SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 17-003
District Docket No. XIV-2015-0517E

IN THE MATTER OF	:
GENE STUART ROSEN	:
AN ATTORNEY AT LAW	:

Decision

Argued: March 16, 2017

Decided: July 6, 2017

Christina Blunda Kennedy appeared on behalf of the Office of Attorney Ethics.

Respondent appeared, pro se, via telephone.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-14(a)(4), based on respondent's disbarment in Florida for violations of that jurisdiction's equivalents of New Jersey RPC 1.15(a) (failure to safeguard funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and the principles of In re Wilson, 81 N.J.

451 (1979) and In re Hollendonner, 102 N.J. 21 (1985) (knowing misappropriation).

The OAE seeks respondent's disbarment. Although we determine to grant the OAE's motion for reciprocal discipline, in our view, the record in Florida does not support a finding of knowing misappropriation. We determine to impose a suspension of three years.

Respondent was admitted to the New Jersey bar in 1968. He was also admitted to practice law in Massachusetts (1971), the District of Columbia (1972), and Florida (1974). In 2012, respondent was disbarred in Florida as a result of his conduct in the within matter. He has no prior discipline in New Jersey, but has been administratively ineligible to practice since November 2015, based on his failure to satisfy his continuing legal education obligations.

This matter arose out of a grievance filed by a Florida attorney representing a group of plaintiffs in Miami-Dade Circuit Court, alleging real estate fraud. One of the charges in that lawsuit involved respondent's alleged breach of fiduciary duty in respect of his handling of escrow funds.

On October 9, 2012, the Supreme Court of Florida issued an order temporarily suspending respondent, pending a hearing on the underlying ethics charges against him. Following

respondent's motion for reconsideration or dissolution of the temporary suspension order, Referee Donald J. Cannava, Jr., conducted a hearing on October 23, 2012. Six days later, on October 29, 2012, Cannava issued a report recommending the denial of respondent's motion. He found, however, insufficient evidence had been presented to support the complaint's allegation that respondent had "misappropriated funds by utilizing deposit monies for his own use and benefit."

On December 19 and 20, 2012, an ethics hearing was held before Cannava, who issued a written report of his findings, on January 24, 2013, as follows.

As a result of the grievance, respondent was ordered to appear before the Florida Bar staff auditor, with his attorney trust account records for the period July 29, 2005 through December 30, 2011. On January 25, 2012, respondent appeared for the audit with some, but not all, of the requested documents. For example, he failed to produce the backs of canceled checks, a cash disbursements journal and client ledger cards for his Popular Bank trust account ending in x1006. Respondent acknowledged that he had not maintained ledger cards as required by the Florida rules.

Respondent also produced records for another account, identified as "Gene S. Rosen Attorney Trust Account, Paradise International Properties of Costa Rica, S.A.," with an account number ending in x3980 (the PIPCR account). Those records pertained to the period December 29, 2006 through December 31, 2011.

In December 2006, respondent and Larry M. Webman launched an enterprise to sell parcels of land in Costa Rica, Central America. Respondent was aware that, in 1993, Webman had been convicted of felony wire fraud and engaging in a scheme to defraud, and that he had served eighteen months in a federal prison for those crimes. Additionally, respondent knew that, in March 2006, the Commodity Futures Trading Commission (CFTC), an independent federal agency that regulates futures and option markets, issued an order permanently enjoining Webman from any dealings with commodities futures sales or transactions.

On December 28, 2006, respondent opened the PIPCR account as a repository for funds related to the sale of PIPCR's real estate parcels in Costa Rica.

On May 4, 2007, Webman (as buyer) and Michael E. Hardy (as seller) executed a Letter of Intent and Exclusive Option to Purchase real estate Hardy owned in Costa Rica, for $400,000, and for which Webman had already made a $10,000 down payment.

