

STATE OF MAINE

SUPREME JUDICIAL COURT
DOCKET NO. BAR-14-9

PAUL E. PECK, ESQ.,)
)
 Petitioner,)
)
 v.)
)
BOARD OF OVERSEERS)
OF THE BAR,)
)
 Respondent.)

DECISION AND ORDER

Attorney Paul E. Peck, Esq., petitions pursuant to M. Bar R. 7.2(a)(1) for review of the Decision of Grievance Panel D imposing a public reprimand upon him on April 10, 2014, as a result of certain actions or omissions alleged to have taken place in 2010. The matter was assigned to the undersigned single Justice on May 5, 2014. The parties have submitted an agreed-upon record of the proceedings before the Grievance Panel and have fully briefed the issues.

FACTS

The salient facts are undisputed; neither party challenges the findings of the Panel. The following text is drawn verbatim from the DECISION AND ORDER OF GRIEVANCE PANEL D:¹

Respondent[] Paul E. Peck [was] at all times relevant hereto [an] attorney[] duly admitted to and engaging in the practice of law in the State of Maine and subject to the Maine Bar Rules and the Maine Rules of Professional Conduct. At the time of the alleged misconduct [Attorney Peck was] employed at the law firm of Drummond & Drummond in Portland, Maine. . . . Mr. Peck was a senior associate and the nominal head of the firm's foreclosure practice group² In 2009 and 2010, the firm was heavily engaged in foreclosure actions as counsel for plaintiff banks and finance companies. In mid-2010, the firm had over 130 cases in the foreclosure process where GMAC Mortgage, LLC (GMAC) was the plaintiff client of the firm, either as the holder of a mortgage or the servicer of a mortgage on behalf of another institution.

In the case of *Federal National Mortgage Association v. Bradbury*, Attorney Peck was the counsel of record when a Motion for Summary Judgment on behalf of the plaintiff was filed in August 2009. That motion was filed with a Statement of Material Facts which was supported by an affidavit of GMAC employee Jeffrey Stephan, whose position with GMAC was "Limited Signing Officer." That affidavit, which in identical or similar form was used in most of the GMAC foreclosure cases being litigated by Drummond & Drummond, asserted that Stephan had reviewed all of the critical documents, that he had personal knowledge of the facts asserted, and that he had signed

¹ The text has been redacted to remove references to other attorney respondents in the Panel proceeding, except where relevant to issues involving Peck, and to modify language to reflect singular rather than plural references. It is otherwise an exact replication of the wording of the factual findings as recited in the Panel Decision.

² The Panel Decision, in findings specifically directed to Peck, describes his role with these words: "Attorney Peck, though not officially designated as Chief of the foreclosure unit at Drummond & Drummond, essentially performed that function for the firm."

and sworn to the affidavit in the presence of a Notary Public.

On June 7, 2010, Attorney Thomas E. Cox, representing the defendant Nicole Bradbury conducted a deposition of Jeffrey Stephan. Julia Pitney, Esq. an associate at Drummond & Drummond participated in the deposition via telephone link on behalf of GMAC. During the deposition Mr. Stephan testified that some of the statements he made in his affidavit were not actually true. He testified that he did not actually review all of the documentation in each foreclosure case filing, but only checked the figures with respect to payments made and amounts due on the mortgages. He also testified that he never actually signed and swore to his affidavits in the presence of a notary. This testimony raised the issue of whether all of the cases that had utilized Mr. Stephan's affidavits in summary judgment motions contained false information not properly sworn to, thus resulting in false information being presented to the various courts where the cases were pending or had been processed.

Some brief information regarding the deposition was given to Paul Peck by Julia Pitney in a passing conversation either on the day of the deposition or shortly thereafter. On June 9, 2010, Attorney Cox had a phone conversation followed up by an e-mail exchange with Ben Campo, Esq., another junior associate at Drummond & Drummond about the problems revealed by the Stephan deposition. These exchanges were in regard to another case where the Stephan affidavit had been utilized in a motion for summary judgment, *GMAC v. Ciraldo*. On or about June 15, 2010, Attorney Cox filed an opposition to the plaintiff's motion for summary judgment in the *Ciraldo* case and copied Attorney Campo with the motion and a copy of the transcript of the Stephan deposition. Thus an actual copy of the transcript of the Stephan deposition was in the possession of Drummond & Drummond by June 17, 2010.

