SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-452

IN THE MATTER OF	
RICHARD R. THOMAS, II	
AN ATTORNEY AT LAW	

Decision

Argued: February 13, 2004

Decided: April 22, 2004

Scott L. Weber appeared on behalf of the District VA Ethics Committee.

Thomas R. Ashley 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 based on a recommendation for discipline (three-year suspension) filed by Special Master Bernard A. Kuttner. The six-count complaint charged respondent with multiple violations stemming from his conduct as the closing attorney in a real estate transaction.

Count one charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.4(a) (failure to communicate with client), RPC 1.5(b) (failure to provide client with written retainer agreement), RPC 1.7(a) (conflict of interest – representing a client where the representation of that client is directly adverse to another client), RPC 1.15(b) (failure to promptly deliver to the client or third person any funds to which the client or third person is entitled), RPC 4.1(a) (knowingly making a false statement of material fact or law to a third person), RPC 8.4(b) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). These charges stemmed from, among other things, respondent's receipt of a wire transfer of mortgage funds into his trust account, and his failure to promptly pay off certain amounts reflected in the HUD-1 settlement statement ("HUD-1").

Count two charged respondent with violations of RPC 1.1(a), RPC 4.1(a), and RPC 8.4(c) for misrepresenting on the HUD-1 that the borrower submitted cash at the closing.

Count three charged respondent with violations of RPC 1.1(a), RPC 1.3 (lack of diligence), RPC 1.4(a), RPC 1.7(b), RPC 1.15(b), RPC 4.1(a), RPC 8.1(a) (knowingly making false statements of material fact in connection with a disciplinary matter), RPC

8.4(a) (violating or attempting to violate the Rules of Professional Conduct), RPC 8.4(b), and RPC 8.4(c) for failing to turn over the net sales proceeds to the seller, as was reflected in the HUD-1, and instead turning over the funds to another individual.

Count four charged violations of RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.15(b), RPC 8.4(a), RPC 8.4(b), and RPC 8.4(c) for respondent's failure to disburse funds to the seller despite her repeated requests, and despite the fact that he continued to hold more than $9,000 from the closing in his trust account.

Count five charged respondent with violations of RPC 1.1(a), RPC 1.15(b), and RPC 1.15(d) and R. 1:21-6 (recordkeeping violations) for failure to prepare a client ledger card, and failure to properly account for the actual disbursements made from the closing on the HUD-1 statement.

Finally, count six charged respondent with a violation of RPC 8.1(a) for making false statements to the Office of Attorney Ethics ("OAE") relating to the transaction.

Respondent was admitted to the New Jersey bar in 1996. He maintains a law practice in New Brunswick, New Jersey.

Respondent was admonished in 2001 after he failed to comply with the terms of an agreement in lieu of discipline. His conduct in the two matters giving rise to the admonition included failure

to communicate to his clients that he was no longer acting as their attorney and failure to protect their interests upon termination of the representation. In the Matter of Richard R. Thomas, II, Docket No. DRB 01-083 (June 29, 2001).

The present matter involves respondent's conduct in connection with a closing. Michele Johnson owned property at 476 Laurel Street, Orange, New Jersey. She had lived there since 1968. The property had been deeded to her by her grandmother in the early 1980s. As of 1997, she lived there with her fiancé, Reginald Hayes.

At some point Johnson's property went into foreclosure. The Public Defender's Office assisted her in filing for bankruptcy protection. Apparently, even though Johnson made payments under the bankruptcy plan, her mortgage fell into arrears. As a result, her house was scheduled for sheriff's sale. Johnson was able to obtain two adjournments of the sheriff's sale, pro se. After consulting with friends, she decided to refinance her mortgage, and was referred to Charles Shelton, a credit counselor and owner of One Stop Consulting. Shelton informed Johnson that, because of her poor credit history, he could not help her refinance her mortgage. He advised her that, in order to obtain a third postponement of the sheriff's sale, she would need the assistance of an attorney. He referred her to respondent.

Together, in May 2001, Shelton and Johnson telephoned respondent. For a $500 fee, respondent agreed to help Johnson obtain a third adjournment of the sheriff's sale. Although respondent had not represented Johnson before, he did not provide her with a retainer agreement. On that same day, it was decided that to save the house from sheriff's sale Johnson would sell her house to Hayes. Respondent drafted the contract of sale.

