Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-219
District Docket No. XIV-2010-0335E

In the Matter of

Lyn P. Aaroe

An Attorney at Law

Decision

Argued: November 21, 2019

Decided: February 6, 2020

Timothy J. McNamara appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter was before us on a recommendation for disbarment filed by Special Master Donna duBeth Gardiner. The formal ethics complaint charged respondent with violating RPC 1.15(a) and the principles of In re Wilson, 81

N.J. 451 (1979), and/or In re Hollendonner, 102 N.J. 21 (1985) (knowingly misappropriating of client and/or escrow funds); RPC 1.2(d) (counseling or assisting a client in illegal or fraudulent conduct); RPC 1.15(a) (failing to safeguard property belonging to a client or third party); RPC 1.15(b) (failing to promptly disburse funds); RPC 4.1(a)(1) (making a false statement of material fact or law to a third person); RPC 4.1(a)(2) (failing to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) (two counts); and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

For the reasons set forth below, we find that respondent knowingly misappropriated the equivalent of escrow funds and recommend his disbarment.

Respondent earned admission to the New Jersey bar in 1971. During the relevant time frame, he maintained an office for the practice of law in Belvidere, New Jersey. He has no prior discipline. On August 28, 2017, the Court entered an Order declaring him ineligible to practice, based on his failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection. Next, on November 5, 2018, the Court entered an Order declaring him ineligible to

practice, based on his failure to comply with New Jersey continuing legal education requirements. Finally, on August 28, 2019, the Court entered an Order declaring him ineligible to practice, based on his failure to comply with the Interest on Lawyers Trust Accounts obligations. He remains ineligible, on all fronts, to date.

At the commencement of the ethics hearing underlying this matter, respondent represented to the special master that he had retired from the practice of law. Upon investigation, the Office of Attorney Ethics (OAE) learned that, at the time respondent made that representation, he was actively representing Green Township regarding land use, but then resigned, abruptly, four days later, on June 13, 2017.

Respondent maintained his attorney trust account (ATA) and his attorney business account (ABA) at PNC Bank. His law practice focused primarily on land use law, including the representation of fourteen municipal boards regarding planning, zoning, and adjustment.

Separate from his law practice, in 1991, respondent incorporated Castle Ridge Development Corporation (CRDC), a Delaware entity, and, in 2003, he registered it to do business in New Jersey. CRDC was wholly owned by respondent and his wife, Barbara Aaroe, until 1995, when they transferred their ownership interests to the new president and sole shareholder, Robert Godusch,

respondent's lifelong friend and frequent business partner. The transfer was not made for new consideration, but, rather, in return for prior investments Godusch had made in the corporation and other ventures, through a series of loans to respondent. Following the transfer of corporate ownership, through the date of the ethics hearing, respondent provided legal services to CRDC and, at times, also served as Acting Secretary to the corporation.

After registering in New Jersey, CRDC commenced the development of a fifteen-home subdivision in White Township, New Jersey (the Project). On October 5, 2004, in furtherance of the Project, CRDC entered into a Memorandum of Agreement (MOA) with Brian Plushanski Construction Company (BPCC), whereby BPCC agreed to perform initial excavation, grading, and construction services, for a total cost of $519,737.75. Brian Plushanski is one of the two grievants underlying this matter. Respondent executed the MOA in behalf of CRDC, as its "Agent/Attorney." Approximately one year after the execution of the MOA, BPCC completed its scope of work, and CRDC paid $100,000 to BPCC. CRDC, however, failed to pay the more than $400,000 balance to BPCC, despite BPCC's multiple demands for payment.

Consequently, on November 2, 2006, BPCC, through its counsel, John Lanza and Kenneth Thomas, filed a lawsuit against CRDC, in the Superior Court of New Jersey, Hunterdon County, alleging breach of contract, and seeking the

balance of the funds owed to BPCC. On January 22, 2007, respondent filed in behalf of CRDC an answer and counterclaim to BPCC's lawsuit. BPCC then filed an answer to the counterclaim, a third-party complaint, and, ultimately, an amended complaint, naming CRDC and Castle Ridge Homes, L.P., as corporate defendants, and Godusch and respondent as additional defendants, individually. During the pendency of the lawsuit, BPCC filed lis pendens notices in respect of most of the subdivided lots in the Project.

On March 31, 2008, following extensive negotiations, all parties to the BPCC lawsuit, including BPCC, CRDC, Castle Ridge Homes, L.P., Godusch, and respondent (who was personally represented by counsel), entered into a Stipulation of Dismissal Without Prejudice and Settlement (the Settlement). The Settlement provided for a promissory note from the defendants, in the amount of $390,000 plus 8% interest, to be secured by a mortgage on seven subdivided lots in the Project (the Mortgage), with a $60,000 payment due to BPCC within thirty days of the date of the sale of any such subdivided lot. The principal balance of the note and Mortgage was to be reduced, by recurring payments of $60,000 to BPCC, upon the sale of each of the seven, mortgaged tax lots to third-party buyers. Paragraph (A)(5) of the Settlement specifically stated that the lis pendens notices filed by BPCC were not to be released until the delivery and recording of the note and Mortgage, as a condition precedent, and that the civil

action would not be dismissed with prejudice until the defendants satisfied all conditions of the settlement. The Order of Disposition issued by the Superior Court stated that the matter had been settled, not dismissed, despite the fact that "dismissal" was included as an option on the order, multiple times, for the court's potential selection. Respondent claimed that he agreed to enter into the settlement, including his personal liability, because "it was the right thing to do," and not because he was the real principal behind CRDC, with Godusch acting as a "strawman," as the OAE repeatedly alleged during its case-in-chief against him.

The Settlement further provided for the "delivery and filing of the duly executed promissory note, [M]ortgage, [and] affidavit of title . . . by the Defendants or either of them," and was signed by Godusch on behalf of himself and the corporate entities, and by respondent on behalf of himself. Despite the language of the Settlement, respondent did not prepare the note, Mortgage, or affidavit until nine months later. During that nine-month delay, Castle Ridge Homes, L.P., entered into a contract to sell one of the subdivided lots encumbered by BPCC's lis pendens notices to third-party buyers, Andrew and Valarie Discafani.

On December 11, 2008, respondent sent to counsel for BPCC drafts of the note, Mortgage, and affidavit of title he had prepared, and, further, requested

that BPCC prepare a discharge/cancellation of the notice of lis pendens for the subdivided lot that Castle Ridge Homes, L.P. sought to sell to the Discafanis, "in order that [the lis pendens] does not show up on the title rundown we need to provide to our construction lender." Four days later, in response, counsel for BPCC asserted that the draft Mortgage did not comply with the terms of the Settlement, and, thus, requested that respondent revise the document.

On December 17, 2008, respondent sent to counsel for BPCC the revised Mortgage draft and other Settlement documents; that same date, counsel for BPCC approved the revised Mortgage and requested a signed, notarized, and recorded/filed copy of the Mortgage before BPCC would supply the signed discharge of the single notice of lis pendens that respondent had requested. Ultimately, respondent sent to counsel for BPCC the fully-executed, original Mortgage, which he never recorded with the Warren County Clerk's Office, as the Settlement required, and BPCC's counsel failed to record it for almost a year. According to Lanza, counsel for BPCC, he did not record the Mortgage because respondent expressly was bound to do so, pursuant to the Settlement, and because, in his opinion, by law, his client's interests were fully protected by the lis pendens notices and the executed Mortgage, despite respondent's failure to promptly record it. BPCC, however, proceeded to discharge/cancel its notice

of lis pendens in respect of the single subdivided lot at the Project, as respondent had requested, despite respondent's failure to record the Mortgage.

At some point prior to September 2009, Castle Ridge Homes, L.P., agreed to sell two additional, contiguous subdivided lots in the Project to the Discafanis, for a total of three lots. On September 14, 2009, in anticipation of closing the transaction, Probe Lawyers Service (Probe), the Discafanis' title company, issued a commitment for title insurance for the three subdivided lots the Discafanis sought to purchase. The commitment required the satisfaction of mortgages on the lots held by Skylands Bank and Jess R. Symonds, P.E., and the cancellation of the lis pendens notices filed against the lots by BPCC, but made no mention of the Mortgage provided for by the Settlement, because it had not yet been recorded. Respondent was aware of the existence of the fully-executed BPCC Mortgage affecting the Project lots that the Discafanis sought to purchase, having prepared the Mortgage and note in behalf of himself, Godusch, and his corporate clients. Respondent, however, failed to notify BPCC of the impending closing affecting BPCC's Settlement interests, despite admitting that BPCC had a legitimate contractual expectation that it would be paid from the closing proceeds.

