PUBLIC MATTER - DESIGNATED FOR PUBLICATION

FILED NOVEMBER 19, 2010

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	No**. 06-O-13329**
	)	
MARIE DARLENE ALLEN,	)	**OPINION**
	)	
Member No. 138263	)	
	)	
A Member of the State Bar.	)	
	)	

The Office of the Chief Trial Counsel (OCTC) of the State Bar is appealing the hearing judge's dismissal of a Notice of Disciplinary Charge (NDC) charging respondent, Marie Darlene Allen, with a single count of misconduct due to her purchase of a residential duplex from a longtime friend and occasional client, Supara Ratanasadudi (Supara). The hearing judge found that the State Bar failed to establish that Allen willfully violated Rules of Professional Conduct, rule 3-300,[1] which governs business transactions with clients, because it did not present clear and convincing evidence that Allen was acting within an attorney/client relationship at the time she entered into the agreement to purchase the duplex. Based on our de novo review of the record (Cal. Rules of Court, rule 9.12), we agree that the State Bar did not meet its evidentiary burden, and we affirm the hearing judge's dismissal of this matter with prejudice.

[1] All further references to "rule(s)" are to the Rules of Professional Conduct unless otherwise noted.

I. EVIDENTIARY BURDEN

The parties submitted the issue of culpability based on an extensive Stipulation as to Facts, filed on April 29, 2009, as modified in June 2009 (Stipulation).[2] The burden is on the State Bar to prove misconduct by clear and convincing evidence. (Rules Proc. of State Bar, rule 213.) This showing requires that the evidence must be " 'so clear as to leave no substantial doubt' " and " 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " (*Sheehan v. Sullivan* (1899) 126 Cal. 189, 193.) Moreover, we resolve all reasonable doubts in Allen's favor, and when equally reasonable inferences may be drawn from the stipulated facts, we accept those inferences that lead to a conclusion of innocence. (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1216.)

II. PROCEDURAL AND FACTUAL HISTORY

The facts in this matter are set forth with particularity in the Stipulation and are accurately recited in the hearing judge's decision filed on December 22, 2009. We adopt the hearing judge's factual findings, and summarize below those facts which are pertinent to our analysis.

Allen was admitted to the practice of law on December 12, 1988, and has been a member of the State Bar of California since that time. She has no prior record of discipline in more than 21-years of practice, which is primarily in the areas of real estate and family law.

Allen and Supara met in 1997 or 1998, and developed a close personal relationship. Allen provided occasional legal services to Supara between July 1999 and October 2002. In

[2] In addition to the Stipulation, Allen submitted five other exhibits that were admitted into evidence by the Hearing Judge. The State Bar submitted no evidence other than the Stipulation. In its Opening Brief and Rebuttal Brief on review, the State Bar refers to various exhibits that were not admitted. The court has not considered these exhibits or those portions of the State Bar's briefs that rely on or reference these exhibits. (Rules Proc. of State Bar, rule 306(a).)

1999, Allen prepared a grant deed and change of ownership for a timeshare owned by Supara in Big Bear Lake, California. Also in 1999, she prepared a land sales contract for Supara for property in Lakewood, California. In early 2002, Allen drafted two letters to the purchasers of the Lakewood property and their attorney. She also prepared two notices to pay rent or quit, and reviewed the Lakewood property escrow instructions and communications from the purchasers' attorney. Later, in October 2002, Allen drafted a memorandum of agreement for property owned by Supara at Leisure World, and she consulted with Supara about enforcement of a judgment against an entity that later filed for bankruptcy. In each of these instances, Allen's services were limited to a specific matter. There was no retainer agreement between Supara and Allen, and Allen did not issue formal billing statements. In fact, Allen received modest compensation for her services. On one occasion, Allen was paid $150 in cash, and in other instances, Supara paid for dinner or arranged for discounted lodging for Allen at various Hilton Hotels. Allen provided no other legal services to Supara between October 2002 and February 2005, although their friendship continued.

In 2004, Supara vacated a duplex she owned in Long Beach, California, when she moved to Leisure World. She initially listed the duplex for sale for $789,000 and then reduced the price to $735,000. But the duplex still did not sell and the listing expired in September 2004. Supara knew that Allen's daughter suffered from multiple sclerosis and wanted to move from Vermont to California to be closer to Allen. With this in mind, in February 2005, Supara offered to sell the duplex to Allen for $700,000 and to finance the entire transaction. Allen agreed to the proposal and on March 7, 2005, they signed a purchase agreement which was a pre-printed form that was chosen by Allen (Purchase Agreement). At Allen's suggestion, the arbitration clause was deleted on the form.

The duplex had a problem tenant in one of the units, so after discussion with Supra, Allen prepared three notices to pay rent or vacate the premises and had them served on the tenant on April 7th and 8th and May 3rd. The State Bar and Allen stipulated that these "instruments were prepared by [Allen] on behalf of Supara." However, the Stipulation also stated that Allen's purpose in preparing the notices was "to facilitate both the removal of a problem tenant and to allow [Allen's] daughter to occupy the premises."

In late April 2005, Supara asked Allen to attend a meeting with Supara's accountant to discuss the tax consequences of the transaction, including the feasibility of an Internal Revenue Code Section 1031 like-kind exchange of the property for Supara. At that meeting, Supara introduced Allen to her accountant as her "friend" and "attorney." Allen did not repudiate this description of herself. Allen and Supara each paid one-half of the accountant's fee. After this meeting, the terms of the deal changed on several occasions. Supara suggested most of the changes, which were favorable to her, including the obligation of Allen to obtain financing. Both parties agreed to extend escrow beyond the contemplated closing date of April 30, 2005, so that Allen could obtain financing and Supara could locate a property for a 1031 like-kind exchange.

On June 1, 2005, the parties signed an "interim occupancy agreement pending close of escrow" allowing Allen to assume management of the premises as well as responsibility for repair and alterations without notice to Supara. Allen repainted, installed new carpet, bathroom flooring, wallboard and tile, replaced windows and kitchen cabinets, made repairs to the stucco and rewired the electrical system.[3] Allen's daughter and her family moved into the duplex in July 2005. Allen was unsuccessful at obtaining financing, but believing she had secured an

[3] The value of these repairs and alterations was about $53,000, according to Allen's expert who testified in the *Allen v. Ratanasadudi* lawsuit, which we discuss *post*.

ownership interest in the duplex under the Purchase Agreement, Allen listed the property for sale for $959,000 without notifying Supara. On April 3, 2006, shortly after the duplex was listed, Allen accepted a written offer of $895,000, subject to the close of escrow of the sale between Allen and Supara. When Supara learned about the sale on April 5, 2006, she instructed the escrow agent to stop the sale and cancel the joint escrow.

Two days later, on April 7th, Allen sued Supara for breach of contract and specific performance in Los Angeles County Superior Court (*Allen v. Ratanasadudi* lawsuit). Supara cross-complained for breach of fiduciary duty and fraud. After a 15-day trial, the jury found for Allen and against Supara, and made the following specific findings in its Special Verdict: (1) at the time of the negotiation and sale of the duplex, an attorney/client relationship did not exist between Allen and Supara; (2) at the time of the negotiation and sale of the duplex, Allen was not providing legal services for Supara; (3) Allen's prior attorney/client relationship with Supara did not cause her to have influence or to obtain any advantage over Supara at the time of the negotiations and purchase of the duplex; and (4) Allen did not exercise undue influence over Supara such that the Purchase Agreement should be unenforceable. The jury awarded Allen $207,000 in damages, plus interest of $20,926.85 and $144,767 in attorneys' fees and costs, for a total award of $372,693.85. Supara appealed to the Court of Appeal, which affirmed the judgment due to Supara's failure to designate the record on appeal.

On September 24, 2008, the State Bar filed the NDC against Allen for one count of violating rule 3-300 by her negotiation and purchase of the duplex. Rule 3-300 provides that "[a] member shall not enter into a business transaction with a client" unless certain requirements have been satisfied.[4] In August 2009, the parties agreed to have the matter adjudicated as to Allen's

[4] Those requirements are that: (A) the transaction and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can reasonably be

culpability based upon the Stipulation. After briefing by the parties, the hearing judge filed his decision and order on December 22, 2009, dismissing this case for lack of proof.

III. JURY'S FINDINGS IN *ALLEN v. RANTANASAUDI*

In reaching our conclusion, we have considered the findings contained in the jury's Special Verdict in the *Allen v. Ratanasadudi* lawsuit, which are entitled to a strong presumption of validity.[5] (*In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446, 455 [civil verdicts, judgments and findings entitled to strong presumption of validity].) We recognize that the purpose of a civil proceeding is different from a disciplinary matter. (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.) "However, civil matters do arise which bear a strong similarity, if not identity, to the charged disciplinary conduct." (*Ibid*.) This is just such an instance.

The *Allen v. Ratanasadudi* lawsuit involved the same sales transaction that is the focus of these disciplinary proceedings. At the civil trial, which lasted 15 days, both Allen and Supara presented expert witnesses who testified about the nature of the attorney/client relationship between them and the ramifications of their relationship to the sale of the duplex. In addition to this expert testimony, the jury considered the same facts that are contained in the Stipulation filed in the instant matter. At the trial's conclusion, the jury found in favor of Allen. Supara moved for a new trial and a judgment notwithstanding the verdict on the specific grounds that Allen did not present substantial evidence in support of the verdict. The trial court denied Supara's motion. We thus find that the issues presented in the *Allen v. Ratanasadudi* matter bear

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understood by the client; (B) the client is advised in writing that he or she may seek the advice of an independent lawyer of the client's choice and given a reasonable opportunity to seek that advice; and (C) the client thereafter consents in writing to the terms of the transaction. Allen stipulated that she did not advise Supara of these requirements; however, she maintains that she was not required to do so in the absence of an attorney/client relationship.

[5] The jury's findings were incorporated into the Stipulation.

a strong identity with the issues raised here, and that the jury's findings, which were made under a preponderance of the evidence standard, were supported by substantial evidence. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 948 [civil findings entitled to strong presumption of validity if supported by substantial evidence].) [6]

IV. APPLICABILITY OF RULE 3-300

The State Bar asserts that "[t]he fundamental issue raised within this request for review is whether, *based upon the stipulated facts submitted*, there existed the requisite attorney/client relationship and its concomitant inherent influence at the time of the proposal, without which the rule [3-300] has no application." (Italics added.) Simply put, the answer is no.

Nowhere in the Stipulation does it state that in 2005 Allen was acting as Supara's attorney at the time of the purchase of the duplex or that an attorney/client relationship continued past October 2002. The State Bar argues that we may infer from the informal nature of Allen's earlier representation that an attorney/client relationship existed in 2005 when Allen purchased the duplex. It posits that this informality "served only to cloud the extent and duration of the existent attorney/client relationship." Indeed, the State Bar contends that "the mere fact that the parties enjoyed an attorney client relationship at some time prior to this real estate sale

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[6] In his decision, the hearing judge did not rely upon the jury's findings because he found they were "irrelevant to any issue" in this proceeding. We disagree and consider the findings to be highly relevant.

We also do not agree with the hearing judge's conclusion that only prior civil findings that are *adverse* to a respondent are entitled to a strong presumption of validity in the State Bar Court. Although prior civil findings are not binding upon us (*In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 327), such findings – whether adverse or exculpatory – come to us with a strong presumption of validity if they were made under a preponderance of the evidence test and supported by substantial evidence. (*Id.* at p. 325.) We find no authority or sound reason to preclude the use of civil findings merely because they are exculpatory of a respondent. To conclude otherwise would give the State Bar an unfair advantage, allowing it to use prior civil findings that are adverse to respondents in establishing culpability, while precluding those same respondents from relying on prior civil findings that help them defend against disciplinary charges.

transaction proposal, suffices to trigger the application of the rule [3-300]." At oral argument, the State Bar summarized its position, stating that, under rule 3-300, "once a client, always a client."

We do not agree with this proposition. The duration of an attorney/client relationship is dependent upon the nature and scope of the relationship. (Vapnek et. al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2008) para. 3:29.5, p. 10-11.) In this case, the sporadic legal services that Allen provided between 1999 and 2002 were limited to four minor matters for which Allen received a total of $150, a few dinners and some discounts on hotel rooms. Although each of these matters concerned real property issues, none of them had any relationship to the purchase of the duplex and Allen did not obtain any confidential or financial information during her earlier representation of Supara that was used in the subsequent negotiations. Nor did Allen use any financial or personal information she otherwise learned about Supara through their prior attorney/client relationship. Moreover, almost two and a half years elapsed between the services provided and the purchase of the duplex.

The State Bar contends that even if the prior relationship ended in 2002, it was "resurrected" in 2005. The State Bar cites to the fact that Allen did not repudiate Supara's introduction of her to the accountant as Supara's attorney as evidence of their attorney/client relationship in 2005. We find this evidence to be inconclusive at best and insufficient to satisfy the clear and convincing standard. The State Bar also cites to Allen's preparation in April and May 2005 of three tenant notices to vacate the premises as evidence of the resurrection of the attorney/client relationship. However, the stipulated facts are in conflict as to whether Allen drafted the three notices on behalf of Supara or herself to facilitate her daughter's occupancy of the duplex. When equally reasonable inferences may be drawn from the stipulated facts, we are obliged to resolve reasonable doubts in Allen's favor. (*Young v. State Bar, supra*, 50 Cal.3d at p.

1216.) More importantly, the competing inferences as to the existence of the attorney/client relationship are outweighed by the presumption of validity we give to the jury's specific findings in the *Allen v. Ratanasadudi* lawsuit that there was no attorney/client relationship between Allen and Supara during the negotiation and sale of the duplex and that no legal services were provided to Supara at that time.

In the alternative, the State Bar seeks to extend rule 3-300 to apply to Supara as a *former* client because "the established long-standing personal friendship and multiple prior attorney/client relations . . . carried with it an ongoing aura of inherent influence associated with the prior history of representation in real property matters." Again, this is rebutted by the specific findings of the jury in *Allen v. Ratanasadudi* that Allen did not exercise undue influence over Supara regarding the Purchase Agreement and that their prior attorney/client relationship did not give Allen any advantage over Supara.

Furthermore, we do not find support for the State Bar's broad interpretation of rule 3-300, either in its language or in the decisional law. Rule 3-300 imposes restrictions on an attorney's business transactions with a "client." In limited circumstances, the courts have applied rule 3-300 and its predecessor, former rule 5-101, "to a transaction between an attorney and a former client involving the fruits of the attorney's representation, if there is evidence that the client placed his trust in the attorney because of that representation . . . ." (*Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 372; accord, *Beery v. State Bar* (1987) 43 Cal.3d 802 [attorney solicited investment from former client in precarious venture *before* final distribution of litigation proceeds]; *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 243 [attorney culpable for solicitation of loan or investment "on the heels" of client's receipt of settlement].) The State Bar's reliance on *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483 in support of its extension of rule 3-300 to former clients is misplaced

because in *Peavey* the attorney entered into a business transaction with his client while he was still representing the clients' interests in litigation (*id*. at p. 486), and in a second instance, the attorney entered into a business transaction while the clients were still seeking his assistance and advice in an ongoing relationship. (*Id*. at p. 489.)

The Supreme Court has not been inclined to "dramatically extend the definition of an 'attorney-client relationship' beyond its common understanding. . . ." (*Hunniecutt v. State Bar, supra,* 44 Cal.3d at p. 372.) We, too, decline to expand the meaning of attorney/client relationship to include Allen's prior representation of Supara.

V. CONCLUSION

Whether an attorney/client relationship exists is a question of law, although we have considered the evidence adduced in the hearing below in arriving at our legal conclusion. (*Meehan v. Hopps* (1956) 144 Cal.App.2d 284, 287.) In so doing, we conclude that the State Bar did not establish by clear and convincing evidence that Allen and Supara had an attorney/client relationship at the time of the purchase of the duplex, which is an essential element of a rule 3-300 violation. Accordingly, we affirm the order dismissing the NDC with prejudice. Because Marie Darlene Allen has been exonerated of all charges following a judicial determination on the merits, she may, upon the finality of this opinion, file a motion seeking reimbursement for costs as authorized by Business and Professions Code section 6086.10, subdivision (d). (Rules Proc. of State Bar, rule 283.)

EPSTEIN, J.

We concur:

REMKE, P. J.

PURCELL, J.