In addition, persons unknown placed a copy of the Stephan deposition transcript on the internet on or about that same date, and it was seen by Julia Pitney and was brought to the attention of Paul Peck on that date. According to Mr. Peck's testimony, it was the on-line version of the deposition transcript that he first saw, on June 17, 2010.

Mr. Peck's initial response to the testimony in the

Stephan deposition was that he couldn't believe the testimony that Stephan gave regarding the fact that he didn't actually review all the documentation and that he didn't actually swear to and sign the affidavits in the presence of a notary, and that Peck thought that these statements would be corrected or changed in an "errata" sheet, before the deposition became final. The panel finds it is not logical that an experienced attorney would consider that such material statements of a deposition witness would actually be substantially changed in an "errata" sheet, which is designed to correct minor errors and clerical mistakes. Shock and disbelief that a GMAC official would operate in such a manner is understandable, but believing that this damaging testimony under oath would somehow be erased by an errata sheet is not.

After filing his motion in opposition to summary judgment in the *Ciraldo* case that included as an exhibit a copy of the Stephan deposition transcript, Attorney Cox contacted Attorney Horace Horton, a senior partner at Drummond & Drummond around June 25, 2010, by telephone and by letter, but was unable to actually talk to him. Cox then wrote a letter to Attorney Mancini on June 29, 2010 expressing his concerns about the problems with the Stephan affidavits as revealed in the deposition of June 7, 2010.

Upon receipt of the letter from Cox, Attorney Mancini, in his role as firm ethics officer, took several steps. He responded to Cox's letter, although in a somewhat non-committal fashion; he contacted Attorney Paul Chaiken seeking advice, and convened a management committee meeting within a few days. That meeting determined that the firm should seek the formal advice of an outside attorney, which resulted in Attorney Daniel Rappaport being retained. A meeting with Rappaport was held on or about July 8, 2010, and a letter with formal advice on how to handle the problem was received from Attorney Rappaport on July 15, 2010. In addition, Attorney Mancini contacted Bar Counsel seeking advice on how to handle the situation.

The advice from Attorney Rappaport was largely adopted by Drummond & Drummond and Mancini and the management committee decided that the correct response would be to write letters to the clerks of court in each pending case, file an affidavit from an attorney at Drummond & Drummond

outlining the problems with the Stephan affidavits, and file a new, properly executed supplemental affidavit in support of the motions for summary judgment that were pending in each case. In addition, in any cases where summary judgment had been granted to the plaintiffs but a foreclosure sale had not yet occurred, all sales were put on hold. . . .

Attorney Saksen was . . . the attorney who essentially implemented Drummond & Drummond's plan to inform the various tribunals of the problem of the Stephan affidavits, although he did not participate in the decision as to how the firm would respond. Saksen drafted and sent the letters to the court clerks along with his own affidavit detailing the problem with the original Stephan affidavits, and included a new supplemental affidavit from Davida Hariott, another officer of GMAC. An example of the letters and affidavits sent to try to correct the problem and inform the tribunals is found in Board's Exhibits 25-27. These documents were filed in the case of *U.S. Bank National Association v. Ciraldo*, a case pending in the Waldo County Superior Court, and were sent to the court on August 3, 2010.

Letters and affidavits such as those represented by Board's Exhibits 25-27 were sent out in approximately 130 cases that Drummond & Drummond had pending in various courts. All were sent out around the first week of August 2010. However, there were a number of cases pending as of the time the problem of the Stephan affidavits became known to Drummond & Drummond where summary judgment proceeded against the defendants before any action was taken to inform the various courts of the defects in the Stephen affidavits that had been presented in support of the plaintiffs' motions for summary judgment. Respondents' Exhibit # 58 was a list prepared by Drummond & Drummond of all of the GMAC cases being handled by the firm at the time of the Stephan deposition of June 7, 2010. That list indicates that between the time of the Stephan deposition and the time that Drummond & Drummond began to send letters and new affidavits to the courts regarding the problems with Mr. Stephan's affidavits, six cases where summary judgment motions were pending relying on Stephan affidavits proceeded to judgment for the plaintiffs, without the courts being notified of the faulty affidavits. In

addition, seven new motions for summary judgment were filed between June 7, 2010 and June 22, 2010, apparently relying on the faulty Stephan affidavits, even though the firm was aware of the problem after the completion of the Stephan deposition on June 7, 2010.

There were at least four contested cases being litigated where counsel for defendants had filed opposition to summary judgment motions filed by the plaintiffs at the time of the Stephan deposition of June 7, 2010. The first case was that of *Federal National Mortgage Association v. Bradbury*, pending in the Bridgton District Court, the case in which the Stephan deposition was conducted by Attorney Cox. In that case, Drummond & Drummond was replaced as counsel for the plaintiff by the Pierce, Atwood law firm. Attorney Cox filed a motion to re-open the partial summary judgment that had already been granted in that case based upon the faulty Stephan affidavit. In September 2010 Judge Powers issued an order reversing the original summary judgment order, denied a subsequent summary judgment motion that had been filed by new plaintiff's counsel, and issued sanctions against the plaintiff for the filing of the original false affidavit.

In *U.S. Bank National Association v. Ciraldo*, a case pending in the Waldo Superior Court, a motion for summary judgment had been filed by the plaintiff on April 25, 2010, utilizing a faulty Stephan affidavit in support of the statement of material facts. Paul Peck was listed as the lead attorney for the plaintiff, although the pleadings were signed by Julia Pitney. Attorney Cox filed an opposition to the plaintiff's motion for summary judgment on June 16, 2010 in which he outlined the problems of the Stephan affidavit and attached a copy of the Stephan deposition. Settlement discussions ensued in this case after that date, but had not been concluded by August 3, 2010, so on that date Alexander Saksen filed his letter and new affidavits to the court clerk outlining the problems with the Stephan deposition. On October 10, 2010, Justice Hjelm, sitting in the Waldo Superior Court considered and denied the plaintiff's motion for summary judgment, stating that under Rule 56 (h) he could not consider the new affidavit since the statement of material fact did not reference the new affidavits. This case was ultimately settled without further motions to the

court.

In the case of *U.S. Bank National Association v. James*, pending in the United States District Court, Attorney Saksen filed a motion for summary judgment on behalf of the plaintiff on April 26, 2010 utilizing the faulty Stephan affidavit. On June 16, 2010 Saksen filed a reply to defendant's opposition to the plaintiff's motion for summary judgment in which no mention of the faulty Stephan affidavit was made, despite the fact Drummond & Drummond had been aware of the problems revealed during the Stephan deposition of June 7, 2010 in the *Bradbury* case. Defense counsel for *James* subsequently filed a motion for relief and sanctions based upon the false Stephan affidavit. Attorney Saksen withdrew from the case and was replaced by counsel from the Pierce, Atwood law firm on August 6, 2010, and apparently no notification to the court regarding the false statements in the Stephan affidavit was ever made to the Court by any attorney from Drummond & Drummond. Magistrate Judge Rich ultimately ruled that sanctions should be imposed against GMAC and ordered attorney's fees be awarded to *James* for the costs of bringing the motion for sanctions and in opposing the original motion for summary judgment by the plaintiff. Judge Rich, however, refused to make a finding of contempt.

Finally, in the case of *U.S. Bank National Association v. Holmes*, the plaintiff's motion for summary judgment was granted by the Belfast District Court on May 4, 2009, again based in part upon an affidavit made by Jeffrey Stephan from GMAC. Notice of a public auction based upon the judgment of foreclosure was mailed to the defendant Michael Holmes by the law firm of Drummond & Drummond on June 10, 2010, scheduling a foreclosure sale for July 1, 2010. This sale was apparently postponed as part of the firm's response to the false Stephan affidavit, and a letter and new affidavits were sent to the clerk at the Belfast District Court on August 3, 2010.

The Panel record also includes the following uncontroverted evidence:

- Peck did not believe that Stephan actually meant what he testified to in the June 7, 2010 deposition; he communicated with GMAC and its counsel regarding the revelations and

believed that Stephan would be significantly repudiating his testimony through an errata sheet;

- Peck believed the errata sheet would be forthcoming through July 9, 2010 when he was affirmatively advised to the contrary;
- Peck did not file, nor was he actively involved in, the seven new motions for summary judgment filed by Drummond & Drummond citing the Stephan affidavit during the June 7—June 22, 2010 period;
- There is no evidence of actual knowledge on the part of Peck of (1) the filing of the aforementioned seven new motions for summary judgment or (2) the six pending cases where summary judgment was rendered in cases involving the Stephan affidavits between June 7, 2010, and when Drummond & Drummond actively commenced notifications to the courts where such matters were pending;
- Drummond & Drummond attorneys took no action to litigate or enforce any summary judgments involving Stephan affidavit cases after the “hold” was placed within the firm on such matters on or after June 17, 2010, until remedial measures (which Grievance Panel D ultimately characterized as not unreasonable) were undertaken;
- Drummond & Drummond cases involving the Stephan affidavits pending after June 17 either had motions for summary judgment withdrawn or had supplemental affidavits filed which appropriately confirmed the information;
- No evidence was submitted suggesting that the facts in the flawed Stephan affidavits was untrue or inaccurate.

DECISION

The May 17, 2013, Disciplinary Petition commenced by the Board of Overseers of the Bar pursuant to M. Bar R. 7.1(e)(1) cites Rules 1.2

(diligence); 3.3 (candor to the tribunal); 5.1 (failure to exercise supervisory responsibilities); and 8.4(d) Conduct prejudicial to the administering of justice). As the Panel did not cite Rule 1.2 or 5.1 as separate grounds for discipline or otherwise discuss their applicability in the Decision, they are not addressed here.

The Panel Decision reviewed Peck's handling of the revelations of the Stephan deposition generally, but cabined its disciplinary decision to the facts of thirteen cases, six of which went to summary judgment upon the Stephan affidavits, and seven new motions for summary judgment were filed, during the period from June 7 through June 27, 2010. Specifically, the Panel conceded that "it is clear that [Peck] did not immediately recognize the full implications of the testimony contained in the deposition," but found fault in that, in the Panel's view, he "should have much more quickly focused on the significance of the Stephan deposition and should have acted more promptly to ensure that no further use of the Stephan affidavits was made"

The Panel believed "that Attorney Peck honestly failed to appreciate the seriousness and the full impact of the Stephan deposition and the faulty affidavits until sometime in July," but noted that he "had the knowledge available to him and failed to act to prevent the continued use and reliance

upon the Stephan affidavits in at least 13 cases” The Panel stopped short of concluding that Peck had actual knowledge (1) that the problems would not be fixed with an errata sheet and (2) of the thirteen cases noted above. Thus, the Panel’s Decision is founded upon a “should have known” standard rather than actual knowledge.

The distinction is critical. Sections 3.3(a)(1) and (3) and 8.4 are clearly predicated upon conscious malfeasance, not negligence or recklessness. The Panel does not conclude, nor does the record support the notion, that Peck knowingly undertook any course of conduct intended to foist false statements of fact upon the court in the form of the Stephan affidavits.

On the contrary, the record supports, and the Panel acknowledges, that Peck originally believed that Stephan’s deposition testimony, which he found astounding, would be resolved by an errata sheet.³ He directed members of his firm to place the affected cases on hold until the matter resolved. When the errata sheet solution was not forthcoming, Drummond & Drummond earnestly undertook to notify every court (in which the affected cases were pending) of the flaws in the affidavits and

³ The Panel placed considerable emphasis upon an incorrect assumption that deposition errata sheets are “designed to correct minor errors and clerical mistakes” and faulted Peck for his belief that an errata sheet could reflect a change in the substance of the witness’s testimony. M.R. Civ. P. 30(e) expressly provides for witnesses to change the substance of their testimony within 30 days following submission of the transcript to the witness.

either withdrew pending motions or supplemented them with appropriate affidavits.

Rule 3.3(a)(3) requires that a lawyer who becomes aware that his client has offered false material evidence to “take reasonable remedial measures” including, if necessary, disclosure to the tribunal.⁴ The Panel held:

Although the remedial measures adopted did not include motions to the various courts asking that motions for summary judgment be withdrawn or for already granted motions to be overturned, the Rule requires only reasonable remedial measures that may include but are not necessarily required to include disclosure to the tribunal. The rule does not require the best possible means of disclosure to the tribunal if disclosure is needed, but only reasonable disclosure. While the panel believes that a better method of making disclosure to the various courts might have been by filing motions that would require action by the courts, *it cannot find that the method of writing letters to the courts along with affidavits by Attorney Saksen and new affidavits properly executed by a different employee of GMAC was not a reasonable remedial measure.*

(Alterations omitted and emphasis added.) Accordingly, upon the facts found by the Panel and the evidence submitted—or not submitted—at the Panel hearing, Peck and his fellow attorneys at Drummond & Drummond have not run afoul of Rule 3.3.

⁴ It must be noted that the material *facts* in the Stephan affidavits have not been shown to be untrue. The flaw in the affidavits, as disclosed in the deposition, is the failure of Stephan to demonstrate a foundation based upon personal knowledge for his statements.

