage, regardless of the collateral given to secure it, would have compromised respondent's ability to ultimately satisfy the NATWEST mortgage. Respondent, however, doubted that any such evaluation would have resulted in a denial of the loan, because she owned so many other properties from which she generated income.

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[3] "3T" refers to the hearing transcript of March 28, 1995.

Although both Starr and Pompliano interpreted the relevant language in the affidavit of title to mean that respondent would use the NATWEST loan proceeds specifically to discharge the outstanding mortgages on the property, as is done in the usual course in mortgage refinancings, respondent took a less literal view of that language. Respondent considered that her duty to NATWEST was to ensure that it had a first lien on the subject premises. Because respondent had no reason to doubt Kellner's representation that the proposed substitution would be accepted upon fulfillment of certain conditions, she believed that the Castelli mortgage would be discharged in the near future. In her mind, that mortgage did not exist at the time she executed the affidavit of title. That notwithstanding, in a somewhat inconsistent posture, respondent conceded that she had a duty to keep sufficient funds in her trust account to satisfy the Castelli mortgage, at least until the proposed substitution had been consummated. Respondent testified that she did not notify NATWEST of her failure and subsequent inability to satisfy the Castelli mortgage because she was embarrassed.

Ultimately, the real estate market become so depressed that respondent defaulted on the NATWEST loan and filed for bankruptcy. It was not until 1992, when NATWEST filed a foreclosure action on the mortgage, that it learned of the continued existence and priority of the Castelli mortgage.

One final point deserves mention. Respondent filed a motion with the Special Master and the Supreme Court to dismiss the Office

of Attorney Ethics' (OAE) complaint based on collateral estoppel and res judicata grounds. Apparently, NATWEST alleged in the foreclosure action that respondent "intended to defraud NATWEST by not providing a valid first mortgage lien to the bank." Transcript of Decision of Hon. Arthur J. Lesemann at 12. Judge Leseman interpreted that allegation to mean that respondent had not intended to give NATWEST a first lien. Judge Leseman found that it was always respondent's intention to give NATWEST a first mortgage on the property and that Kellner had led her to believe that the substitution on the Castelli mortgage would be accomplished. Therefore, the judge concluded that respondent had not engaged in any fraudulent conduct but, rather, had been woefully negligent in carrying out her obligations. Respondent took the position that Judge Leseman had disposed of the fraud issue by the lower standard of proof governing civil actions and that that particular issue could not be relitigated in the ethics proceeding.

The OAE filed a brief in opposition to respondent's motion, maintaining that the foreclosure action and the ethics actions lacked both identity of issues and identity of parties. Moreover, the OAE contended that the ultimate goal of the ethics action was to protect the public against dishonesty or unethical conduct, while the objective of the foreclosure action was to redress a legal wrong by the award of monetary damages.

The Supreme Court denied respondent's motion for a stay of the ethics proceedings. Respondent renewed her motion before the Board in order to preserve that issue for the Court's review.

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The special master found respondent guilty of unethical conduct. Specifically, the special master found that respondent used the NATWEST funds "in a manner expressly contrary to their intended use and in contradiction to the express instruction of the bank." Special master's report at 10. The special master further found that respondent was "obligated to hold the funds belonging to NATWEST in her trust account with the care required of a professional fiduciary . . . [and that] she purposefully and knowingly used NATWEST's money to satisfy her own obligation rather than pay off the liens as required." Id. The special master found respondent guilty of a violation of RPC 1.15(b). He further found that respondent had violated RPC 8.4(c) for her failure to disclose to NATWEST the proposed Castelli substitution and for her misrepresentation in the affidavit of title. After balancing respondent's misconduct against the character testimony given by several of her clients, the special master recommended that respondent be suspended for a period of at least six months.

* * *

Upon a de novo review of the record, the Board is satisfied that the special master's conclusion that respondent was guilty of unethical conduct is supported by clear and convincing evidence. For a long period of time, respondent acted with dishonesty and

misrepresented facts to Natwest. Respondent testified that she initiated negotiations with Kellner on the proposed substitution as early as December 1988 and no later than February 1989. Although the date or nature of the disclosures made on the mortgage application is not part of the record, the commitment letter was dated March 2, 1989, well after her initial negotiations with Kellner. That letter required that NATWEST receive a first lien on the property and that respondent execute a title binder at closing indicating that all liens were satisfied or would be satisfied at the time of closing. Respondent accepted those terms when she signed and returned the commitment letter to NATWEST, as required. Respondent had to know, when she signed that commitment letter, that she did not intend to pay off the Castelli mortgage from the loan proceeds, as NATWEST had expected. Yet she never qualified her acceptance of the loan terms by disclosing, for example, her intention to substitute other collateral for the Castelli mortgage. Moreover, at the loan closing, less than one month later – and on the same day that she executed a substitute mortgage in Castelli's favor – respondent executed an affidavit of title that she prepared, plainly representing that all four outstanding mortgages of record were being "paid off from the proceeds of this loan." Exhibit OAE-4. Furthermore, on that same day, at closing, respondent executed a business purpose letter indicating that the specific use of the loan proceeds was to refinance the existing mortgages on the subject premises. Clearly, had respondent disclosed on the affidavit of title her side agreement with Kellner

to substitute collateral on the Castelli mortgage, Starr would have refused to close the loan without first giving NATWEST's underwriters the opportunity to re-evaluate respondent's creditworthiness in light of the proposed substitution, as opposed to requiring total extinguishment of that personal obligation to repay.

