State of Michigan

Attorney Discipline Board

Grievance Administrator,
Michigan Attorney Grievance Commission,

Petitioner,

Case No. 17-5-GA

v

Barry A. Steinway, P24137,

Respondent.
_____/

Formal Complaint

(Parties and Jurisdiction)

1. Petitioner, Grievance Administrator, is authorized by MCR 9.109(B)(6) to prosecute this Formal Complaint by the Attorney Grievance Commission, which is the prosecution arm of the Supreme Court for the discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.

2. As a licensed Michigan attorney, Respondent Barry A. Steinway is subject to the jurisdiction of the Supreme Court and the Attorney Discipline Board as set forth in MCR 9.104.

3. Michigan attorneys have a duty to conduct themselves personally and professionally at all times in conformity with the standards imposed on members of the bar as a condition of the privilege to practice law.

4. Respondent is a Michigan attorney who was licensed in 1985 and who has his place of business in the County of Oakland.

COUNT ONE

Matter of Michael Francis

(Factual Allegations)

5. In March of 2009, Michael Francis retained Respondent to represent him concerning the acceleration of a loan and possible foreclosure by National City Bank which had been secured by a warehouse owned by a corporation in which Mr. Francis was a fifty percent shareholder.

6. Ultimately, the loan was foreclosed and an approximate $215,000 judgment entered for National City Bank against Mr. Francis' corporation.

7. During the period of 2012 through 2016, Respondent maintained an IOLTA with Fifth Third Bank titled "Steinway Law Offices PC IOLTA," Account No. XXXXXX3775 (Respondent's IOLTA), in which he deposited and maintained client and third-party funds.

8. In approximately March of 2012, Respondent suggested to Mr. Francis that an attempt be made to negotiate a resolution whereby Mr. Francis could acquire the mortgage, mortgage note, and the judgment.

9. On or about May 22, 2012, Mr. Francis wire-transferred $104,474.21 to Respondent's IOLTA, which was received and credited to the account on or about May 25, 2012.

10. The $104,474.21 was to remain in Respondent's IOLTA and to be used to acquire the above-referenced mortgage, mortgage note, and judgment.

11. After the $104,474.21 was deposited into Respondent's IOLTA, he began to withdraw funds immediately.

12. By September 1, 2012, the balance in Respondent's IOLTA was only $28,187.96.

13. At Respondent's request, Mr. Francis sent Respondent a cashier's check in the amount of $15,000 to Respondent which was deposited into Respondent's IOLTA on or about March 20, 2013.

14. By June 13, 2014, the balance in Respondent's IOLTA was $9,374.41.

15. In the spring of 2014, Respondent recommended that Mr. Francis provide additional funds to him purportedly for the purpose of obtaining the above-referenced mortgage, note and judgment.

16. On June 16, 2014, based on Respondent's recommendations, Mr. Francis caused an additional $165,386.39 to be wire transferred for deposit into Respondent's IOLTA to be used for the purpose of obtaining the warehouse.

17. On June 16, 2014, Respondent caused a wire-transfer of funds to issue from his IOLTA in the amount of $115,000, leaving an account balance of $59,760.30.

18. As of November 28, 2014, Respondent should have maintained $284,860.60 in trust for Mr. Francis in Respondent's IOLTA.

19. Mr. Francis never gave Respondent authorization to use his funds for any purpose other than to obtain the above-referenced mortgage, note and judgment.

20. As of November 28, 2014, there was a negative balance in Respondent's IOLTA.

21. Ultimately, no business agreement was entered into by which Mr. Francis acquired the warehouse mortgage, mortgage note, and judgment.

22. From early 2012 through 2015, Respondent knowingly issued checks and made electronic withdrawals from his IOLTA for payment of his personal and/or business expenses, including but not limited to, payment of his personal expenses, insurance payments, transfers to

Respondent's non-trust accounts, payments to his former wife, an investment vehicle (Principal Financial Group), loan payments, and health care premiums.

23. At all relevant times, Respondent caused his social security checks to be automatically deposited into his IOLTA at a time when it held client and third-party funds.

