

5708

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR

92 DHC 16



THE NORTH CAROLINA STATE BAR,)
Plaintiff)
vs.)
THOMAS L. KUMMER, ATTORNEY)
Defendant)

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This cause was heard by a hearing committee of the Disciplinary Hearing Commission composed of Stephen T. Smith, Chair; Henry C. Babb, Jr.; and Emily W. Turner from June 28, 1993 through June 30, 1993. Plaintiff was represented by R. David Henderson and Harriet P. Tharrington and defendant was represented by Joseph B. Cheshire, V and Alan M. Schneider. Based upon the pleadings, the Stipulation on Prehearing Conference and the evidence presented at trial, the committee, by clear, cogent and convincing evidence, makes the following:

FINDINGS OF FACT

1. The North Carolina State Bar is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina and the Rules and Regulations of the North Carolina State Bar promulgated thereunder.
2. Thomas L. Kummer was admitted to the North Carolina State Bar on October 22, 1973 and is, and was at all times relevant herein, an attorney at law licensed to practice in North Carolina subject to the Rules and Regulations of the North Carolina State Bar, the Rules of Professional Conduct of the North Carolina State Bar, and the Laws of the State of North Carolina.
3. During all times relevant herein, defendant was actively engaged in the practice of law in the State of North Carolina and maintained a law office in the City of Winston-Salem, Forsyth County, N.C.

00082

Conflict of Interest Claim

4. First Stevens Limited Partnership ("First Stevens"), a North Carolina limited partnership, was created in 1982 to undertake a rehabilitation project in downtown Winston-Salem. At all times relevant herein, Gail R. Citron ("Citron") was the sole general partner. Citron, as general partner, employed defendant to represent her and First Stevens.
5. First Stevens raised capital by offering limited partnership interests pursuant to a private placement memorandum. First Stevens raised funds to undertake the development of buildings located in downtown Winston-Salem.
6. First Stevens acquired a fee simple interest in the Mercantile and 420 buildings and a leasehold interest in the YMCA Building, all of which are located in downtown Winston-Salem ("the Winston-Salem property"). These properties were variously developed by First Stevens into an office and retail complex.
7. First Stevens utilized the funds provided by limited partner investors and a construction loan from NCNB (now NationsBank) to undertake the initial development of the Mercantile and 420 buildings.
8. Citron decided to sell the Winston-Salem property in approximately November of 1986. At that time, Citron listed the property with First Commercial Real Estate, Inc. ("First Commercial").
9. In November and December of 1986, Steve Bowman of First Commercial presented an offer proposing the exchange of the Winston-Salem property for property located in Indianapolis, Indiana and an offer proposing the exchange of the Winston-Salem property for property located in Reno, Nevada ("the Reno property").
10. After it was determined that the Indianapolis property was not acceptable, defendant travelled to Reno, Nevada to meet with Birch Associates, the owner of the Reno property.
11. Defendant advised Citron and First Stevens in negotiating the terms of a property exchange between First Stevens and Birch Associates.
12. These negotiations led to the execution of an agreement dated February 1, 1987 between First Stevens and Birch Associates. This agreement set forth the parameters for an exchange of the Winston-Salem property for the Reno

property.

13. One of the preconditions set forth in the February 1, 1987 agreement was that First Stevens had to find an acceptable buyer for the Reno property.
14. In February and March of 1987, defendant investigated the feasibility of First Stevens selling the Reno property after it was acquired from Birch Associates and the subsequent development of an apartment complex. On April 1, 1987, defendant wrote a memorandum to Citron which indicated the basis upon which defendant might be able to purchase the Reno property through a limited partnership to be known as First Reno Limited Partnership ("First Reno"). As proposed, defendant would be the sole general partner of First Reno.
15. Thereafter, defendant, on behalf of First Reno, negotiated with Citron and First Stevens, his clients, to purchase the Reno property. These negotiations led to the execution of a purchase agreement dated May 30, 1987 ("the Purchase Agreement").
16. From April 1, 1987, the date defendant first proposed the purchase of the Reno property, until the date of closing, September 25, 1987, defendant drafted numerous documents in preparation for the closing. During this time, defendant continued to represent and advise First Stevens while at the same time acting as general partner of First Reno. Citron and First Stevens were not represented by any other counsel during these negotiations. Defendant did not advise Citron that he had a conflict of interest or advise her to seek other counsel.

\$165,000 Claim

17. In December of 1985, a North Carolina limited partnership known as WS Associates Limited Partnership ("WS Associates") was formed to raise additional capital for First Stevens.
18. On December 12, 1985, an Offering Memorandum for WS Associates was distributed to potential limited partner investors.
19. The WS Associates offering was never fully subscribed. The only person who subscribed to the WS Associates offering was Mr. Jerry Fulp who submitted a \$165,000 contribution pursuant to the offering. On December 31, 1985 the certificate of limited partnership of WS Associates was filed.

OC084

20. Also on December 31, 1985, a Master Lease Agreement was executed between WS Associates and First Stevens whereby First Stevens leased two of the buildings involved in the rehabilitation project to WS Associates ("the Lease").
21. Section 34 of the Lease allowed WS Associates to receive liquidated damages from First Stevens if the buildings were sold before the Lease expired and the Lease was terminated by either party. Section 34 also provided that the Lease could not be terminated prior to December 31, 1991 and that if the property was sold prior to that time, no election to terminate the Lease would be effective until December 31, 1991.
22. On at least three occasions from April 1, 1987 to September 22, 1987, three days prior to the closing, defendant represented the following to Citron: (1) that Jerry Fulp, as the sole limited partner of WS Associates, was entitled to \$165,000 in liquidated damages under Section 34 of the Lease, (2) that the \$165,000 obligation had to be paid to Fulp at the time of closing, (3) that Fulp had agreed to invest these funds in First Reno, and (4) that as a result of First Stevens' obligation to Fulp and Fulp's obligation to First Reno, the cash amount First Stevens was otherwise entitled to receive under the May 30, 1987 purchase agreement would be reduced at the closing by \$165,000 and the cash amount First Reno was otherwise required to pay under said agreement would be reduced by \$165,000.
23. Defendant had numerous discussions with Fulp, the sole limited partner of WS Associates, regarding Fulp's possible involvement in the development of the Reno property. Fulp travelled to Reno to look at the Reno property and discuss the development with contractors and bankers. Defendant and Fulp went to First Citizens Bank to explore the possibility of obtaining a line of credit for use in defraying the costs associated with the development of the Reno property.
24. On July 22, 1987, defendant wrote Fulp indicating that there were still two issues remaining as to Fulp's participation in First Reno: (1) the split of equity between Fulp and defendant, and (2) review by Fulp's attorney of the Partnership Agreement.
25. At no time from April 1, 1987 to September 25, 1987, the date of the closing, did Fulp agree to invest the \$165,000 liquidated damages in First Reno.
26. Notwithstanding previous discussions and actions described in paragraphs 23 and 24 above, at the time of the closing on September 25, 1987, defendant knew that Fulp had not agreed to invest the \$165,000 liquidated

damages amount in First Reno. Defendant also knew that without such an agreement, First Reno was not entitled to receive a \$165,000 credit at closing.

27. Nevertheless, defendant allowed the settlement agent to credit First Reno \$165,000 and debit First Stevens \$165,000. As a result, First Reno was not required to bring \$165,000 to closing and First Stevens, defendant's client, did not receive the \$165,000 it was entitled to. But for the \$165,000 debit/credit at closing, defendant and First Reno would not have been able to purchase the Reno property.
28. Several months after the closing, Citron learned that Fulp had not agreed to invest the \$165,000 liquidated damages amount in First Reno. When Citron approached Kummer with this information, defendant, on behalf of First Reno, gave First Stevens a promissory note in the amount of \$165,000.

\$150,000 Claim

29. At the closing of the sale between First Stevens and First Reno on September 25, 1987, Citron and First Stevens financed \$600,000 of the purchase price.
30. In order to protect the \$600,000 obligation from possible creditor claims, escrow agreements dated September 22, 1987 and September 25, 1987 were prepared by defendant. These agreements required the \$600,000 to be paid to certain named beneficiaries.
31. On or about April 23, 1988, First Reno paid off the purchase money obligation. Various beneficiaries were paid from these funds pursuant to the September 22, 1987 escrow agreement.
32. On or about April 28, 1988, the remaining funds in the amount of \$454,005.92 ("the Loan Proceeds") were transferred to defendant as trustee under the September 25, 1987 escrow agreement ("the Escrow Agreement").
33. Paragraph 3 of the Escrow Agreement required defendant, as trustee, to:

disburse the proceeds in the following order of priority as follows:

- a. To S.S. Casey, Inc., Judith R. Citron, Jennifer A. Citron, and Merel R. Black in satisfaction of their secured promissory notes. . . .

b. To Gail R. Citron, to the extent of her secured promissory note representing loans by her to First Stevens.

c. To CWood Properties, Inc. to the extent of its secured promissory note representing loans by it to First Stevens.

d. To Thomas L. Kummer, of the firm of Horton & Kummer, the sum of \$150,000 for legal fees represented by the secured promissory note executed by First Stevens in favor of Horton & Kummer; and the sum of \$150,000 to Gail R. Citron as General Partner of First Stevens in satisfaction of the obligation of First Stevens to her for General Partner fees represented by the secured promissory note executed by First Stevens in her favor.

