SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-245
District Docket No. XIV-2012-0321E

IN THE MATTER OF	:
FELIX NIHAMIN	:
AN ATTORNEY AT LAW	:

Decision

Argued: November 21, 2013

Decided: December 18, 2013

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Philip Touitou 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 motion for final discipline filed by the Office of Attorney Ethics (OAE). The OAE recommended respondent's disbarment for his guilty plea to the third-degree crime of misapplication of entrusted property,

N.J.S.A. 2C:21-15.[1] For the reasons expressed below, we determine that a three-month suspension is appropriate.

Respondent was admitted to the New Jersey bar in 1995 and the New York bar in 1996. He maintains a law office in New York City.

In 2010, respondent was admonished for deficient recordkeeping practices, negligent misappropriation of escrow funds, failure to safeguard funds held on behalf of a third person, and commingling personal and client funds in his trust account, violations of RPC 1.15(a) and RPC 1.15(d). In imposing only an admonition, we considered that respondent had no ethics history, there was no harm to any clients, he promptly

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[1] This statute provides:

> A person commits a crime if he applies or disposes of property that has been entrusted to him as a fiduciary, or property belonging to or required to be withheld for the benefit of the government or of a financial institution in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted whether or not the actor has derived a pecuniary benefit.
> . . . .
> If the benefit derived from a violation of this section . . . exceeds $1,000.00, but is less than $75,000.00, the offender is guilty of a crime of the third degree.

replenished the funds in the escrow account, and he took steps to maintain more accurate recordkeeping practices. In the Matter of Felix Nihamin, DRB 10-073 (June 14, 2010).

On May 18, 2012, respondent entered a guilty plea to a one-count accusation charging him with third-degree misapplication of entrusted funds. The accusation stated, in relevant part:

> [B]etween on or about May 11, 2005 and on or about June 29, 2007, [in several New Jersey townships, respondent] purposely did apply or dispose of property in an amount in excess of $500 that had been entrusted to him as a fiduciary, in a manner that he knew to be unlawful and that involved a substantial risk of loss or detriment to the mortgage lender and/or purchaser/borrower; that is, [respondent], acting as a settlement agent in real estate closings, did apply or dispose of money in excess of $500 that had been entrusted to him as a fiduciary in relations to mortgage loans for [several individuals], by using said monies for unauthorized purposes and in a manner he knew to be in violation of his fiduciary duties, subjecting the lenders and/or the purchaser/borrowers to a substantial risk of loss or detriment contrary to the provisions of N.J.S.A. 2C:21-15.
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> [Ex.A-document2.]

At the plea hearing, respondent admitted that his office had performed residential real estate closings in Pequannock, Hanover, Brick, Clifton, Jersey City, East Orange, Irvington, Trenton, and Lacey Township, and that, in five or six cases, he had caused "untrue statement[s]" of material fact to "be made or

omit[ted]" on HUD-1 settlement statements (HUD-1), by inaccurately listing the deposit/earnest money on the HUD-1s. Respondent believed that the lenders would rely on the inaccurate information, when determining whether to authorize the closing as well as the disbursement of funds for the purchase of the properties.

Respondent admitted further that he owed a fiduciary duty to the lenders and the buyers in the transactions and that he had a duty to disburse the funds as required by the lenders' written instructions and as represented on the HUD-1s. Instead, respondent disbursed the funds based on the instructions of Peter Eckhardt, Jr., the principal of JP Global Property Management, LLC (JP Global) and George Armani and Sorab Moussavian, the principals of Vest Financial (Vest).[2] Respondent acknowledged that, at the time of the transaction, he knew that his actions were unlawful, that they caused a "substantial risk of loss" to the lenders, and that if he had not engaged in the conduct, the deals would not have been completed.

More specifically, from 2001 through 2008, respondent acted as the settlement agent in connection with a number of real estate closings. The New Jersey homeowners/sellers involved in

[2] The principals were respondent's co-defendants in the criminal matter.

the transactions were facing foreclosure proceedings and the possibility of losing their homes. Because they had credit problems, they were unable to obtain financing through traditional means. Their desperation led them to seek alternate methods to try to remain in their homes.

Vest and JP Global were the entities that structured and drafted the problematic "sale-leaseback" transactions with the homeowners that did not work out as the parties had anticipated. The loan officers for Vest and JP Global (the principals referenced above) completed and submitted loan applications to various lenders to find mortgage loans for the homeowners. The HUD-1s contained inaccurate information upon which the mortgage lenders relied, including the amount of earnest money deposited for the transactions. After the lenders wired the loan proceeds into respondent's trust account, he disbursed them in accordance with the loan officers' instructions, rather than as represented on the HUD-1s.

Respondent apologized for his conduct and accepted full responsibility for his actions. He emphasized, however, that the prior mortgages and liens were always satisfied and that the new lenders were always given first priority on their liens. Respondent added that he charged only his customary fee for the

closings and that his fees were properly reflected on the HUD-1s.

During the sentencing hearing, respondent expressed his regret for his conduct, which caused harm to himself and to others. He asserted that the events had a profound impact on him; that he was deeply humbled by this experience, which changed him not only as an attorney but also as a human being; and that he has since changed his office practices and the way he lives his life.

At sentencing, the Deputy Attorney General (DAG) expressed his satisfaction with respondent's cooperation, asserting that respondent "complied with every request the State has made." The DAG opined that respondent would be a successful candidate for "straight probation."

The sentencing judge balanced the one aggravating factor (deterrence) against the mitigating factors (the absence of serious harm, his compensation to the victims, his performance of community service, his lack of a prior criminal record, and the unlikelihood that his conduct would be repeated). The judge determined that the mitigating factors outweighed the aggravating factor, imposed a three-year term of probation, and ordered respondent to perform 100 hours of community service, to

make restitution totaling $130,000, and to pay fines and penalties.

According to the OAE's brief in support of the motion for final discipline, respondent's guilty plea to third-degree misapplication of entrusted property constituted violations of RPC 8.4(b) (commission of a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The OAE argued that disbarment is required, relying on the following cases where attorneys who had been convicted of misapplication of entrusted property were disbarred: In re Harris, 186 N.J. 44 (2006) (attorney knowingly misappropriated entrusted funds and engaged in money laundering, conspiracy to commit money laundering, theft by deception, and conspiracy to commit theft by deception; as the closing agent in several fraudulent real estate transactions, the attorney failed to pay off the liens, instead distributing all of the funds as her client had directed); In re Villoresi, 163 N.J. 85 (2000) (attorney was convicted of one count of second-degree misapplication of entrusted funds and two counts of second-degree theft for failing to make disposition of property received; the attorney retained $200,000 from the sale of his client's mortgage and depleted the funds by disbursing most of

them for his own purposes; he also obtained more than half of a million dollars from another client to create a trust fund for his client's children but, instead, used the funds for his own benefit, including paying his own debts); In re Bzura, 142 N.J. 478 (1995) (attorney was convicted of theft by deception, theft by failure to make required disposition of property received, misapplication of entrusted property, and false swearing); In re Iulo, 115 N.J. 498 (1989) (a jury found the attorney guilty of knowingly misappropriating client funds and two counts of misapplication of entrusted funds in connection with a real estate transaction; the attorney claimed that he had forgotten to pay off a mortgage; when he sent a $9,000 check to the lender, the check bounced; he knew that there were shortages in his trust account and deposited personal funds and a loan from a friend to try to cover the shortages); In re Kramer, 113 N.J. 553 (1989) (attorney pled guilty to one count of misapplication of trust funds and one count of falsifying or tampering with records; the attorney misappropriated client funds from the sale of real estate; rather than deposit the funds into his trust account, he deposited them in his personal account and drew against the funds; he also let his client sign an affidavit of title attesting that there were no liens against the property, when he knew that was not true); In re Goldberg, 109 N.J. 163

(1988) (attorney was found guilty of numerous counts of misapplication of entrusted funds; the attorney used trust funds to further his gambling addiction); In re Hilliard, 99 N.J. 479 (1985) (attorney was guilty of two counts of misapplication of funds; he used client funds to pay personal bills); and In re Gold, 98 N.J. 53 (1984) (attorney was guilty of two counts of misapplications of funds; he and another attorney embezzled funds to purchase property).

The OAE argued that disbarment is appropriate here because respondent did not disburse funds in accordance with the lenders' instructions, but, instead, according to the instructions of his co-defendants, the loan officers. Moreover, respondent specifically admitted that he knew that the disbursements were unlawful and "involved a substantial risk of loss or detriment to the lenders." The OAE's position was that, under In re Hollendonner, 102 N.J. 21 (1985) (requiring disbarment for misappropriation of escrow funds) and the above misapplication of entrusted funds cases, respondent, too, should be disbarred.

Respondent's counsel, in turn, maintained that disbarment is not warranted, because respondent did not engage in knowing misappropriation, as defined in In re Wilson, 81 N.J. 451 (1979). Counsel argued that misapplication involves "the risk of

a harm, but not necessarily the realization of a harm or the loss of a property interest." Counsel pointed out that, although respondent admittedly placed his clients' funds at greater risk, respondent did not deprive the lenders of their first-lien holder status in the subject properties.

Counsel's brief underscored the fact that respondent played no role in negotiating or advising the parties to the sale-leaseback agreements and that he did not prepare or supervise the preparation of the loan applications.

Counsel emphasized that respondent fully cooperated with the Attorney General's office, expressed remorse for the role that he played in facilitating the transactions, and committed to paying $130,000 in restitution. At oral argument before us, counsel noted that respondent already had paid $70,000 in restitution. Counsel added that, through his attorneys, respondent notified the OAE of his conviction.

Relying on the following cases, counsel argued that respondent's disbarment cannot be justified. In re Gensib, 209 N.J. 421 (2012) (six-month suspension for facilitating fraud in five real estate transactions; the attorney prepared and certified as accurate false HUD-1 statements; the attorney also engaged in conflicts of interest and failed to memorialize fee arrangements); In re Kaminsky, 212 N.J. 60 (2012) (three-month

suspension for preparing false HUD-1 statements); In re Ansetti, 212 N.J. 66 (2012) (censure for certifying the accuracy of false HUD-1 statements in two transactions); In re Gahwyler, 208 N.J. 353 (2011) (censure for attorney who acted as the settlement agent in a sale-leaseback transaction); In re Frohling, 205 N.J. 6 (2011) (censure for false certifications on settlement statements); In re Khorozian, 205 N.J. 5 (2011) (censure for representation of a buyer in a fraudulent transaction; a straw buyer bought the property in name only, with the understanding that the seller would continue to live in the property and buy it back; the attorney made misstatements in the HUD-1 about the amount of funds the buyer contributed to the acquisition of the property); and In re Curreri, 212 N.J. 433 (2012) (reprimand for attorney who certified the accuracy of HUD-1 statements containing misrepresentations).

Counsel contended that respondent's case is most factually similar to Gahwyler, and that the cases cited by the OAE involved conduct far more serious than respondent's. Counsel highlighted the fact that, other than obtaining his normal and customary fees, respondent did not retain any of the loan proceeds, which were disbursed according to the parties' agreements.

Counsel reasoned that, in light of the numerous compelling mitigating factors present here, and the fact that the abundance of case law demonstrates that similarly situated attorneys received far less discipline, the OAE's recommendation for disbarment should be rejected.

At oral argument before us, respondent's counsel emphasized that, at the time respondent engaged in the misconduct, he did not fully appreciate the risk to the lender. He is now more circumspect in real estate transactions and considers the interests of all parties to the transactions.

Following a review of the full record, we determine to grant the OAE's motion for final discipline. The existence of a criminal conviction is conclusive evidence of respondent's guilt. R. 1:20-13(c); In re Gipson, 103 N.J. 75, 77 (1986).

Respondent's guilty plea to a violation of N.J.S.A. 2C:21-15 constitutes a violation of RPC 8.4(b) and RPC 8.4(c). Only the quantum of discipline to be imposed remains at issue. R. 1:20-13(c)(2); In re Lunetta, 118 N.J. 443, 445 (1989).

The sanction imposed in disciplinary matters involving the commission of a crime depends on numerous factors, including the "nature and severity of the crime, whether the crime is related to the practice of law, and any mitigating factors such as

respondent's reputation, . . . prior trustworthy conduct, and general good conduct." In re Lunetta, supra, 118 N.J. at 445-46.

The proper measure of discipline in this case turns on the conduct that formed the basis for respondent's guilty plea to third-degree misapplication of entrusted property (N.J.S.A. 2C:21-15). Respondent did not misappropriate any of the funds for either his or another's benefit. In five or six transactions, he prepared HUD-1s that falsely indicated that earnest money deposits had been made. He also disbursed loan proceeds not in accordance with the lender's instructions. Therefore, the misapplication of entrusted funds cases cited by the OAE are inapplicable here. In those cases, the attorneys knowingly misappropriated client or escrow funds and, therefore, suffered the Wilson/Hollendonner sanction of disbarment. Here, respondent's conduct was more akin to that of the attorneys in the line of cases addressing misrepresentations in closing documents.

The discipline imposed for such misrepresentations has ranged from a reprimand to a term of suspension, depending on the seriousness of the conduct, the presence of other ethics violations, the harm to the clients or third parties, the attorney's disciplinary history, and other mitigating or aggravating factors. See, e.g., In re Barrett, 207 N.J. 34

(2011) (reprimand for attorney who misrepresented that a HUD-1 statement that he signed was a complete and accurate account of the funds received and disbursed as part of the transaction; the HUD-1 reflected the payment of nearly $61,000 to the sellers, whereas the attorney disbursed only $8,700 to them; the HUD-1 also listed a $29,000 payment by the buyer, who paid nothing; finally, two disbursements totaling more than $24,000 were left off the HUD-1 altogether; the attorney had no prior discipline); In re Mulder, 205 N.J. 71 (2011) (reprimand for attorney who certified that the HUD-1 that he prepared was a "true and accurate account of the funds disbursed or to be disbursed as part of the settlement of this transaction;" specifically, the attorney certified that a $41,000 sum listed on the HUD-1 was to satisfy a second mortgage; in fact, there was no second mortgage encumbering the property; the attorney's recklessness in either making or not detecting other inaccuracies on the HUD-1, on the deed, and on the affidavit of title was viewed as an aggravating factor; mitigating circumstances justified only a reprimand); In re Spector, 157 N.J. 530 (1999) (reprimand for attorney who concealed secondary financing to the lender through the use of dual HUD-1 statements, "Fannie Mae" affidavits, and certifications); In re Sarsano, 153 N.J. 364 (1998) (reprimand for attorney who

concealed secondary financing from the primary lender and prepared two different HUD-1 statements); In re Agrait, 171 N.J. 1 (2002) (reprimand for attorney who, despite being obligated to escrow a $16,000 deposit shown on a HUD-1, failed to verify and collect it; in granting the mortgage, the lender relied on the attorney's representation that the deposit had been made; the attorney also failed to disclose the existence of a second mortgage prohibited by the lender; the attorney's misconduct included misrepresentation, gross neglect, and failure to communicate to the client, in writing, the basis or rate of his fee); In re Ansetti, supra, 212 N.J. 66 (censure for making misrepresentations on HUD-1s in two matters and certifying the accuracy of the documents; the attorney also engaged in a conflict of interest); In re Gahwyler, supra, 208 N.J. 353 (censure for attorney who, in one real estate transaction, did not memorialize his fee arrangement, engaged in a conflict of interest by representing both sides, misrepresented the parties' disbursements and receipts on the HUD-1 statement, and certified the accuracy of those figures, thereby misleading the lender; the attorney's misrepresentations led to litigation in bankruptcy court involving the parties and the attorney; mitigation included the attorney's unblemished record of over twenty years, his noteworthy civic involvement, and the fact

that his intentions were not ill-founded); In re Soriano, 206 N.J. 138 (2011) (censure for attorney who assisted a client in a fraudulent real estate transaction by preparing and signing a HUD-1 statement that misrepresented key terms of the transaction; also, the attorney engaged in a conflict of interest by representing both the sellers and the buyers and failed to memorialize the basis or rate of his fee; the attorney had received a reprimand for abdicating his responsibilities as an escrow agent in a business transaction, thereby permitting his clients (the buyers) to steal funds that he was required to hold in escrow for the purchase of a business and for misrepresenting to the sellers that he held the escrow funds); In re Frohling, supra, 205 N.J. 6 (censure for attorney who, in three "flip" real estate transactions, falsely certified on the settlement statements that he had received the necessary funds from the buyers and that all funds had been disbursed as represented on the statements; the attorney's misrepresentations, recklessness, and abdication of his duties as closing agent facilitated fraudulent transactions; the attorney also engaged in conflicts of interest by representing both parties in the transactions and was found guilty of gross neglect and failure to supervise a non-lawyer employee; prior reprimand); In re Khorozian, supra, 205 N.J. 5 (censure imposed

on attorney who represented the buyer in a fraudulent transaction in which a "straw buyer" bought the seller's property in name only, with the understanding that the seller would continue to reside there and would buy back the property after one year; the seller was obligated to pay a portion of the monthly carrying charges; the attorney prepared four distinct HUD-1 forms, two of which contained misrepresentations of some sort, such as concealing secondary financing or misstating the amount of funds that the buyer had contributed to the acquisition of the property; aggravating factors included that the attorney changed the entries on the forms after the parties had signed them and that he either allowed his paralegal to control an improper transaction or that he knowingly participated in a fraud and then feigned problems with recall of the important events and the representation); In re Scott, 192 N.J. 442 (2007) (censure for attorney who failed to review the real estate contract before the closing; failed to resolve liens and judgments encumbering the property; prepared a false HUD-1 statement misrepresenting the amount due to the seller, the existence of a deposit, the receipt of cash from the buyer, and the amount of her fee, which was disguised as disbursements to the title company; prepared a second HUD-1 statement listing a "Gift of Equity" of $41,210.10; issued checks totaling $20,000

to the buyer and to the mortgage broker, based on undocumented loans and a repair credit, without obtaining the seller's written authorization; failed to submit the revised HUD-1 to the lender; failed to issue checks to the title company, despite entries on the HUD-1 indicating that she had done so; misrepresented to the mortgage broker that she was holding a deposit in escrow; and failed to disburse the balance of the closing proceeds to the seller; the attorney had received a prior admonition and a reprimand); In re Kaminsky, 212 N.J. 60 (2012) (three-month suspension for attorney who, in six matters, acted as the buyers' attorney and settlement agent and prepared HUD-1 statements containing false information about the transactions, including non-existent down payments from the buyers and fictitious amounts of proceeds to the sellers at closing; in two instances, the attorney failed to disclose the existence of side agreements; he was also guilty of a conflict of interest in one matter; no ethics history); In re Nowak, 159 N.J. 520 (1999) (three-month suspension for attorney who prepared two settlement statements that failed to disclose secondary financing and misrepresented the sale price and other information; the attorney also engaged in a conflict of interest by arranging for a loan from one client to another and representing both the lender (holder of a second mortgage) and

the buyers/borrowers); In re Gensib, supra, 209 N.J. 421 (six-month suspension for attorney who prepared and certified as accurate HUD-1s in five real estate transactions; engaged in a conflict of interest; and failed to memorialize fee agreements; the attorney had an ethics history); In re Fink, 141 N.J. 231 (1995) (six-month suspension for attorney who failed to disclose the existence of secondary financing in five residential real estate transactions, prepared and took the acknowledgment on false HUD-1 statements, affidavits of title, and Fannie Mae affidavits and agreements, failed to witness a power of attorney, and made a false statement to a prosecutor about the closing documents); In re Alum, 162 N.J. 313 (2000) (one-year suspended suspension for attorney who participated in seven real estate transactions involving "silent seconds" and "fictitious credits"; the attorney either failed to disclose to the primary lender the existence of secondary financing or prepared and signed false HUD-1 statements showing repair credits allegedly due to the buyers; in this fashion, the clients were able to obtain one hundred percent financing from the lender; because the attorney's transgressions had occurred eleven years before and, in the intervening years, his record had remained unblemished, the one-year suspension was suspended); In re Newton, 159 N.J. 526 (1999) (one-year suspension for attorney

involved in nine fraudulent real estate transactions; attorney prepared false and misleading HUD-1 statements in eight transactions, took a false jurat, and engaged in multiple conflicts of interest); and In re Frost, 156 N.J. 416 (1998) (two-year suspension for attorney who prepared misleading closing documents, including the note and mortgage, the Fannie Mae affidavit, the affidavit of title, and the settlement statement; the attorney also breached an escrow agreement and failed to honor closing instructions; the attorney's ethics history included two private reprimands, a three-month suspension, and a six-month suspension).

In our view, In re Gensib, supra, 209 N.J. 421 (six-month suspension), is factually similar to this case in that Gensib was guilty of misconduct in five real estate matters where he acted as the settlement agent and knowingly falsely certified that the HUD-1s he had prepared for each transaction were accurate accountings of the funds that had been deposited and disbursed for each transaction. Gensib, like respondent, did not initiate or mastermind the fraudulent conduct, but willingly facilitated the fraud by assisting his clients in the "deceitful enterprise." For a fee, he lent his name, as an attorney and settlement agent, in furtherance of the fraud.

In Gensib, we considered that the attorney readily admitted his misconduct by entering into a stipulation of facts with the OAE. Here, too, respondent cooperated in his criminal matter by pleading guilty and complying with all of the State's requests. The difference between Gensib and this case is that Gensib had a prior reprimand and censure, while respondent has only a prior admonition. Moreover, unlike here, Gensib was guilty of other violations. He engaged in a conflict of interest in two of the five transactions and, in all five transactions, did not memorialize the fee arrangements with the clients.

In re Kaminsky, supra, 212 N.J. 60, also presents circumstances similar to respondent's. Kaminsky received a three-month suspension for acting as the buyers' attorney and settlement agent in six matters and preparing HUD-1s that contained false information, including non-existent down payments and the fictitious distribution of proceeds to the sellers at the closing. He was also guilty of a conflict of interest in one matter, and two instances of failing to disclose side agreements, but, unlike respondent, had no ethics history.

The question is whether this matter is closer to Gensib (six months) or to Kaminsky (three months). Kaminsky had no prior discipline, while respondent received an admonition and Gensib had been previously reprimanded and censured. Although

both Gensib and Kaminsky, unlike respondent, committed additional violations, Gensib's were more serious: Kaminsky engaged in a conflict of interest in one instance while Gensib engaged in two conflicts of interest and failed to memorialize the basis or rate of the fee.

On balance, considering all of these circumstances, we determine that this case is more akin to Kaminsky than to Gensib. We, therefore, determine that a three-month suspension is sufficient here.

Member Gallipoli did not participate. Members Singer and Hoberman abstained.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Felix Nihamin
Docket No. DRB 13-245

Decided: December 18, 2013

Disposition: Three-month suspension

Members	Disbar	Three-month suspension	Reprimand	Dismiss	Abstained	Did not participate
Frost		X				
Baugh		X				
Clark		X				
Singer					X	
Yamner		X				
Doremus		X				
Gallipoli						X
Hoberman					X	
Zmirich		X				
Total:		6			2	1

Isabel Frank
Acting Chief Counsel