(Grounds for Discipline)

24. By reason of the conduct described above in this Formal Complaint, Respondent has committed the following misconduct and is subject to discipline under MCR 9.104, as follows:

a. Failing to promptly pay or deliver any funds that the client or third party is entitled to receive, in violation of MRPC 1.15(b)(3);

b. Failing to hold property of clients or third persons in connection with a representation separate from Respondent's own property, in violation of MRPC 1.15(d);

c. Using an IOLTA as a personal and/or business checking account, by issuing checks and making electronic transfers directly from the IOLTA in payment of personal and/or business expenses, in violation of MRPC 1.15(c)and (d);

d. Violating or attempting to violate the standards and/or rules of professional conduct adopted by the Michigan Supreme Court, in violation of MRPC 8.4(a), and MCR 9.104(4);

e. Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation where such conduct reflects adversely on

the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b);

f. Engaging in conduct prejudicial to the administration of justice, in violation of MCR 9.104(1);

g. Engaging in conduct that exposes the legal profession to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,

h. Engaging in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

COUNT TWO

Matter of Johni Semma

(General Allegations)

25. In *Grievance Adm'r v Geoffrey N. Fieger*, ADB No. 97-83-GA (1999), the Board held that MCL 600.2106 applies in disciplinary proceedings.

MCL 600.2106 provides:

> A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree.

26. On January 5, 2017, the Oakland County Circuit Court issued its Opinion and Order Re: Plaintiff's Renewed Motion for Default Judgment and for Costs and Attorney Fees as to Defendants Barry A. Steinway and Steinway Law Offices, P.C." (A certified copy of the opinion

and order is appended to and made a part hereof, as Attachment A [Hereafter referred to as the Court's Opinion]).

27. In the Court's Opinion, it was found: "the Court agrees with Plaintiffs' position and finds that the Steinway Defendants removed or converted $150,000 of the earnest money deposit as established by the Fifth Third Bank Records." (Court's Opinion, p. 4).

(Factual Allegations)

28. Petitioner realleges, as if recited verbatim, the General Allegations of this Formal Complaint and the factual allegations set forth in in Count One of this Complaint.

29. In approximately 2012, Johni Semma decided to sell a restaurant and real estate that he owned which was known as the "Bayside Sports Grill" (hereafter "Bayside") located in Walled Lake, Michigan.

30. Respondent represented Mr. Semma and Blue Marlin, Inc., in negotiating the sale of Bayside to a prospective purchaser, Fabian Boji.

31. Mr. Boji later formed a corporation, Bayside Michigan, Inc., for the purchase and operation of Bayside.

32. In 2012, Mr. Semma and Mr. Boji entered into a prospective sale and purchase agreement, pursuant to which, Mr. Boji took possession of the premises and began to operate the Bayside business.

33. In or about September of 2012, Respondent received two checks totaling $200,000 representing the earnest money deposit (hereafter the "EMD") for the purchase of Bayside, which checks were to be deposited and maintained in Respondent's IOLTA according to the terms of the above-referenced agreement between the parties.

34. In connection with the EMD payment, Respondent executed an Acknowledgement of Deposit in his capacity as "escrow agent."

35. On or about September 19, 2012, Respondent deposited the aforementioned two checks into his IOLTA.

36. Although Respondent was to safeguard the funds intact in his IOLTA, he immediately commenced withdrawing a portion of the funds for his personal use and enjoyment.

37. By December 31, 2012, there was only a balance of $101,300.46 in Respondent's IOLTA.

38. Mr. Semma never gave Respondent authority to use any portion of the EMD for his own purposes.

39. On or about November 14, 2014, a revised Purchase Agreement was created and signed for the sale of Bayside between Mssrs. Semma and Boji.

40. In early 2015, the Bayside transaction fell through, and Mr. Semma regained possession of the premises.

41. Mr. Semma contended that the $200,000 EMD was forfeited as liquidated damages. Conversely, Mr. Boji and Bayside Michigan, Inc., contended that the EMD should be refunded in full.

42. Litigation ensued between the parties in the matter of *Bayside Michigan, Inc v Blue Marlin, Inc, et. al.*, Oakland County Circuit Court Case No. 2015-146663-CZ (the litigation).

43. Respondent appeared for the defendants, which included himself, in the aforementioned litigation, and filed responsive pleadings and a counter-claim on behalf of the defendants. The defendants included Blue Marlin, LLC dba Bayside Sports Grille, Key Largo, LLC, Johni Semma, Respondent, and Steinway Law Offices PC.

44. Thereafter, Respondent failed to cooperate with discovery, failed to advise Mr. Semma of discovery requests or that he had stipulated to orders compelling answers to discovery by a date certain, and failed to produce his IOLTA bank records despite requests that he do so.

45. On January 27, 2016, a default judgment entered against defendants.

46. Defendant's counterclaims were dismissed as a sanction for failure to cooperate with discovery and comply with the court's orders.

47. On May 18, 2016, the default judgment was set aside on defendant's motion.

48. On June 8, 2016, plaintiffs moved for reconsideration and attached to their motion an affidavit they had obtained from Respondent.