According to their agreement, the remaining payments were to be made in several installments: $50,000 on May 4, 2007; $25,000 on May 7, 2007; $25,000 on May 10, 2007; $100,000 on June 4, 2007; $100,000 on July 4, 2007; and the final $90,000 at the closing and transfer of the deed, but no later than August 4, 2007.

Webman then sold parcels of the Hardy property to unsuspecting purchasers, through PIPCR, before he held legal title to the property. In fact, PIPCR sold parcels even before Hardy and Webman had executed the letter of intent. Specifically, prior to the August 4, 2007 final payment from PIPCR, at which time title, ostensibly, would pass to Webman/PIPCR, respondent had permitted eleven purchasers to place a total of $351,000 in deposits in his trust account.

Respondent then disbursed the purchasers' funds to pay PIPCR's first two installments to Hardy: on May 3, 2007 ($50,027.50) and May 7, 2007 ($25,000). Following those disbursements, the balance in respondent's trust account was $804.23.

According to the referee, the third (May 10, 2007) payment, in the amount of $25,000, came from escrow funds belonging to purchaser Francine Tocco. Following that payment, the balance in the trust account was just $754.23. On June 12, 2007, the balance in respondent's trust account was only $6,979.23, an

amount insufficient to cover the $100,000 installment to Hardy that was due on June 4, 2007, plus a $3,500 payment to Hardy's attorney. Therefore, respondent deposited $99,000 of his own funds in the trust account to cover the $103,500 payment to Hardy. On July 2, 2007, respondent received $96,000 in repayment of his infusion of funds.

Although the remaining payments were not made, the sale of parcels continued unabated. As of August 13, 2007, the balance in respondent's trust account had ballooned to $1,657,509.54.

On that same day, an individual named Rebeca Gonzalez Monge notified respondent, via e-mail, that respondent's and Webman's application for a $267,000 mortgage and loan had been approved for disbursement. Out of the mortgage proceeds, respondent paid the remaining $190,000 past-due balance for the purchase of the Hardy property. After paying expenses in an undisclosed amount, respondent disbursed the remaining mortgage loan balance of $30,158.25 directly to Webman.

Because respondent and Webman had taken a mortgage on the Hardy property, the parcels that they marketed for sale were now encumbered.

Between December 28, 2006 and February 28, 2011, respondent deposited a total of $2,806,905.54 into the PIPCR account. The account showed little activity after March 1, 2011, with only

five more deposits, totaling $6,123.64, from then until December 15, 2011, when respondent closed the account.

The Florida Bar staff auditor's review of respondent's trust account revealed that, during the audit period, he had issued 221 checks, payable to himself, totaling $1,112,360.77. Those checks were then deposited into several other accounts, as follows: (1) a second PIPCR account ending in x4798; (2) respondent's operating account ending in x0706; (3) various other accounts ending in x2793, x8798, x6152, x7687, x6103; and some distributed "in cash."

Respondent testified that many of the checks that he had written to himself had been cashed and the funds transferred to accounts belonging to PIPCR and others, all at Webman's request. Respondent did so, he claimed, because the bank would not permit him to transfer funds directly to PIPCR accounts for which he was not a signatory. Despite that claim, respondent had endorsed the reverse sides of many of those checks and then directly deposited them into the various PIPCR accounts[1].

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[1] At oral argument before us, however, respondent maintained that he was not able to directly deposit the checks or otherwise transfer funds into Webman's accounts. Rather, the bank required him to write a check payable to himself, endorse it, and then deposit it into Webman's account(s) as if it were cash. Although he did not recall exactly why he was required to follow

(Footnote cont'd on next page)

According to respondent, he had not benefited from any of the transfers, beyond approximately $50,000 in legal fees. The audit, however, revealed that he had received at least $178,311 in legal fees.

