

IN RE: MARC DANIEL FOLEY

S.J.C. Order of Term Suspension entered by Justice Gants on February 22, 2010, with an effective date of March 24, 2010.¹

SUMMARY²

This case arises from the respondent's misconduct in a condominium conversion and subsequent sales of the condominium units. The respondent was admitted to the bar in 2002 and concentrated his practice in real estate closings. At the relevant times, he operated a law firm, employed lawyers and nonlawyer assistants in the firm, and had direct supervisory authority over all his employees. By the end of 2006, a significant percentage of the respondent's business was generated by a mortgage broker and her company. The mortgage broker also bought and sold real estate for her own benefit. The respondent represented the mortgage broker in some of her own investments and was a co-investor with her in at least one development.

In late November or early December 2006, the mortgage broker hired the respondent to represent her in acquiring a twenty-four unit apartment building and converting the units to condominiums. As the respondent was aware, the mortgage broker planned to transfer title to the building to a new entity, sell the units after the conversion, and pay off her financing for the acquisition through the unit sales. The respondent also knew that the mortgage broker and her employees or associates were finding buyers for the units and obtaining purchase money financing for the unit buyers. The mortgage broker arranged for the respondent or his firm to act as lenders' counsel and settlement agent in the unit closings.

At the respondent's direction, Sean Robbins, an attorney employed by the respondent, formed a new corporation with the mortgage broker as sole officer and director and prepared the condominium conversion documents. Using information supplied by the mortgage broker's employees, the firm prepared 24 purchase and sale agreements for the unit closings, each listing a purchase price with no down payment or deposit and the entire consideration due from the unit buyer on delivery of the deed.

On or about December 14, 2006, the respondent represented the mortgage broker, as trustee of a realty trust, in her acquisition of the building. A day or two later, the respondent represented the mortgage broker in her conveyance of the building to the new corporation and her execution of the condominium conversion documents as president of the corporation.

The respondent's firm then represented the lenders in the unit closings. Only one unit buyer had 100% financing; the remaining unit buyers obtained loans secured by first mortgages or, in some cases, by first and second mortgages ranging from about 90% to 95% of the stated purchase price.

Before the unit closings, the respondent's firm received closing instructions from the lenders. Almost all of the instructions prohibited secondary financing without the lender's prior approval and required the settlement agent to prepare and have executed a HUD-1 settlement statement for each loan accurately setting forth all receipts and disbursements; to furnish a copy of the HUD-1 to the lender before the closing; to provide the executed HUD-1 and other closing documents to the lender after the closing; and to report to the lender any

inability to comply with the instructions. The respondent knew before the unit closings that the lenders were or would be funding their loans in reliance on, among other things, the terms of the purchase and sale agreements and HUD-1's and compliance with the closing instructions.

The 24 unit closings took place in late December 2006 and early January 2007. The respondent handled five of the closings; the remaining closings were handled by Robbins at the respondent's direction. For each unit closing, the respondent or Robbins had the parties execute documents including a HUD-1 for each loan. Each HUD-1 for a first mortgage listed, among other things, an amount of cash due from and paid by the unit buyer and an amount of cash paid or to be paid to the seller as net proceeds. With the exception of the unit with 100% financing, the amounts listed as due from the buyers ranged from about \$9,300 to over \$39,000 and totaled about \$449,000 for all the closings.

As the respondent was aware, none of the unit buyers brought funds to any of the closings. The respondent had one of his paralegal employees prepare a "disbursement authorization" for each unit sale whereby the mortgage broker, as president of the seller corporation, authorized the respondent to deduct from the seller's proceeds an amount equal to the supposed buyer's contribution, pay that amount to his firm on behalf of the buyer, and distribute the remaining proceeds, after deduction for the stated buyer's contribution, to the seller.

In each unit closing the respondent or Robbins, under the respondent's direction, had the parties sign a certification on the first mortgage HUD-1 that it was a true and accurate statement of all receipts and disbursements made on the buyer's behalf. Because the buyers had brought no funds to the closings, the respondent then knew, either in fact or by willful blindness, that the parties' certifications were false. For ten of the unit closings, the respondent also executed certifications that the HUD-1's were true and accurate accounts of the transactions and that he had caused or would cause the funds to be disbursed in accordance with the HUD-1's. The respondent knew that those certifications were false.

As the closings were completed, the firm sent the HUD-1's to the unit lenders, recorded the documents, and disbursed the lenders' funds. After deductions for the supposed buyer contributions, the seller corporation received a total of over \$2,000,000 as net proceeds of the unit sales. The respondent never informed any of the unit lenders that the HUD-1's were inaccurate or that the amounts shown as payments from the buyers were not paid at closing.

By intentionally misrepresenting the terms of the unit transactions on the first mortgage HUD-1's; causing or allowing the parties' false certifications on those HUD-1's; certifying falsely the accuracy of some of those HUD-1's; causing or allowing their delivery to the unit lenders; and causing or allowing the closing, funding, recording and disbursement of those unit loans in violation of the lenders' requirements, the respondent violated Mass. R. Prof. C. 8.4(c). By failing to notify the unit lenders of the true terms of the unit closings, failing to comply with the lenders' requirements, and failing adequately to protect the lenders' interests, the respondent violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3 and 1.4(a) and (b).

By directing or knowingly allowing Robbins to handle the closings in violation of the Rules of Professional Conduct, failing to take reasonable action to prevent or remediate Robbins's conduct in the transactions when he could have avoided or mitigated the consequences, and ratifying Robbins's conduct, the respondent was responsible for Robbins's violations of the Rules of Professional Conduct in those transactions pursuant to Mass. R. Prof. C. 5.1(c) and thereby violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 1.4(a) and (b), and 8.4(c). By violating the Rules of Professional Conduct through Robbins and knowingly assisting Robbins in those violations, the respondent violated Mass. R. Prof. C. 8.4(a). By failing adequately to supervise Robbins's conduct, the respondent violated Mass. R. Prof. C. 5.1(a) and (b).³

In addition, the respondent's own interests materially limited his representation of the lender

clients in the unit closings. The respondent never disclosed to any of the unit lenders that he had represented the mortgage broker in her various capacities and that his representation might be limited by his relationship with the mortgage broker, her company, or the new corporation she formed as seller. By representing the unit lenders without such disclosure and without the lenders' consent to the conflict, the respondent violated Mass. R. Prof. C. 1.7(b).

Further, the respondent engaged in trust account violations in connection with the unit closings. All of the unit lenders' funds were deposited to and disbursed from an IOLTA account for which one of the paralegals employed by the respondent had primary recordkeeping responsibility. For each unit closing, the paralegal created an individual ledger and recorded a fictitious deposit in the amount of the buyer's supposed contribution when, in fact, no such funds had been paid by the buyer. To offset the false entries, in each case the paralegal listed and issued an IOLTA check in the same amount as the fictitious deposit, made the check payable to the respondent's firm, and deposited the check back to the IOLTA account. She did not, however, record the deposits of those checks in the individual ledgers or the IOLTA check register. As a result, neither the check register nor the individual ledgers accurately reflected the actual receipts and disbursements for the unit closings, and no three-way reconciliation of the IOLTA account could be performed after the closings started in December 2006.

By failing to maintain individual client records accurately documenting each receipt and disbursement of the lenders' funds, failing to keep an accurate check register for the IOLTA account, and failing to reconcile accurately or make and maintain accurate reconciliation reports for the IOLTA account, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(B), (C) and (E). By failing adequately to supervise the paralegal, the respondent violated Mass. R. Prof. C. 5.3(a) and (b).

In aggravation, the respondent engaged in multiple violations of the disciplinary rules. There were no mitigating circumstances.

After contested proceedings, a hearing committee recommended an eighteen-month suspension for the respondent's misconduct. Neither the respondent nor bar counsel appealed from the committee's report. The board adopted the committee's findings, conclusions and recommendation and filed an information in the Supreme Judicial Court for Suffolk County. The parties waived hearing on the information. On February 22, 2010, the Court entered an order for the respondent's suspension for eighteen months effective March 24, 2010.

FOOTNOTES:

¹ The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

² Compiled by the Board of Bar Overseers based on the record filed with the Supreme Judicial Court.

³ Robbins was suspended for nine months, *Matter of Robbins*, 24 Mass. Att'y Disc. R. 605 (2008), and subsequently reinstated. *Matter of Robbins*, 25 Mass. Att'y Disc. R. ____ (2009).

Please direct all questions to webmaster@massbbo.org.