49. In Respondent's affidavit of June 8, 2016, he falsely represented that he had informed Mr. Semma of the discovery issues.

50. Respondent's statements as set forth in Paragraph Forty-Two (42) were false and were known by him to have been false at the time they were made for the reason that he had failed to inform Mr. Semma of the discovery demands and issues.

51. Respondent signed an affidavit on July 29, 2016, in which he admitted that he had not informed Mr. Semma of the discovery demands and other issues.

52. When confronted by Mr. Semma, Respondent acknowledged that Mr. Semma had not owed any attorney fees, and that Respondent had used the EMD to pay his personal bills and expenses.

53. Respondent's use of the EMD was without authorization and constituted a knowing conversion of the funds.

54. When Mr. Semma asked Respondent for restitution, Respondent told Mr. Semma that he could not pay restitution because he did not have the money to do so.

55. Respondent then apologized to Mr. Semma and said to the effect that he believed he could repay the money after the Bayside closing and that it would not be a "big deal."

56. In representing himself, Mr. Semma, and other defendants in the litigation, Respondent allowed his personal interests to conflict with those of his client.

(Grounds for Discipline)

57. By reason of the conduct described in this Formal Complaint, Respondent has committed the following professional misconduct and is subject to discipline under MCR 9.104, as follows:

a. Failing to keep a client reasonably informed about the status of a matter, in violation of MRPC 1.4(a);

b. Failing to explain a matter to the extent reasonably necessary for a client to make informed decisions regarding the representation, in violation of MRPC 1.4(b);

c. Engaging in a conflict of interest by representing a client when his representation may have been materially limited by Respondent's personal interests, in violation of MPRC 1.7(b)(1);

d. Failing to promptly pay or deliver any funds that the client or third party is entitled to receive, in violation of MRPC 1.15(b)(3);

e. Using an IOLTA as a personal and/or business checking account, by issuing checks and making electronic transfers directly from the IOLTA in payment of personal and/or business expenses, in violation of MRPC 1.15(c)and (d);

f. Failing to hold property of clients or third persons in connection with a representation separate from Respondent's own property, in violation of MRPC 1.15(d);

g. Knowingly making a false statement of material fact in an affidavit, in violation of MRPC 4.1, and 8.4(b);

h. Violating or attempting to violate the standards and/or rules of professional conduct adopted by the Michigan Supreme Court, in violation of MRPC 8.4(a), and MCR 9.104(4);

i. Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.4(b);

j. Engaging in conduct prejudicial to the administration of justice, in violation of MCR 9.104(1);

k. Engaging in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2); and,

l. Engaging in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(3).

COUNT THREE

Failure to Answer

(Factual Allegations)

58. Petitioner realleges, as if recited verbatim, the factual allegations set forth in Counts One and Two of this Formal Complaint.

59. The following Requests for Investigation were served on Respondent in accordance with MCR 9.112(C)(1)(b):

AGC File No.	Filed By	Date Served
0603/16	Michael Francis	March 29, 2016
0742/16	Grievance Administrator	April 21, 2016

60. Respondent did not answer the Requests for Investigation within twenty-one days of service, as required by MCR 9.113(A).

61. Final Notices, with a copy of the Request for Investigation enclosed, were served on Respondent at his State Bar listed address by certified mail, return receipt requested, in accordance with MCR 9.112(C)(1)(b), in the following manner:

AGC File No.	Date Served by Certified Mail
0603/16	April 19, 2016
0742/16	May 12, 2016

57. On August 17, 2016, an Attorney Grievance Commission (hereafter "AGC") contacted Respondent by telephone concerning the pending Requests for Investigation that he needed to answer.

58. On August 17, 2016, at his request, Respondent was emailed additional copies of the Requests for Investigation by the AGC investigator.

59. As of the date of the filing of this Complaint, Respondent has failed to answer the Requests for Investigation.

(Grounds for Discipline)

By reason of the conduct described in this Formal Complaint, Respondent has committed the following professional misconduct and is subject to discipline under MCR 9.104, as follows:

a. Failing to timely answer a Request for Investigation, in violation of MCR 9.104(7), MCR 9.113(A), and MCR 9.113(B)(2);

b. Knowingly failing to respond to a lawful demand for information, in violation of MRPC 8.1(a)(2);

c. Engaging in conduct prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(1).

d. Violating or attempting to violate the standards and/or rules of professional conduct adopted by the Michigan Supreme Court, in violation of MRPC 8.4(a), and MCR 9.104(4);

