SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 17-073
District Docket No. IV-2014-0053E

IN THE MATTER OF ALBERT ANTHONY CIARDI, III AN ATTORNEY AT LAW	Dissent

Argued: May 18, 2017

Decided: September 12, 2017

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

The majority finds no clear and convincing evidence in the record that respondent violated the RPCs with which he was charged, and recommends dismissal in its entirety. For the reasons that follow, I respectfully dissent from that recommendation, and instead vote that respondent be censured, or, at the very least, reprimanded.

In November 2004, grievant, Thomas Tomei, retained respondent's firm to file a Chapter 11 bankruptcy petition on behalf of L&T Development, LLC ("L&T") and M&T Marine Group, LLC ("M&T"), both New Jersey limited liability companies. Tomei, a

member of both entities, signed the engagement letter as a "member." He did not sign as an individual, and neither the engagement letter nor any other record or writing evidences the agreement of Tomei, or anyone else, to be responsible to pay for respondent's legal services to L&T or M&T.

Respondent filed M&T's Chapter 11 petition around January 2007, and, shortly thereafter, the court entered an order converting the case to a Chapter 7 proceeding. Respondent never filed a fee application in the bankruptcy court. Instead, respondent demanded payment of his firm's legal fees from Tomei and, ultimately, in October 2007, respondent sued Tomei and his father, Vincent Tomei, as "trustee."

As the majority opinion recites, the first count of respondent's Pennsylvania complaint alleged breach of contract against Thomas Tomei for his failure to pay the legal fees incurred by L&T and M&T during the bankruptcy proceedings; the second count asserted an unjust enrichment claim against Tomei, claiming that both he and M&T had "appreciated the benefit of the legal services provided"; and the third count asserted that Tomei had falsely orally agreed that he would pay the legal fees of both companies. Respondent's offices are in Pennsylvania and New Jersey. Tomei was a resident of New Jersey. The bankruptcy petition was filed in New Jersey. Regardless of where respondent's

actual retention as attorney took place, it seems beyond dispute that respondent was retained by a New Jersey resident to file a petition in the bankruptcy court in New Jersey on behalf of two New Jersey limited liability companies. To summarize the salient undisputed facts, respondent sued the grievant in Pennsylvania to collect his firm's fees. Respondent claims that, after the conversion to a Chapter 7 proceeding, Tomei wanted respondent to represent him individually on serious personal creditor claims, and, as a condition of such representation, Tomei orally agreed that he would pay the outstanding legal bills of the companies and his prospective individual legal fees. Tomei denies any such agreement. The local District Ethics Committee ("DEC") did not find respondent's testimony regarding post-conversion legal work for Tomei individually either credible or believable.

In the Pennsylvania action, respondent did not give the pre-action notice required under R. 1:20A-6. Respondent asserts both that he was not obligated to do so, as the Rule is not applicable to foreign litigation, and that such notice was not required because his fee was "not in dispute" – only the responsible party.[1]

[1] Of course the "amount of his fee" was in dispute. Respondent claimed Tomei then individually owed $54,980.97, while Tomei defended by asserting he owed nothing, because the debt was not his individually, but, rather, that of the companies that had entered into the retainer agreement with respondent.

Thereafter, apparently because this issue of the R. 1:20A-6 notice had been raised by Tomei's counsel in the Pennsylvania litigation, and while motions were pending decision on Tomei's preliminary objections to the complaint, respondent sent the R. 1:20A-6 notice to Tomei. Tomei's then attorney submitted a request for fee arbitration, which was then docketed by the District IV Fee Arbitration Committee ("FAC") on March 31, 2008. And again, while the motions were still pending decision, respondent filed an Attorney Fee Response Form, claiming that, as of that filing date, he was entitled to a fee of $69,980.97, but based only on the original engagement letter with L&T and M&T, and not on any "unjust enrichment" claim.

Respondent admits that, shortly after Tomei's filing of the request for fee arbitration, he was advised by the FAC secretary to file an answer within 20 days AND "[i]f a lawsuit is pending regarding this fee, you must request that the suit be stayed pending resolution of the matter by the [FAC]." Respondent failed to request a stay of the Pennsylvania litigation and that failure, I respectfully submit, is the foundation for the ethics charges brought against him. After submitting himself and his claim for unpaid legal fees to the jurisdiction of the FAC, respondent knowingly disobeyed his obligation under the rules of that tribunal to stay the pending Pennsylvania litigation.

Instead, at every opportunity, he resisted the efforts of defense counsel to dismiss the litigation; he filed an amended complaint and conveniently failed to advise the Pennsylvania court that fee arbitration was pending; he vigorously pursued discovery; and, ultimately, on May 6, 2009, respondent obtained a judgment against Tomei for $84,377.92, at a point when Tomei was unrepresented. Then, from July 2009 through March 2010, further litigation ensued in both Pennsylvania and New Jersey, wherein new counsel for Tomei first unsuccessfully attempted to reopen the Pennsylvania judgment and then again unsuccessfully sought to set aside the judgment entered in New Jersey under the Uniform Enforcement of Foreign Judgments Act.

In its May 3, 2010 determination, the FAC denied respondent's claim to recover his fees against Tomei because Tomei had not signed the original fee agreement in his personal capacity, but rather in his representative capacity as a member of M&T. The FAC gratuitously commented, "[W]hile this Panel would like to find Tomei responsible for the outstanding fee, since the testimony and documentation supports that the legal work performed was proper and reasonable-we are unable to make such a decision based on the structure of the Fee Agreement." And then, apparently sua sponte, and feeling it had an obligation to do so, the FAC suggested that respondent should

look to the unpublished opinion of the Appellate Division in Cole, Schotz, Meisel Forman and Leonard, P.A. v. Kleiman, (A5255-08T2-2010) for "other options."

Respondent, whether at the suggestion of the FAC or otherwise, continued his pursuit[2] of Tomei to collect on the judgment entered in Pennsylvania and now domesticated in New Jersey. Respondent thereafter went so far as to obtain a writ of execution in December 2012. And then, finally, in February 2016, but only after receiving notice of this ethics grievance, and after unnecessarily litigating his claim for fees against Tomei in the courts of Pennsylvania and New Jersey for more than eight years, respondent, without ever collecting on his judgments, filed a praecipe in Pennsylvania and a warrant of satisfaction in New Jersey, testifying there were no assets, nothing to collect, and that "it would be better for these judgments to be satisfied, so [he] satisfied them."

Even if I accepted what I consider to be the mistaken reasoning of the majority that excuses respondent from including the R. 1:20A-6 notice in the original complaint filed in

[2] Pursuit it was, as foreshadowed by the letter (Exhibit P14) of February 25, 2008, in which Tomei's then attorney recounts to Tomei a conversation with respondent's attorney wherein the attorney wanted a "message" conveyed from Ciardi to Tomei to the effect that "this was a matter of principle now, and that he (respondent) did not care how much time they had to put into it, they were going to do everything they could to collect from you."

Pennsylvania, no amount of like reasoning can convince me that, once respondent submitted to the jurisdiction of the FAC, he was not bound to follow the rules and mandates of that tribunal. Thus, in my view, respondent was obligated to seek a stay of the Pennsylvania proceedings. I would agree that our Rules cannot enjoin foreign courts from exercising jurisdiction over a dispute such as respondent brought to the Philadelphia Court of Common Pleas.[3] Nothing, however, prevented respondent, after he had submitted himself to the FAC, from seeking to stay or voluntarily discontinuing the Pennsylvania litigation so his dispute with Tomei could be adjudicated in binding arbitration. Instead, he vigorously pursued Tomei, ultimately obtaining a judgment to which the FAC later determined he had no entitlement.

The majority appears to accept respondent's argument that he was within his legal rights in obtaining the judgment against Tomei in Pennsylvania and domesticating that judgment in New Jersey. Unfortunately, this argument conflates two distinct issues and misses the crux of respondent's unethical conduct by creating a straw man where one need not exist. While respondent

[3] An interesting question raised out of curiosity only is why was the claim for fees due brought in Pennsylvania, instead of New Jersey – convenience of the respondent or to avoid the probability of mandatory arbitration, had the suit been brought in New Jersey?

had the right, arguendo, to sue Tomei in Pennsylvania, he clearly had no such right to proceed to judgment in Pennsylvania after he submitted himself to the jurisdiction of the FAC. Had respondent done what he had to do – seek a stay or dismiss the suit, if the court would not grant a stay – there would have been no judgment to be thereafter domesticated in New Jersey, and the years of endless and unnecessary litigation would have been avoided. Only by ignoring the undisputed facts and this reality is the majority able to dismiss the charged ethics violations in their entirety.[4]

As the FAC correctly noted, the Court has provided for arbitration of attorneys' fees since 1978. The underlying policy of the protocol is to promote public confidence in the bar and the judicial system. The fee arbitration process affords a client a swift, fair, and inexpensive method to resolve fee disputes. New Jersey Court Rule 1:20A-1 et seq. provides the framework applicable to fee arbitration. The FAC determined that

---

[4] The majority reads Cole, Schotz as standing for the proposition that, when a firm's services benefit both corporate and individual defendants, and the individual defendants accept the firm's services, the firm is entitled to collect fees from the individual defendants on a quantum meruit basis, and uses that understanding to justify respondent's seeking a writ of execution even after the FAC had determined he was not entitled to a recovery of his fees based on the engagement letter. I disagree and submit that, on the facts of this matter, as contrasted with the facts in Cole, Schotz, the majority's justification is totally unwarranted.

violation of the fee arbitration rules is not an ethics violation. I would agree that any violation of the Rules, pertaining to fee arbitration or otherwise, would not *per se* constitute an ethics infraction. However, when an attorney submits himself to the jurisdiction of the FAC, such as respondent did here, and is directed to stay any pending lawsuit seeking to collect a fee, and the attorney disregards that direction, then I part company with the FAC and the majority of the Board and conclude that such violation of the mandate of that tribunal is an ethics violation, especially where, as here, such total disregard of the tribunal's direction led to years and years of unnecessary and expensive litigation – the exact opposite of what the fee arbitration process was designed to avoid.

Disciplinary Review Board
Maurice J. Gallipoli

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel