SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-016

IN THE MATTER OF

ROBERT SUSSER

AN ATTORNEY AT LAW

Decision of the
Disciplinary Review Board

Argued: April 19, 1995

Decided: December 20, 1995

Brian J. Molloy appeared as Special Presenter.

Anthony J. LaRusso appeared on behalf of respondent.

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

Respondent was admitted to the New Jersey bar in 1979. He practices law in Red Bank, Monmouth County.

The original formal ethics complaint, bearing District Docket No. IX-91-011E and Docket No. DRB 93-026, charged respondent with giving fraudulent homeowners' warranties to the buyers in three real estate matters, misrepresenting to the buyers that the warranties had been obtained and presenting fraudulent homeowners' warranties to Neptune Township for the purpose of obtaining certificates of occupancy (first count). The complaint also

charged respondent with disbursing $5,000 in escrow funds to the seller of real estate, a corporation in which respondent had an interest, without first securing the buyers' authorization to the release (second count).

On the scheduled date of the DEC hearing, respondent and the presenter entered into a stipulation in lieu of hearing. As to the first count, respondent stipulated that he misrepresented the status of a homeowners' warranty in one of the transactions. The remaining allegations in that count were dismissed, in light of the presenter's recognition that the evidence was insufficient to show that respondent — as opposed to another principal of the seller-corporation — was responsible for the fraudulent warranties. As to the second count, respondent stipulated that he released the escrow funds to a seller-corporation of which he was the attorney and a shareholder, before obtaining the consent of the buyers. The DEC recommended public discipline.

Following a review of the file, supplemented by oral argument on March 24, 1993, the Board reversed the findings of the District IX Ethics Committee and remanded the case to the Office of Attorney Ethics ("OAE") for a full investigation and prosecution. The Board directed that the hearing proceed before the District VII Ethics Committee and that the proceedings be expedited. The Board did not retain jurisdiction.

Prior to the filing of the formal ethics complaint, but after the OAE had essentially completed the investigation of the matter, it was discovered that the wife of an OAE attorney is the cousin of

an associate in respondent's law firm. After consultation with the Board and with the Supreme Court, it was decided that to avoid any appearance of impropriety the matter should be prosecuted by a Special Presenter and heard by a Special Master, both unaffiliated with any district ethics committee. It was also decided that the OAE should have no further involvement with the matter and that the DRB supervise the ethics proceedings.

On April 27, 1994, the Court appointed a Special Presenter and a Special Master.

On May 17, 1994, the Special Presenter filed a five-count formal complaint charging respondent with knowing misappropriation, conduct involving a criminal act, and conduct involving dishonesty, fraud, deceit or misrepresentation, in that he released $5,000 in escrow funds to a seller-corporation of which he was a shareholder without first securing the consent of the buyers (first and second counts); misrepresentation to counsel for the buyers that the funds were still in escrow as well as misrepresentation to the OAE about his involvement in the seller-corporation and the timing of the release of the escrow funds (third count); conduct involving dishonesty, deceit or misrepresentation, for misleading the homeowners into believing that their properties were covered by warranties (fourth count); and misrepresentation to the OAE that the responsibility for obtaining the homeowners' warranties fell on another principal of the seller-corporation (fifth count).

During the course of the three-day hearing before the Special Master, respondent's counsel amended the answer to include a

separate defense of double jeopardy, on the basis that a formal ethics proceeding had already taken place before the District IX Ethics Committee. The Special Master elected to proceed with the hearing, leaving that determination for either the Board or the Court. The Board disagreed with the contention that double jeopardy barred its review and proceeded with the hearing.

The grievant is Michael A. Irene, Jr., Esq., the attorney for the buyers in the real estate transaction from which the ethics charges arose.

* * *

A. THE PARNELL MATTER

A client of respondent introduced him to John Cremeans, whom respondent represented in a collection matter. In or about 1985, John Cremeans retained respondent to represent his corporation, Diversified Products, Inc. ("DPI"), in a venture involving the purchase of land and construction of a small housing development on ten acres in Neptune. Initially, respondent acted only as counsel for DPI. Later on, however, he purchased a one-third interest in DPI.

DPI obtained a $1,600,000 loan from Collective Federal Savings Bank for the acquisition of the land and the construction of the houses. The loan, which was personally guaranteed by respondent and John Cremeans, was payable in eighteen months. Because at times the bank either would not authorize the release of the

construction loan draw or would authorize the release of only a percentage of the draw, in or about 1988 the corporation had to seek additional financing. That financing was provided by John's father, Robert Cremeans, who also began to acquire corporate stock. Some of those loans were the subject of promissory notes signed by respondent and John Cremeans on behalf of DPI. Respondent, too, made some loans to DPI.

* * *

On November 17, 1988, Adria and Theodore Parnell closed title on one of the houses built by DPI. They were represented by Michael A. Irene, Jr., Esq., the grievant in this matter. Respondent represented DPI. At the closing, the parties agreed that respondent would hold $5,000 in escrow to guarantee the completion of certain work itemized on a "punch list." The list read as follows: "5000.00 to be held in escrow by Robert Susser, Esq. until all punch list items completed to reasonable satisfaction of Buyers." Exhibit P-5. This makeshift escrow agreement was signed by Theodore Parnell and by respondent, in behalf of DPI. Neither John nor Robert Cremeans attended the closing or was aware of the agreement reached at the closing.

By check dated November 17, 1988, the date of the closing, Irene gave respondent $5,000 to be held in escrow. Exhibit P-6. Although the check bore the same date as the closing date, respondent contended that he received it eighteen or nineteen days

after the closing. Irene, in turn, asserted that he gave respondent the check at the time of the closing.

Three weeks after the closing, on December 6, 1988, respondent deposited the $5,000 check in his law firm's trust account. At that time, respondent was a partner at Karasic, Stone and Susser, in Oakhurst. Two days later, on December 8, 1988, respondent released the entire $5,000 escrow to DPI. He admittedly did so without first obtaining the Parnells' or their counsel's consent and prior to the completion of the "punch list" items.

According to respondent, Robert Cremeans, who at that time had exclusive control of the books and financial affairs of the corporation, demanded that the funds be released for the payment of payroll taxes. Respondent complied. After the release of the $5,000, respondent made no effort to ascertain whether they had been used for the payment of payroll taxes. The only important thing to respondent was that Robert Cremeans utilize the funds for a DPI obligation. In fact, Robert Cremeans did not use the escrow funds for payroll taxes. Instead, he paid certain corporate obligations, including a loan installment to himself.

A reconstruction of DPI's account activity undertaken by the OAE showed that, just before the deposit of the $5,000, the account was overdrawn by $2,110.83. After the $5,000 deposit, the account reflected a $2,889.17 positive balance. Robert Cremeans wrote five checks against the account on December 9, 1988, before the account once again became overdrafted. Those checks were: $495.23 to Berris Mellet; $502.90 to Robert Cremeans; $1,500 to ABC

Excavators; $245.67 to Margaret Coville; and $495.23 to Berris Mellet.

Respondent testified that, although not all of the items on the "punch list" had been completed when he released the escrow funds, he was assured by Robert Cremeans that John Cremeans was doing the work and that, in fact, "a lot" of the work had already been done. T178-79, 359-60. Adria Parnell, however, testified that, as of the date of the release of the escrow funds, only one item on the "punch list" had been completed. T96. Respondent contended that, in addition, he believed that the $5,000 escrow exceeded the cost of the repairs. Asked why he had released the escrow money to DPI, respondent replied:

> * * * it was a combination of [Robert Cremeans'] demand and what I believed at that time to be -- I know I'm wrong in doing it but what I believed at the time to be the cost or value of the work that had to be done at that point. I just don't know the exact amount of work that we'd already done, what was left to do at that time. I just -- you know, I -- that's what I say, I prefaced the whole thing by saying I thought the $5,000 demand, I thought we were -- they basically held us up at the closing for that amount, that it really did not represent the value of the work.
> [Exhibit P-20 at 40-41, T360-61]

Respondent admitted that, when he released the $5,000 escrow funds to DPI on December 8, 1988, he intended to do so. He conceded that the funds were not released as a result of a clerical mistake. As mentioned above, respondent's explanation was that he believed that the escrow funds exceeded the value of the work performed, that "a lot" of the work on the "punch list" had been completed at the time of the release and, in addition, that he had

succumbed to Robert Cremeans' demands for the release of the money because he was afraid of Cremeans. Respondent testified as follows:

A. * * * Robert Cremeans was an overbearing person * * * * Bob was basically running the show at that point in time, and he's — you don't question him.

Q. Are you saying you were intimidated by him?

A. Very much so.

Q. I assume it wasn't physical intimidation? There were no threats, were there?

A. No physical threats.

Q. Emotional, mental intimidation?

A. Yes * * * *

[T201]

Q. * * * Is it your testimony that you could have questioned him but you did not question him about this? There's nothing about your testimony that would tell me that you couldn't question him physically.

A. Physically question him?

Q. Yes, or say to him no, I'm not going to release it. I have an obligation to not only DPI but also to the Parnells, to the other attorney, to my profession, I can't do it.

A. I said that to him.

Q. And he said, I don't care, I want the money?

A. Right, and that's what I said * * * *

[T202-03]

Q. * * *You could have told him I can't do it, couldn't you have?

A. He would have — he was the kind of person that he would have come down to the office, sat in the office waiting room, not even the office waiting room, demanded to see me, demanded to have the check written, make a whole scene because he was demanding that money be released. There was no reason for money to be escrowed. His son was getting the work done, and so on and so on. I mean, he's the kind of person — he would — you just don't say no to him that's what he — I mean, he would get on the phone and scream if I continued to say no. He would — he might have even called Mike Irene. He would have done anything he could to get that $5,000 because he wanted the $5,000. He didn't think there was a reason for $5,000 being escrowed, and John's getting the work done, John's gotten the work done, and all of that.

[T207]

Q. He did not physically intimidate you at that time when he appeared in your office when you had the $5,000 Parnell check; isn't that true?

A. Yes. He did not physically threaten me.

Q. Or intimidate you? If I can split hairs on that? He didn't physically intimidate you at that time, did he? Were you frightened by just the mere fact that he was six foot two and you're five foot six?

A. No.
Q. And he was standing over you with his eyes bulging?

A. No, but I was fearful if I didn't give him an answer that he wanted, the next office that he would be in would be my [law] partners' office.

[T302-03]

He wouldn't let go of me until I agreed to do what he wanted to do. When I mean let go, not necessarily physically, but do whatever he had to do, to cause me to agree to get that money released — to release that money. And he

knew that I did not want to involve my partners in something like this.

Q. Let me ask you something, Mr. Susser. If there were $500,000 in escrow, and that was being held, that money was being held because the house had a major problem, that you consider major, would you have given him the $500,000? We're not talking about $5,000, we are now talking about $500,000. Would it have made a difference, the amount of the money?

A. Yes.

Q. Why?

A. I guess it would have mattered as far as my resolve to stand up against him. Somehow the amount of money and my resolve to stand up against him had kind of had something to do with it.

[T304-05]

* * * [H]e was questioning me as an attorney why I even allowed $5,000 to be escrowed when his son — when the "punch list" was this small, and this was just a continuation of his questioning of me, and he blaming me. It was my fault that the $5,000 was in escrow not because the house wasn't done or anything like that, it was always my fault. Everything became my fault.

[T306]

Robert Cremeans did not testify at the DEC hearing.

* * *

On March 22, 1989, Michael Irene, attorney for the Parnells, wrote to respondent complaining that the work had not been completed and demanding the release of the monies in escrow to be applied to the outstanding items on the "punch list." As noted earlier, the funds had already been released on December 8, 1988,

of which Irene and the Parnells were unaware. By letter dated March 28, 1989, respondent replied as follows:

> Dear Mike:
>
> I was surprised not only to receive your letter of March 22, 1989, but also to receive a phone call from Mrs. Parnell approximately one week ago wherein she advised that there were items of work other than the air conditioning and driveway. Since I was uncertain as to what minor items remained outstanding, I directed Mr. Cremeans to contact Mrs. Parnell. She appeared to be satisfied with my efforts. Therefore, I am surprised by your action at this time.
>
> The amount of work that needs to be completed does not come close to the $5,000 in escrow. I will see to it that whatever minor items need to be addressed are resolved, and that the air conditioning be installed and the driveway stone be applied no later than April 7, 1989. I am sure that this is satisfactory to your client. Whatever work is not completed by that date, we will agree upon a value and deduct it from the escrow.
>
> Please discuss this with your clients and get back to me at your earliest convenience.
>
> [Exhibit P-8]

Respondent did not tell Irene at that time that the escrow funds had been released some three months before. It was not until September 11, 1989 that respondent finally apprised Irene that the funds had been released in December 1988.

Respondent denied that he intended to conceal the release of the monies from Irene. He acknowledged, however, that his letter could "suggest" that the funds were still in escrow. Respondent added that, at the time that he wrote that letter, he considered revealing to Irene that the monies had been released months earlier, but decided against it because he believed that DPI had

essentially satisfied the conditions of the escrow agreement and because he was personally embarrassed by his inability to stand up to Robert Cremeans.

* * *

Ultimately, respondent assumed personal responsibility for the payment of the repairs on the Parnell residence, which cost him approximately $5,000. In fact, when respondent left the Karasic law firm in 1990, he allowed the firm to withhold $5,000 of certain monies due to him, until the Parnells were satisfied that the repairs had been undertaken. On October 23, 1990, the Parnells authorized the law firm to disburse the sum of $4,350 to respondent, after the deduction of $650 for some of the repairs. Exhibit R-2.

B. THE HOMEOWNERS' WARRANTIES ("HOW") MATTER

The formal ethics complaint also alleged that, in 1988 and 1989, respondent handled three real estate transactions, Parnell, Szynal and Misdom, involving the sale of single-family houses constructed by either DPI or Renaissance Construction and Development Corp. ("Renaissance"), a company solely owned by respondent. The complaint alleged that, in each of these transactions, the buyers were presented with HOW certificates that

had not been actually issued. The complaint also charged that, following the closings of title, respondent wrote to several of the homeowners or their attorneys, advising them that HOW coverage would be confirmed and would be in effect as of the date of the closing. Lastly, the complaint alleged that neither respondent nor DPI or Renaissance arranged for HOW coverage on any of these properties and that respondent failed to so inform the homeowners or their counsel, thereby leading them to believe that their houses were covered.

* * *

The Special Master concluded that respondent knowingly misappropriated the escrow funds when he released them to a corporation of which he was a shareholder, prior to obtaining the consent of the buyers. The Special Master made no specific findings on whether the $5,000 released to DPI ultimately found its way into the account of a corporation solely owned by respondent, Renaissance, as alleged in the complaint. The Special Master also found that respondent misrepresented to Irene that the monies were still in escrow when, in fact, they had been released. The Special Master dismissed the allegations that respondent made false and misleading statements to the OAE (third count) as well as the allegations of misconduct in connection with the homeowners' warranties (third, fourth and fifth counts).

* * *

Following a de novo review of the record, the Board is satisfied that the Special Master's findings are fully supported by clear and convincing evidence. The Board also agrees with the Special Master's dismissal, for insufficient proofs, of the allegations of false statements to the OAE during the investigation of this matter and the allegations of misconduct in connection with the homeowners' warranties. Although the Special Master made no specific findings as to whether the $5,000 disbursed to DPI wound up in Renaissance's account, the Board concludes that the evidence is insufficient to support a finding of misconduct in this regard. Respondent testified that the $5,000 deposit to Renaissance's account on December 21, 1988 was unrelated to the Parnell transaction and pertained to obligations between DPI and Renaissance. There is no evidence refuting respondent's testimony.

It is clear, however, that, in his letter of March 29, 1989, respondent misrepresented to Irene, the attorney for the Parnells, that the funds were still in escrow. Respondent's letter to Irene stated that "* * * [t]he amount of work that needs to be completed does not come close to the $5,000 in escrow * * * * Whatever work is not completed by [April 7, 1989], we will agree upon a value and deduct it from the escrow." (Emphasis supplied). Exhibit P-8. Respondent's claim that he had no intention to mislead Irene is unworthy of belief. The letter unambiguously referred to the funds as being in escrow. Moreover, by respondent's own admission, he

considered telling Irene that the monies had been released but decided against it because he believed that, in essence, DPI had fulfilled the terms of the escrow agreement and because he was embarrassed by his weakness in the face of Robert Cremeans' demands. The Board is persuaded that respondent intended to mislead Irene and that his conduct on this score was a clear violation of RPC 8.4(c).

With respect to the release of the escrow funds, it is undeniable that respondent breached his fiduciary duty as escrow agent when he released the funds to DPI before all the repairs had been undertaken and without the Parnells' authorization. "* * * [A]bsent some extraordinary provision in an escrow agreement * * * it is a matter of elementary law that when two parties to a transaction select the attorney of one of them to act as the depository of funds relevant to that transaction, the attorney receives the deposit as the agent or trustee for both parties." In re Hollendonner, 102 N.J. 21, 28 (1985)(citations omitted). The more difficult question is whether respondent's conduct amounted to knowing misuse of escrow funds.

Had respondent not had an interest in the seller-corporation, his transgression might have been limited to breach of the escrow agreement. This would be so because, although the release of the funds was premature, that is, prior to the occurrence of the event that gave rise to the escrow agreement, the funds were directly disbursed to one of the parties to the agreement. Cases dealing with this sort of ethics impropriety have generally resulted either

in the imposition of a private reprimand (now an admonition) or, at most, a public reprimand. For instance, an attorney received a private reprimand for releasing escrow funds to a client without the other party's consent, following the attorney's inability to obtain bills from two of the client's creditors. Another attorney was also privately reprimanded for releasing escrow funds to a client without the seller's approval, based on the honest belief that the client was entitled to the monies. In another case, an attorney received a public reprimand for releasing escrow funds to himself, as buyer of real property, when several complaints to the builder demanding completion of repairs went unanswered. In re Flayer, 130 N.J. 21 (1992).

Thus, if an attorney, prior to the fulfillment of the conditions stipulated in an escrow agreement and without the consent of the other party, releases, in good faith, escrow funds to a party to the agreement — or to a third-party beneficiary — the attorney will not be facing disbarment, although clearly the attorney will be guilty of a breach of the escrow agreement.

What puts this matter in the category of disbarment cases is the fact that respondent had an interest in DPI and did not act out of a good faith belief that DPI was entitled to the entire escrowed sum. Knowing misappropriation "* * * consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for

the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client." In re Noonan, 102 N.J. 157, 160 (1986). In Hollendonner, the Court noted the obvious parallel between escrow funds and client trust funds. The Court ruled that "[s]o akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the disbarment rule of In re Wilson, 81 N.J. 451 (1979)." In re Hollendonner, supra, 102 N.J. at 28.

Under the Hollendonner rule, thus, respondent must be disbarred. Without the buyers' — or their attorney's — permission, respondent disbursed to the seller/corporation, in which he had an interest, funds that were to be kept in escrow until the seller's completion of the repairs enumerated on the "punch list." Respondent disbursed the $5,000 to DPI only two days after depositing the funds in his firm's trust account. He knew that the work had not been completed. He lied about the transaction thereafter in correspondence to Irene. As the final straw, he had a financial interest in DPI. It matters not that the benefit to respondent might have only been indirect or tenuous. In knowing misappropriation cases, the purpose for which the taken monies are used is irrelevant. In re Noonan, supra, 102 N.J. at 160.

Respondent's vigorous attempts to defend his actions as the product of coercion on Robert Cremeans' part cannot save him from disbarment. That the pressure to take the money is great is

irrelevant to a finding of knowing misappropriation. Ibid. In addition, the proofs do not demonstrate that the circumstances caused a loss of competency or comprehension of such magnitude that it served to excuse respondent's knowing and purposeful conduct. In re Jacob, 95 N.J. 132, 137 (1984).

A four-member majority of the Board recommends that respondent be disbarred for his violation of the Hollendonner rule. Three members dissented, voting for a six-month suspension. Those members filed a separate dissenting decision. Two members did not participate.

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

Dated: December 20, 1995

Elizabeth L. Buff

ELIZABETH L. BUFF
VICE-CHAIR
Disciplinary Review Board