The Board did not accept respondent's denial of the proposition that she concealed the side agreement to substitute because she feared that it would refuse to close on the loan. If respondent truly believed that the Castelli mortgage was about to be discharged or transferred to another piece of collateral and that NATWEST would not rescind the loan with that knowledge, she would have lost nothing by disclosing her intentions to NATWEST, to Starr or even to her friend and attorney, Pompliano. It is clear that respondent was engaged in what she described as "creative financing" and that she feared it was just a little too creative for NATWEST. It is equally clear, by virtue of respondent's almost immediate and continuous use of the loan proceeds for her own purposes, that she had other plans for the NATWEST refinance proceeds very early on in the transaction. Her conduct can be characterized as nothing less than dishonest, in violation of RPC 8.4(c).

The more troubling question is whether respondent's inconsistent use of the loan proceeds can be classified as a knowing misappropriation, as charged in the formal ethics complaint. Such a finding, of course, would depend on the

characterization of the funds at issue as trust funds. The general term trust funds is used to denote client funds as well as escrow funds. Of course, an attorney's knowing misuse of client funds invariably results in disbarment, In re Wilson, N.J. 451 (1979), as does his or her knowing misuse of escrow funds, In re Hollendonner, 102 N.J. 21 (1985). The relevant inquiry, therefore, becomes whether the NATWEST loan proceeds were trust funds. Certainly, at least a portion of those proceeds were respondent's to use without restriction. The record suggests that respondent had notified the bank that she had paid down the principal on some or all of the outstanding mortgages and that there would be excess funds in the approximate amount of $40,000 to $50,000, which would be available for disbursement to her after complete satisfaction of those mortgages. The issue is, thus, the characterization of the remainder of the funds.

If respondent were not an attorney and had engaged in the same conduct, the bank would have a valid cause of action for damages against her for breach of contract and, possibly, for fraud, which might yield punitive damages. Here, respondent was acting not as an attorney but as a loan applicant. That, however, did not relieve her of the ethics obligation to act with honesty and integrity. Indeed, because respondent is an attorney, she is held to a higher standard of conduct. The Board, however, did not consider that respondent's position as an attorney automatically converted the character of the loan proceeds in her hands into trust funds — at least not on the basis of this record.

Clearly, had NATWEST disbursed the proceeds to Pompliano and had he knowingly misused those proceeds, he would have been guilty of misappropriation. However, Pompliano was not the recipient or the beneficiary of the loan, respondent was. In return for that loan, respondent made certain contractual promises to NATWEST. She promised to use the proceeds to satisfy the mortgages. She breached that promise. She promised to repay the loan. She breached that promise too. The bank was damaged by her breach of those promises, for which it has legal recourse. Indeed, respondent remains personally and legally obligated to repay that loan. To be sure, respondent clearly used the proceeds inconsistently with their stated and intended purpose, constituting both misrepresentation and a breach of contract. However, to label that breach as a knowing misappropriation under the facts of this case is both unfair and inappropriate. As stated above, not all funds that come into an attorney's hands — particularly those that pertain to the attorney's private affairs — can be characterized as trust funds merely because of that attorney's professional status.

Respondent's misconduct was nevertheless serious. She obtained a loan under false pretenses by failing to disclose to NATWEST her intention to substitute collateral on the Castelli mortgage. She then actively misrepresented on the affidavit of title that she would use the proceeds to satisfy all outstanding mortgages and, finally, perpetuated those pretenses over a course of several years. Respondent's misconduct, at least in failing to

disclose her true intentions to NATWEST from the beginning, can be analogized to a failure to disclose secondary financing to a lending institution. This is particularly true if one accepts respondent's claim that she believed the substitution agreement had been or would be consummated. In that case, the relevant inquiry for NATWEST would have been whether the continued existence of the Castelli obligation affected respondent's ability to pay the NATWEST mortgage loan, which, of course, is the principal concern in secondary financing prohibitions.

An attorney was recently reprimanded for failing to disclose secondary financing in the closing documentation where he had orally advised the primary mortgage lender of the existence of secondary financing but was advised by its representative to omit reference to any secondary financing in the closing documents. In re Blanch, 140 N.J. 519 (1995).

Harsher discipline has resulted in cases of misrepresentations to mortgage lenders. However, those cases have involved clear attempts to defraud the lender, a factor not present in this matter. See, e.g., In re Mocco, 75 N.J. 313 (1978); In re Labendz, 95 N.J. 623 (1989) and In re Barlett, 114 N.J. 623 (1989) (all three attorneys suspended for one year). Nevertheless, respondent's conduct is still deserving of a period of suspension. Not only did she fail to disclose her intentions to NATWEST, but she also actively misrepresented in the affidavit of title that she would use the mortgage proceeds to satisfy all existing outstanding mortgages on the property. Moreover, even after it became clear to

her that the proposed substitution or subordination would not be consummated, respondent never once notified NATWEST of the true situation. Indeed, it was not until respondent finally defaulted on the loan that NATWEST learned, during the course of ensuing litigation, that respondent had not satisfied the outstanding mortgages. In aggravation, the Board considered that respondent's misconduct extended over several years, that NATWEST was never made whole and that respondent was the subject of prior discipline for conduct that only partially overlapped in time with her misconduct in this matter. On the other hand, in mitigation, the Board noted the testimony of several character witnesses who testified that respondent competently and faithfully serves a specific ethnic community that might not otherwise be served.

Under a totality of the circumstances, the Board unanimously determined to suspend respondent for a period of six months for her prolonged and serious violations of RPC 8.4 (c). Respondent must understand that her position as an attorney obligates her to conform her conduct as a private individual to a higher standard and would be well-advised to act accordingly.

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

Dated: 10/15/96

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board