ORIGINAL

IN

THE SUPREME COURT OF OHIO

Disciplinary Counsel,	:	
Relator,	:	
v.	:	CASE NO. 2013-0611
Thomas Jones,	:	
Respondent.	:	
	:	

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' FINAL REPORT

Jonathan E. Coughlan (0026424)
Disciplinary Counsel
Philip A. King (0071895) (COUNSEL OF RECORD)
Assistant Disciplinary Counsel
Office of Disciplinary Counsel
The Supreme Court of Ohio
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411
(614) 461-0256
Fax No. (614) 461-7205
P.King@sc.ohio.gov

COUNSEL FOR RELATOR, DISCIPLINARY COUNSEL

Mr. Thomas Jones
2982 E. 59th Street
Cleveland, OH 44127

RESPONDENT *PRO SE*

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STATEMENT OF THE CASE

On April 26, 2011, relator, Disciplinary Counsel, filed the instant complaint with the Board of Commissioners on the Unauthorized Practice of Law ("board") against Thomas Jones alleging that he had engaged in the unauthorized practice of law (UPL) by preparing four deeds on behalf of Chanel Triplett and Claudia Cammon. (Report at 1.)

On January 19, 2012, respondent filed his first motion to dismiss, and in response, relator timely filed a memorandum in opposition on February 8, 2012. *Id.* at 2. By Order dated August 27, 2012, the hearing panel denied respondent's motion to dismiss and ordered respondent to file an answer to the complaint by September 17, 2012. *Id.* Instead of filing an answer, respondent filed a second motion to dismiss on September 17, 2012. *Id.* The hearing panel denied the second motion to dismiss. *Id.* Respondent never filed an answer in this matter. *Id.*

On October 2, 2012, relator filed a motion for default judgment; however, respondent did not file a response. On December 13, 2012, the hearing panel granted relator's motion for default judgment. *Id.*

On April 16, 2013, the board filed its final report ("Report") with this Court delineating its findings of fact, conclusions of law and recommending that this Court (1) issue an order prohibiting respondent from engaging in UPL activity in the future, (2) impose a civil penalty totaling $10,000 ($2,500 for each deed respondent prepared), and (3) require respondent to reimburse the costs incurred by this Court. *Id.* at §VI. This matter is now before this Court on respondent's objections to the Report.

STATEMENT OF FACTS

As determined by the board, the following facts and violations were established by a preponderance of the evidence regarding respondent's misconduct in the matter.

Respondent is a Cleveland, Ohio resident and is not an attorney-at-law in the state of Ohio admitted pursuant to Gov. Bar R. I, registered pursuant to Gov. Bar R. VI, or certified pursuant to Gov. Bar R. II, Gov. Bar R. IX or Gov. Bar R. XI. (Report at §III, ¶2; Mot. Def. at Ex.1.)

Chanel Triplett

In 2008, Chanel Triplett owned the property located at 2982 East 59th Street, Cleveland, Ohio 44127. (Report at §III, ¶3; Mot. Def. at Ex. 2.) This property was subject to a secured mortgage held by the Deutsche Bank National Trust Company ("Deutsche Bank"). (Report at §III, ¶4; Mot. Def. at Ex. 3.) On January 10, 2008, Deutsche Bank filed a foreclosure complaint in the Cuyahoga County Court of Common Pleas, Case No. 08CV646959, against Triplett as the owner of the 2982 East 59th Street property for failing to pay her mortgage. *Id.*

While the foreclosure action was pending, respondent and disbarred attorney Michael Troy Watson purchased the 2982 East 59th Street property from Triplett for $100. (Report at §III, ¶5; Mot. Def. at Ex. 4.) To facilitate the sale of the 2982 East 59th Street property, respondent prepared a quitclaim deed, which Triplett executed on November 17, 2008, transferring the property to respondent and Watson. (Report at §III, ¶6; Mot. Def. at Ex. 4.) That same day, the quitclaim deed was filed with the Cuyahoga County Recorder's Office, record #200811170616. (Report at §III, ¶7; Mot. Def. at Ex. 4.)

In 2009, Triplett owned a second property located at 3116 West 17th Street, Cleveland, Ohio 44109. (Report at §III, ¶8; Mot. Def. at Ex. 5.) Sometime in 2009, respondent negotiated

and purchased the 3116 West 17th Street property from Triplett for $100. (Report at §III, ¶9; Mot. Def. at Ex. 5.) To facilitate the sale of the 3116 West 17th Street property, respondent prepared a quitclaim deed, which Triplett executed on December 7, 2008, transferring the property to respondent and Watson. (Report at §III, ¶10; Mot. Def. at Ex. 6.) About a year later, the quitclaim deed was later filed with the Cuyahoga County Recorder's Office on December 4, 2009, record #200902040511. (Report at §III, ¶11; Mot. Def. at Ex. 6.)

Claudia Cammon

In 2008, