SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-277

IN THE MATTER OF

LUIS A. ALUM

AN ATTORNEY AT LAW

Decision

Argued: September 17, 1998

Decided: April 5, 1999

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

Raymond Barto appeared on behalf of respondent.

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 VI Ethics Committee ("DEC"). The complaint alleged that respondent participated in the procurement of secondary financing (also known as "silent seconds") in

seven separate real estate transactions in which he acted as attorney for either the buyer or the seller.

Respondent was admitted to the New Jersey bar in 1983. He maintains a law office in Guttenberg, Hudson County. At the time of the alleged misconduct, respondent was a partner in the law firm of Greenberg, Feiner, Wallerstein, Benisch and Alum. Respondent has no prior ethics history.

* * *

In December 1988 respondent left the Greenberg, Feiner firm to open his own practice. Shortly thereafter, members of the Greenberg, Feiner firm filed a grievance against respondent based on irregularities discovered in some of his files.

The formal ethics complaint was filed on January 9, 1995. The complaint alleged that, between June 30, 1988 and January 26, 1989, respondent knowingly participated in a scheme to defraud the primary mortgage lenders in seven real estate transactions by providing false information on the RESPA and Fannie Mae forms. In all of the transactions, there was either secondary financing or one hundred percent financing that was not disclosed to the lender. In each instance, respondent represented either the buyer or the seller.

According to the complaint, the transactions were of two types. In the first, the purchase price of the real estate was artificially inflated to obtain one hundred percent

financing. A phoney system of "repair credits" was then created, whereby at closing the seller would give the buyer a "credit for repairs" in order to reflect a reduction in the purchase price. In several instances, the buyer actually financed in excess of the actual full purchase price of the property and walked away from settlement with the excess funds. In the second type of transaction, the buyer obtained a "silent second" — a second mortgage loan not disclosed to the primary mortgage lender — in violation of the contractual provisions of the commitment letter.

In each of the seven matters discussed below, respondent was charged with violations of RPC 8.4 (b) (committing a 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.) Indeed, respondent essentially admitted all of the factual allegations of the complaint although disputing the RPC violations charged. The DEC dismissed the allegations of violations of RPC 8.4(b) because respondent was never charged with any crimes as a result of his actions. These matters had been referred to the United States Attorney's Office by the OAE. However, the United States Attorney's Office declined to pursue any action against respondent.

The Espiritu Matter

In or about June 1988 respondent represented Rudy and Leonida Espiritu in the sale of real estate located in Jersey City. The closing was held on June 30, 1988. Respondent

admitted that the RESPA prepared for the Espiritu matter failed to disclose $30,600 in secondary financing to the primary lender.

Respondent testified at the DEC hearing that the attorney for the buyer had prepared the RESPA in the transaction. Respondent claimed that the buyer's attorney was fully aware of the failure to disclose the secondary financing, as were the Espiritus. According to respondent, he merely "facilitated the parties' deal." Respondent stated that, although he assumed that secondary financing was prohibited in the transaction, he was unsure if that was, in fact, the case. Indeed, the record contains no evidence that the primary lender forbade the use of secondary financing in the transaction.

The Dunn Matter

Respondent represented Irene Dunn in the purchase of real estate located in West New York. The closing took place on August 18, 1988. Respondent admitted that he prepared and signed a misleading RESPA, showing a "repair credit" allegedly due to the buyer in the amount of $25,000. In this fashion, Dunn was able to obtain one hundred percent financing from the bank. Furthermore, respondent admitted that he executed and submitted to the primary lender a Fannie Mae affidavit containing false information about the true nature of Dunn's financing. That document also failed to disclose the "repair credit" to Dunn.

The Feliciano Matter

Respondent represented Michael and Estella Feliciano in the purchase of real estate located in Union City. In his answer to the complaint and at the DEC hearing, respondent admitted that he prepared, signed and submitted to the primary lender a misleading RESPA that did not reflect a $27,000 second mortgage obtained by the Felicianos. Indeed, respondent admitted that he knew that the June 9, 1988 mortgage commitment from Citicorp Mortgage specifically prohibited secondary financing. Despite that knowledge, respondent went forward with the transaction.

The Correa Matter

Respondent represented Luis Correa in the purchase of real estate located in North Bergen. Respondent allowed Correa to sign two separate RESPA forms at closing: the first RESPA, prepared for respondent's file, reflected a "repair credit" to the seller in the amount of $19,250. The second RESPA, prepared for submission to the primary lender, listed an artificially inflated purchase price of $55,000. This way, Correa was able to obtain one hundred percent financing from the bank. Respondent acknowledged that the purchase price of the real estate had been inflated to facilitate the sham.

The Davíla Unit 3-C Matter

Respondent represented José Davíla in the purchase of real estate located in West New York. The price of the property was $35,000. For this transaction respondent prepared a RESPA that falsely showed a $55,000 purchase price, failed to disclose a second mortgage loan to Davíla in the amount of $10,000 and listed a phony "repair credit" to Davíla in the amount of $20,000. Moreover, respondent allowed his client to sign two separate RESPA forms, both of which were prepared by respondent. The first RESPA, prepared for respondent's file, included additional calculations on the bottom of the first page showing the $20,000 "repair credit," the $10,000 second mortgage and a notation that Davíla would receive $13,140.11 from the settlement proceeds. The second RESPA, prepared for submission to the primary lender, failed to reflect the second mortgage and indicated that Davíla was to bring $14,859.89 to the closing. Respondent submitted the second RESPA to the primary lender along with a Fannie Mae affidavit that mirrored the false terms contained in the RESPA. Indeed, respondent's handwritten note found in his file stated that the actual price of unit 3-C was $35,000, in contrast to the $55,000 purchase price listed in the contract of sale.

By artificially inflating the purchase price to $55,000, listing a false "repair credit" of $20,000 and obtaining a $10,000 second mortgage loan, Davíla was able to walk away from the closing with funds that exceeded the purchase price. In fact, Davíla was able to buy a second unit, as seen below.

The Davíla Unit 2-A Matter

In this matter, respondent personally prepared and signed the RESPA form for Davíla's purchase of unit 2-A. Respondent admitted intentionally omitting any reference in the RESPA to a second mortgage in the amount of $10,000 before submitting it to the primary lender in an effort to mislead the lender. In his answer, respondent admitted that he knew that the primary lender forbade secondary financing. Furthermore, respondent instructed his client to sign two separate RESPA forms for the purchase of the unit. Both forms listed an artificially inflated price of $74,000. In reality, the price of the property was $49,000. The first RESPA , prepared for respondent's file, disclosed the second mortgage and a "repair credit" of $25,000 to Davíla, and also showed that Davíla was to receive $11,476.28 from the settlement proceeds. The second RESPA, prepared for the lender, omitted any reference to the second mortgage and to the "repair credit" and showed that Davíla was to bring $21,239.57 to the closing. Moreover, respondent prepared a Fannie Mae affidavit containing the same false information listed on the RESPA submitted to the mortgage lender. Respondent allowed Davíla to sign both documents, knowing them to be false. Furthermore, respondent's handwritten note to the file stated that the actual price of unit 2-A was $49,000, in contrast to the stated contract price of $74,000.

By inflating the purchase price and hiding the $10,000 second mortgage loan from the lender, respondent assisted Davíla in obtaining, via the first mortgage, funds in excess of the actual purchase price.

The Simone Matter

In this matter, respondent represented Gianni and Antonia Simone, the sellers, in the sale of property located in North Bergen. According to the complaint, at the start of the OAE investigation, respondent admitted that he knew about the use of both forbidden secondary financing and dual RESPA forms in this transaction. However, in his answer to the complaint, respondent denied making such an admission. Moreover, the record contains little testimony from respondent or others that would substantiate the charge that respondent facilitated an improper secondary financing in this matter. Respondent testified that, although he believed that there might have been an improper financing here, he could not be sure because he did not participate in the negotiations that led up to the closing. According to respondent, he reluctantly agreed to conduct the closing when the file was delivered to him by Greenberg, Feiner shortly after his departure from the firm. Indeed, there is no evidence in the record that secondary financing was prohibited by the purchasers' primary lender or that the purchasers had secured a second mortgage, other than a reference in the rider to the contract of sale that the seller would take back a second mortgage.

* * *

Much of the testimony taken at the DEC hearing, which spanned six hearing days between August 1996 and March 1997, was devoted to mitigation of respondent's actions.

Respondent's counsel argued at length that respondent was involved in a deceptive practice that was rampant in the legal community of Hudson County in the 1980s.

Doreen Gonzalez was an attorney at Greenberg, Feiner at about the same time as respondent. She testified that, shortly after respondent's departure, she was asked to attend the closing in Simone. According to Gonzalez, she had been told that irregularities had been found in some of respondent's files and she had been instructed to halt the closing if anything improper occurred. Gonzalez testified that dual RESPAs were presented at the closing and that, therefore, she refused to proceed. Apparently, it was after this aborted closing that Greenberg, Feiner delivered the Simone file to respondent at his new office location.

Marvin Walden, the partner in charge of Greenberg, Feiner's Guttenberg office in late 1988, testified that he worked alongside respondent. According to Walden, respondent took with him most of the Greenberg, Feiner files that he had handled. Walden also testified that he personally found irregularities in some of the files that respondent had left behind. Walden stated that he had been asked to attend the closing in a matter in which dual RESPAs were presented. According to Walden, he walked out of the closing when the parties refused to close with the correct RESPA.

Stephen Benisch testified that he was a partner in the Greenberg, Feiner law firm in late 1988 and that he worked in the same office as respondent. Benisch testified generally that, after respondent left the firm, he discovered irregularities in some of respondent's real

estate files, including dual RESPAs. However, Benisch did not have any specific recollection of the within matters.

Jeanine Verdel, an OAE investigator, testified generally about the investigation into these matters. On cross-examination by respondent's attorney, she was asked to testify about the alleged rampant practice in Hudson County of concealing secondary financing from primary lenders. Of particular interest to respondent's counsel were the results of investigations into the practices of fourteen attorneys named by respondent's attorney in a letter to the OAE during the investigation of this matter.[1] Respondent's counsel attempted to show that the fourteen attorneys named were equally guilty of unethical conduct and that, because none of them were subjected to discipline, respondent was unfairly being singled out for "selective prosecution." Respondent's attorney tried to elicit testimony from Verdel in support of his position that attorneys practicing real estate in Hudson County during the 1980s engaged in the same type of misconduct charged against respondent. However, Verdel was unaware of any such widespread practice.[2]

---

[1]Respondent's counsel drafted a May 6, 1994 letter to the OAE outlining the nature of the "silent seconds" practice, as he understood it. In addition, he implicated a number of attorneys in the letter. The DEC entered a protective order to prevent the dissemination of information regarding those attorneys, who were not the subject of formal ethics complaints.

[2]Respondent's counsel argued that the Greenberg, Feiner firm trained respondent to conceal secondary financing in his real estate transactions. According to counsel, the firm culture readily embraced such unethical conduct. Counsel further argued that it was the irregularities in the firm's handling of its trust account that led respondent to question the propriety of his participation in the "silent seconds."

Respondent's secretary, Caridad Noriega, testified that she participated in several "silent seconds" with respondent when he first opened his own office in December 1988. According to Noriega, silent seconds were prevalent in Hudson County between 1985 and 1991. Noriega also testified that respondent refused to engage in that type of conduct after closing out the last of the "hold-over" files from Greenberg, Feiner, in early 1989.

Warren Kaps, an attorney, testified that respondent sought his legal advice in April 1988. According to Kaps, respondent was troubled primarily by the fact that the OAE was investigating Greenberg, Feiner's handling of its trust and business accounts. When respondent told him about the irregularities in his real estate practice, Kaps recommended that respondent leave the firm as quickly as possible.

Respondent also presented two character witnesses, David K. Poces and Rolando Diaz, both of whom vouched for respondent's honesty and integrity. In addition, the record contains numerous letters in support of respondent's good character.

Thomas J. Norton, a banking expert, testified that the practice of hiding secondary financing from primary lenders was common in the 1980s. According to Norton, in order for the transaction to go smoothly, all parties involved, including the lawyers for both buyer and seller, had to "look the other way" to facilitate these transactions. Further, Norton testified that the primary lenders or their agents were sometimes involved in these transactions. Norton testified that the primary lenders were interested in obtaining a "clean file" containing assurances that no secondary financing existed, whether or not the contents

of the RESPAs and Fannie Mae documents accurately reflected the transaction. Norton presumed that this was the case because the mortgages generated in these transactions were to be immediately sold on the secondary mortgage market.

Finally, respondent testified at length about the climate in the legal community in Hudson County and particularly at Greenberg, Feiner when he became an attorney in the early 1980s. Respondent argued that, because "everyone was doing it," he allowed himself to participate in "silent seconds."

Respondent also testified that, in 1988, he consulted with Kaps because of disturbing problems in his firm's trust account. Apparently, the OAE was investigating the firm's books and records at the time. Respondent testified that, when Kaps advised him to leave the firm, he determined to make a "clean break," closing any remaining "silent seconds" matters and leaving the firm. Respondent claimed that, from the moment he closed the last hold-over case from Greenberg, Feiner, he conducted himself in a professional and ethical manner.

With regard to his own assessment of his transgressions, respondent testified as follows:

> Well, this has been, it has been a nightmare. During the interview in '94 I cried various [sic] occasions. And I almost – must confess to the panel, even still I am drawn to my knees many nights in despair. I feel terribly embarrassed about this. I put my family through hell, my son, my dad who is 85 years old, and my wife . . . This has a very humble effect, personally and professionally.

> I'm going to psychiatric care. I take medication on a daily basis. . . .You know, growing up I have always, in school I was always a good student. I was very decent at least. I graduated Phi Beta Kappa, magna cum laude. I was always praised as a good boy, excellent student, and I had high aspirations as an attorney. I always wanted to be a lawyer. And I realized that my professional career has been tarnished for life. This is irreparable. I can't erase what I did. I'm just very sorry. . . If I had been smarter, I wouldn't be in the position that I am in.

* * *

As noted above, the DEC dismissed the alleged violations of RPC 8.4(b) on the basis that no criminal charges were filed against respondent for his role in these transactions. With regard to the remaining allegations of violations of RPC 8.4(c), the DEC found as follows:

In the Espiritu matter, the DEC determined that there was no clear and convincing evidence that respondent had prepared the false RESPA used in the transaction or that secondary financing was prohibited by the primary lender. The DEC, thus, dismissed that matter; In Dunn, the DEC found a violation of RPC 8.4(c), noting respondent's admission that he had issued false RESPA and Fannie Mae documents to conceal the secondary financing; In Feliciano, the DEC found that respondent violated RPC 8.4(c) by allowing his clients to sign and submit false RESPA and Fannie Mae documents to the primary lender at closing. Respondent admitted his participation in the scheme; In Correa, the DEC found that respondent violated RPC 8.4(c) by his admitted role in the use of a phony "repair credit." The DEC found that respondent failed to disclose the true nature of the "repair credit" on the

RESPA submitted to the primary lender; In the Davila - 3C, matter the DEC found that respondent's use of false RESPA and Fannie Mae documents, coupled with respondent's admissions, amounted to a violation of RPC 8.4(c). Likewise, in the Davila - 2A matter, the DEC found a violation of RPC 8.4(c), based on respondent's admitted utilization of false documents to conceal secondary financing and to obtain a first mortgage for the full purchase price.

The DEC declined to find a violation of RPC 8.4(c) in the Simone matter, despite respondent's belief that this was a "silent second" transaction. Indeed, the DEC found no evidence in the record to conclude that the primary lender prohibited the use of secondary financing.

The DEC unanimously recommended the imposition of an admonition, noting that, had these matters been brought prior to 1995, the recommendation would have been for a private reprimand. In recommending an admonition, the DEC considered the passage of time, respondent's total cooperation, candor, remorse and contrition as significant mitigating factors.

* * *

Upon a de novo review of the record, the Board was satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

There is no question that respondent violated the Rules of Professional Conduct by knowingly engaging in the "silent second" transactions in the Dunn, Feliciano, Correa matters and in both Davíla matters. However, in Esposito and Simone, there is no evidence that the mortgages disallowed secondary financing and rule violations cannot be found. In the remaining transactions, respondent either personally prepared false RESPA and Fannie Mae documents designed to conceal prohibited financing or he facilitated the use of false documentation at the closing by allowing his clients to sign the false documents. Wherever necessary, respondent signed the false documents, fully aware that they contained false information. Respondent's actions violated RPC 8.4(c).

Respondent's counsel accepted representation of respondent after respondent had made candid admissions about his misconduct. Nonetheless, the record developed below to advance the several arguments presented by counsel is unnecessarily voluminous. For instance, counsel argued that respondent was selectively prosecuted in these matters. Counsel contended that it was unfair to prosecute this respondent for ethics infractions, when other attorneys who engaged in similar conduct may have escaped detection. This argument is without merit or factual basis. The Board has previously sanctioned many attorneys for the use of "silent seconds" and related improprieties in real estate transactions. See, e.g., In re Capone, 147 N.J. 590 (1997)(where attorney was suspended for two years based on federal conviction of knowingly making a false statement on a loan application; in his own real estate purchase, the attorney inflated the purchases price of the property by $125,000 to

obtain additional financing, later defaulting on the loan.) Even absent a criminal conviction, discipline may be imposed. Generally, failure to disclose secondary financing will result in at least a reprimand. See In re Sarsano, 153 N.J. 364(1998)(reprimand for violating RPC 8.4(c) by concealing secondary financing from lender in one real estate transaction); In re Spector, 157 N.J. 530 (1999)(reprimand for concealing secondary financing from the primary lender in three real estate transactions by facilitating the use of dual RESPA's). Notably, Sarsano was the attorney for the buyers in the Simone transaction. Likewise, Spector was the attorney for the seller in the Correa and two Davila matters. See also In re Blanch, 140 N.J. 519(1995)(reprimand for failure to disclose secondary financing to mortgage company, in violation of company's written instructions); and In re Silverberg, 142 N.J. 428(1995)(reprimand for gross neglect, lack of diligence and misrepresentation in failing to correct inaccurate RESPA, after the attorney discovered, post-closing, that his clients had concealed secondary financing). Where the conduct is more extensive, suspension may result, as in In re Fink, 141 N.J. 231 (1995)(suspension for six months for use of dual RESPAs and false affidavits in five matters, all to avoid discovery of secondary financing. The attorney also made misleading statements to the county prosecutor during an investigation of the matter); and In re Labendz, 95 N.J. 273 (1984)(one-year suspension for knowingly making and instigating fraudulent misrepresentations on mortgage application concerning falsely inflated purchase price in order to obtain additional funds from primary

lender: the attorney did not represent either party in the transaction, and only assisted the buyers in obtaining the mortgage in return for a fee.

Respondent's counsel also argued that respondent was simply a product of the environment in which he was trained. In essence, counsel contended that respondent could not have known better than to engage in his misconduct because he was taught to engage in "silent seconds" by his mentors at Greenberg, Feiner. Even if this were true, respondent had to know that providing false information in documents to be submitted to a mortgage lender was unethical, particularly where he created a second set of documents for his file, which contained the true terms of the transaction. Clearly, this record does not support respondent's claim in this respect, given that others at the firm who took on his files refused to follow through on closings that included "silent seconds".

Counsel further argued that the entire complaint should be dismissed due to the passage of time. However, there is no statute of limitations in disciplinary matters. As noted by the OAE, a significant amount of time was lost when these matters were pending with the United States Attorney's Office. Although not appropriate for consideration as a defense, the passage of time may, in appropriate circumstances, be considered as a mitigating factor.

The Board considered that no parties to any of the above transactions appear to have been harmed, that none of the borrowers defaulted on their obligations under the terms of the mortgage loans granted to them under false pretenses, and that respondent did not benefit in any way from these transactions. In addition, respondent's cooperation with the ethics

authorities, his contrition and his remorse are noteworthy. In that regard, the following excerpt from the panel report is relevant:

> The most credible and honest witness in these hearings was respondent himself. We noted earlier that he candidly and fully cooperated with the OAE in the investigation and prosecution of this matter. That honesty was obvious on the witness stand. As noted, respondent has taken full responsibility for his actions and appears ready to accept appropriate discipline.
>
> What has impressed the hearing panel most about respondent is his diligence in dealing with these disciplinary proceedings and how hard he has taken the charges. Respondent sought legal counsel early on, having consulted Warren Kaps, Esq. in the spring of 1988. He had been concerned with a variety of issues which he raised from his experience at his firm. That consultation appears to have been the beginning of respondent's determination to leave the firm. The fact that respondent would seek legal counsel regarding questionable practices engaged in by his firm is significant. One might expect an attorney who observes questionable practices to decide for himself or herself how to handle the situation or to retain outside counsel to make sure his or her 'butt' is covered. Respondent's consultation demonstrates that he was less concerned with protecting himself from any consequences of those practices than in trying to determine if he could continue with the firm on an ethical moral basis. It appears to this panel respondent is one of those hopefully not too rare attorneys whose primary concern is that his conduct fairly, honestly, and fully serves his clients, and secondarily that he makes a living doing so.
>
> [Respondent] has punished himself for his violations of the Rules of Professional Conduct more than five times over. He has beaten himself emotionally (as in punishment, not defeat) for years. He has, thankfully, received psychiatric treatment. He has also, thankfully, left a firm which would probably eventually have caused him more serious problems with his conscience than have the charges considered here. He has eloquently

> expressed to this hearing panel that he feels he has failed himself, his family, his principles, his profession, and his God. Nothing could be further from the truth. We have come to consider [respondent] a success as a member of the bar, a model citizen, and someone to be admired.

Obviously, respondent impressed the DEC with his candor and regret.

After giving significant weight to the passage of time, respondent's candor and his unblemished record in the ten years following the within misconduct, the Board unanimously determined to impose a reprimand. In reaching its determination, the Board considered that reprimands were also imposed on Spector (the attorney on the other side of the Correa and Davila closings) and on Sarsano (the attorney for the buyer in Simone). Attorneys should, however, be forewarned that, in the future, similar misconduct will be met with more severe discipline.

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

Dated: 4/8/99

LEE M. HYMERLING
Chair
Disciplinary Review Board