IN RE: PETER S. FARBER

NO. BD-2011-0037

S.J.C. Order of Public Reprimand entered by Justice Gants on August 29, 2011.[1]

Page Down to View Memorandum of Decision

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

COMMONWEALTH OF MASSACHUSETTS

Suffolk, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-2011-037

IN RE: PETER S. FARBER

MEMORANDUM OF DECISION

At the direction of the Board of Bar Overseers (the board), Bar Counsel has filed a three-count information seeking disciplinary action against attorney Peter S. Farber. The hearing committee recommended that Farber be suspended from the practice of law for one year and one day; the Board recommended a public reprimand. I agree with the Board that the appropriate disciplinary sanction for Farber's misconduct is a public reprimand.

Standard of Review. "In all disciplinary proceedings Bar Counsel shall have the burden of proof by a preponderance of the evidence." Rules of the Board of Bar Overseers § 3.28. The board reviews, and may revise, the findings of fact, conclusions of law and recommendations of the hearing committee, "paying due respect" to the role of the hearing committee "as the sole judge of the credibility of the testimony presented at the hearing." S.J.C. Rule 4:01, § 8(5)(a). "[T]he findings and recommendations of the board, though not binding on [the Supreme Judicial Court], are entitled to great weight." In re Lupo, 447 Mass. 345, 356 (2007), quoting Matter of Hiss, 368 Mass. 447, 461 (1975).

Accord In re Murray, 455 Mass. 872, 879 (2010). The court accepts subsidiary facts found by the board if they are supported by substantial evidence in the record. S.J.C. Rule 4:01, § 8(6); In re Murray, supra. "[A]s long as there is substantial evidence, we do not disturb the board's finding, even if we would have come to a different conclusion if considering the matter de novo." Id., quoting Matter of Segal, 430 Mass. 359, 364 (1999). "'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." Matter of Segal, supra at 364, quoting G. L. c. 30A, § 1(6).

Discussion. The board adopted the hearing committee's subsidiary factual findings and, except as to count two, its legal conclusions. I address each count separately, beginning with the two counts that the hearing committee and board agreed warranted discipline no more severe than a public reprimand.

Count one. As found by the board, the gist of count one is that Farber represented one of the sellers in a real estate closing, where there was a dispute with the other sellers as to the disposition of $4,019.87. Prior to the closing, Farber proposed that the sum in dispute be placed in escrow in his IOLTA account so that the sale could close. The attorney for the other sellers, William Riley, agreed that Farber may hold these funds in escrow "until all parties agree." Farber held these funds in escrow following the closing, but Farber's client later became

upset that the other sellers were not communicating with him to resolve the issue in dispute, and demanded that Farber pay him the escrowed funds. Farber sent an email to Riley informing him that Riley's clients had made no effort to speak with Farber's client in the four weeks since the closing, and that he would release the escrow to his client if Riley's clients did not contact his client "right away." Riley replied that Farber had a fiduciary obligation with respect to the escrowed funds and asked that Farber inform him if he did not intend to hold the money in escrow so that he could seek to obtain a protective order from a court. Farber released the escrow to his client without giving prior notification to Riley.

I agree with the board's conclusion that Farber owed a fiduciary obligation as escrow agent to all the sellers, and that he breached this obligation by releasing the funds before an agreement had been reached regarding its disposition without first obtaining a court order.[1] While the precise terms of the escrow had not been delineated, Farber should have recognized that he could not unilaterally release the funds to his client

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[1] The Board of Bar Overseers (board) concluded that Farber had violated Mass. R. Prof. C. 1.15(c), which requires prompt disposition of funds to a party entitled to receive them and, by implication, requires an attorney not to transfer funds to a party who is not entitled to receive them. The board also concluded that Farber violated Mass. R. Prof. C. 8.4(h), which prohibits conduct that reflects adversely on an attorney's fitness to practice. I agree with the board's conclusions of law.

solely because the other sellers had not timely communicated with his client. Even if he had a different view as to the terms of the escrow, at a minimum, he should have provided Riley with advance warning of his release of the escrowed funds so that Riley had an opportunity to litigate the question.

Count three. As found by the board, the gist of count three is that Farber requested a retainer of $2,500 to represent a client who believed that he had a right to purchase a particular property on Cape Cod. The client paid him a partial retainer of $1,500, which Farber deposited in his business account rather than his IOLTA account, without prior notification to the client and without providing the client with an accounting. After Farber asked for the balance of the retainer, the client said that he had found another attorney and demanded refund of the partial retainer. Farber refused to return the partial retainer to the client, and did not transfer it to his IOLTA account.

In the Matter of Sharif, 459 Mass. 558, 564-565 (2011), this court recently declared:

> "Under the Massachusetts Rules of Professional Conduct, where a client pays an attorney a sum of money for legal fees before the legal fees have been earned, the fees advanced, often referred to as a retainer, belong to the client until earned by the attorney and must be held as trust funds in a client trust account. See Mass. R. Prof. C. 1.15(a)(1), as appearing in 440 Mass. 1338 (2003) ("trust funds" defined as any funds belonging to client but held by lawyer in connection with representation); Mass. R. Prof. C. 1.15(b)(1), as appearing in 440 Mass. 1338 (2003) (lawyer must hold client trust funds in trust account separate from lawyer's own property). Once an attorney has earned all or

some of the fees advanced, the attorney should withdraw the earned fees, see Mass. R. Prof. C. 1.15(b)(2)(ii), as appearing in 440 Mass. 1338 (2003), but the attorney may not do so before delivering to the client "in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a statement of the balance of the client's funds in the trust account after the withdrawal." Mass. R. Prof. C. 1.15(d)(2), as appearing in 440 Mass. 1338 (2003). Where the client disputes the bill, the attorney may not withdraw the disputed funds from the trust account until the dispute is resolved. See Mass. R. Prof. C. 1.15(b)(2)(ii). If the attorney has already withdrawn the amount billed and the client within a reasonable time after receiving the bill disputes the bill, the attorney must restore the disputed amount to the trust account until the dispute is resolved. Id.