The contract of sale listed Hayes' address as 14 Arsdale Terrace, East Orange, New Jersey, which was not true. It also stated that the purchase price was $98,000; that Hayes was to pay $1,000 upon signing the contract; and that he was to obtain a first mortgage in the amount of $88,200. The balance of the sales price, $8,800, was to be paid at closing in cash or by certified or bank check. The closing date was to take place on or before June 15, 2001.

On or about May 15, 2001, respondent succeeded in obtaining the third adjournment of the sheriff's sale. Because the closing did not take place when anticipated, Johnson's house was sold at a sheriff's sale. As a result, on or about July 2, 2001, respondent filed a motion to extend Johnson's redemption period nunc pro tunc. He succeeded on the motion. Johnson testified that she believed that respondent continued to represent her through the

motion and through the closing, since he never told her that he had stopped representing her.

At some point not specified in the record, Hayes filled out a mortgage application form. The form contained numerous false entries, including the wrong home address, the wrong bank in which he maintained an account, an inflated bank balance, his ownership of a car, and an inflated salary (approximately twice what he actually earned). It is not known who assisted him in filling out the form. Hayes claimed, however, that, when he signed the form, some of the information was missing. When Hayes questioned respondent about the mistakes in the application, before signing it, respondent told him not to worry about it. Hayes stated that Shelton, Antonio Ellis[1] and respondent told him that he would purchase Johnson's house without having to put any money down; the "cash to seller" amount would come from the mortgage. The mortgage was approved by Worldwide Financial Resources.[2]

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[1] According to respondent, Antonio Ellis was in the business of matching up people about to lose their property with other individuals "to take over their property to either help pull people out of foreclosure or else to help clear them up somehow." Ellis apparently also assisted individuals with poor credit histories in obtaining mortgages.

[2] Earlier, a mortgage commitment letter had been sent to Hayes to an old address. The loan commitment was subject to, among other things, proof of payment of two judgments: one for $1,603 to University Surgical, Inc., and the other for $249 to the Division of Motor Vehicles. Hayes never received the commitment letter.

The closing occurred on the evening of July 16, 2001. Shelton and Ellis drove Johnson and Hayes to Shelton's house, where the closing took place. Although they arrived there at approximately 9:00 p.m., the closing did not start until approximately 11:30 p.m., when respondent arrived with the paperwork.

At the closing, Johnson and Hayes recalled going through a stack of judgments to determine which ones belonged to each of them. According to Johnson, respondent did not review the documents with her at the closing. He asked her to sign the HUD-1 statement, without explaining the entries, and without giving her the opportunity to question them. Johnson and Hayes did not receive copies of the closing documents until approximately one month after the closing. When Johnson reviewed the documents, she tried to call respondent several times to inquire about some of the information on them, to no avail. Respondent did not return her calls.

The HUD-1 listed $55,778.71 as the "cash to seller" amount. Johnson believed that she would realize that amount from the sale. She did not, however, understand that item 303 ("cash from borrower") required Hayes to bring to the closing $16,390. Neither one of them had those funds.

Johnson did not receive any money at the closing. Respondent told her that he had to "crank out the numbers" and that she would receive her money the next day. As seen below, that was not true.

According to Johnson, a few days after the closing, respondent called her and told her that she would have to sign one last paper before she could get the closing proceeds. Johnson stated that Ellis and Shelton came to her house with several documents for her to sign, including one that stated:

> To whom it may concern:
>
> I, Michele Johnson, presently residing at 476 Laurel Street, Orange, New Jersey, and the former owner of said property, do hereby direct the law offices of Richard R. Thomas, II, LLC, to distribute the proceeds from the sale [sic] 476 Laurel Street, to Ellis Investments. The proceeds are being paid to Ellis Investments for the services they performed the above referenced transactions [sic].
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> [Exhibit OAE-12.]

Johnson stated that she felt uneasy about the language in that document and, therefore, telephoned respondent. According to Johnson, respondent advised her to sign the document so that Ellis could make the disbursements for the closing and she could get the proceeds of the sale. Johnson did not understand that, by signing the document, Ellis would realize more than $35,000, and she would receive nothing. She testified that, had she known that circumstance, she would not have gone forward with the closing.

