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IN THE SUPREME COURT OF FLORIDA

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 01:41:21 PM, Clerk, Supreme Court

COMPLAINT

The Florida Bar, complainant, files this Complaint against Erik David Wesoloski, respondent, pursuant to the Rules Regulating The Florida Bar and alleges:

1. Respondent is and was at all times mentioned herein a member of The Florida Bar admitted on October 23, 2001 and is subject to the jurisdiction of the Supreme Court of Florida.

2. Respondent resided and practiced law in Miami-Dade County, Florida, at all times material.

3. The Eleventh Judicial Circuit Grievance Committee P found probable cause to file this complaint pursuant to Rule 3-7.4, of the Rules Regulating The Florida Bar, and this complaint has been approved by the presiding member of that committee.

4. Progress Residential entered into an agreement with respondent in or around November 2012. Respondent agreed to perform due diligence in connection with the purchase of foreclosed properties located throughout the state. Respondent assisted Progress Residential in expanding the company's real estate investment portfolio in the South Florida market.

5. In exchange for this service, respondent and his company, Title Capital Management (TCM), received a four percent commission on the total purchase price of any property acquired on behalf of Progress Residential.

6. According to a complaint filed by respondent in Case 1:16-cv-21882-KMW in Florida's Federal Southern District Court, respondent alleges that prior to the start of his business relationship with Progress Residential, he allegedly created a "sophisticated spreadsheet" that assisted in determining a foreclosed property's value. (*See* TFB Ex. A)

7. Low-level employees, referred to as analysts, entered data into respondent's 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.

8. The data was input into a formula to calculate the maximum bid respondent and TCM were authorized to make.

9. The relationship between respondent and Progress Residential turned sour in May 2013, when Progress Residential terminated its business relationship with respondent. TCM accused respondent of artificially inflating the maximum bid price of the properties, which would result in larger commissions for respondent and TCM.

10. In an email exchange beginning May 20, 2013, respondent provided Don Mullen, president of Progress Residential, with the name of his attorney following a phone call with him. In the email, respondent 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).

11. 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.

12. In that lawsuit, Progress Residential alleged breach of contract, breach of fiduciary duty, and constructive fraud.

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

14. The court ordered production of the additional documents on August 12, 2015.

15. 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, the same month Progress filed its lawsuit against respondent.

16. 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.

17. As part of its analysis, the court took up the issue of spoliation. It found that there are 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.

18. In its order, the court found that "the record evidence establishes that the analysts had functional email accounts in use during the time respondent provided services to Progress Residential." (*See* TFB Ex. C at 5).

19. Consequently, 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." (*See* TFB Ex. C at 6). 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. (*See* TFB Composite Ex. B and TFB Ex. C at 8).

20. Moreover, 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 respondent or another person manipulated the data upon transfer. In other words, 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, no other means existed to obtain this information. (*See* TFB Ex. C at 8-9).

21. Apart from this, the court also noted that although respondent 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." Significantly, the court rejected respondent's 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).

22. By reason of the foregoing, respondent has 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).

WHEREFORE, The Florida Bar prays respondent will be appropriately disciplined in accordance with the provisions of the Rules Regulating The Florida Bar as amended.

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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

NOTICE OF TRIAL COUNSEL AND DESIGNATION OF PRIMARY EMAIL ADDRESS

PLEASE TAKE NOTICE that the trial counsel in this matter is Rita Florez, Bar Counsel, whose address, telephone number and primary email address are The Florida Bar, Miami Branch Office, 444 Brickell Avenue Rivergate Plaza, Suite M-100; Miami, Florida 33131-2404, (305) 377-4445 and rflorez@floridabar.org. Respondent need not address pleadings, correspondence, etc. in this matter to anyone other than trial counsel and to Staff Counsel, The Florida Bar, 651 E Jefferson Street, Tallahassee, Florida 32399-2300, psavitz@floridabar.org.

MANDATORY ANSWER NOTICE

RULE 3-7.6(h)(2), RULES REGULATING THE FLORIDA BAR, PROVIDES THAT A RESPONDENT SHALL ANSWER A COMPLAINT.