

IN THE SUPREME COURT OF FLORIDA

JUN 10 1985

THE FLORIDA BAR,)
Complainant,)
v.)
HERMAN COHEN,)
Respondent.)
_____ /

CLERK OF THE SUPREME COURT
Supreme Court
Case No. 71,279

ON PETITION FOR REVIEW OF REPORT OF REFEREE
IN A DISCIPLINARY PROCEEDING

ANSWER BRIEF OF COMPLAINANT

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STATEMENT OF THE CASE

On October 14, 1987, The Florida Bar filed a complaint against Herman Cohen and on October 22, 1987, the Chief Justice appointed the Honorable Harry G. Hinckley, Jr., Circuit Judge, 17th Judicial Circuit, as Referee in this case. The final hearing was held on February 16, 1988 and the Referee filed the Report of Referee on March 25, 1988.

The Respondent mailed a Petition for Review to the Supreme Court of Florida on April 20, 1988 and later filed a Motion for Extension of Time for Filing a Brief. This court granted the motion and allowed Respondent until June 2, 1988 to serve the brief. The Certificate of Service on the brief states that the brief was mailed to Bar Counsel on June 2, 1988.

The Report of Referee recommends that the Respondent be found guilty of all the allegations in the complaint. In addition, the Referee recommended that the Respondent be suspended from practicing law for ninety-one days and that he be required to show proof of rehabilitation before being reinstated to practice law. Also, the Referee recommended that the Respondent pay \$1,650.02 for costs.

STATEMENT OF THE FACTS

N.I. Meats, Inc. owned two apartments in Coral Gables, Florida. Spike Von Zamft was the sole stockholder. Herman Cohen was attorney for N.I. Meats, Inc. In order to avoid high premiums for liability insurance and payment of damages to potential claimants, Cohen advised Von Zamft to execute a mortgage deed and promissory note from N.I. Meats, Inc. to Von Zamft and Cohen. (RR, pgs. 1 & 2; Bar Ex 1, T. 16-17)

Originally the mortgage deed and note were to be in the name of Von Zamft. However, Cohen told Von Zamft it would look too self-serving and it would be better to add another name. (T. 49)

On or about December 1, 1979, Von Zamft, as president of the corporation, executed a mortgage deed and promissory note for \$60,000.00 in favor of Von Zamft and Cohen. (Bar Exhibit 2 and T. 17.) Although the note indicates that \$60,000 was "for value received" and the mortgage deed was "for divers good and valuable consideration," and also "for consideration of the aggregate sum named in the note," in fact, N.I. Meats, Inc. did not receive \$60,000.00 or other valuable consideration for the promissory note and mortgage deed. (T. 18. RR, pgs. 1 & 2).

The mortgage deed and note were used as a subterfuge, to avoid payments to persons who might be injured on the uninsured properties owned by N.I. Meats, Inc. (RR pg. 2, T. 19).

After the mortgage deed and promissory note were issued in the names of Cohen and Von Zamft, Von Zamft became concerned about Cohen's name being on the documents. Accordingly, Cohen promised to give Von Zamft \$30,000.00. However, this was never accomplished. (T. 50). Von Zamft testified that Cohen never gave valuable consideration for the promissory note or mortgage deed. (T. 18-19).

During the latter part of 1980 or the first part of 1981, at the suggestion of Cohen, Von Zamft and Cohen foreclosed the mortgage executed by N.I. Meats, Inc. to Von Zamft and Cohen (Bar Ex. 3).

On or about March 3, 1981, Cohen filed an Affidavit of Indebtedness in the case of Spike Von Zamft and Herman Cohen, in the Circuit Court of the Eleventh Judicial Circuit, Case No. 81-541-Div. 10. Cohen stated in the affidavit, that N.I. Meats, Inc. was indebted to Von Zamft and Cohen in the sum of \$60,000.00 with interest in the amount of \$3,000.00 (Bar Ex. 4 and Bar Ex 1).

The Referee found that the Mortgage Deed, Promissory Note, Mortgage Foreclosure Action, and the affidavit, were shams, as there really was no indebtedness of \$60,000.00 by N.I. Meats, Inc. to Cohen and Von Zamft. (RR, pg. 2).

SUMMARY OF ARGUMENT

The Florida Bar submits that the Report of Referee should be sustained, as the Referee's findings of fact should be accorded substantial weight and has the same presumption of correctness as the judgment of the trier of fact in a civil proceeding.

The Florida Bar argues that the mortgage note and promissory note were bogus and merely filed for the purpose of preventing potential claimants from collecting money, in the event they were injured on the property and obtained a judgment.

The Florida Bar argues that the filing of a false affidavit of indebtedness is unethical. Moreover, it is contended that the recommended discipline is appropriate as cumulative misconduct is involved in this matter.

ARGUMENTS

I.

**THE REFEREE'S FINDINGS OF GUILT SHOULD NOT
BE OVERTURNED ABSENT A SHOWING THAT SUCH
FINDINGS ARE CLEARLY ERRONEOUS OR LACKING IN
EVIDENTIARY SUPPORT**

Findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in the civil proceeding. Fla. Bar Integr. Rule art. XI, Rule 11.06(9)(a), The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981).

Florida Bar Integration Rule art. XI, Rule 11.09(3)(e) and Rule 3-7.6(5), Rules of Discipline, state:

Burden. Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful or unjustified.

This Court stated in The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968), "In disciplinary matters, the ultimate judgment remains with this Court. However, the initial fact-finding responsibility is imposed upon the Referee. His findings of fact should be accorded substantial weight. They should not be overturned unless clearly erroneous or lacking in evidentiary support."

In The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978), this Court stated:

It is our responsibility to review the determination of guilt made by the Referee upon the facts of record, and if the charges be true, to impose an appropriate penalty for violation of the Code of Professional Responsibility. Fact-finding responsibility in disciplinary proceedings is imposed on the

Referee. His findings should be upheld unless clearly erroneous or without support in the evidence.

The Respondent has failed to make the required showing that the findings of the Referee are clearly erroneous or lacking in evidentiary support. Therefore, the findings of guilty by the Referee should be approved.

II.

**IT IS UNETHICAL TO PLACE A BOGUS
MORTGAGE ON REAL PROPERTY, FOR THE
PURPOSE OF PREVENTING POTENTIAL CLAIMANTS
FROM COLLECTING JUDGMENTS**

The Respondent, on Page 8 of his brief, states, "It is not unethical to place an unfunded mortgage on real property in the State of Florida." The Florida Bar does not disagree with this statement. However, when said unfunded mortgage is bogus and is placed on the property for the purpose of preventing potential claimants from collecting on judgments, it is unethical. In this case, the mortgage deed and note were bogus, as they were created solely for the purpose of protecting the owner of the property from potential claimants, as the property was not protected by liability insurance. (RR pgs. 1 and 2, Bar Ex 1. T. 16-17; T. 59 and Defendant's Ex 5, pgs. 13-14). Also, while the promissory note indicates that \$60,000.00 was "for value received" and the mortgage deed was "for divers good and valuable consideration," and also "for consideration of the aggregate sum in the note," in fact, N.I. Meats, Inc. did not receive \$60,000.00 or other valuable consideration for the note and mortgage deed. (T. 18, RR pgs. 1 and 2, Bar Ex. 2, Defendant's Ex. 5, pg. 17).

Based upon the evidence, it is obvious that the mortgage deed and promissory note were used as a subterfuge to avoid payments to persons who might be injured on the uninsured properties of N.I. Meats, Inc. (RR pg. 2, T. 19).

As a general principle of law, a mortgage is not valid and binding unless founded upon a bona fide and sufficient consideration. Kremser v. Tonokaboni, 356 So.2d 1331 (Fla. 3 DCA 1978). In Chaykin v. Kant, 327 So.2d 793 (Fla.3 DCA 1976), there was a scheme between the mortgagor and mortgagee to defeat a possible internal revenue lien and there had been no consideration for the mortgage.

In the case at hand, there was a scheme between the mortgagor (N.I. Meats, Inc.) and the mortgagees (Cohen & Von Zamft) to defeat possible personal injury claims. Also, there had been no bona fide and sufficient consideration. While the case at hand is a Florida Bar disciplinary proceeding, rather than of a civil nature, the general principle is the same, and that is that bogus mortgages or notes are not valid. Also, when such bogus instruments are filed for the purpose of defeating the possible claims of others, the filing becomes unethical.

Although no person was injured by this scheme, it is not necessary that actual injury occur, for the act to be unethical. For example, this court stated in The Florida Bar v. Breed, 387 So.2d 783, 785 (Fla. 1979), "We give notice, however, to the legal profession of this state, that henceforth we will not be reluctant to disbar an attorney for this type of offense even though no client is injured." (emphasis added).

Accordingly, although no client or other person was injured by Mr. Cohen's scheme, it was nevertheless dishonest and unethical.

III.

**RESPONDENT COMMITTED AN UNETHICAL
ACT WHEN HE FILED THE AFFIDAVIT
OF INDEBTEDNESS**

The Referee found that on or about March 3, 1981, Cohen filed an Affidavit of Indebtedness in the case of Spike Von Zamft and Herman Cohen, in the Circuit Court of the Eleventh Judicial Circuit, Case No. 81-541-Div. 10. (RR, pg. 2, Bar Ex. 4) Cohen stated in the Affidavit, that N.I. Meats, Inc., was indebted to Von Zamft and Cohen in the sum of \$60,000 with interest in the amount of \$3,000.00 (Bar Ex. 4).

The Referee found that the Affidavit was a sham, as there really was no indebtedness of \$60,000.00 by N.I. Meats, Inc. to Cohen and Von Zamft. (RR, pg. 2)

The record shows by clear and convincing evidence that the mortgage deed and note were shams and that no consideration was given for mortgage deed and promissory note. Therefore, the Affidavit (Bar Ex. 4) was false.

The testimony before Judge Jon I. Gordon, on January 8, 1986, Defendant's Ex. 5, shows that there was no consideration for the mortgage deed and promissory note (Bar Ex. 2). Please read the following portions of Defendant's Exhibit 5 (testimony before Judge Gordon) Cohen:

Page 13, lines 21-25 and page 14, lines 1-2:

A. I don't recall at the time, but what we did then is we decided to give ourselves a mortgage on the property.

Q. All right. Well, explain that to me further.

A. So there was a--we decided in the event there was any kind of problems or lawsuits or any kind of a problem, we would get a mortgage to ourselves.

Page 16, lines 14-25:

Q. --though unrecorded.

Then N.I. Meats takes a mortgage and presumably what, borrows money from--

A. There was no money. It was just a note and mortgage given to us. We gave it to ourselves to protect the property.

Q. But you gave nothing for it, you did not give that corporation any money?

A. No.

Q. Well, how much was the face value of the note?

A. I believe it was for \$60,000.

Defendant's Ex. 5. Page 17:

Q. How did you come up with that figure?

A. Mr. Von Zamft came up with that figure.

Q. How did you and he agree that this was a proper figure for it?

A. Well, at the time I don't remember clearly how we got that number. I believe that number was the number that matched the note and the mortgage at the bank.

Q. What note and mortgage at the bank?

A. There was a note and mortgage at the bank for \$60,000.

Q. You mean there was already a first mortgage on the property?

A. Yes, there was a mortgage on the property.

Q. Was it a first mortgage?

A. Yes.

Q. Did it come before your mortgage?

A. Yes; oh, yes.

Q. So you took--though-you received a mortgage and note, though you say that you were in part an owner of the property by way of this deed of June 12, 1980, you are indicating that you accepted a mortgage from N.I. Meats; though you gave him no consideration for it, is that correct? (underscoring supplied for emphasis).

A. Correct.

A review of the entire record in this case clearly and convincingly shows that there was no consideration for the mortgage and note and that \$60,000 was never given to N.I. Meats, Inc., in return for the mortgage and note. Therefore, it is obvious that the Affidavit of Indebtedness (Bar Ex 4) was false and Mr. Cohen knew it was false when he filed it.

IV.

**THE DISCIPLINE RECOMMENDED BY THE REFEREE IS
APPROPRIATE IN THIS CASE**

The Referee recommended that Herman Cohen be suspended for ninety-one days (with proof of rehabilitation required) and that he pay the costs. This discipline might seem severe, if this were an isolated case, considering that Cohen has been a member of The Florida Bar for approximately 37 years. Nevertheless, this is not an isolated case, as Mr. Cohen received a Public Reprimand in the case of The Florida Bar v. Cohen, 331 So.2d 306 (1976) and he was privately reprimanded on March 30, 1983 (RR, pg. 4).

In addition, the Circuit Court, Eleventh Judicial Circuit, in the case of Jack Gordon and Sandra Gordon v. New Sunrise Investment Corp., Case No. 76-16246 FC(26), found by "Clear and convincing evidence" that Herman Cohen and his brother fraudulently transferred properties. In addition, the court further stated, "the testimony of the Cohen brothers and their bogus documents amounted to a shocking exercise in duplicity" (RR, Page 4). In The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979) this Court stated that it deals more severely with cumulative misconduct than with isolated misconduct. Therefore, it is respectfully submitted that cumulative misconduct is involved here and the recommended discipline is appropriate.

CONCLUSION

The evidence clearly and convincingly shows that the mortgage deed and promissory note were bogus and were prepared for the purpose of protecting the owner of the real property against claims, as said property was not covered by liability insurance. In addition, the Affidavit of Indebtedness was false and the record establishes that \$60,000 was never given to N.I. Meats, Inc, as consideration for the mortgage deed and note and in fact, there was no consideration given for these instruments.

Based upon the foregoing, it is respectfully submitted that the Report of Referee be approved and that Herman Cohen, the respondent, be suspended from practicing law for ninety-one days, that he be required to show proof of rehabilitation before being reinstated and that he pay costs in the amount of \$1,650.02.



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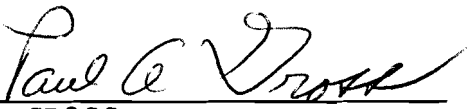
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Answer Brief of Complainant were mailed this 10 day of June, 1988 to the following attorneys:

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