

**IN THE SUPREME COURT
OF THE STATE OF FLORIDA**
(Before a Referee)

CASE NO.: SC18-1037

FLORIDA BAR FILE NUMBERS:
Fla. Bar File No.: 2017-70,299 (11H)
Fla. Bar File No.: 2017-70,582 (11H)

<p>THE FLORIDA BAR,</p> <p>Complainant,</p> <p>vs.</p> <p>RAFAEL A. CASTRO, III.,</p> <p>Respondent.</p>	<p>RESPONDENT’S RESPONSE TO THE MOTION TO DISMISS THE INITIAL BRIEF</p>
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COMES NOW, Respondent, Rafael A. Castro, III, Esq. (“Respondent”), acting *pro se*, and, pursuant to Florida Rule of Appellate Procedure 9.300, hereby moves this Court to deny the Motion to Dismiss (as defined hereunder) (“Motion”). In support of this Motion, Respondent states as follows:

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1. This is a referee-review proceeding. Respondent filed his initial brief (“Brief”) on May 31, 2019, challenging the Report of the Referee based, among other things, on a (due process) procedural error committed by the Referee.
2. In his Brief, Respondent alleged that this matter involved issues of law and could have, *and should have*, been adjudicated by summary judgment and that a final hearing – in which witnesses were required to testify – was not necessary. Respondent noted in the Brief that he even stated specific reasons in his pre-final-hearing motions¹ concerning the premature nature of having a final hearing:

Respondent stated specific reasons for his request to change such hearing, asserting that the Ethics Proceeding “was not ready for an evidentiary hearing, nor for trial ...” (R. 16 at 6-7:¶11). Among the reasons enumerated, Respondent mentioned pending discovery requests, discovery not being completed, his need to depose Ms. Gordon and Mr. Tilley as a means of defending, and the opportunity to file pre-trial motions, such as a motion for summary judgment after those key witnesses were deposed (R. 16 at 6-7:¶¶11.a., 11.f., and 11.h.) At that point, Respondent

¹ The main one is defined as “Combined Motion to Dispense with Trial” in the Brief but refers to the pre-hearing motion titled *Respondent’s Motion to Dispense with the Final Hearing and Second Motion for Continuance to File a Summary Judgment Motion*, dated November 30, 2018 (R. 24). The first motion for continuance, defined as “Motion to Continue the Final Hearing,” which refers to *Respondent’s Unopposed Motion for Continuance of the Final Hearing (Or Trial)*, filed on October 05, 2018 (R. 16), also sought to depose witnesses and to file a motion for summary judgment.

already had a suspicion that an immediate trial (or an evidentiary hearing) was premature (R. 16 at 7:¶11.g.).

(Initial Br. at 11, 13 and 19).²

3. On June 04, 2019, Complainant, the Florida Bar (“The Bar”) filed a motion to dismiss the filed Brief (“Motion to Dismiss”). The Bar alleges that Respondent violated Rule 3-7.7 (c)(2) of the Rules Regulating the Florida Bar.
4. The Bar properly quotes the rule but overstates its application to these facts. The Bar’s Motion to Dismiss presumes that all issues were decided on the merits, but they were not. To be sure, as noted in paragraph 2 above, the issues of law raised in Respondent’s pre-final-hearing motions and especially in the Combined Motion to Dispense with Trial were never adequately addressed since the Referee’s Report ignored them and the Referee did not even mention these defenses in such Report.
5. The Referee proceeded with the final hearing as if Respondent were in default for lack of appearance. In his Brief, Respondent alleged that this was a reversible error for want of due process, since Respondent’s

² The Referee ignored this procedural defense and does not even mention it in her Report. She instead, in anger and disdain, referred to Respondent’s motion as a motion for continuance of the final hearing, even though it was a motion filed to dispense with the final hearing and in lieu of a physical appearance, which due to work obligations and financial reasons, Respondent could not attend.

Combined Motion to Dispense with Trial, which actually sought leave to depose witnesses and file a motion for summary judgment, was de facto, if not de jure, an actual appearance at the final hearing of this referee proceeding.

6. Consequently, for the reasons stated above, the transcript is not necessary because the testimony of The Bar's witnesses is irrelevant, for if Respondent was correct³ that the issues of law would be resolved in his favor, he would be entitled to summary judgment as a matter of law regardless of the testimony of The Bar's witnesses, the purpose of which is to vilify Respondent for filing belated briefs (in Tilley's case), which were accepted by the Second District as timely filed, and a belated habeas corpus/mandamus petition (in Gordon's case), which had no specific time-frame for filing, in both of these Hail-Mary post-trial proceedings.
7. Rule 3-7.7 (c)(2) of the Rules Regulating the Florida Bar, relied on by The Bar, does not require dismissal, since it specifically states that "[f]ailure to timely file and serve all of such transcripts *may be* cause for dismissal of the party's petition for review."

³ As Respondent alleged in the Combined Motion to Dispense with Trial, The Bar needed to answer the Requests for Admission, which were not answered,

8. The testimony in this case is irrelevant, since the facts elicited from their testimony do not deal with the issues of law in this ethics proceeding, which were raised by Respondent in his pre-final-hearing motions.
9. Respondent has no objection if The Bar wishes to prepare seek transcription of the unnecessary testimony of those witnesses and the filing of such transcript, provided that The Bar pays for it and Respondent does not have to incur the burden of paying for the cost of such transcription. (Respondent is insolvent and cannot pay for such transcript, in any case, at this point in time.)
10. Presumably, Rule 3-7.7 (c)(5) of the Rules Regulating the Florida Bar contemplates the notion that the party relying on the testimony of witnesses must file a transcript to make the record complete if – and most probably only if – such party relies on facts of witnesses that could only be ascertained and reviewed as evidence by having such transcript.
11. But, in this case, Respondent is not relying at all on the testimony of any of The Bar’s witnesses and, instead, has asserted in his Brief that a due process violation vitiates the validity of the Referee’s Report.
12. Moreover, and in any case, Rule 3-7.7 (c)(5) of the Rules Regulating the Florida Bar imposes a burden on Respondent to “demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified,”

and Respondent has satisfied this burden by asserting in his Brief that treating this ethics proceeding as if Respondent had been in default and making a finding of fact that Respondent did not appear, when in fact he did via the filing of the Combined Motion to Dispense with Trial, coupled with the Referee's failure to accord Respondent due process by refusing to grant a one-month extension to complete discovery and file a motion for summary judgment, constituted reversible error for want of due process.

13. It is blackletter law that a dispositive issue of law or fact that has not been fully addressed in the trial court makes the appeal premature for final review of that non-adjudicated fact or legal issue. *See generally Thomas vs. Suwannee County*, 734 So. 2d 492 (Fla. 1st DCA 1999),⁴ In addition,

⁴ This is one of the busiest times of the year for Respondent's new business and, in the limited time that he has available, has not been able to find a case on point for the assertion that an appeal is premature if the Referee has not squarely addressed procedural due process error. Respondent could file a supplemental brief on this jurisdictional issue if this Court so wishes and gives Respondent ample time to do so. In any case, this appeal should not be dismissed and, in the worst case scenario, should be abated until such legal issues raised by Respondent have been adjudicated on the merits by the Referee. In this ethics case, the legal issues raised by Respondent in the Combined Motion to Dispense with Trial were never actually adjudicated by the Referee. Therefore, this appeal is premature concerning the facts testified by The Bar's witnesses, which would have been irrelevant if Respondent was right that only legal issues existed and if those issues had been resolved in Respondent's favor, he would have been entitled to judgment as a matter of law irrespective of the damning testimony of The Bar's witnesses.

the rules of appellate procedure – or even the rules of civil procedure – ought to be "liberally construed to effectuate the ends of justice and to promote the consideration of appeals on their merits." *Director of Revenue v. United States*, 392 F.2d 307 (10th Cir.1968). And the ends of justice in this ethics proceeding required the Referee to allow Respondent to complete discovery and file his motion for summary judgment, or, to deny that request but squarely address why summary judgment was not appropriate and not treat Respondent's filings as if no filings had occurred.

14. As for The Bar's allegation that the Brief should be stricken because Respondent did not comply with typeface or font limitations, this issue will not be addressed because The Bar has not shown specific examples of such violations for the Brief to be stricken entirely, and the Brief should not be stricken if such violations were insubstantial.

WHEREFORE, Respondent humbly prays that this Court deny The Bar's Motion to Dismiss this appeal and that this Court, in fairness and to avoid a miscarriage of justice, determine on the merits whether the due process violation asserted in the Brief requires reversal and remand in this referee-review proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Respondent, acting *pro se*, hereby certifies that, on June 21, 2019, a true and correct copy of the foregoing was served by electronic mail to the persons set out in the Service List on the following page, and that, on this same date, the original has been filed electronically in this Court via Florida's E-File Portal website (<https://www.myflcourtaccess.com>).

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