Moreover, CRDC, Castle Ridge Homes, L.P., Godusch, and respondent received a copy of the title commitment; obtained a payoff amount for the

Skylands Bank mortgage, and a release of mortgage from Jess R. Symonds, P.E.; and provided Probe with a copy of the Order of Disposition entered by the Superior Court in respect of the Settlement. It is not clear from the record whether respondent provided Probe with a copy of the actual Settlement, which required the execution of the promissory note, the recording of the Mortgage, and the payment of monies from CRDC to BPCC, as conditions precedent to the release of the respective notices of lis pendens, despite the title company's request for the document. On September 30, 2009, a Notice of Real Estate Settlement was filed in respect of the pending Discafani purchase.

On October 26, 2009, the closing on the Discafanis' purchase of three Project lots took place at respondent's office. The Discafanis were accompanied by attorney Michael Discafani. Signature Closing Services, L.L.C. (Signature) served as the settlement agent.[1] Respondent represented CRDC, Castle Ridge Homes, L.P., and Godusch, who was not present. Signature prepared the HUD-1 closing statement.

Respondent admitted that the failure of the defendants to the BPCC lawsuit and Settlement, including himself, to pay BPCC $120,000 from the

[1] Michael is the brother of Andrew; he testified that he did not formally represent the Discafanis at the closing, in light of his employment as in-house counsel to Hovnanian builders.

Discafanis' net sales proceeds violated the Settlement, but claimed that the disbursement of those closing proceeds was made in Godusch's sole discretion, as President of CRDC and managing member of Castle Ridge Homes, L.P. Respondent claimed that Godusch had directed respondent, as his counsel, to exercise a "creditor preference" in respect of those funds.

Specifically, in connection with the closing, Skylands Bank was paid $57,243.46, in satisfaction of its mortgage on the Discafani Project lots; the remainder of the Discafani sales proceeds, totaling $150,006.70, was paid to respondent, via a Signature check payable to "Lyn Paul Aaroe Attorney Escrow Account." Respondent claimed to have received those funds strictly in behalf of his client, Godusch. Respondent further claimed that he never made a representation, in respect of the Discafani closing, that the BPCC lis pendens notices had been "cancelled, nullified, or otherwise disposed of," but, rather argued to the Discafanis' counsel and Signature, at the closing, that, although the BPCC lis pendens notices remained open of record, they did not, "as a matter of fundamental title law," cloud the title to the Project lots, representing that the litigation underpinning the lis pendens notices had been dismissed.

During the ethics hearing, Thomas, counsel for BPCC, asserted that respondent knew that his recitation of title law at the closing table was false, in light of his status as a self-professed expert in land use law, and the existence of

black letter precedent on the issue – Manzo v. Shawmut Bank, N.A., 291 N.J. Super. 194, 206 (App. Div. 1996) – which Thomas asserted held that mortgage priority dates back to the date a lis pendens notice underlying a mortgage was filed. Thomas also testified that respondent was doubly aware of the lis pendens issue, as CRDC had struggled to obtain construction financing due to the post-Settlement existence of the lis pendens affecting the Project lots. In the presentation of his defense, respondent admitted that he might have been wrong, "as a matter of title law," regarding his position on the lis pendens, but noted that his argument ultimately persuaded Signature to release the net sales proceeds to him.

Before the closing concluded, Signature realized that the BPCC lis pendens notices remained an issue in title, and, after consulting with Probe, required respondent to return the $150,006.70 check. The day after the closing, respondent mailed to Signature three deeds and three affidavits of title for the Project lots purchased by the Discafanis, which respondent had prepared, along with instructions that the documents were to be held in escrow until the sellers received their net proceeds. The affidavits of title, which Godusch signed and respondent notarized, represented that no interests or legal rights, including liens or mortgages, had been allowed to attach to the properties. Respondent disclaimed responsibility for Godusch's execution of the documents, asserting

that they were based on a "standard NJ form" affidavit. BPCC's attorneys, Lanza and Thomas, emphasized that, regardless of respondent's purported legal view of the effect of the lis pendens notices on title, he knew that the executed promissory note and Mortgage, both of which emanated from the Settlement, existed at the time that his client executed these affidavits, and, yet, he prepared and notarized them, in his role as counsel to Godusch and his corporate entities.

On October 28, 2009, respondent contacted Signature to ascertain the status of the net seller proceeds from the Discafani closing. One day later, Signature reissued its check, in the amount of $150,006.70, payable to "Lyn Paul Aaroe Attorney Escrow Account," and respondent deposited the funds in his ATA. According to Thomas' testimony, during the litigation that followed the release of those closing funds, Signature admitted that disbursing the closing funds to respondent had been a mistake.

During the post-Discafani litigation between BPCC, CRDC, Godusch, and respondent, a managing employee at Probe, Jacob R. Pence, was deposed regarding the issue of the lis pendens notices. According to Pence, during the Discafani closing, after Signature raised the issue of the BPCC lis pendens notices affecting title to the subject real estate, respondent contemporaneously faxed to Probe documents relating to the BPCC litigation, and telephoned Pence, requesting removal of the lis pendens as a condition to the title commitment, so

that the closing could proceed. Pence claims that he refused and that his underwriter/counsel at Old Republic National Title had instructed him not to remove the lis pendens notices from the title insurance without first receiving proof of discharges of record.

On November 10, 2009, instead of complying with his and his clients' joint and several debt to BPCC, owed under the Settlement, the note, and the Mortgage, respondent disbursed $15,000 of the net Discafani sales proceeds to himself for attorneys' fees associated with the Project; $49,938.74 to Godusch to pay Caterpillar Financial in association with leased heavy equipment at the Project that was about to be repossessed; and $85,067.96 to Washington Township for satisfaction of overdue property tax obligations owed on respondent's primary residence, which his wife owned and which was facing an imminent tax sale. Brian Plushanski did not consent to the use of the net closing proceeds, of which he was owed $120,000, plus interest.

By letter dated November 16, 2009, Signature stated to respondent,

> [i]n connection with the October 26, 2009 transfer of title, please see attached letter dated November 12, 2009 received by our office from [BPCC's attorney, Ken Thomas]. Also attached is a copy of [the Settlement] signed by you and by [CRDC and Castle Ridge Homes, L.P.], stipulating that an amount of $60,000 shall be paid to [BPCC] upon sale of [two of the three Discafani tax lots] . . . . Please contact this office immediately upon receipt of this fax to confirm you indeed have forwarded the $120,000 payment to

> the attorneys for [BPCC], and the lots will be immediately released from the Lis Pendens filed on October 23, 2007.
>
> We look forward to hearing from you, and receiving the necessary proof that all liens against the property have been satisfied.
>
> [Ex.16.]

That same date, respondent replied to Signature,

> I am in receipt of your correspondence . . . I am also aware, having received correspondence directly from [counsel for BPCC], of their demands with respect to payment.
>
> . . . Castle Ridge has obligations to [BPCC] which are being addressed directly with [counsel for BPCC]. I advise you with the greatest possible respect, that you are allowing yourself to be dragged into a matter with respect to which you have no responsibility or liability whatsoever.
>
> Particularly, the title to the three (3) lots conveyed [to the Discafanis] was "clear" in that the lis pendens notice of which [BPCC] speaks was with regard to litigation long since dismissed . . . . Proof of the dismissal was provided to [the title company] in the form of an Order of Dismissal signed by Judge Rubin. I think we can all agree that it is fundamental title law that a lis pendens notice for litigation that has been dismissed is a nullity and consequently, cannot affect title, your responsibility, or those of [the title company] which are limited to addressing matters of public (title) record, only.
>
> While there was and remains a settlement agreement between the parties, this settlement agreement is a private (non-record title) matter which neither you nor

> [the title company] have, had or could have had any knowledge or notice, whatsoever.
>
> [Ex.17.]

The next day, respondent sent a letter to counsel for BPCC, stating

> [t]here was a bit of a problem regarding Castle Ridge's obligations to [BPCC] . . . . Inadvertence on our respective parts has led to this closing and the previous disbursement of the closing proceeds . . . .
>
> While, certainly, we are aware of the $60,000 per lot payment obligation to [BPCC], [I] clearly recalled receiving a release of the lis pendens . . . it [is now clear to me that the release was limited to one of the three Discafani tax lots]. [I] was not mindful of this limitation when closing took place . . . . Clearly a mistake on my part which I herewith freely admit. Nor, apparently, was the mortgage provided for by the [Settlement] signed 18 months ago ever prepared by your office and forwarded for signature by Castle Ridge. That is why no mortgage appeared of record in the context of the closing.
>
> I suggest that we each be given the benefit of the doubt for our respective inadvertences and move on from here. What we propose is full and immediate settlement with [BPCC] in the only manner now possible, which is conveyance of title to a Castle Ridge property which, at least at this point in time, is unencumbered and free and clear . . . .
>
> [Ex.18.]

John Lanza testified, in respect of respondent's "inadvertence" letter, that Plushanski had never given consent or authorization to respondent to ignore the express terms of the Settlement and to use the Discafani net sales proceeds as

respondent had disbursed them. In February 2010, after BPCC's demands for Settlement payments in connection with the Discafani sales proceeds were not met, BPCC filed a motion to enforce the Settlement. In March 2010, the court entered a judgment in favor of BPCC, in the amount of $393,179.56, including attorneys' fees, against respondent, Godusch, CRDC, and Castle Ridge Homes, L.P., jointly and severally. As of the conclusion of the ethics hearing, the defendants had failed to pay to BPCC any of the debt owed pursuant to the Stipulation and the judgment. BPCC, which recorded the Mortgage subsequent to the Discafani closing, ultimately instituted a foreclosure action on the lots owned by the Discafanis, who paid $90,000 to BPCC to clear title and to keep their property. BPCC also obtained $30,000 from Signature, pursuant to a mediation, and $20,000 from Probe, pursuant to litigation.

According to Plushanski, the breach of the MOA and Settlement by CRDC, Godusch, and respondent caused him extreme financial strain. Plushanski had started the business in 1978, and, in 2009, in order to sustain the company, was forced to auction off almost half of his equipment, spend his entire savings, liquidate his 401k account, and borrow money from his father, in order to pay bills, pay the costs he had incurred in connection with the Project, and provide for his family.

In his reply to Plushanski's ethics grievance, respondent asserted that Lanza had failed, for nine months, to prepare the Mortgage required by the Settlement, and that the executed documents "languished" in Lanza's office for an additional eleven months. He further asserted that the Settlement had "voided" the lis pendens notices that BPCC had filed against the Project. He admitted that his client, Godusch, had intentionally violated the Settlement, but denied that any fraud or criminal act had been committed. Although respondent erroneously denied having prepared the Mortgage in connection with the Settlement, he subsequently admitted, during the ethics hearing and in multiple letters admitted into evidence, to having done so.

As set forth above, in 2002, CRDC had commenced the development of the Project. On February 2, 2005, in furtherance of the Project, CRDC entered into a contract (the Contract) with Barry Bourquin, who was doing business as Home Construction Management Consultant (HCMC), whereby HCMC agreed to serve as construction manager for the Project. Bourquin is the second of the two grievants underlying this matter. Respondent executed the Contract in behalf of CRDC, as its "Agent/Attorney." Although Bourquin and HCMC completed the construction of several homes in the project, CRDC paid HCMC for its services as to only one home. Respondent then replaced Bourquin without informing him, only to later ask Bourquin to return to the Project, because the

replacement contractor had performed subpar work. Ultimately, Bourquin ceased providing any services to CRDC and respondent.

Bourquin testified that, during his involvement in the Project, respondent himself was performing the excavation work required to build the homes. According to Bourquin, respondent was "not an excavator," and was "just terrible;" it took him four months to complete a septic system that should have taken three days; he hit a well and a propane tank; and he failed to report that he cracked a foundation while operating a backhoe. Respondent claimed that he performed all of the site work necessary for the Project, following BPCC's initial rough excavation, including digging all the foundations and septic systems for the newly-constructed homes, and, thus, was justified in receiving the funds distributed to him and his wife in connection with the Discafani closing.

In May 2007, Bourquin hired an attorney, who filed a lien notice in respect of the Project. On July 8, 2009, Bourquin and HCMC secured a court order that required CRDC to engage in mandatory, binding arbitration, pursuant to the terms of the Contract.

On December 5, 2009, prior to the mandatory arbitration, "and in anticipation of civil proceedings to enforce the [Settlement] with BPCC," respondent purportedly sold real estate owned by CRDC and located in Harland,

Vermont, to Waterfall Ridge, LLC, a Vermont company solely owned and managed by respondent's wife, Barbara. The transfer to Barbara purportedly was made for $100,000, despite the property's assessed value of $275,000, as respondent stipulated. However, respondent claimed that a timeshare aspect of the transaction, referenced in the deed, diminished the value of the property. In response, counsel for BPCC filed a court action asserting that the transfer constituted a fraudulent conveyance, and added Barbara and Waterfall Ridge, LLC as defendants.

On January 13, 2010, the arbitration hearing between Bourquin, HCMC, and CRDC was held in respondent's absence. On February 16, 2010, the American Arbitration Association awarded more than $206,000 in damages to Bourquin. According to Bourquin, however, he has not been paid any of the funds owed to him.

In 2011, after respondent, Barbara, Godusch, and the CRDC corporate entities filed for bankruptcy, BPCC made multiple allegations of fraud and misconduct against them, including the transfer of the Vermont property from Godusch to Barbara. BPCC's intervention in the bankruptcy ultimately was dismissed. The bankruptcy court ordered the sale of the Vermont property on the open market for the benefit of creditors.

Attorney Karen Bezner, the appointed trustee for respondent's bankruptcy, testified that she was assigned to respondent's matter in February 2011, and twice challenged his right to a bankruptcy discharge. The crux of Bezner's challenges was her allegation that respondent had engaged in fraudulent transfers of real estate, and had been less than forthcoming in his filings, specifically regarding tax information and the value of assets he owned. She claimed that respondent failed to cooperate with her and made the matter more complicated and more expensive for the bankruptcy estate.

Bezner also learned that respondent had failed to file federal income tax returns from 2006 through 2013. The Internal Revenue Service confirmed that, as of May 1, 2015, respondent had belatedly filed tax returns for portions of that period, except for 2006, 2007, 2008, and 2013, and owed taxes and penalties totaling $358,840.29. Bezner recounted that the Vermont property was one of the properties she had recovered, as trustee, for the benefit of the estate, after alleging that the transfer to respondent's wife had been fraudulent and designed to avoid the claims of his creditors. Respondent settled in respect of the Vermont property, via voluntary mediation. Bezner testified that, based on her investigation as trustee, no actual cash consideration was paid in respect of the transfer of the Vermont property to Barbara. In October 2016, the property was sold for $275,000; none of those funds were paid to BPCC/Plushanski or

Bourquin. Finally, Bezner testified that, in respondent's bankruptcy case, he had not listed excavation work, legal work, or other accounts receivable as monies owed to him by Godusch, in respect of the Project or otherwise.

During his testimony, respondent denied having committed any of the misconduct charged in the formal ethics complaint. Rather, he maintained, as his defense, that he had disbursed the net sale proceeds of the Discafani closing as expressly instructed by his client, Godusch, to whom he owed "undivided loyalty." He admitted that, in receiving his $15,000 legal fee, he received a benefit from the Discafani net sale proceeds. Moreover, he admitted that the more than $85,000 paid from the net sale proceeds to satisfy overdue real estate taxes on his and his wife's primary residence was a benefit to him, as they were facing an imminent tax sale. Finally, he admitted that the $49,938.74 disbursed to Godusch benefited him, as those funds were used to settle a lawsuit, filed by Caterpillar Financial, to repossess the excavation equipment being used for the Project; respondent had personally guaranteed the Caterpillar Financing, and was a party to that settlement, which allowed the Project to continue. He justified the payment of the overdue taxes as monies earned by his excavation, site work, and construction management services provided in respect of the Project.

Respondent asserted that the debts that CRDC and Godusch owed to him, and that debts that he and Godusch owed to Caterpillar, were in a superior

position to the debt owed to BPCC, because the debts owed to respondent were "necessary . . . to have any hope whatsoever of continuing the [P]roject." Although respondent acknowledged that the $85,000 disbursed for respondent's back real estate taxes were not directly necessary to continue the Project, he steadfastly maintained that the debts owed to him had indirect "business priority," not "legal priority," over BPCC's debt, because, for example, if he lost his house, he would not be able to see the Project to completion, and he had been neglecting his legal practice to move the Project forward.

In respect of the Mortgage, respondent asserted that, once he sent the fully-executed, recordable Mortgage to counsel for BPCC, it was BPCC's counsel's obligation to record the Mortgage, despite the express language in the Settlement and the subsequent correspondence between the parties. He further maintained that his representation to Probe and Signature, at the closing, that the BPCC lis pendens notices were void as a matter of title law, was truthful and correct. He asserted that Signature's eventual provision of the net sale proceeds to him led him to reasonably conclude that Probe and Signature were satisfied with his legal opinion regarding the lis pendens notices, and he argued that he had no ethics or professional obligation to tell the Discafanis, Probe, or Signature about the express terms of the Settlement or the executed, but not recorded, note and Mortgage in favor of BPCC.

Respondent admitted discussing the Mortgage with Godusch, contemporaneously with the Discafani closing, and advising him that "[T]here is no mortgage recorded [by BPCC], so that, Mr. Godusch, it does not relieve you, or me, from financial responsibility, whether the [M]ortgage is recorded or not. But it does relieve you from the obligation as a seller to have to allow that [BPCC payoff amount] to be deducted . . . [from the net seller closing proceeds]." Respondent testified that, although Godusch expected his decision to lead to litigation, he then directed respondent to disburse the net sales proceeds as he did, as a creditor preference, and that respondent complied, given his duty of "[u]ndivided loyalty to my client." Respondent blamed Lanza for BPCC's failure to receive payment in connection with the Discafani closing, stating "[t]here was no fraud here, no fraud. There was bungling, malpractice no doubt on the part of Mr. Lanza, that afforded Mr. Godusch, not [respondent], an opportunity to exercise a creditor preference." Respondent further asserted that "a mortgage has only sentimental value unless and until" it is recorded, and that respondent had transferred the obligation to record the Mortgage to Lanza, by sending him a fully-executed, recordable Mortgage, and that he had no obligation to "babysit" Lanza. Respondent emphasized that, in his view, a mortgage does not encumber a property unless and until it is recorded.

In defense of the charge that he had knowingly misappropriated client or escrow funds, respondent asserted that the only funds he had handled, in respect of the ethics complaint, were CRDC's funds, which Godusch had directed respondent to disburse. Next, although respondent admitted that the Discafani sales proceeds "certainly could be considered escrow funds . . . [because respondent] handled the closing," he denied that he had committed any ethics violation in his handling and disbursement of them, since all disbursements were made at Godusch's direction. In respect of the RPC 1.2(d) (counseling or assisting a client in illegal or fraudulent conduct) charge, respondent argued that, despite the money owed to Plushanski and Bourquin, he had not assisted Godusch in any conduct violative of that Rule, but merely abided by his obligation of "undivided loyalty" to his client. Under that context, however, respondent admitted that, at the time of the Discafani closing, he was in "financial distress and absolute emergency" in respect of the tax sale about to occur at his primary residence, and knew that he had "better come up with that money," or imminently would lose his home.

Respondent further denied that he had an obligation to provide notice of the Discafani closing to BPCC, despite personally being bound by the Settlement, because BPCC's attorneys had not been astute enough to include

such a notice provision in the Settlement. In the same vein, however, respondent admitted that his actions personally breached the Settlement with BPCC.

In its post-hearing summation, dated August 14, 2018, the OAE asserted that it had proven that respondent knowingly misappropriated escrow funds, in violation of Hollendonner, arguing that respondent had disbursed the Discafani net sales proceeds to Godusch, himself, and his wife, without Plushanski's required consent. The OAE maintained that the net sales proceeds constituted escrow funds, given respondent's and Godusch's joint and several obligation, pursuant to the Settlement, to pay $120,000 to BPCC from those sales proceeds. The OAE emphasized that $15,000 went directly to respondent, as attorneys' fees, more than $85,000 paid the back taxes on respondent's primary residence, and more than $40,000 paid the debts owed to Caterpillar – debts that respondent had personally guaranteed.

The OAE contended that disciplinary precedent vitiated respondent's defense that he was duty-bound to follow Godusch's instructions regarding the disbursements, and that an ignorance of the law argument cannot defeat a charge of knowing misappropriation of escrow funds. Accordingly, the OAE argued that respondent should be disbarred.

In turn, in both his undated post-hearing summation and in his brief to us, respondent reiterated his position that he had committed no misconduct and that

all the charges levied against him should be dismissed. Specifically, respondent argued that, although Plushanski had an "interest" in the Discafani net sales proceeds, "these funds were not encumbered, rather they were merely promised." Respondent, thus, acknowledged that he and Godusch breached their promise to Plushanski, made in the Settlement, via their disbursement of those net sales proceeds, but argued that those actions did not constitute unethical conduct.

The special master concluded that the OAE proved, by clear and convincing evidence, that respondent knowingly misappropriated escrow funds, in violation of Hollendonner. Specifically, the special master emphasized that, despite respondent's asserted defense that the Discafani net sales proceeds were not escrow funds, respondent had the obligation, as a fiduciary, pursuant to both the Settlement and the executed Mortgage, to safeguard and deliver $120,000 of those net sales proceeds to BPCC/Plushanski.

Moreover, the special master rejected respondent's additional defense – that he was duty-bound to follow Godusch's instructions in respect of the sales proceeds – further concluding that respondent's disbursement of the funds for his and Godusch's benefit violated RPC 1.2(d) and RPC 1.15(a) and (b).

The special master additionally found that respondent had repeatedly violated RPC 4.1(a)(1) and (2), by preparing the misleading affidavits of title

and by repeatedly asserting that, by law, the BPCC lis pendens notices were not an encumbrance to title. The special master determined that respondent's pattern of deceitful and fraudulent conduct violated RPC 8.4(c). The special master failed to address the additional allegation that respondent had violated RPC 8.4(d).

The special master, however, dismissed the RPC violations alleged in respect of Bourquin's dealings with respondent, Godusch, and the corporate entities. Specifically, the special master concluded that the OAE had failed to meet its burden of proof that the transfer of the Vermont property to respondent's wife, although highly questionable, in light of the arbitration award and pending bankruptcies, had violated RPC 8.4(b) and RPC 8.4(c).

Finally, the special master rejected respondent's proffer that the decision of the bankruptcy court exonerated him, noting that she was not bound by that decision in respect of ethics proceedings, and that the bankruptcy court lacked "many salient facts" regarding the Discafani net sales proceeds.

Based on her determination that respondent knowingly misappropriated escrow funds, the special master recommended his disbarment.

Following a de novo review of the record, we are satisfied that the special master's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence. Respondent's most egregious

misconduct was his knowing misappropriation of the equivalent of escrow funds, in violation of Hollendonner, which requires his disbarment.

The record, however, supports additional findings that respondent committed numerous other RPC violations. Specifically, respondent represented CRDC, and, during multiple relevant transactions, served as an Acting Secretary to the corporation. Besides his professional role, he was intimately and emotionally involved in the development of the Project, holding a tenuous, personal financial stake of such magnitude that it clearly clouded his personal and professional judgment. After CRDC commenced the development of the Project, it entered into contracts with both BPCC and HCMC. Despite the performance of their respective obligations, neither BPCC nor HCMC were paid in full for their services, leading to the pertinent facts underpinning respondent's misconduct.