34. At the time defendant received the Loan Proceeds, a total of \$229,194.10 was owed under paragraph 4(a) of the Escrow Agreement and the balance of \$284,748.01 was owed to Citron under paragraph 4(b). No funds were left to be disbursed pursuant to subparagraphs (c) and (d) of the Escrow Agreement. Specifically, no funds were left under the Escrow Agreement to pay defendant's outstanding legal fees under subparagraph (d).
35. On April 28, 1988 defendant deposited the Loan Proceeds into his trust account. Immediately thereafter, without Citron's knowledge or consent and in violation of the Escrow Agreement and his duties as trustee and as counsel for Citron, defendant disbursed \$150,000 of the Loan Proceeds to himself for "Legal Fees."
36. At the time defendant disbursed these funds to himself, First Stevens, and Citron as the general partner of First Stevens, owed defendant for legal fees in excess of \$150,000.
37. Defendant deposited the \$150,000 into his personal checking account on April 28, 1988. Over the next seven days, defendant spent \$149,083.23 of the \$150,000 disbursed to himself. These funds were spent without Citron's knowledge or consent and were used for defendant's own benefit or for the benefit of someone other than Citron.
38. Citron made repeated demands on defendant to return the \$150,000 wrongfully taken from her. However,

defendant failed and refused to return these funds to her.

BASED UPON the foregoing Findings of Fact, the hearing committee makes the following:

CONCLUSIONS OF LAW

1. By representing Citron and First Stevens throughout the negotiation of the sale of the Reno property from First Stevens to First Reno while at the same time acting as general partner of First Reno, defendant violated Rule 5.1(B) of the Rules of Professional Conduct which states that a lawyer shall not represent a client when the representation of that client may be materially limited by the lawyer's own interests;
2. By allowing the settlement agent to credit First Reno and debit First Stevens \$165,000 even though the limited partner of WS Associates had not agreed to invest these funds in First Reno, defendant: (a) violated Rule 7.1(A)(3) of the Rules of Professional Conduct which states that a lawyer shall not intentionally damage his client during the course of the professional relationship, and (b) engaged in conduct involving deceit and misrepresentation in violation of Rule 1.2(C) of the Rules of Professional Conduct;
3. By disbursing \$150,000 in funds entrusted to him in a fiduciary capacity for his own use without Citron's knowledge or consent, or without any other legal authority, defendant engaged in conduct involving deceit and misrepresentation in violation of Rule 1.2(C) of the Rules of Professional Conduct; and
4. By failing, upon demand, to pay to Citron the \$150,000 disbursed to himself, defendant: (a) failed to promptly pay or deliver to the client as directed by the client funds belonging to the client to which the client is entitled in the possession of defendant in violation of Rule 10.2(E) of the Rules of Professional Conduct, and (b) failed to deliver to the client all property to which the client is entitled in violation of Rule 2.8(A)(2) of the Rules of Professional Conduct.

Signed by the undersigned chairman with the full knowledge

and consent of the other hearing committee members, this the 14
day of August, 1993.

ST SMITH

Stephen T. Smith, Chair
Hearing Committee

BEFORE THE
DISCIPLINARY HEARING COMMISSION
OF THE
NORTH CAROLINA STATE BAR



92 DHC 16

THE NORTH CAROLINA STATE BAR,)
Plaintiff)
vs.)
THOMAS L. KUMMER, ATTORNEY)
Defendant)

ORDER OF DISCIPLINE

This cause was heard by a hearing committee of the Disciplinary Hearing Commission composed of Stephen T. Smith, Chair; Henry C. Babb, Jr.; and Emily W. Turner from June 28, 1993 through June 30, 1993. After entering the Findings of Fact and Conclusions of Law in this matter, the committee received evidence and considered arguments of counsel concerning the appropriate discipline to be imposed. Based upon the evidence and arguments presented, the committee finds the following aggravating and mitigating factors:

AGGRAVATING FACTORS

1. Multiple offenses;
2. Substantial experience in the practice of law; and
3. Some of defendant's actions were taken for personal gain.

MITIGATING FACTORS

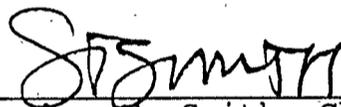
1. Absence of a prior disciplinary record;
2. Cooperative attitude toward the proceedings;
3. Plaintiff's delay in prosecuting this case from May 24, 1989 to November 1, 1991; and
4. The \$150,000 taken from defendant's trust account was for legal fees and reimbursement of costs which Citron had previously agreed was owed to defendant.

Based upon the Findings of Fact and Conclusions of Law and the above aggravating and mitigating factors, the committee hereby enters this

ORDER OF DISCIPLINE

1. Defendant is hereby suspended from the practice of law for a period of three years, commencing 30 days after service of this order upon defendant.
2. Defendant shall violate no laws of the State of North Carolina and shall violate no provisions of the Rules of Professional Conduct during the period of suspension.
3. Defendant shall comply with all the provisions of Article IX, Section 24 of the Rules and Regulations of the North Carolina State Bar.
4. Defendant is taxed with the costs of this proceeding.

Signed by the undersigned chairman with the full knowledge and consent of all parties and the other members of the hearing committee, this the 4 day of August, 1993.



Stephen T. Smith, Chair
Disciplinary Hearing Committee

[437]

00091