

PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

FILED JANUARY 26, 2011

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)	No. 10-R-00403
)	
JOSEPH KEITH FERREIRA,)	OPINION
)	
Petitioner for Reinstatement.)	
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Petitioner Joseph Keith Ferreira was disbarred from the practice of law in California effective April 22, 1994. On December 22, 2009, he attempted to file a petition for reinstatement with the State Bar Court. The petition was rejected by the court clerk and returned by mail that same day because, among other stated reasons, it was not accompanied by a proof of service. Ferreira ultimately filed his petition for reinstatement on January 19, 2010.

Effective January 1, 2010, however, the California Rules of Court were modified to include a requirement that Ferreira provide proof, at the time of filing for reinstatement, that he had taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners within three years before filing the petition. (Cal. Rules of Court, rule 9.10(f).) Ferreira's petition did not include such proof. Accordingly, the hearing judge granted the motion of the Office of the Chief Trial Counsel of the State Bar (State Bar) to dismiss the petition based on this omission. The hearing judge also simultaneously denied Ferreira's motion to designate December 22, 2009, rather than January 19, 2010, as the date his petition was filed. Ferreira seeks summary review of the hearing judge's orders.

Based on our de novo review of the record (Cal. Rules of Court, rule 9.12), we find that Ferreira was required to provide a proof of service with his petition for reinstatement and that he failed to do so. Therefore, we reject his request to designate December 22, 2009 as the filing date of his petition, and affirm the hearing judge's order dismissing the matter.

I. PROCEDURAL ISSUES

We granted Ferreira's request for summary review of this matter under rule 308 of the Rules of Procedure of the State Bar of California.¹ As a result, the decision of the hearing judge is final as to all material findings of fact *and* as to all issues or contentions not raised in the briefs filed on review. (Rule 308(c).) Our review is limited to contentions that the facts support conclusions of law different from those reached by the hearing judge. (Rule 308(a)(1).)

Along with his opening memorandum, Ferreira filed a document entitled "exhibits in support of opening memorandum," attaching several pleadings he filed in the hearing department. Ferreira requests that we incorporate by reference the arguments he made in his pleadings below. However, rule 802(f)(1) requires parties on summary review to file opening memoranda that: (1) "Concisely state the issues presented on review, including, if applicable, the modifications requested with regard to the conclusions of law and/or disposition;" and (2) "List the authorities asserted in support of the contentions raised on review, with a concise statement of the proposition for which each authority is cited." Ferreira's opening memorandum fails to comply with these requirements. We decline to sort through the various pleadings Ferreira filed in the hearing department to determine on review which arguments and authorities he is relying on to challenge the hearing judge's conclusions of law. As a result, we limit our

¹ All further references to rule(s) are to this source unless otherwise noted.

review to those contentions set forth in his opening brief, and all others are deemed waived.²
(Rule 308(c).)

II. FACTUAL FINDINGS

We adopt the hearing judge's factual findings, which are deemed final, and summarize them below. (Rule 308(a).)

Ferreira attempted to file a petition for reinstatement with the State Bar Court on December 22, 2009. The court clerk rejected the petition for filing and returned it by mail that same day because, among other things, no proof of service was attached. Ferreira did not learn that his petition had been rejected until he received it by mail on December 31, 2009. He ultimately filed his petition for reinstatement on January 19, 2010, with a proper proof of service.

On April 6, 2010, the State Bar filed a motion to dismiss the proceedings under rule 9.10(f) of the California Rules of Court, which requires proof, at the time of filing for reinstatement, that the petitioner has taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners within three years prior to filing the petition. To avoid this requirement, on April 7, 2010, Ferreira filed a motion identified as a "Motion for Order Designating December 22, 2009 as Date of Petition Filing Nunc Pro Tunc." Each party filed a response to the other's motion.

As summarized by the hearing judge in her order dated April 22, 2010, Ferreira argued in his motion that: (1) no proof of service was required with his initial pleading; (2) even if it were required, its absence is an insubstantial defect; (3) the imminent effectiveness of rule 9.10(f) of the California Rules of Court and the court clerk's unavailability were compelling reasons for

² We also deny the State Bar's request that we take judicial notice of the official court file in this matter. Not only is it unnecessary to request judicial notice of a part of the record, the State Bar fails to identify any particular document or reason for its request. (See State Bar Ct. Rules of Prac., rule 1224(f).)

acceptance of the December 22, 2009 petition; and (4) the State Bar would not be prejudiced by issuing a nunc pro tunc order designating December 22, 2009, as the effective filing date. The hearing judge found that the court clerk's rejection of Ferreira's December 22, 2009 petition was proper, concluding: (1) pursuant to former rule 661(c),³ the court was required not to file a petition for reinstatement without a proof of service; (2) the cases cited by Ferreira in support of back-dating the petition involved insubstantial error or negligence on the part of the court clerk, while in this case the court clerk's refusal to file the petition was necessary and appropriate; and (3) unlike the cases he cited, Ferreira had not lost his right to seek reinstatement. Accordingly, the hearing judge denied Ferreira's motion to designate December 22, 2009 as the filing date, granted the State Bar's motion to dismiss, and ordered that the \$1,600 filing fee be refunded to Ferreira. On May 25, 2010, the hearing judge denied Ferreira's motion for reconsideration.

III. LEGAL CONCLUSIONS

Ferreira argues in his opening memorandum that the hearing judge erroneously concluded that former rule 661(c) precluded the court clerk from filing his petition without a proof of service. Ferreira argues that under rule 60 and rule 1111 of the Rules of Practice of the State Bar Court, he was not required to serve the State Bar or file a proof of service with his initial filing, but could have served the State Bar *at any time* after he filed his petition and then filed the proof of service within 10 days of service. We reject Ferreira's argument, finding that former rule 661 required that he serve the State Bar *and* file the proof of service with his petition.

Former rule 661 required that Ferreira serve the petition on the State Bar by certified mail (rule 60), as well as provide a proof of service with his petition. In particular, the rule provided:

³ Rule 661 was revised effective January 1, 2010. We look to the language of former rule 661 to determine the requirements of the petition submitted on December 22, 2009.

RULE 661. REQUIREMENTS

- (a) The petition . . . shall be verified by the petitioner . . .
- (b) The petitioner shall serve a copy of the petition on the Office of Trials pursuant to the rule for service of initial pleadings (rule 60) . . .
- (c) The petition shall not be filed by the Court unless accompanied by a proof of service establishing compliance with the service requirements of this rule. The petition shall be accompanied by a filing fee of \$1,600 . . .

Like the filing fee, a proof of service was a clear condition precedent to filing the petition. (See *Duran v. St. Luke's Hosp.* (2003) 114 Cal.App.4th 457, 459 [clerk had duty to demand and receive proper fee and action deemed untimely where proper fee not paid before limitations period ran].) Thus, the court clerk was required to reject the petition based on Ferreira's failure to comply with this mandatory requirement. (Former rule 661(c); see also State Bar Ct. Rules of Prac., rule 1112(a)(1) [pleadings submitted without proof of service will be rejected].)

Ferreira attempts to thwart the unambiguous requirements of former rule 661 by relying on rule 1111(a) of the Rules of Practice of the State Bar Court. Rule 1111(a) allows a party serving an initial pleading pursuant to rule 60 to have a 10-day grace period after the date of service on the other party to file the proof of service.⁴ Although rule 1111 may be a *general* rule regarding service, the more *specific* provision for service of petitions for reinstatement set forth in former rule 661 clearly controls under the circumstances. (*Woods v. Young* (1991) 53 Cal.3d 315, 325 [specific provision will govern general provision even though general provision standing alone is broad enough to include subject to which specific provision relates]; Code Civ. Proc., § 1859 [“when a general and [a] particular provision are inconsistent, the latter is paramount to the former”]; see also Bus. & Prof. Code, § 6086.5 [rules of practice may not conflict with rules of procedure].)

⁴ Rule 1111 provides: “(a) **Filing proof of service of initial pleading.** The party serving the initial pleading pursuant to rule 60 of the Rules of Procedure shall, within ten (10) days of service on opposing parties, file proof of such service.” Nothing in this rule allows a party to delay serving the other party, as Ferreira argues.

Having waited to file his petition until just seven court days before the effective date of the new examination requirement, Ferreira bears the consequences of failing to perfect his filing. He has not lost his right to seek reinstatement to the practice of law. He remains entitled to do so once he successfully complies with all prerequisites to filing his petition.

IV. CONCLUSION

We reject Ferreira's request to designate December 22, 2009 as the filing date of his petition for reinstatement, and affirm the hearing judge's order dismissing the matter.

REMKE, P. J.

We concur:

EPSTEIN, J.

PURCELL, J.