Wherefore, Respondent should be subjected to such discipline and payment of restitution as may be warranted by the facts or circumstances of such misconduct, including restitution

Dated: January 23, 2017

Alan M. Gershel, P29652
Grievance Administrator
Attorney Grievance Commission
535 Griswold, Suite 1700
Detroit, MI 48226
(313) 961-6585

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BAYSIDE MICHIGAN, INC. and
BAYSIDE PROPERTY, LLC,

Plaintiffs,

v

Case No. 2015-146663-CZ
Hon. Wendy Potts

BLUE MARLIN, LLC d/b/a
BAY SIDE SPORTS GRILLE,
KEY LARGO, LLC, JOHNI SEMMA,
BARRY A. STEINWAY, and STEINWAY
LAW OFFICES, PC,

Defendants,

_____/

OPINION AND ORDER RE: PLAINTIFFS' RENEWED MOTION FOR DEFAULT JUDGMENT AND FOR COSTS AND ATTORNEY FEES AS TO DEFENDANTS BARRY A. STEINWAY AND STEINWAY LAW OFFICES, P.C.

At a session of Court
Held in Pontiac, Michigan On
JAN 05 2017

This matter is before the Court on Plaintiffs' Renewed Motion for Default Judgment and for Costs and Attorney Fees as to Defendants Barry A. Steinway and Steinway Law Offices, P.C.

In their Renewed Motion, Plaintiffs assert that this lawsuit has been resolved as to Defendants Blue Marlin, LLC, Key Largo, LLC, and Johni Semma.[1] However, the January 27, 2016 Default against Defendants Barry A. Steinway and the Steinway Law Offices, P.C. ("Steinway Defendants") remains in full force and effect.

[1] Plaintiffs and Defendants Blue Marlin, LLC, Key Largo, LLC, and Johni Semma entered into a Settlement Agreement on August 29, 2016.

ATTACHMENT A

As set forth in their Renewed Motion, Plaintiffs initially sought a Default Judgment against the Steinway Defendants, jointly and severally, for damages in the amount of $200,000.00, treble damages in the amount of $600,000.00, statutory interest, and attorney fees. On November 2, 2016, the parties appeared before the Court on Plaintiffs' Renewed Motion, at which time Plaintiffs represented that they would credit the Steinway Defendants $50,000.00 for the disbursement made to Defendant Johni Semma from the $200,000.00 earnest money deposit. Plaintiffs have now requested entry of a Default Judgment against Barry A. Steinway and the Steinway Law Offices, P.C., jointly and severally, in the amount of $150,000.00 as to Counts I, III, IV, and VI, treble damages as to Count IV/Conversion, statutory interest, and attorney fees.

In response,[2] the Steinway Defendants contend that $55,000.00 of the earnest money deposit was actually disbursed to Defendant Johni Semma for his benefit. The Court notes for the record that Plaintiffs' June 8, 2016 Motion for Reconsideration includes as Exhibit C, the Affidavit of Barry A. Steinway, in which Attorney Steinway asserts that $55,000.00 of the earnest money deposit was utilized for the benefit of Defendant Johni Semma. The Court will not consider Attorney Steinway's Affidavit, however, for the reason that the Steinway Defendants are in default. While Attorney Steinway moved to set aside the Default against Defendants Blue Marlin, LLC, Key Largo, LLC, and Johni Semma in his February 17, 2016 Motion for Reconsideration, Attorney Steinway has never moved to set aside the Default against himself. Since the Default remains in effect against Barry A. Steinway and the Steinway Law Offices, P.C., the Court finds that $50,000.00 shall be credited to the Steinway Defendants for purposes of determining damages in this matter.

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[2] Parenthetically, the Steinway Defendants filed a Supplemental Answer to Plaintiffs' Renewed Motion, raising the question of whether or not the earnest money deposit belongs to Defendant Blue Marlin, LLC under the terms of the original Purchase Agreement. The Court observes that Plaintiffs have since entered into a Settlement Agreement with Defendant Blue Marlin, LLC and further, the Steinway Defendants are in default. The only issues before the Court at the present time are Plaintiffs' damages and their request for attorney fees.

The Court has also considered the Steinway Defendants' argument that Plaintiffs are seeking a double recovery of the $160,000.00 settlement amount from Defendants Blue Marlin, LLC, Key Largo, LLC, and Johni Semma. Whereas Plaintiffs maintain that this settlement amount is separate and distinct from the $200,000.00 earnest money deposit, the Steinway Defendants speculate that the $160,000.00 are recovered funds of the earnest money deposit and therefore, Plaintiffs are not entitled to a double recovery of that amount.

"As a general rule, only one recovery for a single injury is allowed under Michigan law. The amount that a plaintiff recovers from one defendant is set off against a subsequent verdict obtained against a codefendant." *Markley v Oak Health Care Inv'rs of Coldwater, Inc.*, 255 Mich App 245, 251; 660 NW2d 344 (2003). "To determine whether a double recovery has occurred, this Court must ascertain what injury is sought to be compensated. Thus, where a recovery is obtained for any injury identical with another in nature, time, and place, that recovery must be deducted from the plaintiff's other award." *Grace v Grace*, 253 Mich Ap. 357, 368–69; 655 N.W.2d 595 (2002); See also *Great Northern Packaging, Inc. v General Tire & Rubber Co.*, 154 Mich App. 777, 781, 399 NW2d 408 (1986).

A judgment in favor of Plaintiffs for $150,000.00 cannot be considered a double recovery in light of the $160,000.00 settlement for the reason that recovery for conversion is not identical in nature, time, and place with Plaintiffs' recovery from Defendants Blue Marlin, LLC, Key Largo, LLC, and Johni Semma. The nature of Plaintiffs' injury in relation to Defendants Blue Marlin, LLC, Key Largo, LLC, and Johni Semma is the alleged breach of certain contractual provisions under the Purchase Agreement. The nature of Plaintiffs' injury in relation to the Steinway Defendants is their alleged conversion of $150,000.00 of Plaintiffs' earnest money deposit. Clearly, the Steinway Defendants and Defendants Blue Marlin, LLC, Key Largo, LLC, and Johni Semma are not joint tort-feasors with regard to the alleged act of conversion. As such, the Steinway Defendants would

be solely responsible for, and Plaintiffs would be entitled to, the entire judgment amount of $150,000.00 for conversion.

Moreover, the Court observes that $50,000.00 of the $160,000.00 settlement amount were identified as funds from the earnest money deposit, for which the Steinway Defendants have received a credit. For the reasons stated previously, the Court concludes that the remaining $110,000.00 of the settlement amount includes damages unrelated to the $200,000.00 earnest money deposit.

Upon review of the court record and in consideration of the parties' filings and oral argument, the Court agrees with Plaintiffs' position and finds that the Steinway Defendants improperly removed or converted $150,000.00 of the $200,000.00 earnest money deposit as established by the Fifth Third Bank records.

While Plaintiffs seek treble damages against the Steinway Defendants, the Court notes that an award of treble damages is discretionary under the terms of the conversion statute. "MCL 600.2919a(1) provides in part, '[a] person damaged as a result of ... the following *may* recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees: (a) Another person's stealing or embezzling property or converting property to the other person's own use.'" *Aroma Wines & Equip., Inc. v Columbian Distribution Servs., Inc.*, 303 Mich App 441, 446–50; 844 NW2d 727 (2013). [Emphasis added.]

The Court shall exercise its discretion and not award treble damages against the Steinway Defendants for their conversion of the $150,000.00 amount, however, Plaintiffs shall be entitled to statutory interest, statutory costs, and reasonable attorney fees. Thus, the Court hereby awards a Default Judgment in favor of Plaintiffs and against Defendants, Barry A. Steinway and the Steinway Law Offices, P.C., jointly and severally, in the amount of $150,000.00 in addition to statutory interest, statutory costs, and reasonable attorney fees.

With respect to Plaintiffs' request for attorney fees, the Steinway Defendants filed Objections to Legal Fees Requested by Plaintiff, in which they formally object to specific billing entries and request an evidentiary hearing.

Once a fee applicant submits its detailed billing records, the opposing party may contest the reasonableness of the requested attorney fees. "If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence." *Smith v Khouri*, 481 Mich 519, 532; 751 NW2d 472 (2008). As such, the Steinway Defendants are entitled to an evidentiary hearing on the issue of attorney fees.

Counsel for the parties shall have fourteen days to draft and present to the Court a mutually agreeable Default Judgment to include the $150,000.00 judgment amount, statutory interest, statutory costs, and reasonable attorney fees. If the parties are unable to agree on the terms of the Default Judgment, each party shall submit its proposed Default Judgment within fourteen days for the Court's review. Upon review, the Court shall enter the appropriate Default Judgment and the issue of Plaintiffs' attorney fees shall be scheduled for an evidentiary hearing.

IT IS SO ORDERED.

Dated: JAN 05 2017

Hon. Wendy Potts,
Circuit Court Judge