

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

CASE NO. 71,279

HERMAN COHEN,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

FILED
SID J. WHITE

JUN 8 1980

CLERK, SUPREME COURT
By _____
Deputy Clerk

ON PETITION FOR REVIEW TO THE RECOMMENDATIONS OF THE REFEREE,
HONORABLE HARRY G. HINCKLEY, JR.

PETITIONER'S MAIN BRIEF

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STATEMENT OF THE CASE

This cause comes to the Supreme Court of Florida on the Petition of Herman Cohen for review of the findings of the referee in a disciplinary proceeding in which The Florida Bar was Complainant and Mr. Cohen was Respondent. The parties will be referred to in this brief by proper name or by standing here or below as appropriate. References to the record adduced before the referee will be made by use of the symbol "R" with appropriate page number. Reference to exhibits before the referee will be made by use of the symbol "Ex." with appropriate exhibit number. Reference to the transcript of hearing before the referee will be made by use of the symbol "T" with appropriate page number. Reference to specific portions of Plaintiff's Exhibit 5 in evidence before the referee, which is the transcript of a hearing had in the Circuit Court of the Eleventh Judicial Circuit In and For Dade County, Florida in Case No. 84-25182 styled Herman Cohen, Plaintiff, vs, Spike Von Zamft, Defendant, which hearing was had January 8, 1986, will be made by use of the word "hearing" with appropriate page number of that transcript.

STATEMENT OF THE FACTS

Herman Cohen, the Respondent and your Petitioner, has been for many years a member of The Florida Bar. In 1984, Mr. Cohen, by and through other counsel, became the Plaintiff in a lawsuit

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against Spike Von Zamft in the Circuit Court of the Eleventh Judicial Circuit In and For Dade County, Florida, General Jurisdiction Division, Case No. 84-25182. That case was assigned to the Honorable Jon I. Gordon, Circuit Judge. On January 8, 1986, a hearing was commenced before Judge Gordon in the case. The transcript of that hearing has been introduced before the referee as Respondent's Exhibit 5. At the outset of that hearing, the following proceedings were had (hearing 1):

"THE COURT;

Let's go.

I think you have the gentleman's appearances.

Why don't you all be seated. I have some questions I wanted to ask and then you can all ask some questions.

We're here today for an evidentiary hearing on the application of Mr. Cohen for the appointment of a receiver. That's why we are here today. I think this is the first occasion where we have had an evidentiary hearing on this application.

Would you two gentleman, please, the parties, raise your right hands to be sworn . . . "

The Court then proceeded to question the parties for some 83 pages and then announced (hearing 83):

"THE COURT;

OK.

Based upon what I have heard here today I am not inclined to appoint a receiver.

MR. BENJAMIN: Thank you Your Honor.

MR. FINE: If Your Honor please, I don't mind Your Honor proceeding any way he wants, but I

think I have a right of cross examination, just like Julie does, this is America. You haven't heard all of the facts in this case and I have a couple of pretty significant points that I would like to make before you rule.

THE COURT: Fine, I tell you what: I scheduled this hearing for 45 minutes. I gave an extra 45 minutes for it. So I have been here an hour and a half on this hearing.

I do not know when I'm next going to have time to complete everything you want. I have given you twice the amount of time and one-half hour for lunch just to have a full exploration of your hearing.

Now, you are telling me you don't feel you got a fair hearing.

MR, FINE: No, it's not a question of fair, Your Honor, although there is a question of fairness. I think Your Honor has handled this hearing very well and has developed the subject, but I suggest to Your Honor that no court can know the case as well as the lawyers.

THE COURT: I don't disagree with you.

MR, FINE: And I have a couple of points and it won't take them long, but there are a couple of things I would like-a couple of points I would like to make, and probably Julie feels the same way. I can't speak for him. . . .

THE COURT: He says, 'I haven't had an opportunity to examine' so you are right; but understanding that, I'm going to reflect on it and I will determine whether I have enough, notwithstanding that, to rule on the matter and that's what I am going to do.

Gentlemen, I'll thank you. Please let me go to lunch."

The receiver was never appointed. The hearing was never continued. Mr. Cohen suggested through counsel that the Court recuse himself and the Court did so. He also referred the matter to the

Bar Association which referral resulted in the preferment of the charges in this case and this disciplinary proceeding.

The facts around which the disciplinary proceeding arise are these. The proceeding before Judge Gordon was an action by Herman Cohen against Spike Von Zamft for partition of certain real property lying and being in Dade County, Florida, the legal title to which was vested in Herman Cohen and Spike Von Zamft by virtue of a Clerk's Deed issued in the Circuit Court of Dade County, Florida. The Clerk's Deed was issued as the result of a foreclosure by Cohen and Von Zamft of a mortgage on the property which had been executed in their favor by N.I. Meats, a corporation owned, controlled or dominated by Mr. Von Zamft.

Mr. Von Zamft had caused N.I. Meats to execute a mortgage in favor of Cohen and Von Zamft in the amount of \$60,000 which mortgage was recorded in Dade County, Florida and which was the mortgage foreclosed by Cohen and Von Zamft resulting in title being vested by the Clerk's Deed in Cohen and Von Zamft.

It is undisputed that at the time N.I. Meats made the mortgage to Cohen and Von Zamft no cash changed hands between Cohen or Von Zamft and N.I. Meats.

Mr. Von Zamft admits that there came a time when Mr. Cohen was to have an interest in the property but he asserts that Mr. Cohen was to pay him \$30,000 for it. (Hearing 55). Mr. Cohen says that he was to get his interest in the property because Mr. Von Zamft, who had acquired the property without outlay, was

injured and he wanted Cohen to manage the property for him since at that time the two parties were engaged in a number of similar real estate deals together.

In any event, they placed this unfunded mortgage on the property running from N.I. Meats to Cohen and Von Zamft and subsequently they foreclosed on the property. That foreclosure joined no other defendants but N.I. Meats (Florida Bar Exhibit 3, mortgage foreclosure file) and did not alter any priority of existing lien or claim. At the time the mortgage was foreclosed, there were no creditors or claimants against N.I. Meats.

In the course of the foreclosure, Cohen, who acted as attorney for both parties, made an affidavit stating that there was \$60,000 due and owing under the mortgage.

At the time of the foreclosure, Cohen had advanced monies for the benefit of the venture and in addition to that, he had expended time, effort and energy in the management of the project.

Von Zamft took the position that the equity in the property which he was placing in the venture consisted of \$60,000 of which, of course, \$30,000 would have been his (hearing 32 et seq.).

There is no evidence in the record contradicting the valuations of the contributions of the partners at the time of the foreclosure of the mortgage.

Based upon the foregoing facts, the Bar charged and the referee found that Cohen had been guilty of a breach of ethics and, in fact, the referee finds that the mortgage was a sham and was used as a subterfuge to avoid payment to persons who might be injured on the uninsured properties owned by N.I. Meats. The referee finds that no persons were injured by this scheme as he characterizes it, but he finds that the scheme was nevertheless unethical.

SUMMARY OF ARGUMENT

- I. THE PLACING OF AN UNFUNDED MORTGAGE ON REAL PROPERTY IN FLORIDA IS NOT AN UNETHICAL PRACTICE BUT TO THE CONTRARY IS ONE WHICH HAS LONG BEEN RECOGNIZED BY BOTH STATUTE AND CASE LAW IN THIS STATE.

- II. THERE IS NO PROOF IN THE RECORD THAT AT THE TIME THE AFFIDAVIT OF INDEBTEDNESS WAS MADE IN THE FORECLOSURE, THE MORTGAGE HAD NOT BEEN FUNDED AND TO THE CONTRARY, IT APPEARS THAT THE MORTGAGE HAD BEEN FUNDED. THE VALUATION OF THE FUNDING, AS REFLECTED IN THE AFFIDAVIT, IS UNCONTRADICTED IN THE RECORD.

ARGUMENT

IT IS NOT UNETHICAL TO PLACE AN UNFUNDED MORTGAGE ON REAL PROPERTY IN THE STATE OF FLORIDA.

Florida Statutes 697.04 originally enacted by the 1940 Legislature and amended from time to time provides:

"(1)(a) Hereafter, any mortgage or other instrument given for the purpose of creating a lien on real property may, and when so expressed therein, shall, secure not only existing indebtedness, but also such future advances, whether such advances are obligatory or to be made at the option of the lender, or otherwise, as are made within twenty years from the date thereof, to the same extent as if such future advances were made on the date of the execution of such mortgage or other instrument, although there may be no advance made at the time of the execution of such mortgage or other instrument and although there may be no indebtedness outstanding at the time any advance is made. Such lien, as to third persons without actual notice thereof, shall be valid as to all such indebtedness and future advances from the time the mortgage or other instrument is filed for record as provided by law."

The purpose of the statute as pointed out by the First District Court of Appeal in Snead Construction vs. First Federal Savings & Loan Association, 342 So.² 517 (1 DCA FL 1976) was not to validate the prior lien of a mortgage given to secure repayment of a loan the disbursement of which was postponed but was rather intended to limit the time in which the advances could be made under the security of a mortgage and to change the then existing law respecting mortgages for future advances such as those under which the mortgagee has only an option but no obligation to make advances.