Respondent drafted the real estate contracts that PIPCR used to sell the properties in Costa Rica. According to the referee's final report, the "Sale and Purchase Agreement included language indicating that the deposit from Purchaser's [sic] would be held in the respondent's trust account and would be distributed to the Seller." In his brief in the Florida disciplinary proceeding, submitted to us in reply to the OAE's motion for reciprocal discipline, respondent quotes paragraph six of the purchase and sale contract as follows:

> All deposits shall be made payable to GENE S. ROSEN ATTORNEY AT LAW TRUST ACCOUNT. Upon receipt of the signed Agreement and the initial deposit by Seller, Seller will return the signed copy of the Agreement to Purchaser and the first Deposit will be disbursed to Seller. The Second Deposit will also be disbursed to seller upon receipt thereof. (emphasis added).
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> [Rb1.][2]

(Footnote cont'd)

that protocol, respondent confirmed the procedure in an e-mail to us following oral argument.

[2] Rb1 refers to the undated brief respondent filed in the Florida disciplinary case and submitted to us on January 27, 2017.

On March 9, 2017, following a request from Office of Board Counsel, the OAE provided four sample contracts in connection with the sale of the property at issue. All four of the purchase and sale agreements contain the above-quoted paragraph, which did not require respondent to maintain the buyers' deposits in escrow.

The Florida referee made the following "Factual Findings and Analysis":

> 1. Respondent failed to follow the terms of the Sale and Purchase Agreements by the individual purchasers, which were constructively escrow agreements, by disbursing funds to entities and individuals other than the Seller (i.e. Paradise International Properties of Costa Rica and/or Webman) (emphasis added).
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> 2. Respondent was an escrow agent for both the purchasers and the seller in these transactions, by virtue of the Sale and Purchase Agreements, as well as the fact that his trust account was being used. Respondent further acted as such by communicating directly with purchasers regarding escrow and refund issues.
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> 3. Based on the totality of the circumstances, which include, Webman's criminal past, the lack of progress and development on the project over almost a four (4) to five (5) year period, communications with purchasers regarding their dissatisfaction and requests for a refund, disbursement of monies to entities other than the seller when no progress was being made on the property, and lack of conveyance of any title for a period of three (3) to four (4) years, respondent should have taken proactive steps to safeguard the deposit monies and meet his fiduciary responsibilities to the purchasers but failed to do so.
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> 4. Respondent allowed his name, trust account, and

education credentials to be utilized to create a sense of security with purchasers, which continued after he became aware of significant problems with the project, and continued to be posted on Paradise's website as late as December of 2012.

5. Respondent actively participated in the project in the role of escrow agent by having conversations with purchasers and acting as a primary point of contact for purchaser communications (emphasis added).

6. Based on the credible testimony of Michael Carver ("Carver"), one of the purchasers, respondent, at one point, did request additional monies from Carver, which is further evidence of respondent's breach of fiduciary obligations.

7. Additional evidence in the form of respondent's deposition testimony in an earlier family law matter to the effect that he had a ten (10) percent interest in Paradise International is also considered by the referee. The referee finds that the discussions regarding a possible ten (10) percent interest in the project, discussions admitted by respondent regarding respondent's serving as an officer of Paradise International Properties of Costa Rica, and the respondent providing seller with a loan in the amount of $99,000 to assist in the project is further evidence that respondent was completely aware of the status of this project at all stages.

8. Respondent did benefit financially in that he continued to pay himself legal fees on the project. Although the total amount is unclear and not necessarily excessive, it still benefitted him financially as he continued to collect legal fees while deposits were being accepted into his Trust Account.

9. The referee also finds that respondent's conduct was intentional, as it was deliberate and knowing, and Respondent failed to use reasonable skill in the delivery of the escrow funds.

10. In addition, Respondent violated trust account procedures by failing to maintain proper client ledger cards. The respondent admitted to this violation.

11. The referee also incorporates the following findings from the prior report of the referee filed after the hearing on respondent's Motion for Reconsideration or Dissolution of Order Granting Petition for Emergency Suspension:

(a) The agreement signed by various individual purchasers of land in Costa Rica was drafted by respondent. The purchase agreement contained specific language indicating to the purchaser that payment monies would be deposited into the Gene S. Rosen attorney trust account.

(b) Additionally, the purchase agreement set forth specific terms indicating the deposit monies paid by purchasers would be fully refundable upon request after inspection of the property.

(c) The Sale and Purchase Agreement regarding the establishment of an attorney trust account controlled by respondent created an expectation of the purchasers that their money would be protected.

(d) Respondent was aware of his client's criminal past that included a 1993 conviction for fraudulent activity resulting in his client's serving an eighteen (18) month sentence in Federal Prison for wire fraud and engaging in a scheme to defraud. In addition, respondent was aware of a 2006 Consent Order of Permanent Injunction and Other Equitable Relief Against Defendants Larry M. Webman and Melvin H. Webman issued by the Commodity Futures Trading Commission.

(e) Respondent was aware of the lack of any significant development progress on the Costa Rica property but continued to accept deposit money from purchasers into his trust account.

(f) Respondent was responsible for the disbursement of all monies paid by purchasers (approximately $2.8 million) out of his Trust Account without any significant development to indicate that the project would be successful

orwithout the provision of titles/deeds of ownership to any purchasers.[3]

It is abundantly clear that the Florida Supreme Court and the Florida Bar hold attorneys in the State of Florida to a higher standard of conduct than a non-attorney engaged in a business deal. This is particularly true when the attorney involved in the business transaction utilizes his trust account to provide Buyers with a sense of security, reliability and accountability. *The Florida Bar v. Hosner,* 520 So.2d 567 (Fla. 1988), *The Florida Bar v. Bennett* 276 So. 2d 481 (Fla. 1973) ("It is difficult to isolate one's position as an attorney when involved in activities with investments and property developments that of necessity involve legal ramifications and special care must be taken to avoid such an active role if an attorney expects not to be held accountable under the Code of Professional Responsibility for Attorneys."). In addition to the higher standard imposed on the Respondent by virtue of his being a member of The Florida Bar, his actions created a fiduciary responsibility to the Purchasers that was established through the use of his escrow account and his ongoing, active communication with the Purchasers and the Seller regarding the status of the land development and sale of the property. Consistently, the Florida Supreme Court has found that a unique fiduciary duty is required of an attorney handling finances particularly in the context of an escrow agreement to both purchasers and sellers. (emphasis added). *The Florida Bar v. Ward*, 599 So.2d 650 (Fla. 1992). In *Florida Bar v.*

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[3] In the prior Report of Referee, the undersigned found that respondent had made these disbursements without any development on the project. While it now appears that there may have been some development progress based on some of the documentation submitted by respondent, the undersigned referee finds that there was no significant progress to indicate the project would be successful or legitimate.

Joy, 679 So.2d 1165 (Fla. 1996) the Court cites the following language from *United American Bank of Central Florida, Inc. v. Seligman*, 5499 So.2d 1014 (Fla. 5th DCA 2012):

> "Regardless of the escrow agent's other relationships or duties to the principal parties (lawyers often hold funds in escrow where their client is one principal party) when principal parties agree upon an escrow agent, by undertaking to act as such, the escrow agent establishes a new legal relationship to the principal parties and by an expressed agreement or by agreement implied in law, agrees to certain basic inherent matters. The relationship established is that of principal and agent and involves the escrow agent being an agent of, and owing a fiduciary duty to, all of the principle parties. <u>In the absence of an express agreement</u>, written or oral, the law will imply from the circumstances of the escrow that the agent has undertaken a legal obligation (1) to know the provisions and conditions of the principal agreement concerning the escrowed property, and (2), to exercise reasonable skill and ordinary diligence in holding and delivering possession of the escrowed property (i.e. to disburse the escrowed funds) in strict accordance with the principals' agreement" (emphasis added).