In November 2006, BPCC filed a lawsuit against CRDC, seeking the $432,004.37 balance owed to BPCC under the MOA. On March 31, 2008, following extensive litigation and negotiations, BPCC, CRDC, Castle Ridge Homes, L.P., Godusch, and respondent (who was personally represented by counsel), entered into the Settlement, which provided for a promissory note from the defendants, in the amount of $390,000 plus 8% interest, to be secured by the Mortgage, with a $60,000 payment due to BPCC within thirty days of the date

of the sale of any such subdivided lot. The principal balance of the note and Mortgage was to be reduced by recurring payments of $60,000 to BPCC, upon the sale of each of the seven, mortgaged tax lots to third-party buyers. CRDC and respondent, thus, knowingly and intentionally tied the revenue to be produced by the Project to their debt to BPCC.

Notably, the Settlement specifically stated that existing BPCC lis pendens notices were not to be discharged until the delivery of the note and the recording of the Mortgage, as a condition precedent, and that the civil action would not be dismissed with prejudice until the defendants satisfied all conditions of the Settlement. The Settlement further provided for the "delivery and filing of the duly executed promissory note, [M]ortgage, [and] affidavit of title . . . by the Defendants or either of them," and was signed by Godusch on behalf of himself and the corporate entities, and by respondent on behalf of himself. Despite the language of the Settlement, respondent failed to prepare the note, Mortgage, or affidavit for nine months. During that delay, however, the Project continued in earnest, and Castle Ridge Homes, L.P. entered into a contract to sell one of the lots encumbered by BPCC's lis pendens notices to bona fide third-party buyers, the Discafanis. In other words, the Project was about to produce its first, positive stream of revenue, to which BPCC was partially entitled, pursuant to the Settlement and the Mortgage.

On December 11, 2008, striving to advance the Project now that the first buyers had been secured, respondent sent to counsel for BPCC drafts of the note, Mortgage, and affidavit of title he had prepared in accordance with the Settlement. In turn, respondent requested that BPCC prepare a discharge of the notice of lis pendens for the lot that Castle Ridge Homes, L.P. sought to sell to the Discafanis, "**in order that [the lis pendens] does not show up on the title rundown we need to provide to our construction lender**" (emphasis added). In response, counsel for BPCC requested specific revisions to the Mortgage.

On December 17, 2008, respondent sent to counsel for BPCC the revised Mortgage draft and other Settlement documents; that same date, counsel for BPCC approved the revised Mortgage and, pursuant to the terms of the Settlement, requested a signed, notarized, and recorded copy of the Mortgage before BPCC would supply the signed discharge of the single notice of lis pendens that respondent had requested. Ultimately, respondent sent to counsel for BPCC the fully-executed, original Mortgage, but he had failed to record it, as the Settlement required. BPCC's counsel then also failed to record it, for almost a year. According to Lanza, one of BPCC's attorneys, he did not hasten to record the Mortgage because respondent expressly was bound by the Settlement to do so and, because, in his opinion, his client's interests were fully protected by the lis pendens notices and the executed Mortgage. BPCC,

however, proceeded to discharge its notice of lis pendens in respect of the single subdivided lot at the Project, as respondent had requested, despite respondent's failure to record the Mortgage, a condition precedent to BPCC's obligation.

Castle Ridge Homes, L.P. then agreed to sell two additional, contiguous lots in the Project to the Discafanis, for a total of three lots. On September 14, 2009, Probe issued a title commitment for the three Discafani lots. Notably, the commitment required the satisfaction of mortgages held by Skylands Bank and Jess R. Symonds, P.E., plus the discharge of the BPCC lis pendens notices encumbering the lots. The commitment made no mention of the Mortgage held by BPCC, because it had not yet been recorded.

Respondent, however, was acutely aware of the existence of the fully-executed BPCC Mortgage affecting the Project lots that the Discafanis sought to purchase, having prepared the Mortgage and note in behalf of himself, Godusch, and his corporate clients, and sending it to BPCC's counsel. Respondent, however, failed to notify BPCC of the impending closing affecting BPCC's Settlement interests, despite admitting that BPCC had a legitimate contractual expectation that it would be informed of the closing and paid from the net sale proceeds. In our view, respondent intentionally exploited BPCC's failure to record the Mortgage, viewing it as an opportunity to delay and defraud BPCC for the benefit of the Project. The proof of the respondent's intent to

engage in such a scheme of deceit and fraud is borne out in his actions which followed his discovery that BPCC had failed to record the Mortgage.

CRDC, Castle Ridge Homes, L.P., Godusch, and respondent received a copy of the title commitment, proceeded to obtain a payoff for the Skylands Bank mortgage and a release of the Jess R. Symonds, P.E. mortgage, and provided Probe with a copy of the Order of Disposition in respect of the Settlement. On October 26, 2009, the closing on the Discafanis' purchase of three Project lots took place at respondent's office. Respondent represented CRDC, Castle Ridge Homes, L.P., and Godusch, who did not attend. Signature prepared the HUD-1 closing statement.

In connection with the closing, Skylands Bank was paid $57,243.46 to satisfy its mortgage; the remainder of the sales proceeds, totaling $150,006.70, were paid to respondent, via a Signature check payable to "Lyn Paul Aaroe Attorney Escrow Account." Despite respondent's direct, personal involvement and liability associated with CRDC, the Project, and the Settlement, he steadfastly contended that he had received the $150,006.70 strictly in behalf of Godusch. That claim was a desperate, hollow attempt to shield himself from the consequences of his subsequent, improper disbursement of those funds.

Respondent further claimed that he never made a representation, in respect of the Discafani closing, that the BPCC lis pendens notices had been "cancelled,

nullified, or otherwise disposed of," but, rather, argued to the Discafanis' counsel and Signature, at the closing, that, although the BPCC lis pendens notices remained open of record, they did not, "as a matter of fundamental title law," cloud the title to the Project lots, representing that the litigation underpinning the lis pendens notices had been dismissed.

Thomas, one of BPCC's attorney, asserted that respondent knew that his recitation of title law at the closing table was false, in light of his status as a self-professed expert in land use law, and the existence of black letter precedent on the issue. Thomas also emphasized that respondent was intimately aware of the lis pendens issue, in light of CRDC's prior struggles to obtain construction financing due to the lis pendens notices affecting the Project lots. Respondent conceded that he may have been wrong, "as a matter of title law," regarding his position on the lis pendens, but noted that his argument ultimately persuaded Signature to release the net sales proceeds to him – the outcome he desperately sought in order to preserve the Project.

Prior to the conclusion of the closing, however, Signature realized that the BPCC lis pendens notices remained an encumbrance in title, and, after consulting with Probe, required respondent to return the $150,006.70 check. The day after the closing, respondent mailed to Signature three deeds and three affidavits of title for the Project lots purchased by the Discafanis, which he had

prepared. He instructed Signature that the documents were to be held in escrow until the sellers received their net proceeds. The affidavits of title, which Godusch signed and respondent notarized, contained the affirmative misrepresentations that no interests or legal rights, including liens or mortgages, had been allowed to attach to the properties. Respondent disclaimed any responsibility for Godusch having executed the documents, asserting that they were based on a "standard NJ form" affidavit. BPCC's attorneys, Lanza and Thomas, emphasized that, regardless of respondent's purported legal view of the effect of the lis pendens notices on title, he knew that the executed promissory note and Mortgage, both of which emanated from the Settlement, existed at the time that his client executed these affidavits, and, yet, he prepared and notarized them, in his role as counsel to Godusch and his corporate entities. We reject respondent's defense and determine that his conduct to this point in the transaction violated RPC 1.2(d), RPC 4.1(a)(1) and (2), and RPC 8.4(c).

Specifically, respondent's assertions at closing that the BPCC lis pendens notices remained open of record, but did not encumber the Project lots, which he bolstered by misrepresenting that the litigation underpinning the lis pendens notices had been dismissed, violated RPC 4.1(a)(1) and (2) and RPC 8.4(c). Respondent knew, based on his legal expertise and review of the title for the Project's construction loans and for the Discafani closing, that the lis pendens

notices encumbered title. In fact, he had previously requested that BPCC discharge a lis pendens in order to remove that encumbrance from the title rundown that the Project's construction lender was about to order. Moreover, he knew of the existence of the Mortgage, yet drafted and counseled his client to execute false affidavits of title, in further violation of RPC 1.2(d), RPC 4.1(a)(1) and (2), and RPC 8.4(c). Respondent saw an opening to keep the revenue from the sale and set in motion a plan to take that revenue.

Two days after the closing, on October 28, 2009, respondent contacted Signature, inquiring as to the status of the net seller proceeds from the closing. One day later, Signature reissued its check, in the amount of $150,006.70, payable to "Lyn Paul Aaroe Attorney Escrow Account," and respondent deposited the funds in his ATA. According to Thomas, during the litigation that followed the release of those closing funds, Signature admitted that disbursing the closing funds to respondent had been a mistake.

Moreover, during subsequent litigation between BPCC, CRDC, Godusch, and respondent, Pence, a managing employee at Probe, recalled that, during the Discafani closing, Signature had raised the issue of the BPCC lis pendens notices encumbering title to the subject real estate. In response, respondent faxed to Probe documents relating to the BPCC litigation, and asked Pence to remove the lis pendens notices as a condition to the title commitment, so that

the closing could proceed. Pence refused, because his underwriter/counsel at Old Republic National Title had instructed him not to remove the lis pendens notices from the title insurance without first receiving proof of discharges of record.

Respondent openly admitted that, on November 10, 2009, instead of complying with his and his clients' joint and several debt to BPCC, owed under the Settlement, the note, and the Mortgage, he disbursed $15,000 of the net Discafani sales proceeds to himself for attorneys' fees associated with the Project; $49,938.74 to Godusch to pay Caterpillar Financial in association with leased heavy equipment at the Project that was about to be repossessed; and $85,067.96 to Washington Township for satisfaction of overdue property tax obligations owed on respondent's primary residence, which was owned by his wife and was facing an imminent tax sale. We find that, in light of respondent's personal and professional obligations under the Settlement and the Mortgage, this conduct further violated RPC 1.15(a) and (b) and RPC 8.4(c).

Indeed, respondent openly admitted that the failure of the defendants to the BPCC lawsuit and Settlement, including himself, to pay BPCC $120,000 from the Discafanis' net sales proceeds violated the Settlement, but claimed that the disbursement of those closing proceeds was made in Godusch's sole discretion, as President of CRDC and managing member of Castle Ridge Homes,

L.P. Specifically, respondent contended that Godusch had directed respondent, as his counsel, to exercise a "creditor preference" in respect of those funds. We summarily reject respondent's defense.

On November 16, 2009, seeking a post-closing solution to the lis pendens title encumbrance, Signature demanded proof that respondent had forwarded $120,000 of the $150,006.70 in net closing proceeds to BPCC. Respondent replied that the Settlement "is a private (non-record title) matter which neither you nor [the title company] have, had or could have had any knowledge or notice, whatsoever." Then, in a November 17, 2009 letter to counsel for BPCC, respondent stated that he and his client had inadvertently disbursed the Discafani net closing proceeds to parties other than BPCC. He attempted to split the blame for those improper disbursements between himself and counsel for BPCC, despite the language of the Settlement and the Mortgage; the fact that BPCC had no knowledge of the timing of the closing; and respondent's exercise of sole control of the closing proceeds.

Lanza testified, in respect of respondent's "inadvertence" letter, that Plushanski had never given consent or authorization to respondent to ignore the express terms of the Settlement and to use the $120,000 in net sales proceeds as respondent had disbursed them. In February 2010, after BPCC's demands for Settlement payments in connection with the Discafani sales proceeds were not

met, BPCC filed a motion to enforce the Settlement. In March 2010, the court entered a judgment in favor of BPCC, in the amount of $393,179.56, including attorneys' fees, against respondent, Godusch, CRDC, and Castle Ridge Homes, L.P., jointly and severally. We determine that respondent's attempts to spin his disbursement of the net settlement proceeds constitutes additional violations of RPC 4.1(a)(1) and RPC 8.4(c). Respondent's misconduct in respect of the Discafani closing and his resulting disbursement of the net proceeds to anyone other than BPCC was anything but inadvertent. We reject, however, the assertion that BPCC's motion to enforce the settlement, which was precipitated by the purposeful breach of the settlement, constituted a violation of RPC 8.4(d) by respondent.

As of the conclusion of the ethics hearing, the defendants had failed to pay to BPCC any of the debt owed pursuant to the Settlement and the judgment. BPCC, which recorded the Mortgage subsequent to the Discafani closing, ultimately instituted a foreclosure action on the lots owned by the Discafanis, who paid $90,000 to BPCC to clear title and to keep their property. BPCC also obtained $30,000 from Signature, pursuant to a mediation, and $20,000 from Probe, pursuant to litigation.

In his reply to Plushanski's ethics grievance, respondent attempted to blame Lanza for allowing the executed Mortgage and Settlement documents to

"languish" in Lanza's office. He further asserted, without any basis grounded in law or fact, that the Settlement had "voided" the lis pendens notices that BPCC had filed against the Project. He admitted that his client, Godusch, had intentionally violated the Settlement, but denied that any fraud or criminal act had been committed. Although respondent erroneously denied having prepared the Mortgage in connection with the Settlement, he subsequently admitted, during the ethics hearing and in multiple letters admitted into evidence, to having done so.

As detailed above, on February 2, 2005, CRDC also entered into the Contract with Bourquin, who agreed to serve as construction manager for the Project. Although Bourquin and HCMC completed the construction of several homes in the project, CRDC paid HCMC for only one. Respondent then replaced Bourquin without notice, only to ask Bourquin to return to the Project after his replacement performed subpar work. Ultimately, Bourquin ceased providing any services to CRDC and respondent. Ultimately, the American Arbitration Association awarded more than $206,000 in damages to Bourquin. According to Bourquin, however, neither respondent nor CRDC has paid any of the funds owed to him.

Meanwhile, on December 5, 2009, prior to the mandatory arbitration, "and in anticipation of civil proceedings to enforce the [Settlement] with BPCC,"

respondent executed the sale of a CRDC property located in Vermont to Waterfall Ridge, LLC, a Vermont company solely owned and managed by his wife, Barbara. In response, counsel for BPCC filed a court action asserting that the transfer constituted a fraudulent conveyance, and added Barbara and Waterfall Ridge, LLC as defendants. In 2011, after respondent, Barbara, Godusch, and the CRDC corporate entities filed for bankruptcy, BPCC made multiple allegations of fraud and misconduct against them, including the transfer of the Vermont property from Godusch to Barbara. BPCC's intervention in the bankruptcy ultimately was dismissed. The bankruptcy court, however, ordered the sale of the Vermont property on the open market for the benefit of creditors.

Attorney Karen Bezner, the appointed trustee for respondent's bankruptcy, twice challenged his right to a bankruptcy discharge, based on her allegation that respondent had engaged in fraudulent transfers of real estate, and had been less than forthcoming in his filings, specifically regarding tax information and the value of assets he owned. She claimed that respondent failed to cooperate with her and made the matter more complicated and more expensive for the bankruptcy estate.

Bezner also learned that respondent had failed to file federal income tax returns from 2006 through 2013. The Internal Revenue Service confirmed that, as of May 1, 2015, respondent had belatedly filed tax returns for portions of that

period, except for 2006, 2007, 2008, and 2013, and owed taxes and penalties totaling $358,840.29. Bezner recounted that the Vermont property was one of the properties she had recovered, as trustee, for the benefit of the estate, after alleging that the transfer to respondent's wife had been fraudulent and designed to avoid the claims of his creditors. Respondent settled in respect of the Vermont property, via voluntary mediation. Bezner testified that, based on her investigation as trustee, no actual cash consideration was paid in respect of the transfer of the Vermont property to Barbara. In October 2016, the property was sold for $275,000; none of those funds were paid to BPCC/Plushanski or Bourquin. Finally, Bezner testified that, in respondent's bankruptcy case, he had not listed excavation work, legal work, or other accounts receivable as monies owed to him by Godusch, in respect of the Project or otherwise. Based on respondent's conduct in respect of Bourquin, and the fraudulent transfer of the Vermont property to Barbara, we further find that respondent violated RPC 8.4(b) and RPC 8.4(c).

Specifically, respondent violated RPC 8.4(b) and RPC 8.4(c) by counseling and assisting CRDC in the illegal and fraudulent transfer of CRDC's Vermont property to respondent's wife, Barbara. Respondent admitted that the transfer to Barbara was made for $100,000, despite the property's assessed value of $275,000. Bezner testified that, based on her investigation as trustee, no

actual cash consideration was paid in respect of the transfer. We reject respondent's purported timeshare argument and find that this transfer was made to circumvent creditors. The transfer forced the bankruptcy trustee to unravel that transaction, recover the property, and sell it for the benefit of creditors. But for respondent's fraudulent counseling of CRDC and professional misconduct, the time and resources of the bankruptcy court would not have been wasted.

In sum, to this point in our analysis, we find that respondent violated RPC 1.2(d); RPC 1.15(a); RPC 1.15(b); RPC 4.1(a)(1); RPC 4.1(a)(2); RPC 8.4(b); and RPC 8.4(c). We determine, however, to dismiss the allegation that respondent violated RPC 8.4(d). Respondent, however, committed additional misconduct.

This crux of this case is respondent's violation of Hollendonner. Most egregiously, respondent admitted that he disbursed the net sales proceeds from the Discafani transaction for expenses other than the secured obligations owed to BPCC, pursuant to the Settlement, the note and Mortgage, and New Jersey law, yet, claimed that his conduct did not constitute the knowing misappropriation of escrow funds. Respondent made that baseless argument, despite admitting that his conduct in respect of the disbursement of the Discafani net sales proceeds constituted his personal breach of the Settlement. Respondent conceded that he neither sought nor received the authorization of BPCC or

Plushanski to disburse those funds. We conclude that respondent had a fiduciary duty – both personally and as counsel to Godusch, CRDC, and Castle Ridge Homes, L.P. – to hold the net sales proceeds of the Discafani transaction in trust until the $120,000 obligation to BPCC was paid from those proceeds. That fiduciary duty was rooted in the Settlement, to which respondent was personally a party; the Mortgage, which secured the Settlement; and New Jersey statutory authority pertaining to the effect of a notice of lis pendens and mortgage priority. The first $120,000 of the net sales proceeds belonged to BPCC, and respondent neither sought nor obtained the authorization of Plushanski to disburse those funds to anyone other than BPCC. To the contrary, he seized the opportunity to convert those funds for the benefit of himself, his clients, and the Project, which he admitted he desperately sought to see to fruition. Under that framework, and when viewed in the harsh light of his deceitful conduct overarching the Discafani transaction, his proffered defense of good faith reliance on the instructions of Godusch, his client, is meritless.

In Wilson, the Court described knowing misappropriation of client trust funds as follows:

> Unless the context indicates otherwise, 'misappropriation' as used in this opinion means any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own

> purpose, whether or not he derives any personal gain or benefit therefrom.
>
> [In re Wilson, 81 N.J. 455 n.1.]

Six years later, the Court elaborated:

> The misappropriation that will trigger automatic disbarment under In re Wilson, 81 N.J. 451 (1979), disbarment that is 'almost invariable' . . . consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of Wilson is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment . . . . The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' – all are irrelevant.
>
> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, the presenter must produce clear and convincing evidence that the attorney used trust funds, knowing that they belonged to the client and knowing that the client had not authorized him or her to do so.

This principle also applies to other funds that the attorney is to hold inviolate, such as escrow funds. In re Hollendonner, 102 N.J. 21 (1985).

In Hollendonner, the Court extended the Wilson disbarment rule to cases involving the knowing misappropriation of escrow funds. The Court noted the "obvious parallel" between client funds and escrow funds, holding that "[s]o akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the [Wilson] disbarment rule . . . ." In re Hollendonner, 102 N.J. at 28-29.

As detailed above, the record clearly establishes that the net sales proceeds of the Discafani transaction constituted escrow funds. As we recently opined in In the Matter of Robert H. Leiner, DRB 16-410 (June 27, 2017) (slip op. at 21), "[c]lient funds are held by an attorney on behalf, or for the benefit, of a client. Escrow funds are funds held by an attorney in which a third party has an interest. Escrow funds include, for example, real estate deposits (in which both the buyer and the seller have an interest) and personal injury action settlement proceeds that are to be disbursed in payment of bills owed by the client to medical providers." The Court agreed. In re Leiner, 232 N.J. 35 (2018).

There is no need for a formal escrow agreement or other writing to conclude that funds held by an attorney are escrow funds. Rather, the relationship between the relevant parties underpins the conclusion that particular

monies constitute escrow funds. Here, the Settlement, the promissory note, the Mortgage, and New Jersey law all bound respondent to disburse the first $120,000 of t escrow funds to BPCC and/or Plushanski. His failure to do so, and disbursement of those funds for other purposes, amount to knowing misappropriation. See Moshe Meisels v. Fox Rothschild LLP, ___ N.J. ___, 2020 N.J. LEXIS 4 (2020), and Banco Popular North America v. Gandi, 184 N.J. 161, 180 (2005) (addressing the concept of the reliance of third parties on an attorney serving as a fiduciary and the finding of corresponding ethics violations).

The purpose of BPCC's filing of notices of lis pendens against the Project is crucial to the analysis in this matter. In our state, lis pendens notices are filed to provide potential purchasers and future lien holders with constructive notice that specific real estate is affected by pending litigation, and that, should the plaintiff prevail in the litigation, any subsequent interest takers may be subordinate to the plaintiff's position. See N.J.S.A. 2A:15-7(a) and Manzo v. Shawmut Bank, N.A., 291 N.J. Super. 194, 199 (App. Div. 1996). Thus, "the primary purpose of the notice of lis pendens is to preserve the property which is the subject matter of the lawsuit from actions of the property owner so that full judicial relief can be granted, if the plaintiff prevails." Manzo, 291 N.J. Super. at 200.

In New Jersey, a notice of lis pendens may be filed in connection with any civil action affecting real estate and is governed by N.J.S.A. 2A:15-6, et. seq.

N.J.S.A. 2A:15-6 provides, in relevant part:

> In every action, instituted in any court of this State having civil jurisdiction . . . to enforce a lien upon real estate or to affect the title to real estate . . . plaintiff or his attorney shall, after the filing of the complaint, file in the office of the county clerk or register of deeds and mortgages, as the case may be, of the county in which the affected real estate is situate, a written notice of the pendency of the action, which shall set forth the title and the general object thereof, with a description of the affected real estate.

N.J.S.A. 2A:15-10 provides that lis pendens notices may be discharged for the plaintiff's failure to prosecute the action diligently; the passage of three years from the date of filing; final judgment in favor of defendant; defendant's posting a bond sufficient to secure plaintiff's claim; or complete and final satisfaction of the claim against defendant, or by settlement or abandonment of the action.

N.J.S.A. 2:15-17 provides that, in the case of a settlement, a notice of lis pendens may be discharged by filing a statement of such settlement with the county clerk or register of deeds and mortgages in whose office the original notice was filed. Thereupon, the real estate affected by the action and described in the notice shall be discharged of all the title encumbrance the lis pendens notice had created. Stated differently, the affirmative filing of a statement of

settlement is required, under New Jersey law, to discharge a recorded notice of lis pendens. No such filing was perfected in this case, and respondent and CRDC admittedly did not satisfy BPCC's claim against them through payment of the full Settlement amount. Notably, respondent sought and received one such discharge of lis pendens from BPCC, in order to satisfy CRDC's construction lender that BPCC's interest had been removed, of record, from a certain subdivided lot.

Subsequent to BPCC's filing of the lawsuit and corresponding lis pendens notices, and following extensive negotiations where respondent was personally represented by counsel, all parties to the BPCC lawsuit entered into the Settlement.

As part of his defense, respondent incorrectly asserted that "a mortgage has only sentimental value unless and until" it is recorded; that respondent had transferred the obligation to record the Mortgage to Lanza, by sending him a fully-executed, recordable Mortgage; and that he had no obligation to "babysit" Lanza. Under New Jersey law governing deeds, mortgages, and other recordable instruments, respondent's position is wholly without merit. In fact, New Jersey law is "well-settled that an unrecorded deed [or other instrument, including mortgages] is void only as against subsequent purchasers, encumbrancers, and judgment creditors. It is perfectly efficacious in passing title from grantor to

grantee, subject to all subsequent recorded liens against the grantor and subject to potential divestment by a subsequent bona fide grantee without notice." Siligato v. State, 268 N.J. Super. 21, 28 (App. Div. 1993).

In furtherance of that rule, to protect creditors who gain their interest subsequent to such unrecorded instruments, New Jersey is a "race notice" state, and, thus, protects judgment creditors who record their instruments first, without notice of unrecorded instruments. See Lieberman v. Arzee Mid-State Supply Corp., 306 N.J. Super. 335 (App. Div. 1997).

At the time he received the net Discafani sales proceeds in trust in his ATA, respondent was a fiduciary, bound both personally and as counsel to Godusch and CRDC, by the terms of the Settlement, the promissory note, the valid Mortgage affecting the Discafani lots, and New Jersey law regarding lis pendens notices and mortgages. In that context, he was duty-bound to safeguard the first $120,000 of those sales proceeds, as escrow funds, and to promptly disburse them to BPCC. Instead, he and his client engineered a scheme to divert those funds to themselves, in the hopes of keeping the Project afloat, and in violation of the rule addressed in Hollendonner and In re Gifis, 156 N.J. 323 (1998) – that escrowed funds cannot be disbursed without all interested parties' prior authorization.

In Gifis, the attorney blatantly used real estate deposits and settlement funds for his own purposes, claiming that he did not need both parties' permission to use the funds. The attorney contended that his use of the deposit was not knowing misappropriation because he was unaware of the rule of Hollendonner, and because he honestly, but mistakenly, believed that the funds belonged solely to one of the parties. We rejected those arguments and recommended that Gifis be disbarred. The Court agreed.

Like the attorney in Gifis, respondent blatantly used BPCC's funds for his own purposes, claiming that he did not require both parties' permission to use the funds, and, alternatively, that he was bound to follow Godusch's directive that he exercise a "creditor preference." His defenses ignore his own role in the Settlement, in the Mortgage, and in misleading Probe to ensure that the Discafani closing occurred, so that he and his client could secure the net sales proceeds. As in Gifis, we reject respondent's hollow arguments and recommend his disbarment to the Court.

We recognize that attorneys have escaped disbarment for their improper or premature release of escrow funds when they have held reasonable, although mistaken, beliefs that, for one reason or another, the release of the escrow funds was appropriate. See, e.g., In re De Clement, 214 N.J. 47 (2013) (motion for discipline by consent; reprimand for attorney who failed to safeguard funds in

which a client or third party had an interest, and released a portion of $75,000 he had agreed to hold in escrow, in connection with a joint venture agreement between his client and a third party, without first obtaining the third party's consent; no escrow provision governed the attorney's actions, but the $75,000 check deposited by the attorney included a notation identifying it as an escrow deposit, and the joint venture agreement identified the attorney as the "escrow attorney;" the attorney, however, was never provided a copy of the joint venture agreement, and improperly relied on his client's assurance that he was allowed to use a portion of the escrow funds to cover expenses associated with the joint venture); In re Holland, 164 N.J. 246 (2000) (reprimand for attorney who was required to hold, in trust, a disputed fee in which she and another attorney had an interest; instead, the attorney took the fee, in violation of a court order; the attorney claimed that she believed that a subsequent court order had entitled her to the entire fee, and, thus, she had made a mistake, rather than knowingly defied a court order; those defenses were rejected); and In re Milstead, 162 N.J. 96 (1999) (reprimand for attorney who disbursed escrow funds to a client, in violation of a consent order).

Stated differently, the above cases can be characterized as fact patterns where "premature disbursement," or disbursement under a colorable dispute occurred. In this case, however, the record contains no scenario supporting such

a mens rea on the part of respondent, because he and Godusch were bound to disburse to BPCC the first $120,000 received from the Discafani net sales proceeds.

To the contrary, respondent's conduct was neither reasonable nor mistaken, but, rather, was much more akin to that of attorneys who have been disbarred for the unauthorized use of trust funds designated to satisfy a lien or other known, contractual obligation. In In re Frost, 171 N.J. 308 (2002), the attorney, along with his co-counsel, Michael Rubino, represented Bruce Hagerman in a workers' compensation claim and a related third-party products liability lawsuit. After settling the lawsuit, Rubino believed that he had negotiated a settlement of the workers' compensation lien held by an entity named CNA. Based on that understanding, Frost sent $79,000 to CNA to satisfy the lien. CNA, however, denied that it had compromised its lien and returned the check to Frost, who then asked Hagerman to lend him money. Although Hagerman initially refused, and although Rubino advised against the loan, Hagerman subsequently agreed to the loan.

Frost drafted a loan agreement in which he represented that he owned two pieces of property and that, upon request, he would give Hagerman a first mortgage on them. However, Frost previously had conveyed his interest in one of the properties to his wife. He then issued three checks to Hagerman, who

endorsed two of them back to Frost - one for $40,000 and one for $39,000 - constituting a $79,000 loan to Frost. Hagerman retained the third check for $1,636.89, representing interest.

Frost settled the CNA lien by agreeing to pay $83,740. However, he did not sign the settlement agreement or make any payments to CNA. Several months after CNA sued Hagerman, Frost, Rubino, and others for payment of its workers' compensation lien, respondent filed a bankruptcy petition. As of the date of the disciplinary hearing, CNA had not been paid.

The Court determined that Frost was guilty of knowing misappropriation of funds belonging to CNA. By forwarding the $79,000 check to CNA, Frost showed that he was aware of CNA's lien and knew that the funds did not belong to him or to his client. Upon CNA's return of the check, Frost had a duty to safeguard the funds in his escrow account. As an escrow agent, Frost knew that the money was not his property. Even though Hagerman consented to his use of the funds, Frost did not have CNA's consent.

In determining to disbar Frost, the Court emphasized its holding in In re DiLieto, 142 N.J. 492 (1995), that "[a]n attorney cannot satisfy his or her professional responsibility with respect to escrow funds by simply relying on information from a client . . . 'It is not enough simply to follow a client's instructions.'" (quoting In re Wallace, 104 N.J. 589, 593 (1986)). In re Frost,

171 N.J. at 324. Stated differently, prior to releasing escrow funds, an escrow holder must obtain the permission of both parties to the escrow agreement.

Here, although there was no formal escrow agreement, respondent was well aware of his and his client's secured, contractual obligation to BPCC. We, thus, reject his defense that he properly ignored that obligation, pursuant to reliance on Godusch's instructions, and that the exercise of a "creditor preference," which almost exclusively benefited him, was a viable option.

Moreover, although respondent's state of mind in respect of his knowing misappropriation of escrow funds is not relevant to whether he committed unethical conduct, the record is replete with proof that respondent acted dishonestly toward multiple third parties, as part of the execution of an opportunistic scheme resulting in his own pecuniary benefit. Specifically, instead of complying with his and his clients' known joint and several debt to BPCC, owed under the Settlement, the note, the Mortgage, and New Jersey law, respondent disbursed the net Discafani sales proceeds to himself, for attorneys' fees associated with the Project; to Godusch to pay Caterpillar Financial in association with leased heavy equipment at the Project that was about to be repossessed; and to Washington Township for satisfaction of overdue property tax obligations owed on respondent's primary residence, which was owned by his wife and was facing an imminent tax sale.

Respondent conceded that even the funds disbursed to Godusch benefited him, as they were used to settle a lawsuit, filed by Caterpillar Financial, to repossess the excavation equipment being used for the Project. Respondent had personally guaranteed the Caterpillar Financing, and was a party to that settlement, which allowed the Project to continue.

Accordingly, because respondent knowingly misappropriated funds that were the equivalent of escrow funds, disbarment is the only appropriate sanction, pursuant to the principles of Wilson and Hollendonner. Therefore, we need not address the appropriate quantum of discipline for the additional ethics violations we found, as detailed above.

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
Bruce W. Clark, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Lyn P. Aaroe
Docket No. DRB 19-219

Argued: November 21, 2019

Decided: February 6, 2020

Disposition: Disbar

Members	Disbar	Recused	Did Not Participate
Clark	X		
Gallipoli	X		
Boyer	X		
Hoberman	X		
Joseph	X		
Petrou	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	9	0	0

Ellen A. Brodsky
Chief Counsel