SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-211

IN THE MATTER OF :

KARL A. FENSKE :

AN ATTORNEY AT LAW :

Decision

Argued: July 23, 1998

Decided: January 11, 1999

Willard Bergman, Jr. appeared on behalf of the District X Ethics Committee.

Respondent appeared pro se.

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

This matter was before the Board based on a recommendation for discipline filed by the District X Ethics Committee ("DEC"). The complaint alleged a violation of RPC 1.15 (improper release of escrow funds). The crux of this matter was whether respondent's return of a real estate deposit to his client was improper.

Respondent was admitted to the New Jersey bar in 1977 and maintains an office for the practice of law in Morristown, New Jersey. He has no prior disciplinary history.

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In February 1996, respondent was retained by David Vorcheimer to represent him in the purchase of a house from the grievant in this matter, Alicia Soukup. The initial real estate contract provided that respondent would hold the $29,000 deposit in escrow until the closing. Respondent requested a number of modifications to the contract, including a provision that the seller's attorney hold the deposit money.[1] By "fax" dated February 12, 1996, Soukup's attorney, William Pegg, Jr., advised respondent that the modifications were acceptable to Soukup. The attorney review period ended on that date.

On February 14, 1996, Pegg "faxed" a letter to respondent requesting that the balance of the deposit money, $28,000, be delivered to the broker that day as called for in the contract. The broker was already holding the initial $1,000 deposit from Vorcheimer. Pegg had forgotten that the addendum to the contract provided that he was to hold the deposit. He was also mistaken that the remainder of the deposit was due on February 14, 1996. Because the

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[1] There was no apparent reason for respondent's request that seller's attorney hold the deposit, instead of respondent. Respondent had a practice, in real estate matters, of sending a form to the other attorney containing standard modifications to the contract. One of these standard modifications was that seller's attorney hold the deposit, instead of buyer's attorney.

addendum adjusted all dates to commence at the conclusion of attorney review, the deposit was not due until February 26, 1996.

Nevertheless, on February 14, 1996, respondent sent a reply "fax" to Pegg stating that the "deposit is in" and attached copies of Vorcheimer's $29,000 check made payable to respondent's trust account, as well as an escrow control sheet showing that respondent had established an escrow in Vorcheimer's name. Vorcheimer testified that respondent told him to make the check payable to respondent. The deposit was never forwarded to Pegg, as required by the contract, or to the broker, as Pegg had requested.

After the house was appraised, a dispute arose because the contract price was $291,000 and the appraiser valued the house at $270,000. The crucial communications between respondent and Pegg occurred on February 27, 1996. On that date, Pegg "faxed" a letter to respondent in which he stated that he had been advised of the low appraisal and of Vorcheimer's second thoughts about purchasing the house. The letter further stated that the low appraisal should not be of serious concern because Vorcheimer was putting $88,000 of his own money into the purchase, there was still a good loan-to-value ratio and the mortgage should be approved even with the low appraisal.

Pegg and respondent agreed that they had a telephone conversation about the appraisal on February 27, 1996; however, there were material differences in the testimony of respondent and Pegg as to the substance of that conversation.

On direct examination, Pegg testified that respondent told him that the house had "underappraised" and that his client could not purchase it. According to Pegg, he told respondent that he wanted to see the appraisal and the mortgage denial and that the deposit could not be released until Pegg was assured that Vorcheimer could not obtain a mortgage. Later, on cross-examination, Pegg testified that there might not have been any discussion at all about the deposit money. However, Pegg remained adamant that he would never have told respondent, without documentation of a mortgage denial, that the deposit could be released.

Respondent, in turn, testified that Pegg called him on February 27, 1996 and told him that "the deal was dead," that Soukup would not lower the purchase price and that she was putting the house back on the market. Respondent testified that there was no discussion of the deposit during that conversation.

On February 28, 1996, respondent "faxed" a letter to Pegg, dated the day before. That letter stated as follows:

> Based on our conversation today and the appraisal of $270,000, the Contract will be declared null and void and I will return my client's deposit moneys to him. By copy of this letter I am requesting the Realtor to return the $1,000 deposit to my client as well.[2]

Pegg replied to respondent by "fax" on the same day, stating that he had merely advised respondent that, in the event Vorcheimer could not obtain a mortgage, Soukup would "consider immediate termination of the contract as being futile." Pegg further warned respondent that he

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[2] In fact, the broker had already returned the initial $1,000 deposit to Vorcheimer so that Vorcheimer could issue a check for the entire $29,000 deposit.

was not authorized to release the deposit money and requested copies of the mortgage application, appraisal and mortgage denial letter.

Respondent "faxed" a reply to Pegg's "fax" that same day, stating that Pegg had indicated in their February 27, 1996 telephone conversation that the "deal was dead." He also advised that he had already returned the deposit to Vorcheimer based on that conversation.

On February 29, 1996, Pegg "faxed" a letter to respondent in which he stated that the release of the deposit was a breach of respondent's fiduciary duty to Soukup and urged respondent to stop payment on the check. After receiving that letter, respondent sent a letter to Pegg maintaining that Pegg had declared the contract "null and void" and that, based upon Pegg's statement, he had released the deposit.

Respondent's trust account check made payable to Vorcheimer, in the amount of $29,000, was dated February 27, 1996. The check was deposited into Vorcheimer's account on March 4, 1996 and cleared respondent's trust account on March 5, 1996.

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The DEC found that respondent had an obligation to maintain the deposit in escrow or to transfer it to Pegg. It further found that Pegg never authorized respondent to release the escrow money and that the February 27, 1996 discussion between respondent and Pegg "clearly and unequivocally did not permit respondent to release the funds he was holding in escrow to

his client." The release of the funds by respondent was determined to be a violation of RPC 1.15(c).

The DEC recommended that respondent be reprimanded.

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

Initially, it should be noted that the DEC determined that respondent's conduct constituted a violation of RPC 1.15(c); however, that rule addresses situations where the attorney asserts an interest in the funds. Here, respondent had no interest in the deposit; RPC 1.15(a) is the appropriate rule. Although an incorrect rule section was cited, respondent was on notice of the actions for which discipline was sought, the proofs at the hearing concerned respondent's improper release of the escrow to his client and respondent had the opportunity to defend against that charge. Therefore, the Board deemed the complaint amended to conform to the proofs. In re Logan, 70 N.J. 222, 232 (1976).

There is clear and convincing evidence that respondent released the $29,000 deposit to his client without authorization from the other party to the contract and without any legal right to do so. Although respondent and Pegg disagreed as to what was discussed during their February 27, 1996 telephone conversation, Pegg was adamant that he would never have given

respondent permission to return the deposit to Vorcheimer and that respondent did not have the right to release the escrow without Pegg's authorization. Moreover, respondent testified that the deposit was not even discussed during that conversation. Clearly, respondent did not have Pegg's or Soukup's consent to the disbursement of the escrow.

Respondent asserted that he released the escrow because Pegg had declared the contract "null and void." Pegg, however, denied having made that statement. The contemporaneous written communications support Pegg's testimony that he did not declare the contract "null and void." In fact, Pegg's letters reflect that, as late as February 27, 1996, he was still ironing out some of the conditions of the contract, such as the repairs that his client agreed to make based upon the home inspection report. In that letter, Pegg also stated that the low appraisal should not be an impediment to Vorcheimer's obtaining a mortgage. Similarly, there is nothing in Pegg's February 28, 1996 letter indicating that Soukup had voided the contract.

Significantly, the contract did not provide for termination for a low appraisal; rather, the contract was to be "null and void" only if Vorcheimer could not obtain a mortgage commitment by March 27, 1996.[3] In fact, Vorcheimer testified that, although he never completed the mortgage process, he was confident that he would have obtained the requested commitment for a $207,000 mortgage, had he continued with the process. Shortly after the deposit money was returned to him, Vorcheimer contracted to buy a lower-priced home.

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[3] The contract stated that Vorcheimer had until March 15, 1996 to obtain a mortgage commitment; however, the addendum adjusted all dates to commence at the conclusion of the attorney review period.

There were a number of other circumstances that added considerable strength to Pegg's position that he did not terminate the contract. First, respondent's own client, Vorcheimer, testified that he believed that his purchase was contingent on the seller obtaining an appraisal that valued the house for at least the purchase price and that he considered the transaction canceled when the appraisal came in lower than the purchase price. Second, after respondent "faxed" a letter to Pegg indicating that he was returning the deposit to Vorcheimer, Pegg immediately protested. By "fax" sent that same day, Pegg disputed the existence of an agreement to declare the deal canceled and corrected respondent's understanding of their conversation. Third, respondent knew on February 28, 1996 that it was Pegg's position that the contract was not void and that respondent was not authorized to release the escrow. However, respondent made no attempt to retrieve the check from Vorcheimer. According to Vorcheimer, he received respondent's trust account check in the mail and the check was not deposited into Vorcheimer's account until March 4, 1996. Finally, it was not in Soukup's interest to cancel the deal. The house had been appraised at a value lower than the purchase price; Soukup, thus, would have been happy with the original deal. As it turned out, she ultimately sold the house to another party for a higher price but, due to the additional time and carrying costs, her profit from the sale was $6,000 to $7,000 less than it would have been if the Vorcheimer purchase had been concluded.

Respondent argued that, because the contract provided that Pegg was to hold the deposit, respondent was not the escrow holder and, accordingly, did not need the consent of Pegg or

Soukup to release the money. There is no merit to that argument. Pursuant to the terms of the contract, respondent should have forwarded the deposit to Pegg by February 26, 1996; therefore, the deposit money should not have been in his trust account on February 27, 1996. Having undertaken to be the escrow holder of the deposit, respondent had the duty to keep it intact until the conditions of the escrow agreement were satisfied.

Respondent sought to use his own failure to abide by the terms of the contract to relieve him of his fiduciary responsibility to Soukup. As stated by the Supreme Court, "[i]t is well settled that an escrow holder acts as an agent for both parties." In re Hollendonner, 102 N.J. 21, 26 (1985).

Respondent also argued that there were other problems with the house that would have allowed Vorcheimer to avoid the contract. However, it is clear that any such problems had not reached the stage where a prospective purchaser could have terminated a contract. In addition, respondent did not indicate at the time that any of these problems were the cause of the return of the deposit.

Discipline for the improper release of escrow funds has ranged from an admonition to a lengthy suspension, depending on the circumstances involved in the misconduct. See In re Spizz, 140 N.J. 38 (1995) (letter of admonition); In re Flayer, 130 N.J. 21 (1992) (reprimand) and In re Susser, 152 N.J. 37 (1997) (three-year suspension).

In light of all of the circumstances of this case, such as the confusion as to the proper escrow holder and contractual dates and the fact that respondent does not have a prior ethics history, the Board unanimously determined that an admonition is sufficient discipline.

The Board also directed that respondent reimburse the Disciplinary Oversight Committee for administrative costs

Dated: 1/11/99

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Karl A. Fenske
Docket No. DRB 98-211

Argued: July 23, 1998

Decided: January 11, 1999

Disposition: Admonition

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling				x			
Zazzali				x			
Brody				x			
Cole				x			
Lolla				x			
Maudsley				x			
Peterson				x			
Schwartz				x			
Thompson				x			
Total:				9			

By Robyn M. Hill 11/13/99
Robyn M. Hill
Chief Counsel