The Respondent fell far short of his fiduciary responsibility to the Purchasers through his failure to exercise reasonable skill and caution in caring for the monies in escrow. The Respondent failed to properly distribute the escrowed funds per the specific instructions set forth in the Sale and Purchase Agreement drafted by the Respondent and relied upon the Purchasers. In addition, by Respondent's own admission, he failed to properly maintain ledger cards required by the Bar to ensure accountability and accuracy in the handling of escrow funds.

> Five (5) purchasers testified telephonically during the final hearing regarding their reliance on the Respondent's expertise as a seasoned attorney as well as the safety they believed was inherent in the utilization of an attorney's trust account. The Respondent in *The Florida Bar v. Hall*, 49 So.3d 1254, 1259(Fla. 2010) acted in a similar manner prompting the Court in *The Florida Bar v. Watson*, 76 So. 3d 915 (Fla. 2011) to find that: "He caused these individuals to believe that their funds would be safe in his attorney trust account, yet he intentionally disbursed their funds without their knowledge or consent. Respondent's flagrant misuse of his position as an attorney by which he purposefully lulled members of the public into thinking their fund would be safe in his account merits a severe sanction." *Id.* Although it can be argued that the Purchasers, in the case at hand, were aware of the disbursement instructions set forth in the Sale and Purchase Agreement, the Respondent still violated the plain meaning of those instructions by disbursing the escrow funds to entities other than the Seller and did so with knowledge that the project was essentially non-existent (emphasis added).
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> Lastly, regardless of the Respondent's self-serving testimony to the contrary, the physical and testimonial evidence presented by The Florida Bar indicate that his actions were intentional in that they were knowing and deliberate. *The Florida Bar v. Watson*, 76 So.3d 915 (Fla. 2011).
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> [OAEbEx.8 at 12-19.][4]

As seen above, essentially, the referee concluded that, because respondent used his trust account to hold the real estate deposits, respondent owed a fiduciary duty to the purchasers. That duty was magnified, in the eyes of the

[4] OAEb refers to the OAE's January 18, 2017 brief in support of the motion for reciprocal discipline.

purchasers, by respondent's "having conversations with purchasers and acting as a primary point of contact for purchaser communications." The Florida referee further concluded that the purchase and sale contracts, which respondent had drafted, operated as constructive escrow agreements. Accordingly, the referee found that respondent had a fiduciary duty, as escrow agent, to the purchasers as well as to the seller. The referee further found that respondent's knowledge of Webman's criminal conviction and his bar by the CFTC, as well as respondent's knowledge of the lack of development of the property, required him to take proactive measures to safeguard the deposit monies. He violated that duty by disbursing funds to entities and individuals other than the seller, PIPCR.

The referee also accepted as true, respondent's prior deposition testimony in a family law matter in which he had acknowledged his own ten percent interest in PIPCR's project, his role as one of PIPCR's officers, and his $99,000 loan to PIPCR to assist the project. The referee considered the testimony as further evidence of respondent's complete awareness, at all stages, of the project.

As of January 24, 2013, the date of the referee's report, not a single purchaser of the Costa Rican property had gone to settlement on his or her parcel and none had received title to

their parcels. An untold number of purchasers lost a total of more than $2,500,000 to Webman and to respondent.

The referee recommended that respondent be found guilty of the following Florida Rules Regulating the Florida Bar: Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), Rule 5-1.1 (trust accounts)[5] and Rule 5-1.2 (trust accounting records and procedures).

On October 13, 2014, the Supreme Court of Florida entered an order, retroactive to November 9, 2012, approving the referee's report and disbarring respondent.

In a January 25, 2017 letter to us, respondent stated his intention not to contest the OAE's motion for reciprocal discipline, but urged us, "[r]ather than permanent disbarment, [to] consider an indefinite suspension subject to reinstatement in Florida." Doing so "would both preclude respondent from practicing in New Jersey but at the same time offer him the opportunity to return to both Bars."

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[5] Subsection (b) of the Rule, titled Application of Trust Funds or Property to Specific Purpose, states: "Money or other property entrusted to an attorney for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be deemed a conversion."

Respondent plans to seek reinstatement in Florida in November 2017, five years after his disbarment, as Florida law permits. He also argued that his Florida disbarment is tantamount to a five-year suspension, and that permanent disbarment in New Jersey "would result in greater discipline" than was meted out in Florida.

As previously stated, respondent attached a copy of the brief that he filed with the Supreme Court of Florida in his disbarment proceedings. In it, he denied any wrongdoing, and contended that the purchasers' contracts permitted him to disburse their deposit funds to PIPCR. Furthermore, respondent argued, because "Webman was PIPCR," when he disbursed funds to other entities at Webman's direction, "[a]ll monies wound up exactly where Webman wanted them to be."

Essentially, respondent maintained that the real estate contract did not require him to hold the buyers' deposits in escrow, but, to the contrary, the buyers consented to the disbursement of their funds to the seller without conditions. Moreover, respondent contended that, because he disbursed the funds either to his client, or at his client's direction, his conduct was not unethical.

* * *

Following a review of the record, we determine to grant the OAE's motion. Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides that

> The Board shall recommend imposition of the identical action or discipline unless the Respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the Respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
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> (E) the unethical conduct established warrants substantially different discipline.

The Florida disciplinary authorities disbarred respondent for the totality of his actions with Webman and PIPCR, primarily for his failure to take "proactive steps to safeguard the deposit monies and meet his fiduciary responsibilities to the purchasers." Subsection (E), above, applies, inasmuch as such misconduct, while egregious, would not result in disbarment in New Jersey.

In his submission to us, respondent quoted from paragraph six of the model purchase and sale agreement used in these transactions. That paragraph permitted respondent to immediately disburse both of the buyers' deposits to Webman. The OAE did not contest respondent's version of paragraph six. Finally, prior to oral argument, the OAE furnished us with several agreements, all of which support respondent's position that, unlike typical real estate contracts, the agreements at issue did not require the real estate deposits to be held in escrow until closing of title, but, rather, expressly permitted respondent to disburse the deposits to his client upon receipt.

The OAE, nevertheless, urged us to disbar respondent for knowing misappropriation of escrow funds, using the "constructive escrow agreement" theory that the Florida authorities imputed to respondent. It is clear to us, however, that respondent had no duty to the purchasers to withhold those deposits from Webman.

In fact, to the contrary, the Florida referee commented in the temporary suspension hearing report that the Florida court had concluded that insufficient evidence had been presented to sustain a finding that respondent "misappropriated funds by utilizing deposit monies for his own use and benefit."

Respondent has been consistent throughout that he was authorized, under paragraph six of the escrow agreement – an agreement that he drafted – to disburse the deposit monies to the seller, and that he disbursed the deposit monies exactly as instructed by Webman. There is no evidence in the record to the contrary.

It is true that we are bound by the facts contained in the Florida record. "A final adjudication in another court, agency or tribunal, that an attorney admitted to practice law in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." Rule 1:20-14(a)(5). Nevertheless, we are not bound by the Florida court's legal conclusion that respondent had an overarching duty to maintain the deposit monies intact in his trust account by way of a constructive escrow agreement. Indeed, a portion of the Florida case that the referee cited in support of his finding of a constructive escrow, United American Bank of Central Florida v. Seligman, supra, 5499, So.2d 1014, contains the following quoted language: "[i]n the absence of an express agreement, written or oral, the law will imply" certain duties of care upon the escrow agent, in this case, respondent.

Here, however, the parties had an express, written, and fully executed escrow agreement, as evidenced by paragraph six. Therefore, we cannot find clear and convincing evidence that respondent knowingly misappropriated purchasers' deposit monies, either for himself or for another improper use.

Respondent, nevertheless, engaged in egregiously dishonest, fraudulent conduct, in violation of RPC 8.4(c). We find that he also assisted Webman in conduct that he knew was fraudulent, in violation of RPC 1.2(d), and ran afoul of Florida's recordkeeping rules, equivalent to New Jersey R. 1:21-6 and RPC 1.15(d).

When respondent partnered with Webman and drafted the model purchase and sale agreement, he knew that Webman had been convicted of fraud in federal court, that Webman had spent time in a federal penitentiary for his crimes, and that a few short months before launching the PIPCR scheme, Webman had been banned for life from participating in the futures and commodities markets in the United States. Under such obvious circumstances, it was unconscionable, and perhaps deliberate, for respondent

to draft such a lopsided escrow arrangement into the purchase and sale agreement.[6]

It is also axiomatic that, in any purchase and sale agreement, the seller is presumed to own the property he is offering for sale. The facts here, however, suggest that the purchasers were not aware that PIPCR did not own the property when they turned over their deposits to secure the purchase price of their lots. But respondent knew that PIPCR and Webman did not own the Hardy property. He also knew that Webman would use those funds to purchase that very property and for other, unrelated purposes.

Respondent also acted dishonestly by facilitating PIPCR's $267,000 mortgage and loan for the Hardy property, which encumbered the property that he and Webman were actively marketing to the unsuspecting purchasers at the time.

Respondent also acted as an intermediary with purchasers, who were comforted to know that an attorney of respondent's experience was involved in the development

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[6] Respondent has claimed that the Costa Rica project was a legitimate real estate development that fell on hard times. We view respondent's actions, from the outset, to cast doubt on that claim.

project.[7] Yet, respondent was acutely aware of the precarious state of the project at all times, as evidenced by his $99,000 loan to PIPCR, his apparent ten percent interest in PIPCR, and his role as an officer in the company. Respondent knew, all along, that the project was going nowhere, that Webman was using the purchasers' funds for purposes unrelated to the project, and that no purchaser had taken title to his or her parcel of land.

Ultimately, the vast majority of purchasers were unable to obtain any refund of their deposits, with losses totaling more than $2,500,000.

Worst of all, Webman must have known, from the outset, that, given his felony conviction for fraud, he needed an attorney like respondent to lend an imprimatur of honesty and integrity to the otherwise unscrupulous landscape — a realization that could not have escaped respondent's sensibility.

Although respondent cannot be found guilty of knowing misappropriation on these facts, for the above reasons, he is,

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[7] To the extent that they may also have been comforted to know that their funds were deposited in an attorney trust account, that reliance appears to have been unfounded, in light of paragraph six of the agreement.

nevertheless, deserving of a significant term of suspension for his duplicitous conduct.

Cases involving egregious violations of RPC 8.4(c), even where the attorney has a non-serious ethics history, have resulted in the imposition of terms of suspension. See, e.g., In re Franco, 227 N.J. 155 (2016), In re Carmel, 219 N.J. 539 (2014), and In re Steiert, 220 N.J. 103 (2014).

In Carmel, the Court imposed a three-month suspension on the attorney for his "egregious misconduct," in violation of RPC 8.4(c). The attorney had represented a bank in a successful real estate foreclosure proceeding against a borrower. To avoid duplicate transfer taxes, Carmel and the bank chose not to immediately record the bank's deed in lieu of foreclosure. When a subsequent buyer for the property was under contract, the attorney discovered that, in the interim, an Internal Revenue Service (IRS) lien had been filed against the property. Because the IRS lien was superior of record to the bank's interest, the IRS would levy against the bank's proceeds from the intended sale of the property. Rather than disclose the prior IRS lien to his client, Carmel fabricated a lis pendens for the foreclosure action, which was intended to deceive the IRS into believing that its lien was junior to the bank's interest. The attorney then sent the false lis pendens to the IRS, represented that it

had been filed prior to the IRS lien, and attempted to engage the IRS in settlement discussions. Rather than settle, the IRS referred the matter to the U.S. Attorney's Office. Carmel finally admitted his misconduct. In mitigation, he had an unblemished disciplinary history and satisfied the IRS lien with his own funds to make both his client and the government whole.

