

New Hampshire Supreme Court

Professional Conduct Committee

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DiLucci, Raymond J. advs. Gabe Cohen # 03-097

**PUBLIC CENSURE
and
ORDER ON MOTION TO PERMIT WAIVER OF HEARINGS COMMITTEE PROCESS**

On January 17, 2006, the Professional Conduct Committee considered the matter. Members present included: Margaret H. Nelson, Chair, Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, David N. Cole, Alan J. Cronheim, Eleanor Wm. Dahar, Gretchen Rule Hamel, James R. Martin, David N. Page. Gerald A. Daley abstained.

The Professional Conduct Committee, upon consideration, granted Disciplinary Counsel's Motion To Permit Waiver of Hearings Committee Process, dated January 11, 2005.

I. FACTUAL FINDINGS

The Professional Conduct Committee determined that the record supports the findings of fact by clear and convincing evidence as set forth in the Stipulation, which was signed by the parties on January 9 and 11, 2006:

1. In a sworn letter of complaint dated November 4, 2003, and in subsequent letters, the Complainant, Gabe Cohen, asserted allegations of professional misconduct against Mr. DiLucci.
2. Mr. DiLucci is an attorney licensed to practice law in New Hampshire. Mr. DiLucci was admitted to practice in 1990. At all times material to this proceeding, Mr. DiLucci operated his law office at 81 South State Street, Concord, New Hampshire 03301.

3. Mr. DiLucci represented Andrea and Jeffrey Goldstein in the negotiation of a Purchase and Sales Agreement ("P & S"). The P & S would enable the Goldsteins to repurchase a property they had lost at a foreclosure sale on August 27, 2003.
4. As of October 1, 2003, Mr. Cohen, as Trustee for 271 Brookline Realty Trust, held title to the subject property.
5. On October 2, 2003, Mr. Cohen went to Mr. DiLucci's office and signed the P & S, which was drafted by Mr. DiLucci. The Goldsteins signed it on October 6, 2003. The selling price for the property was \$209,900.00.
6. The P & S contained a provision requiring a buyer's deposit. That provision stated:

Deposit, receipt of which [sic] hereby acknowledged in the form of a check is to be held in an escrow account by Buyer's Attorney, Raymond J. DiLucci in the sum of \$2,000.00.
7. The P & S also contained the following liquidated damages provision:

If the BUYER shall default in the performance of his obligation under this agreement, the amount of the deposit may, at the option of the SELLER, become the property of the SELLER as reasonable liquidated damages. SEE REVERSE SIDE FOR INTERPLEADER PROVISIONS WHICH ARE INCORPORATED HEREIN BY REFERENCE AND MADE A PART HEREOF.
8. Neither Mr. DiLucci nor Mr. Cohen retained a copy of the "reverse side" of the P & S.
9. The closing date was scheduled for October 15, 2003.
10. The Goldsteins were permitted to reside in the property during the pendency of the P & S.
11. According to the terms of the P & S, it was not contingent on the Goldsteins' securing financing.
12. Because the Goldsteins did not secure financing by October 15, 2003, the closing did not take place as scheduled on that date.
13. Mr. Cohen agreed to extend the closing date to October 31, 2003, for a \$1,500.00 fee.
14. The Goldsteins and Mr. Cohen entered into an "Extension Agreement" to effectuate the extension of the closing date.
15. Mr. DiLucci drafted the Extension Agreement.
16. Per the terms of the Extension Agreement, the \$1,500.00 payment was "good and valuable consideration" for the extension of the closing date.

17. Ms. Goldstein and Mr. Cohen signed the Extension Agreement on or about October 24, 2003.
18. Mr. DiLucci paid Mr. Cohen \$1,500.00, as called for by the Extension Agreement. The closing date was thereby extended to October 31, 2003.
19. Unbeknownst to Mr. Cohen, Mr. DiLucci paid Mr. Cohen for the Extension Agreement by disbursing \$1,500.00 to him from the \$2,000.00 being held in escrow as the deposit.
20. As of October 27, 2003, it became clear to all parties that the Goldsteins were not going to secure the necessary financing for the October 31, 2003, closing.
21. On that date, without informing Mr. Cohen, Mr. DiLucci disbursed the funds remaining in the escrow account (\$500.00) to the Goldsteins.
22. On or about October 30, 2003, Mr. Cohen telephoned Mr. DiLucci's office to inquire about the \$2,000.00 deposit. Mr. DiLucci's secretary informed Mr. Cohen that the deposit had been disbursed to Ms. Goldstein.
23. On or about October 31, 2003, Mr. Cohen faxed Mr. DiLucci a letter demanding that, on or before November 3, Mr. DiLucci forward the \$2,000.00 deposit to him pursuant to the terms of the P & S.
24. Mr. DiLucci did not forward the \$2,000.00 deposit money to Mr. Cohen.

II. RULINGS OF LAW

The Professional Conduct Committee concludes that there is clear and convincing evidence that Mr. DiLucci violated the following Rules of Professional Conduct:

Rule 1.15(a): Failure to Safeguard

25. The terms of the P & S required Mr. DiLucci, as escrow agent, to safeguard the \$2,000.00 deposit pending the closing of the transaction. According to the terms of the P & S, Mr. Cohen had a colorable claim to the \$2,000.00 once it became clear that the deal would not be consummated for lack of the necessary financing.
26. By disbursing the \$2,000.00 escrow account without proper authorization and without first informing Mr. Cohen and seeking his consent, Mr. DiLucci violated his obligations as fiduciary under the P & S.

27. If proven by clear and convincing evidence, Mr. DiLucci's failure to safeguard the escrow funds would constitute a violation of N.H. R. Prof. Conduct 1.15(a).

Rule 8.4(a): General Rule

28. Because there exists clear and convincing evidence that Mr. DiLucci violated the above rules, there is necessarily clear and convincing evidence of a violation of N.H. R. Prof. Conduct 8.4(a).

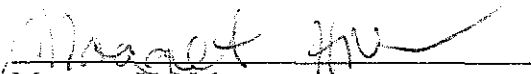
III. SANCTION

The Professional Conduct Committee concludes that the appropriate discipline in this matter is a Public Censure. This sanction is in accord with the purpose of attorney discipline as described by the New Hampshire Supreme Court and with the ABA Center for Professional Responsibility, Standards or Imposing Lawyer Sanctions (1991). *See, e.g., Wolterbeek's Case*, No. LD 2005-002, slip op. at 2 (N.H., October 31, 2005) (noting that although the Court has never formally adopted these Standards, the Court has considered them when imposing sanctions).

IV. CONCLUSION

For the above reasons, the Professional Conduct Committee issues a Public Censure to Raymond J. DiLucci, for violating N.H. R. Prof. Conduct 1.15(a) and 8.4(a). Mr. DiLucci is assessed all costs associated with the investigation and prosecution of this matter.

January 24, 2006


Margaret H. Nelson
Chair

Distribution:

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