Johnson alleged that respondent also asked her to sign four additional HUD-1 forms, and to provide a blank check from Hayes' checking account to enable the mortgage company to verify the existence of his bank account. Johnson explained that she took a blank check from the middle of the checkbook, "one of the fancy ones," so that she would remember which check had been submitted for verification purposes. She claimed that she turned the check over to Ellis a day or two after the closing. It was not until she received copies of the closing documents that she learned that someone other than Hayes had completed the check. The photocopy showed that the check was payable to her in the amount of $16,390.69. Her name was misspelled, and she believed that the signature at the bottom was not Hayes'. Hayes also confirmed that he had not completed the check or signed it. Both denied that the check was turned over to Johnson at the closing. The check was never negotiated, and its whereabouts are unknown. Neither Hayes nor Johnson ever had that much money in their account.

Johnson testified that she never saw the entry on the HUD-1 "cash from borrower, $16,390.69," and, therefore, never questioned the entry; had she seen it, she would have questioned it, because of Hayes' lack of funds. When she attempted to look at the documents during the closing, she was told that she only had to sign a few of them; the folder containing the documents was

closed. A month later, and after Johnson's efforts to contact respondent, Ellis, and Shelton were unsuccessful, Hayes contacted Henry Furst, Esq. to assist him and Johnson in obtaining information about the closing.

It was not until after Johnson filed a grievance against respondent and the OAE intervened that Johnson received any monies from respondent. By letter dated February 27, 2002, respondent forwarded a check to Johnson in the amount of $1,313.68. The letter stated:

> At the time of the closing you directed this office to disburse your proceeds to Ellis Investments. Unfortunately, Mr. Ellis tragically lost his life, thus, the remaining proceeds from the sale revert back to you.[3]
>
> [Exhibit OAE-7.]

The letter further stated that respondent was holding approximately $4,103 in trust: $1,603 for the payment of one of Hayes' judgments, and an additional $2,500 as fees for services that respondent rendered in connection with the motion to extend the redemption period. By letter dated February 28, 2002, however, respondent forwarded another check to Johnson, in the amount of $2,500. Thus, the total amount that Johnson received from the

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[3] The report prepared by OAE investigator Wanda Riddle stated that, on February 15, 2002, Ellis was murdered. A detective from the Essex County's Prosecutor's Office informed Riddle that his office was investigating Ellis and his alleged involvement in various mortgage fraud scams. Ellis's three associates, allegedly involved in the scams, were also murdered.

closing was $3,813.68. Respondent noted that the check represented the amount that he had been holding in connection with the motion he had filed, and requested that Johnson forward a check to him for his outstanding fee.

The OAE investigator's report memorialized her telephone interview of Antonio Ellis. According to Ellis, he contacted respondent the week of July 9, 2001, to ask him to close the loan for Johnson and Hayes. He confirmed that, after the closing, "on or about July 19, 2001," he asked respondent to turn over the proceeds to him. Respondent refused to do so unless Ellis obtained an assignment from Johnson. According to Ellis, he and Shelton drove to Johnson's house and waited in the car while Johnson signed the assignment. Ellis claimed that he had a verbal agreement with Johnson for the sale proceeds. Johnson denied the existence of such agreement.[4]

At all times, Johnson believed that respondent was acting as her attorney. She stated that she trusted all of the individuals involved in the closing. Although she admitted agreeing to pay Ellis the mortgage company charges, she testified that she never understood that she would be paying an outrageous amount for his

[4] The OAE investigator's report also indicated that, in a subsequent interview with Shelton, Shelton denied accompanying Ellis, post-closing, to Johnson's home. According to the report, Shelton stated that Ellis was dead and got what he deserved. He further claimed that he had no further dealings with Ellis after the Johnson closing.

services. Johnson relied on respondent to represent her at the closing and "to make sure everything was correct."

Hayes, too, believed that respondent was representing him and Johnson at the closing. Respondent never told him to retain other counsel. In fact, Hayes signed a form at the closing, believing that he had selected respondent as his attorney. According to Hayes, respondent told him that his fee would come out of the mortgage, as would the "cash to seller" amount.

Hayes confirmed much of Johnson's testimony. Hayes testified that documents were placed before him for signature, without any explanation of their contents. According to Hayes, respondent told him to sign the documents and he did so believing that respondent was looking out for his best interests. Hayes claimed that he was told that Johnson would receive $55,778.71, after all closing expenses were paid. Hayes testified, notwithstanding this representation, respondent failed to satisfy a judgment listed on line 1304 of the HUD-1. As a result, Hayes ended up paying it to avoid having his wages garnished.

As to the $16,590.69 check to Johnson, Hayes stated that it was not in his handwriting, that Johnson's first name was misspelled, and that he did not sign his name in the manner in which it appeared on the check. According to Hayes, Ellis requested his blank check to verify the existence of his checking

account to qualify him for the mortgage. Hayes admitted that he did not maintain such a large balance in his checking account, and that he never saw a copy of the completed check until Henry Furst obtained copies of the closing documents from respondent, a month after the closing.

Hayes had never applied for credit before. He had no car loan, no credit cards, and no credit history. Prior to applying for the mortgage loan, he did not know that he had any outstanding debts. According to Hayes, Ellis and respondent took care of the entire mortgage process. Hayes did not receive notice that his mortgage loan had been approved. He learned of the approval from respondent and Ellis. He had no knowledge of the mortgage process or how he had obtained the mortgage loan.

Henry Furst testified that he tried to contact respondent several times, to no avail. Eventually, he spoke with respondent, who admitted that he represented Hayes and had formerly represented Johnson. Furst questioned respondent about the services provided by Ellis that would warrant the payment of more than $35,000. Respondent simply referred him to the authorization signed by Johnson. The OAE investigator's report stated that, since Furst did not specialize in real estate matters, he advised Johnson and Hayes to consult a real estate attorney, because something "just didn't smell right." Furst told the OAE

investigator that Johnson and Hayes were "very nice people," "unsophisticated," and "classically trusting."

At the DEC hearing, the OAE investigator testified that respondent did not prepare a client ledger card for the Johnson/Hayes transaction, until requested to do so by the OAE. From the records obtained during the course of her investigation, the OAE investigator determined that, on July 16, 2001, the lender had wire-transferred $95,072.27 to respondent's trust account.

The HUD-1 that respondent prepared and certified as true reflected the "cash from borrower" amount as $16,390.69, and the "cash to seller" amount as $55,778.71. Respondent contended that Hayes provided his personal check no. 1124 in the amount of $16,390.69. However, respondent did not deposit the check into his trust account, and it was never negotiated. Also, respondent was required to remit net sales proceeds of $55,778.71 to Johnson. Respondent did not disburse the loan proceeds in accordance with the HUD-1. As shown in a table prepared by the OAE investigator, the HUD-1 differed substantially from the actual disbursements made by respondent.

Respondent incorrectly reflected on the HUD-1 that loan proceeds of $93,100 were received, rather than the actual amount of $95,072.27. In addition, he failed to reflect disbursements totaling $38,788.54 (the checks to Ellis and the service release

premium ["SRP"]), and failed to disburse a total of $5,760.77 shown on the HUD-1 as having been paid. The checks to Ellis (check nos. 1626 and 1628) were the first checks issued by respondent and totaled $35,662.29. The Ellis checks represented a portion of the net sales proceeds that Johnson should have received. In fact, there were no disbursements made to Johnson until after the OAE intervened. Respondent reflected on the HUD-1 that the $3,126.25 service release premium was paid outside of closing. In fact, it was paid from the loan proceeds. Respondent also failed to pay the outstanding judgment of $1,603, as directed by the lender. After respondent made certain disbursements, $9,096.68 remained in his attorney trust account.

OAE investigator Riddle testified that she had obtained from respondent copies of the checks that he had given to Ellis. When she showed Johnson and Hayes the check copies, it was "obvious" to her that they were unaware that the checks had been given to Ellis.

Riddle further testified that she interviewed Ellis about the transaction. Ellis recalled that, on or about July 19, 2001, he requested from respondent the sale proceeds, based on his "verbal agreement" with Johnson, and that he and Shelton then took the assignment document to Johnson, post-closing, for her signature. Ellis was unable to give Riddle an explanation as to why he was

getting the proceeds from the sale, other than to tell her that he and Johnson had a verbal agreement. Although Riddle did not have much opportunity to testify at the DEC hearing, her report stated that, during Shelton's interview, he told her that, "Ellis had failed to pay [respondent] from the Johnson proceeds that he received. Shelton did not know how much Ellis was supposed to pay [respondent]." The report further stated that, during a second interview with respondent, respondent admitted that "[h]e expected to be paid something from the funds given to Ellis."

Respondent confirmed that, on May 10, 2001, he was retained to postpone the sheriff's sale on Johnson's property. He succeeded in obtaining the postponement. However, the Johnson/Hayes closing did not occur before the property was sold at a sheriff's sale, in June 2001. Thereafter, he prevailed on his motion to extend the redemption period. Respondent conceded that he did not provide Johnson with a written retainer agreement, but instead gave her a receipt with a notation about the services he would render. Respondent was unable to produce the receipt. Respondent claimed that he never spoke to Hayes until the closing, but admitted drafting the contract of sale and faxing it to him.

Respondent conceded that he had been involved in several other transactions with Ellis. He claimed that he had met Ellis at a closing on June 1 (presumably 2001), for a similar type of

transaction. After that closing, Ellis had also received the balance of the proceeds.

Respondent denied that he represented either Johnson or Hayes at the closing. He claimed that he represented the title company, free of charge. Notwithstanding this assertion, the HUD-1 shows two disbursements to respondent: a fee of $950 and $300 for title examination. According to respondent, when he arrived at the closing, he inquired as to who would be paying his fee; Ellis replied that the seller was responsible for respondent's fee.

In an attempt to explain the discrepancy between the amount that the mortgage company wire-transferred to him ($95,072.27) and the principal amount of the loan ($93,100), respondent stated that the net proceeds wired into his account were for additional fees and services that the lender wanted paid. He stated that

> [t]he additional funds that were wired in there were for additional fees that the bank wanted paid but they were not a loan to Mr. Hayes. They funded into the wire, and then the closing agent is required to make those payments but is not required -- Mr. Hayes is not responsible for the $95 plus thousand dollars. He's only responsible for the $93,000.
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> [2T46-2T47.][5]

Respondent explained that he failed to satisfy one of the judgments reflected on the HUD-1 as paid, because he did not know who the judgment creditor was. He also claimed that the SRP was to

[5] 1T denotes the transcript of the September 22, 2003 DEC hearing. 2T denotes the transcript of the October 2, 2003 DEC hearing.

be paid by the seller. Respondent, however, paid the SRP from the loan proceeds. He claimed that, afterwards, he instructed Johnson to have Hayes submit monies for the SRP; to prevent the cancellation of the mortgage, he submitted the SRP from the mortgage loan. Because Hayes never reimbursed that amount, respondent believed that he had insufficient funds to pay off the remaining closing costs listed on the HUD-1. After he prepared a client ledger card, at the OAE's request, he learned otherwise. Respondent never pursued Hayes for the SRP amount.

Respondent contradicted Johnson's and Hayes' testimony, as well as Ellis' statement, about the Hayes check. Respondent claimed that Hayes handed him the completed check at the closing, which he turned over to Johnson. Respondent stated that, during the closing, no one questioned whether the check had been forged.

As to the assignment of the closing proceeds, respondent asserted that Johnson and Ellis had discussed the terms at the closing. Respondent, therefore, typed up the agreement for Johnson to sign at the closing. Respondent did not question Ellis about the agreement. During the OAE investigation, respondent admitted that he had no idea how Ellis had arrived at his "fee," and that Johnson "didn't express any concern about the [assignment] and that he assumed everything was fine with them." At the DEC hearing, respondent stated that he did not feel the need to

question why Ellis was getting approximately one third of the loan amount.

After respondent paid the SRP, he stopped working on the matter and making disbursements. Respondent did not perform an accounting to determine what was left in his account. As of September 24, 2002, respondent still had more than $9,000 in his trust account. By the date of the DEC hearing, he had $2,711.24 left in his trust account, which apparently belonged to Johnson.

Respondent claimed that he was called on the day of the closing to purportedly act as a settlement agent. This contradicted Ellis' statement to the OAE investigator that he had called respondent during the week of July 9th to ask him to participate in the closing. Respondent prepared the affidavit of title and the deed, and filed the deed with the county registrar on August 23, 2001. The deed contained an incorrect sale price. Respondent's excuse for the mistake was that he was working from a copy of the title report, and had used the amount for which the property was insured, not the sale price.

The special master found that Johnson and Hayes must have known about the mortgage application scheme and were willing participants in the application process. He also found that respondent knowingly made false representations on the HUD-1 at the time he prepared it, and certified it to be true and accurate.

Specifically, the special master concluded that respondent misrepresented on the HUD-1 that he had made ten disbursements, when in fact they were not paid. Respondent's bank records and trust checks showed that the disbursements were made several months after the closing, and only after the OAE intervened in the matter. Respondent failed to include on the HUD-1 checks paid to Ellis, in the amounts of $9,500 and $26,162.29. Those checks were drawn before any other disbursements were made.

The special master found that respondent misrepresented that Johnson was to receive $55,778.71 ("cash to seller") for the transaction. The special master determined that Johnson could not have received that amount unless Hayes submitted $16,390.69 at the closing. The special master concluded that respondent knew that Hayes had not provided that amount of cash at the closing, and, therefore, knew that Johnson could not and would not receive $55,778.71.[6]

The special master noted that, at the closing, Johnson signed the deed that was prepared by respondent and that misrepresented the sale price as $106,000 and/or $105,000. Respondent knew that the sale price was false, as he had previously prepared the contract of sale and the HUD-1, both listing the sale price as

[6] Although the special master found that respondent sent through the mail the HUD-1 and deed that included false information, he did not find a violation of RPC 8.4(b) (criminal act) in this regard.

$98,000. Respondent, nevertheless, certified the deed and had it filed and recorded with the Essex County Registrar.

In count one, the special master found that respondent failed to keep his client (presumably Johnson) reasonably informed about the status of the matter and failed to promptly comply with her requests for information. The special master also found a conflict of interest, because respondent did not obtain written consent to represent the parties (whom the special master did not identify) at the closing, or, in the alternative, did not memorialize that respondent was not representing each, both, or only the title company. The special master also found that respondent violated RPC 1.15(b) by not promptly paying off the judgments and delivering the balance due to Johnson, and RPC 4.1(a) and RPC 8.4(c) by misrepresenting the sale price to the mortgage company and making false statements to third parties about the financing. The special master did not find clear and convincing evidence of a violation of RPC 1.5(b), apparently because of the urgency of the representation.

For the same reasons applicable to his findings in count one, the special master found violations of RPC 1.1(a), RPC 4.1(a), and RPC 8.4(c) in count two, in connection with respondent's participation in the mortgage financing process.

In count three, the special master did not find clear and convincing evidence of a violation of RPC 8.4(b). He determined, however, that respondent did not keep client ledger cards or proper books and records, in violation of RPC 1.15(d) and R. 1:21-6 (recordkeeping violations).

As to counts four and five, the special master found that respondent violated RPC 1.15(b) and RPC 1.15(d). He also found that respondent's failure to properly account for disbursements and funds on hand was a violation of RPC 1.1(a). Finally, in count six, the special master found that respondent's statements to the OAE were inaccurate and false, in violation of RPC 8.1(a).

The special master concluded that respondent participated in a sham (presumably against the mortgage company), failed to keep proper records, failed to disburse funds, failed to cure the conflict of interest, and gave false information to third persons, as well as to the OAE. The special master also found that respondent recklessly misapplied trust funds – apparently by failing to promptly pay judgments and the balance of the proceeds due to Johnson – made false statements under oath, was grossly negligent in handling his trust account, and had a prior disciplinary record. Because the special master determined that Johnson knowingly executed the assignment of funds, he did not find knowing misappropriation. Instead, he found that respondent's

conduct constituted willful blindness, as in In re Skevin, 104 N.J. 476 (1986). The special master recommended a three-year suspension.

Following a de novo review of the record, we find that the evidence clearly and convincingly establishes that respondent's conduct was unethical.

We find that respondent knew about the conspiracy to defraud the mortgage company and ratified the conspiracy through his conduct in connection with the closing.

At the outset, respondent agreed to represent Johnson to assist her in obtaining a third adjournment of the sheriff's sale on her property. He had never represented her before, and, therefore, was required to provide her with a written retainer agreement. Respondent claimed that, instead, he gave her a receipt. Not only did he fail to produce the receipt at the hearing, but a receipt would not have satisfied the requirements of the rule. Respondent's conduct in this regard, thus, violated RPC 1.5(b).

On the same date that respondent agreed to represent Johnson, he also prepared a contract of sale between her and Hayes and faxed it to Hayes. Afterwards, when Johnson's house was sold at a sheriff's sale, respondent filed a motion in her behalf to extend the period of redemption nunc pro tunc. Later, he prepared the

closing documents, was the closing agent at the closing, and took a fee from Hayes' mortgage proceeds. Respondent claimed that he did not represent Johnson and Hayes at the closing. He never apprised them of that fact. They, therefore, had a reasonable belief that respondent was acting as their attorney at the closing, and, in fact, so testified. They believed that respondent was there to protect their interests. In addition, at the closing, Hayes signed the New Jersey Right to Own Attorney Disclosure, believing that his attorney was respondent. Finally, after the closing, respondent admitted to Furst that he was Hayes' attorney. Because Johnson's and Hayes' interests were adverse, respondent's failure to inform them of the desirability of seeking independent counsel, and his failure to obtain their consent to the continued representation of both, and presumably the title company, violated RPC 1.7(a).

