IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

ERIK DAVID WESOLOSKI,

Respondent.

_____/

Supreme Court Case
No. SC21-1725

The Florida Bar File
No. 2017-70,351 (11P)

Received, Clerk, Supreme Court
DEC 07 2022

REPORT OF REFEREE ACCEPTING CONSENT JUDGMENT

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On December 15, 2021, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings. All of the aforementioned pleadings, responses thereto, exhibits received in evidence, and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

Respondent's Conditional Guilty Plea and Consent Judgment for Discipline (hereinafter "Consent Judgment") has been approved and signed by respondent, his counsel, and bar counsel, and provides that respondent

is to receive a 90-day suspension, pay the bar's disciplinary costs, and complete Ethics School within six months of the date of the Supreme Court of Florida's order approving this consent judgment and pay the $750.00 fee associated with this program.

II. FINDINGS OF FACT

In his consent judgment, Respondent admits certain factual matters, which I hereby accept and adopt as the findings of fact in this cause, to wit:

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Narrative Summary Of Case: Progress Residential entered into an agreement with Respondent's company, Title Capital Management LLC ("TCM") in or around November 2012. TCM agreed to perform due diligence in connection with the purchase of foreclosed properties located throughout the state. TCM assisted Progress Residential in expanding the company's real estate investment portfolio in the South Florida market, for which TCM was to receive a 4 percent commission of the purchase price of any property acquired on behalf of Progress Residential. TCM's duties

included the creation of a proprietary spreadsheet to assist in determining a foreclosed property's value. The relationship between TCM and Progress Residential turned sour and Progress Residential terminated its business relationship with TCM in May 2013, with Progress Residential accusing TCM of artificially inflating the maximum bid price of the properties, which would result in larger commissions for TCM.

In an email exchange beginning May 20, 2013, respondent and the president of Progress Residential engaged in discussions which made it apparent that litigation might ensue. The parties tried to negotiate a settlement but ultimately failed. Consequently, on September 23, 2013, Progress Residential filed a lawsuit in Miami-Dade County, styled as Progress Residential, LP f/k/a Fundamental REO LP, v. Title Capital Management LLC. Two years later Progress Residential amended its complaint to include the respondent; respondent's law firm, Wesoloski Carlson, PA; two other companies owned by respondent, Rocket Lien Search, LLC and Erik Wesoloski, PA; and Respondent's wife, Case No. 2013-30433 CA 01.

After the suit was filed in November 2013, Progress Residential sought production of all of the due diligence materials completed by TCM

and TCM produced everything it had in its possession without objection. On July 10, 2015, Progress Residential sought production of additional documents, including internal emails between TCM employees. The court ordered production of the emails on August 12, 2015 and required TCM to provide an affidavit regarding the process by which it searched for such emails if no emails were produced. On September 11, 2015, TCM served Progress residential with an affidavit of respondent. In the affidavit, respondent stated that with the exception of computers belonging to himself and Javier Perez, the computers of all TCM staff where wiped clean and discarded or given away in September 2013 prior to Progress Residential filing its lawsuit against TCM.

Following a hearing on Progress Residential's Spoliation Motion Against TCM and Respondent for Destruction of Evidence, the court entered an order in favor of Progress Residential on December 29, 2016. The court found that "it is clear that the electronic information existed at one time." As such, respondent was under a duty to preserve the emails, as "litigants are under a duty to preserve evidence which they know, or reasonably should know is relevant in an action." Indeed, the court found that the content in the correspondence between respondent and agents of

Progress Residential established that respondent knew that absent a negotiated settlement, litigation was imminent. Moreover, the court found that the evidence sought by Progress Residential would have been critical in proving or disproving its theory of the case. Furthermore, because of the numerical nature of the documents and data sought by Progress Residential, no other means existed to obtain this information. Subsequent to the Spoliation Order, the emails were recovered and produced to Progress Residential prior to trial. Thereafter, the case was settled and dismissed by Progress Residential.

Respondent reported in the September 2015 affidavit that the computers containing the emails had been "wiped." Respondent asserts that he did so based on what the former IT employee of TCM told respondent. It was later revealed that nothing was "wiped". Instead, the IT employee had re-positioned the computers for use by other users so that the emails could not be readily accessed although they were still there. The IT employee also told respondent that the computers were discarded when in fact some were taken to his house, others placed in a storage closet at respondent's former office or were simply left behind at respondent's former office. Once that was known, TCM was able to retrieve the emails

and produce them to Progress Residential. Respondent admits his affidavit was poorly drafted and that he should have disclosed his understanding that the emails were no longer available came from the IT employee and not from his personal knowledge. Respondent also admits that his affidavit caused the parties and the court to incur unnecessary time and expense.

Regarding The Florida Bar File No. 2017-70, 351 (11P), respondent admits to violating Rule 4-3.4(a) (Fairness to opposing parties and counsel) and 4-8.4(d) (Conduct prejudicial to the administration of justice). The Florida Bar agrees to voluntarily dismiss Rule 4-3.3(a) (False Evidence; Duty to Disclose).

III. RECOMMENDATIONS AS TO GUILT

I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: Rule 4-3.4(a) (Fairness to opposing parties and counsel) and 4-8.4(d) (Conduct prejudicial to the administration of justice).

Respondent will eliminate all indicia of respondent's status as an attorney on email, social media, telephone listings, stationery, checks, business cards office signs or any other indicia of respondent's status as an attorney, whatsoever.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

600 VIOLATIONS OF DUTIES OWED TO THE LEGAL SYSTEM

6.1 False Statements, Fraud and Misrepresentation

6.1(b) Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action.

I find this standard to be applicable in the instant case, based on the admissions tendered in respondent's Conditional Guilty Plea for Consent Judgement.

V. CASE LAW

I considered the following case law prior to recommending discipline:

In *The Florida Bar v. Forrester*, 818 So. 2d 477 (Fla. 2002), respondent was suspended for 60 days followed by one year of probation. The misconduct in question included concealment of an original copy of the subcontract during deposition in subcontractor's civil action and in made an intentional misrepresentation to subcontractor's counsel that the attorney did not know the location of the document, which the attorney had placed

near her briefcase after the general contractor's president had removed the document from the table and handed it to the attorney.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. 90-day suspension

B. Completion of Ethics School within 6 months of the date of the Supreme Court of Florida's order approving this consent judgment and pay the $750.00 fee associated with this program; and

C. Payment of disciplinary costs.

VII. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following personal history of Respondent, to wit:

Age: 47

Date admitted to the Bar: October 23, 2001

Prior Discipline: None

Mitigating Factors:

In mitigation, respondent has no prior discipline [Florida Standards for Imposing Lawyer Sanctions 3.3(b)(1)]; Full and free disclosure to the Bar

and cooperative attitude toward the proceedings; respondent had several in-depth meetings with the Bar where he freely admitted what he did and how he could have handled the situation differently. Additionally, respondent's first lawyer passed away while the matter was being investigated by the grievance committee. Respondent requested time to secure new counsel, which he did within a month of informing the bar of his former attorney's passing. [3.3(b)(5)]. Shortly thereafter, the entire world experienced a force majeure caused by the shutdown due to the COVID-19 pandemic; throughout the proceedings, respondent exhibited remorse [3.3(b)(12)]. Furthermore, the misconduct in question did not occur while respondent was acting as an attorney but rather as a party to litigation. Rather than further tying up court resources upon losing his motion for rehearing on the order at issue, respondent settled the case with the opposing party.

Aggravating Factor:

- 3.2(b)(9): Substantial Experience in the Practice of Law

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Costs:	$1,250.00
TOTAL:	$1,250.00

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and that should such cost judgment not be satisfied within thirty days of said judgment becoming final, Respondent shall be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6, unless otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 9 day of September, 2022.

Honorable Victoria Ferrer, Referee
Hialeah Branch Courthouse
11 East 6th Street, Room 225
Hialeah, FL 33010

Original To:

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