In Steiert, the Court imposed a six-month suspension on the attorney for serious misconduct, in violation of RPC 8.4(c) and (d). Through coercion, the attorney had attempted to convince his former client, who had been a witness in Steiert's prior disciplinary proceeding, to execute false statements. The attorney intended to use the former client's false statements to exonerate himself with regard to the prior discipline. In aggravation, the attorney's conduct was found to amount to witness tampering, a criminal offense. Additionally, Steiert exhibited neither acceptance of his wrongdoing nor remorse. Finally, he had a prior reprimand, in 2010, for practicing law while ineligible and making misrepresentations in an estate matter.

In Franco, the Court imposed a one-year suspension on the attorney for his "brazen deception" and egregious violations of RPC 8.4(c). The attorney represented a real estate developer in a failed business transaction. Initially, he assisted his client

in securing a $350,000 short-term loan under false pretenses. In order to benefit his clients by delaying their obligation to repay the loan, Franco violated his fiduciary duties as an escrow agent, and purposely omitted material facts from his subsequent communications with the lender. Then, in an attempt to avoid all discipline and civil liability, Franco engaged in a scheme of self-serving evasion and deceit, lying, while under oath, during the disciplinary proceedings brought against him by the OAE. He showed no remorse, and refused to accept responsibility for his misconduct.

Attorneys found guilty of having violated RPC 1.2(d) have been admonished or reprimanded. See, e.g. In the Matter of David G. Polazzi, DRB 13-252 (January 28, 2014) (admonition for attorney whose supervisor directed him to prepare provisions for the use of lender funds that were not disclosed to the lender, resulting in adjustments and credits that did not appear on the HUD-1 closing statement (RPC 1.2(d)), and without advising the client about the limitations on his conduct (RPC 1.4(d)) and In re Rosen, 209 N.J. 157 (2012) (reprimand for attorney guilty of RPC 1.2(d) and RPC 1.4(d) for handling real estate closings in which he had prepared written instruments that shifted certain statutory fees from seller to buyer, terms that he knew were

expressly prohibited by law, and knowing that his client expected assistance not permitted by the RPCs).

Recordkeeping irregularities ordinarily are met with an admonition, so long as they have not caused a negligent misappropriation of clients' funds. See, e.g., In the Matter of Eric Salzman, DRB 15-064 (May 27, 2015) and In the Matter of Leonard S. Miller, DRB 14-178 (September 23, 2014).

Although respondent's conduct is most akin to that of the attorney in Franco, supra, (one-year suspension), where the attorney's egregious misconduct arose out of a single client matter, respondent's conduct is all the more serious because he engaged in a pattern of dishonesty and fraudulent conduct, assisting Webman over a period of four to five years, in a multitude of real estate transactions. In the process, an untold number of purchasers lost a combined $2,500,000 in deposits to their scheme.

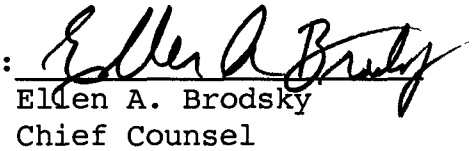
In further aggravation, respondent is, to this day, unrepentant for his actions, maintaining the belief that he is "innocent of any wrongdoing."

For the totality of respondent's misconduct, the harm caused, and his demonstrated lack of remorse, we determine to impose a three-year suspension, with reinstatement conditioned on reinstatement in Florida.

Members Gallipoli and Zmirich voted for respondent's disbarment for the totality of his misconduct, which they termed "part and parcel of a Ponzi scheme."

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Gene Stuart Rosen
Docket No. DRB 17-003

Argued: March 16, 2017

Decided: July 6, 2017

Disposition: Three-year Suspension

Members	Three-year Suspension	Disbar	Did not participate
Frost	X		
Baugh	X		
Boyer	X		
Clark	X		
Gallipoli		X	
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich		X	
Total:	7	2	

Ellen A. Brodsky
Chief Counsel