According to Hayes, respondent assisted him in the mortgage application process. It is undisputed that the application contained numerous false statements, including, but not limited to, the wrong address for Hayes, an inflated bank balance in a fictitious account, and an inflated salary. Respondent denied assisting Hayes with the application. There is no clear and convincing evidence in the record that he assisted in the preparation of that false application. It cannot be denied,

however, that respondent was responsible for the preparation of the HUD-1, which contained numerous misrepresentations. Thereafter, he signed the certification indicating that he prepared the document and that it was "a true account of the funds disbursed or to be disbursed . . . as part of the settlement of [the] transaction." Underneath respondent's signature was the warning that "it is a crime to knowingly make false statements to the United States on this or any other similar form." Respondent knew, when he prepared the form, that Johnson would not receive $55,778.71; he knew that he misstated the amount of the mortgage loan; he knew that he did not receive $16,390.69 from Hayes, because it was not deposited into his trust account; he knew that he omitted any reference on the form to the disbursements made to Ellis; and he knew that he did not make a number of the disbursements listed on the HUD-1. This conduct violated RPC 4.1(a) and RPC 8.4(c).

Assuming, for the sake of argument, that Ellis and Johnson had a valid agreement for the assignment of her funds, Ellis was entitled only to the net proceeds from the transaction, after all other closing disbursements had been made. However, Ellis received the first disbursements. In addition, respondent admitted that he did not make any disbursements after he paid the SRP. He also failed to take any action to correct any of the misstatements in

the form. Because it is a crime to knowingly make false statements on a HUD-1, we find that respondent's conduct violated RPC 8.4(b).

Respondent also drafted the deed, which misstated the sale price and the grantor's acknowledgment of receipt of the money. He then sent it to the county registrar for recording. Respondent claimed that he mistakenly inserted the wrong amount on the deed, and that he used the amount for which the property had been insured, not the sale price. This claim is simply not believable. Because respondent prepared the other documents for the transaction, he should have been aware of the sale price. Moreover, there is no evidence that he took any action to correct his mistake. This, too, violated RPC 8.4(c).

In addition, respondent's failure to make prompt disbursements from the closing proceeds and his failure to remit the remaining proceeds to Johnson violated RPC 1.15(b); his failure to reply to Johnson's numerous telephone calls violated RPC 1.4(a); his false statements to the OAE in connection with the investigation (relating to his failure to pay off certain items after the closing) violated RPC 8.1(b); and his mishandling of the entire transaction violated RPC 1.1(a) and RPC 1.3.

As to the sale proceeds, respondent claimed that Johnson and Ellis had an agreement that the proceeds would be turned over to Ellis. Respondent claimed that Johnson and Ellis discussed the

agreement in his presence. He also stated that he had earlier been involved in a similar transaction with Ellis, where the sellers turned over their proceeds to Ellis. He claimed that he drafted the agreement at the closing, and had Johnson sign it that night. The testimony of Johnson and Hayes, and Ellis' statement to Riddle, however, show otherwise. A day or two after the closing, Ellis requested his disbursement from the closing. Respondent would not release the proceeds without a signed authorization from Johnson. According to Ellis, he and Shelton drove the agreement to Johnson's house to obtain her signature. Johnson and Hayes both confirmed this. They also confirmed that they were uneasy with the language in the agreement, and that Johnson had called respondent to determine whether she should sign the document. Respondent advised her to sign the document so that Ellis could make the disbursements for the closing, including her share. Johnson's, Hayes', and Ellis' contention that the assignment was obtained days after the closing is more believable. Johnson relied on respondent to protect her interests. Significantly, no one – not respondent, Ellis or Johnson – could specify which services Ellis provided to justify his receipt of the lion's share of the sale proceeds. Even though it was respondent's duty to protect his clients' interests, he never inquired why the purported agreement

was struck between Ellis and Johnson, and certainly never advised Johnson that the agreement was of no benefit to her.

