SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-102
District Docket No. XIV-2011-0663E

IN THE MATTER OF	:	
JOHN E. CERZA	:	
AN ATTORNEY AT LAW	:	Decision

Argued: June 19, 2014

Decided: October 9, 2014

Timothy J. McNamara appeared on behalf of the Office of Attorney Ethics.

Salvatore T. Alfano 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 recommendation for a reprimand filed by the District VC Ethics Committee (DEC), based on respondent's stipulated violations of RPC 1.3 (lack of diligence), RPC 1.15(b) (failure to promptly deliver funds to a client), RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), and RPC 8.4(d) (conduct prejudicial to the administration of justice). The OAE recommended either a

reprimand or a censure. Respondent urged a reprimand. We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1996. In 2010, he received an admonition for recordkeeping violations and failure to promptly satisfy tax liens in connection with two client matters, even though he had escrowed funds for that purpose. In re Cerza, 202 N.J. 337 (2010).

This disciplinary matter was prompted by an October 3, 2011 letter to the DEC from Erin J. Kennedy, Esq., who reported that respondent had acted as the settlement agent in a real estate transaction in which the seller, Jacqueline Houston, had not received all of the proceeds to which she was entitled. Kennedy's firm represented Barbara A. Edwards, Esq., the trustee in Houston's Chapter 7 bankruptcy proceeding and had discovered the alleged shortfall.

After respondent filed an answer to the formal ethics complaint, he stipulated to having violated all of the charged RPCs and waived his right to a hearing. He submitted certifications from himself and from five character witnesses.

The underlying real estate transaction took place on September 13, 2006, when Jacqueline Houston sold her Union Township home to Bryan Price for $250,000. Respondent

represented Price and acted as the settlement agent at the closing. Houston did not attend the closing. An individual named Bruce Alston appeared on her behalf, with a power of attorney (POA) allegedly signed by Houston on September 6, 2006. At the time of the closing, Houston's property was in foreclosure.

At the closing, Alston signed a use-and-occupancy agreement, which provided that respondent would hold $10,000 of the sale proceeds in escrow and that Houston could remain in the property until September 25, 2006, at a daily rate of $75. If she failed to vacate the premises at the end of the initial term, the daily rate would increase to $250. The agreement also provided that the escrow could be applied "to water and or mortgage payoff and rent for $2600.00."

At the closing, respondent gave Alston two trust account checks, totaling $90,435.37, as reflected on the HUD-1. The checks were payable to Houston. In addition, on October 17, 2006, respondent issued to Houston trust account check no. 3119 for $351.90, representing a "water escrow balance," and trust account check no. 3122 for $6,623.64, representing an "escrow balance," for a total of $6,975.54.

From the closing proceeds, respondent also issued a check to the existing mortgagee (Wells Fargo) for $132,010.73. Later, in April 2007, Wells Fargo refunded $464.24 to respondent, representing an overpayment of the mortgage pay-off figure. Respondent never disbursed those funds, which remained in his trust account for five years. He claimed that, initially, he did not know whether Price or Houston was entitled to those funds. Later, when he reconciled his accounts for an OAE audit in connection with the matter for which he received an admonition, he determined that the funds belonged to Houston. Respondent stated that he is prepared to disburse these funds, which his attorney is holding in trust.

According to Kennedy, Houston's bankruptcy proceeding revealed that she had received only $9700 from the sale proceeds, rather than the $90,435.37 reflected on the HUD-1. Thus, the bankruptcy trustee suspected fraud.

On June 4, 2009, Kennedy served respondent with a "Subpoena for Rule 204 Production of Documents" in the Houston bankruptcy proceeding. Respondent failed to comply with the subpoena.

On September 29, 2009, the trustee filed an adversary proceeding in the Houston bankruptcy matter against Price (the buyer), respondent, and others. The next day, respondent was

served with the summons and complaint. He did not file an answer or otherwise appear in the lawsuit.

On October 21, 2009, the bankruptcy court ordered respondent to produce the subpoenaed documents. Respondent failed to comply with that order.

On August 19, 2010, the court entered a $305,341.89 default judgment against all defendants, including respondent, in the adversary proceeding.

In his written reply to the grievance, respondent asserted that he (1) disbursed the proceeds in accordance with the HUD-1 that was approved by the lenders; (2) spoke to Houston after the closing and she "did not raise any issue regarding the closing proceeds;" and (3) negligently failed to answer the complaint that resulted in the judgment. He denied any wrongdoing in connection with the transaction.

At an OAE demand interview, on July 16, 2012, respondent stated that he had no business dealings with either Price or Alston, prior to the Houston closing. He explained that Alston had appeared at his office for the closing with the signed POA and a copy of Houston's driver's license. He contended that, during a telephone conversation with Houston, before the closing, she had confirmed that she had given Alston the POA and

that she was unable to attend the closing. Houston denied respondent's contention. According to respondent, Houston had also told him that she needed to remain in the house, after the closing.

Respondent told the OAE that he "had handled prior closings where POA [sic] were utilized". His practice was to check the identification of the POA parties, ensure that the document had been properly notarized, and record the POA with the closing documents. He stated that he had followed this procedure, at the Houston-to-Price closing.

The HUD-1 form reveals that respondent disbursed a $100 survey refund to Price, rather than to Houston, who had paid Price's closing costs. Respondent admitted that the $100 "technically" belonged to Houston.

According to respondent, he disbursed to himself $3,689.88 in fees and costs, including $1080 in recording fees. Yet, according to the OAE's review of respondent's file, the actual amount of recording fees was only $410, not the $1080 reflected on the HUD-1, a difference of $670.

Respondent's counsel told the OAE that the figures that respondent inserted on the HUD-1 were estimates and that respondent acknowledged that he "should have returned the

difference between what was estimated and collected and what the actual costs were - namely $670." According to counsel, respondent's failure to do so resulted from negligence and respondent was "prepared to reimburse these moneys," upon the OAE's instruction.

Of the five certifications offered in support of respondent's character, four were from attorneys and one was from the Belleville Chief of Police, Joseph P. Rotunda. All expressed the opinion that respondent is a well-respected, fair, courteous, and honest professional. In addition, each of them stated that respondent had explained to them the ethics proceedings instituted against him, admitted his wrongdoing, and expressed remorse therefor.

In mitigation, the parties stipulated that respondent had cooperated with the OAE's investigation, acknowledged responsibility for his wrongdoing, and displayed remorse for his derelictions.

Based on the stipulated facts, the DEC found clear and convincing evidence that respondent had violated RPC 1.3, RPC 1.15(b), RPC 3.4(c), and RPC 8.4(d). In mitigation, the DEC noted respondent's cooperation with the OAE, his admission of

wrongdoing, his remorse, the "strong character witness testimony," and his service to the community.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

Respondent disbursed the $100 survey refund to Price, rather than to Houston, who paid Price's closing costs. He also disbursed $410 for recording costs, instead of the $1,080 reflected on the closing documents, but failed to refund the $670 balance to Houston, as well as the $464.24 that has now been held in escrow for more than five years. By failing to promptly turn over funds to a client or third person, respondent violated RPC 1.15(b).[1]

Additionally, respondent failed to comply with a "Subpoena for a Rule 204 Production of Documents" and, after the action was filed, failed to obey the bankruptcy court's order compelling him to comply with the Rule 204 subpoena. Eventually, a default judgment was entered against him and the

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[1] Although respondent also stipulated a violation of RPC 1.3 for this conduct, the more applicable rule is RPC 1.15(b).

other defendants. By knowingly disobeying an obligation under the rules of a tribunal, respondent violated RPC 3.4(c) and RPC 8.4(d).

Ordinarily, attorneys who fail to obey court orders are reprimanded. See, e.g., In re Mason, 197 N.J. 1 (2008) (with information gathered during the representation of Marx Toys, the attorney switched sides to represent a competing entity; he was found guilty of having violated a court order entered after the switch, directing him not to "perform any legal work which involves Marx Toys and [not make] any disclosures regarding Marx;" conflict of interest also found); In re Gourvitz, 185 N.J. 243 (2005) (attorney repeatedly disregarded several court orders requiring him to satisfy financial obligations to his former secretary, an elderly cancer survivor who sued him successfully for employment discrimination; the attorney had refused to allow the secretary to return to work after her recovery from cancer surgery, because the medical condition had disfigured her face); In re Carlin, 176 N.J. 266 (2003) (attorney failed to comply with two court orders and with mandatory trust and business recordkeeping requirements; gross neglect, lack of diligence, failure to communicate with the client, and failure to promptly deliver funds to a third person

also found); In re Kersey, 170 N.J. 409 (2002) (motion for reciprocal discipline; reprimand for attorney who failed to comply with orders of a Vermont family court in his own divorce matter); In re Holland, 164 N.J. 246 (2000) (attorney who was required to hold in trust a fee in which she and another attorney had an interest took the fee, in violation of a court order); In re Malfara, 157 N.J. 635 (1999) (attorney failed to honor a bankruptcy judge's order to reimburse the client $500 for the retainer given in a case where he failed to appear at two court hearings, forcing the client to represent himself; other violations were gross neglect and failure to cooperate with ethics authorities during the investigation of the matter); and In re Milstead, 162 N.J. 96 (1999) (attorney disbursed escrow funds to his client, in violation of a court order).

Here, respondent also failed to promptly disburse escrow funds, an impropriety that is usually met with an admonition. See, e.g., In the Matter of Raymond Armour, DRB 11-451, DRB 11-452 and DRB 11-453 (March 19, 2012) (in three personal injury matters, attorney did not promptly notify his clients of his receipt of settlement funds and did not promptly disburse their share of the funds; the attorney also failed to properly communicate with the clients; mitigation considered); In the

Matter of Douglas F. Ortelere, DRB 03-377 (February 11, 2004) (attorney failed to promptly deliver balance of settlement proceeds to client after her medical bills were paid); and In the Matter of E. Steven Lustig, DRB 02-053 (April 19, 2002) (for three-and-a-half years, attorney held in his trust account $4800 earmarked for the payment of a client's outstanding hospital bill). In fact, as said before, respondent himself received an admonition for not promptly satisfying tax liens out of funds that had been escrowed for that purpose. In re Cerza, supra, 202 N.J. 337.

The attorney in Carlin, much like respondent, ignored two court orders and failed to promptly disburse trust funds. Carlin received a reprimand. Carlin did not have a disciplinary record, contrasted to respondent's prior admonition, and presented mitigating factors that were more compelling than respondent's. On the other hand, Carlin also exhibited gross neglect, lack of diligence, and failure to communicate with the client. All things considered, however, we believe that the circumstances in both cases are on balance. We determine that, like Carlin, respondent should receive a reprimand.

We further determine to require respondent to provide proof to the OAE, within thirty days of the Court's order, that he has returned $2,004.24 ($100 + $670 + 464.24) to Houston.

Member Gallipoli voted for a censure. Member Rivera abstained. Vice-Chair Baugh did not participate.

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: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John E. Cerza
Docket No. DRB 14-102

Argued: June 19, 2014

Decided: October 9, 2014

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Censure	Abstained	Did not participate
Frost			X			
Baugh						X
Clark			X			
Gallipoli				X		
Hoberman			X			
Rivera					X	
Singer			X			
Yamner			X			
Zmirich			X			
Total:			6	1	1	1

Ellen A. Brodsky
Chief Counsel