In the case at bar, Mr. Cohen had every right at law and under statute to cause an unfunded mortgage to be placed on the

property. Of course, that mortgage would be valid under the terms of the statute (and even in the absence of statute under the terms of the law) as to subsequent creditors only to the extent that advances had been made and the mortgage funded. It is worthy of note that at no time did any question of priority over any subsequent creditor ever arise. At no time was there ever any attempt made to assert this mortgage in any way that would be fraudulent as to the rights of any other party.

At the time this mortgage was made, Mr. Cohen and Mr. Von Zamft contemplated a situation where each would contribute to a venture involving the property. Clearly, under the unrebutted record, Mr. Cohen contributed money and advance money and also advanced time, effort and energy in the management of the property. At the time the mortgage was made, the parties obviously contemplated that there were interests to be protected by the mortgage. We suggest that this is not in any way fraudulent since every mortgage for future advances contemplates that there is or may be an interest to be protected in the future, to-wit: the advances. We respectfully suggest that when two men are going to become involved in a piece of real property and they are going to advance time, effort money or things for the benefit of the real property, then they are clearly entitled to mortgage the property for that purpose and it cannot be said that the mortgage is a sham, nor can it be said that the mortgage is put on the

property for the purpose of defrauding anyone. To the contrary, the mortgage is put on the property pursuant to the authority of statute and the permission of the law and for a lawful purpose. The fact that the funding of the mortgage will secure a priority over other creditors is not fraudulent since they are not required to prefer other creditors to themselves and they are entitled under the statute to give themselves a priority to the extent the mortgage is funded.

We would respectfully suggest that if Judge Gordon had permitted this case to be litigated by the lawyers and had permitted examination and cross examination, he might not have reached the conclusions which he obviously did unilaterally; he might not have been asked to recuse himself; and he might not have written to the Bar about the matter.

For the referee, however, we can only say that the conclusions of his report are contrary to law and are plain error.

II, THERE IS NOTHING OF RECORD TO INDICATE THAT THE AFFIDAVIT OF INDEBTEDNESS FILED IN THE FORECLOSURE BY THE RESPONDENT WAS INACCURATE AS TO AMOUNT.

The foreclosure was not defended. The only Defendant was a corporation controlled by Spike Von Zamft who was one of the persons foreclosing. No other person's rights were involved in this foreclosure.

In connection with this default, Mr. Cohen made an Affidavit stating that the \$60,000 indebtedness evidenced by the mortgage was due.

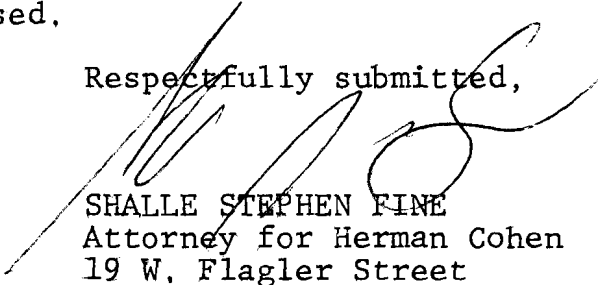
While a great todo has been made in the record about this affidavit, the Bar has not established that the \$60,000 was not due. Von Zamft agreed to the \$60,000 figure because he had \$30,000 of it that he was contributing to the contemplated venture. Von Zamft asserts that the remaining \$30,000 would be a contribution from Cohen. Von Zamft asserts that he was entitled to the \$30,000 in cash. Cohen has asserted continually in the litigation between himself and Von Zamft over the property that he was to assume and contribute as his share the management of the property in addition to which when cash was required from time to time, he contributed cash. If that is the case, there is nothing to show that the mortgage was not funded to the full amount of the \$60,000 and particularly there would be nothing to show that those valuations could be challenged by N.I. Meats or would be challenged by N.I. Meats, the owner and Defendant in the lawsuit. Obviously, Von Zamft was content with the situation at the time of the foreclosure. It was only later when the property acquired substantial value and a dispute began between the parties that Von Zamft suddenly decided that he was unhappy with the arrangement. That, of course, is a matter for civil litigation between these parties which is currently ongoing in the partition suit filed by Cohen and in the defenses raised therein by Von Zamft. However, what we are dealing here with is a question of ethical propriety and whether Cohen had a basis in the record for making the affidavit that the \$60,000 evidenced by the N.I. Meats

mortgage was due. Clearly, he had such a basis and just as clearly the findings of the referee are not sustained by the record, nor is there anything this record could challenge the assumptions made by Cohen respecting that affidavit.

CONCLUSION

We respectfully submit that this proceeding is not supported either by law or by the record and that the findings of the referee must and ought be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to Paul A. Gross, Esq., The Florida Bar, 211 Rivergate Plaza, 444 Brickell Avenue, Miami, FL 33131, this 2nd day of June, 1988.



SHALLE STEPHEN FINE