Even if we accept respondent's explanation for the agreement, the only conclusion that can be drawn from the evidence is that respondent was involved in a conspiracy to defraud the mortgage lender and to coerce a desperate mother of nine to give up monies that were rightfully hers or, in the alternative, lose her house. Respondent's conduct in this regard violated RPC 8.4(c). Respondent knew both Shelton and Ellis and, by his own admission, had been involved in a similar mortgage transaction the month before. It is, therefore, logical to conclude that respondent was involved in this scam from the outset. Although the mortgage lender was defrauded, Johnson was the only true victim in the scheme. Johnson lost her family home and the proceeds from the sale of her house. While it is true that the mortgage loan was procured by fraud, the harm to the mortgage company is unknown, since Hayes became obligated to make the mortgage payments.

In sum, respondent's misconduct included violations of RPC 1.1(a), RPC 1.3, RPC 1.4(a), RPC 1.5(b), RPC 1.7(a), RPC 1.15(b) and (d), RPC 4.1(a), RPC 8.1(a), and RPC 8.4(a), (b) and (c).

Respondent's conduct in connection with the mortgage scam, which was carried out to prevent a sheriff's sale of Johnson's property, is akin to that found in In re Newton, 159 N.J. 526

(1999). In Newton, the attorney was suspended for a one-year period for her involvement in a mortgage fraud scheme. The attorney participated in a scheme to defraud lenders by drafting lease/buyback agreements that were specifically created to avoid secondary financing and to allow the sellers, not the investors, to remain on the premises. The attorney took at least one false jurat, and in eight transactions acknowledged documents that contained misrepresentations, including affidavits of title, Fanny Mae affidavits and agreements, and HUD-1 statements. As a result, the lenders were deceived into believing that the investors were going to occupy the subject properties as their primary residences.

More specifically, Newton became involved with a company that did business with persons experiencing difficulties in making their mortgage payments or who were on the verge of defaulting on their mortgage loans. The company used a mortgage broker to obtain financing for the clients and to find investors to purchase the homes from the financially distressed clients. Newton's role in the transactions was to act as the settlement agent in the title closings and purportedly to represent the investors. Some of the sellers also believed that she was acting as their attorney. She arranged the closings and prepared much of the paperwork. The

Court found that Newton engaged in a conflict of interest, and in conduct involving dishonesty, fraud, deceit or misrepresentation.

See also In re Frost, 156 N.J. 416 (1998) (two-year suspension where the attorney breached an escrow agreement, failed to honor closing instructions, and prepared misleading closing documents, including the note and mortgage, the Fannie Mae affidavit, the affidavit of title, and the settlement statement; attorney's ethics history included two private reprimands, a three-month suspension, and a six-month suspension); In re Fink, 141 N.J. 231 (1995) (six-month suspension where the attorney 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); and In re Labendz, 95 N.J. 273 (1984) (one-year suspension where the attorney assisted his clients in obtaining a larger loan by submitting a fraudulent mortgage application and altering the contract submitted with the mortgage application to reflect a greater sale price).

One further point deserves mention. The special master found that respondent's conduct constituted willful blindness, as in In re Skevin, 104 N.J. 476 (1986). We disagree. Generally, a finding of willful blindness is reserved for situations involving the unauthorized taking of client monies. The Court has characterized

an attorney's conduct as willful blindness when an attorney acts without satisfying himself or herself that he or she is not misappropriating funds, such that the attorney's state of mind goes beyond recklessness and satisfies the requisite of knowledge. In other words, the "intentional and purposeful avoidance of knowing what is going on in one's trust account will not be deemed a shield against proof of what would otherwise be a 'knowing misappropriation.' " In re Davis, 127 N.J. 118, 130 (1992).

While the special master may have found that respondent turned a blind eye to the mortgage scam, we do not find this to be the case, nor do we find willful blindness. We find that respondent's actions constituted an endorsement of the proscribed conduct.

We have considered the nature and extent of respondent's actions, as well as the discipline imposed for analogous conduct. In our view, a one-year suspension is the appropriate measure of discipline for respondent's overall ethics transgressions. Two members did not participate.

We further determine that, prior to reinstatement, respondent must submit proof to the OAE that he has completed a seminar in real estate law and ten hours of professional responsibility courses.

We also determine that, upon reinstatement, for a two-year period, respondent must practice under the supervision of a proctor approved by the OAE.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Richard R. Thomas, II
Docket No. DRB 03-452

Argued: February 13, 2004

Decided: April 22, 2004

Disposition: One-year suspension

Members	*Disbar*	*One-year Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley		X					
O'Shaughnessy		X					
Boylan		X					
Holmes		X					
Lolla							X
Pashman							X
Schwartz		X					
Stanton		X					
Wissinger		X					
Total:		7					2

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel