Filing # 140432507 E-Filed 12/15/2021 01:40:40 PM

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

ERIK DAVID WESOLOSKI,

Respondent.

_____/

Supreme Court Case
No. SC-

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

RECEIVED, 12/15/2021 01:41:22 PM, Clerk, Supreme Court

REQUESTS FOR ADMISSION

The Florida Bar requests respondent, Erik David Wesoloski make the following admissions for the purpose of this action only and subject to all pertinent objections to their admissibility, which may be interposed at the trial, pursuant to Fla. R. Civ. P. 1.370, within 45 days after service of this request.

1. You admit that Progress Residential entered into an agreement with you in or around November 2012, in which agreed to perform due diligence in connection with the purchase of foreclosed properties located throughout the state, as well as assist Progress Residential in expanding the company's real estate investment portfolio in the South Florida market.

2. You admit that in exchange for this service, you and your company, Title Capital Management (TCM), received a four percent

commission on the total purchase price of any property acquired on behalf of Progress Residential.

3. You admit that according to a complaint filed by you in Case 1:16-cv-21882-KMW in Florida's Federal Southern District Court, you allege that prior to the start of your business relationship with Progress Residential, you created a "sophisticated spreadsheet" that assisted in determining a foreclosed property's value. (*See* TFB Ex. A).

4. You admit that low-level employees, referred to as analysts, entered data into your allegedly proprietary spreadsheets. These analysts had no power to change the information within the document's columns and rows. Rather, the data entered into the spreadsheet by the analysts was derived from information contained within various real estate databases and listing services.

5. You admit that the data was input into a formula to calculate the maximum bid you and TCM were authorized to make.

6. You admit that the relationship between you and Progress Residential turned sour in May 2013, when Progress Residential terminated its business relationship with you.

7. You admit that TCM accused you of artificially inflating the maximum bid price of the properties, which would result in larger commissions for you and TCM.

8. You admit that in an email exchange beginning May 20, 2013, you provided Don Mullen, president of Progress Residential, with the name of his attorney following a phone call with him. In the email, you stated, "on the phone you stated you would be sending this matter to counsel. While we could prefer an amicable resolution to this matter, if you are intent on following the legal route, please find the contact information for our counsel below. I kindly ask that you send our counsel's contact information to your attorney as well." (*See* TFB Composite Ex. B).

9. You admit that 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; Erik Wesoloski; Rocket Lien Search, LLC; Wesoloski Carlson, PA; Erik Wesoloski, PA; and Carmen Serrano*, Case No. 2013-30433 CA 01.

10. You admit that in that lawsuit, Progress Residential alleged breach of contract, breach of fiduciary duty, and constructive fraud.

11. You admit that after the suit was filed, Progress Residential sought production of all emails generated by TCM's office staff in conjunction with the services you and TCM performed on Progress's behalf. On July 10, 2015, Progress Residential sought production of additional documents, including internal emails between TCM employee.

12. You admit that the court ordered production of the additional documents on August 12, 2015.

13. You admit that on September 11, 2015, TCM served Progress residential with an affidavit executed by you, in which you stated that with the exception of computers belonging to you and Javier Perez, the computers of all TCM staff where wiped clean and discarded or given away in September 2013, the same month Progress filed its lawsuit against you.

14. You admit that following a hearing on Progress Residential's Spoliation Motion Against Title Capital Management, LLC and Erik Wesloski for Destruction of Evidence, the court entered an order in favor of Progress on December 29, 2016.

15. You admit that as part of its analysis, the court took up the issue of spoliation, finding three elements: (1) whether the evidence existed at one time; (2) whether the spoliator had a duty to preserve; and (3)

whether the evidence was critical to an opposing party being able to prove its prima facie case or defense.

16. You admit that in its order, the court found that “the record evidence establishes that the analysts had functional email accounts in use during the time you provided services to Progress Residential.” (*See* TFB Ex. C at 5).

17. You further admit that the court found that “it is clear that the electronic information existed at one time.” As such, you 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.” (*See* TFB Ex. C at 6).

18. You admit that the court found that the content in the correspondence between you and agents of Progress Residential established that you knew that absent a negotiated settlement, litigation was imminent. (*See* TFB Composite Ex. B and TFB Ex. C at 8).

19. You admit that the court found that the deleted emails would have established which services TCM analysts performed, explained whether the data was properly transferred to bidding sheets, or whether you or another person manipulated the data upon transfer.

20. You admit that because of the numerical nature of the documents and data sought by Progress, no other means existed to obtain this information.

21. You admit that the court specifically noted that although you contended that the cleaning and disposal of the hard drives was a good faith act, "the discovery responses, and ensuing correspondence and hearings, were clearly designed to thwart [Progress Residential's] access to the information. Rather than disclose that the data and correspondence had been destroyed, TCM and [respondent] produced incomplete documents and vigorously opposed further efforts directed at obtaining full disclosure of electronic data."

22. You admit that the court rejected your claim that the "destruction occurred in 'routine, good faith operation of an electronic information system,' and conclude[d] that sanctions [were] indeed warranted." (*See* TFB Ex. C at 9-10).

23. You admit that you have violated the following Rules Regulating The Florida Bar: 4-3.3(a) (False Evidence; Duty to Disclose); and 4-3.4(a) (Fairness to Opposing Party and Counsel).

Respectfully submitted,

Rita Florez, Bar Counsel
The Florida Bar
Miami Branch Office
444 Brickell Avenue
Rivergate Plaza, Suite M-100
Miami, Florida 33131-2404
(305) 377-4445
Florida Bar No. 1011307
rflorez@floridabar.org

CERTIFICATE OF SERVICE

I certify that this document has been efiled with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, with a copy provided via email to Brian Lee Tannebaum, Attorney for Respondent, at btannebaum@tannebaum.com; and that a copy has been furnished by United States Mail via certified mail No. 7017 33870 0000 1082 8093, return receipt requested to Brian Lee Tannebaum, Attorney for Respondent whose record bar address is 1 SE 3rd Avenue, Suite 1400; Miami, FL 33131-1708 and via email to Rita Florez, Bar Counsel, rflorez@floridabar.org, on this 15th day of December, 2021.

Patricia Ann Toro Savitz
Staff Counsel