



NO. BD-2010-113

S.J.C. Order (Dismissing Petition for Discipline) entered by Justice Gants on May 2, 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-2010-0113

IN THE MATTER OF AN ATTORNEY

MEMORANDUM OF DECISION

In June, 1988, the respondent was general counsel to a closely-held, family-owned corporation in which John, one of the founder's sons, was an officer and director and owned a minority share of all issued stock.¹ On June 28, 1988, John and his wife filed a complaint for divorce. That same day, a judge of the Probate and Family Court issued a temporary restraining order prohibiting John (and anyone acting in privy with him) from selling, transferring, assigning, or otherwise disposing of any interest in any real and personal property that John owned, and in any stock or securities standing in his name.

In the fall of 1987, Stephen, John's brother and an officer and director of the corporation, lent \$496,945 to the corporation in return for two promissory notes from the corporation. In May, 1988, John lent the corporation \$250,000, and Stephen provided John with a promissory note on behalf of the corporation. John.

¹ Because the record in this case is impounded, and because I affirm the Board of Bar Overseers' dismissal of the charges against the respondent, I do not identify the respondent or the corporation for which he served as general counsel, and use only the first names of the other individuals involved.

then assigned the note to Stephen. With the assignment of this note, the corporation owed Stephen \$746,945. Later, the corporation issued additional corporation shares, which it sold to Stephen in return for the amount due on the promissory notes. The consequence of this "debt-for-equity" transaction was that John's equity interest in the corporation was reduced to approximately nineteen per cent, while Stephen's equity interest increased to approximately sixty-one per cent. The issue in this proceeding is the date of the "debt-for-equity" transaction: if it closed after the issuance of the restraining order, it arguably was in violation of the order, because it diluted John's interest in the corporation. Bar counsel alleges that the respondent, knowing of the restraining order, fraudulently back-dated the "debt-for-equity" transactions and lied under oath concerning them.

On February 8, 2010, a hearing committee found that respondent fraudulently back-dated these transactions and gave false testimony under oath, and recommended a three-year suspension.² In a unanimous vote on October 18, 2010, the Board of Bar Overseers ("board") dismissed the complaint. The board

² Bar counsel also alleged that the respondent had committed a fraud against the Probate and Family Court, and represented conflicting interests, because he served as general counsel to the corporation while initially representing John in the divorce proceeding. The hearing committee found in favor of the respondent on these charges.

concluded that, although a rational fact finder could reasonably draw the inferences made by the hearing committee, bar counsel did not meet her burden of proving the respondent's alleged misconduct by a preponderance of the evidence. Bar counsel appeals the dismissal by the board. Because the board's determination is supported by substantial evidence, I affirm the board's dismissal.

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). Where bar counsel, as here, objects to the formal proceeding concluding by dismissal, 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

1-10

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." Id. at 364, quoting G. L. c. 30A, § 1 (6).

Discussion. After reviewing the record, I find substantial evidence to support the board's dismissal. At the hearing, bar counsel did not call any witnesses but instead offered in evidence the many documents that she contended demonstrated that the respondent had participated in the back-dating of the transactional documents and then lied about the back-dating. Only the respondent called witnesses to testify. The board stated:

"We do not take issue with the legitimacy of [the inferences drawn by the hearing committee]; a rational fact finder could draw them and so drawn they might form the basis for a circumstantial case against the Respondent's version of events. But they are not - and the committee makes no claim that they are - compelled by the documents. Given that bar counsel has the burden of persuasion, we find the inferences inadequate to discharge that burden."

Board's Memorandum of Opinion at 5. The board did not disturb any credibility determinations made by the hearing committee. Rather, it determined that the documentary evidence, standing alone without any explanatory witness testimony, was not enough to prove by a preponderance of the evidence that the respondent

back-dated the debt-for-equity transaction, and therefore dismissed the complaint.

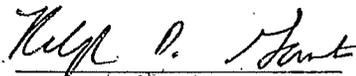
I recognize that reasonable minds may differ regarding the strength of the inferences that are warranted by the documentary evidence. Bar counsel points to corporate memoranda and letters in the record, dated after June 30, 1988, that contain references to stock allocations and refer to promissory notes equal to the amount of debt involved in the debt-for-equity transaction. See, e.g., Ex. 70, 72, 73, 113. A fact finder reasonably could conclude, as did the hearing committee, that these documents referred to the debt-for-equity transaction at issue, and that they would not have been written as they were if the debt-for-equity transaction concluded on June 20, 1988, as the respondent claims it did.

The record, however, also includes documents that allow a reasonable inference that the transaction took place before the restraining order issued. For example, the record contains stock certificates, signed by the corporation's president, indicating the transaction occurred on June 19, 1988.³ See, e.g., Ex. 59, 60, and 61. The record also contains an opinion from the corporation's independent auditors that the corporation's 1987 and 1988 financial statements "present fairly the consolidated

³ The corporation president had died before the hearing, and could not testify concerning the accuracy of these documents.

financial position" of the corporation; the 1988 financial statement declares that the debt-for-equity transaction took place in June, 1988. See Ex. 93, n.12. A fact finder reasonably may conclude, as did the board, that these documents suggest that back-dating did not take place, and that the inference of back-dating from the documents relied on by the hearing committee is not strong enough, without witness testimony, to satisfy bar counsel's burden of proof by a preponderance of the evidence. Because the board's finding is entitled to great weight and is supported by substantial evidence, I will not disturb it. See Matter of Segal, supra at 364.

Conclusion. For the reasons stated above, I affirm the board's decision to dismiss the petition against the respondent.


Ralph D. Gants
Associate Justice

Entered: May 2, 2011

1-107