I agree with the board's conclusion that Farber violated Mass. R. Prof. C. 1.15(b),(d)(1), & (d)(2) by depositing the advanced fee in his business account before providing the client with an itemized bill or other accounting showing the services rendered, and by failing to transfer the advanced fee to the IOLTA account after the client disputed the bill. I also conclude that the board's finding that Farber had earned the advanced fee before depositing it in his business account and that he erroneously believed that the advanced fee had been earned on receipt is supported by substantial evidence in the record.

Count two. As found by the board, the gist of count two is that Farber was contacted by Gregory Johnson and Ellen Gerety to make an offer on a house in Chatham they had decided to purchase. Johnson and Gerety had learned of the property through a real

estate broker, Russ Damon, who had an exclusive listing with the property's owners which provided for a five percent broker's commission, to be shared with the buyer's broker. Gerety had visited the property twice with Damon, but would not make an offer through Damon. Damon had told Gerety that he thought the owners would accept an offer of $525,000. Once Johnson learned that Farber was a real estate broker, Johnson looked for a price concession, possibly from receiving a share of the broker's commission.

Farber contacted Damon and presented himself as the prospective buyer, adding that he was a licensed real estate broker and expected to share in Damon's broker's commission. Initially, Damon refused to split the commission, but Farber said he needed the commission split because he planned to renovate the house and install a new septic system. After Farber made a low offer and the owners presented a counter-offer of $525,000, Farber offered $520,000, and told Damon that he planned to re-sell the property after making the renovations, and would make Damon the broker for re-sale in return for Damon's splitting of the commission.[2] The owners agreed to sell the property to

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[2] Farber denies having made the misrepresentations regarding his intention to renovate and sell the property, and to retain Damon as a broker when he did, and notes that the only evidence that he made these statements came from Damon, who had brought the complaint against him in an attempt to recover the portion of the broker's fee he had paid to Farber. Credibility findings, however, are the province of the hearing committee, and I

Farber for $520,000, and Damon agreed to pay Farber $13,000, half of the broker's commission. Farber identified himself as the purchaser in the purchase and sale agreement and at the closing. Shortly after the closing, however, Farber transferred the property to a nominee trust in which Gerety was the trustee, and Johnson and Gerety the beneficial owners. Farber paid half of the broker's fee that he received to Johnson, retaining $6,500 for himself. This was the only compensation Farber received for his role in the transaction, apart from the $250 he was paid by Gerety for drafting the trust instrument for the nominee trust.

The hearing committee found that Farber had committed fraud by failing to reveal that he was acting on behalf of Johnson and Gerety in the sale. The board concluded, however, that Farber did not commit fraud by failing to reveal to Damon or the property owners that he was acting as an agent for undisclosed principals. The board found that it was immaterial to the owners whether they sold it to Farber or to undisclosed principals, and that Gerety would not have purchased the property through Damon, so Damon would not have received any broker's commission had the sale not been made through Farber.[3] The board found that the

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conclude that the hearing committee's findings, which were adopted by the board, are supported by substantial evidence.

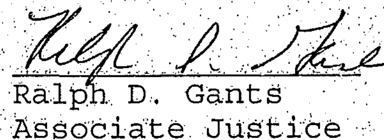
[3] The board also noted that the hearing committee did not find that Johnson or Gerety intended to deprive Damon of a commission that they thought he was entitled to receive.

only acts of misconduct Farber committed during the transaction were his misrepresentations about his intent to renovate the property and to retain Damon as a broker for the re-sale. The board concluded that these misrepresentations violated Mass. R. Prof. C. 8.4(c), which prohibits an attorney from engaging in conduct involving misrepresentation. The board also concluded that Farber was acting as a broker, not an attorney, when he made these statements. The board rejected the hearing committee's legal conclusions that these misrepresentations violated the conduct rules prohibiting an attorney from assisting a client to engage in fraud, because the board found that there was no evidence that Johnson or Gerety knew of these misrepresentations or authorized them.

Because the legal conclusions and disciplinary recommendations of the board "are entitled to great weight," In re Lupo, supra at 356, I give deference to the board's conclusion that Farber made these misrepresentations to induce Damon to relinquish half of his broker's commission, that he was not acting as an attorney in so doing, and that his misconduct was "far less egregious than that of lawyers who have been suspended for actions taken outside of the practice of law." See In re Angwafo, 453 Mass. 28 (2009) (one month suspension for attorney who misrepresented her marital status and financial assets in her divorce proceeding); In re Balliro, 453 Mass. 75 (2009) (six

month suspension for attorney who provided false testimony in criminal case involving domestic dispute where she was victim); Matter of Finnerty, 418 Mass. 821 (1994) (six month suspension for misrepresentation made on financial statement in attorney's divorce). In view of all the circumstances, considering the misconduct found in counts one through three together, recognizing that this is the first time Farber has been found to have engaged in misconduct, I also give deference to the board's conclusion that the purposes of professional discipline are adequately served by the imposition of a public reprimand. See Matter of Finnerty, supra at 829 (overriding consideration in bar discipline is "the effect upon, and perception of, the public and the bar").

Conclusion. For the reasons stated above, I affirm the board's decision, adopt its conclusions of law, and order that Farber be publicly reprimanded.



Ralph D. Gants
Associate Justice

Entered: August 29, 2011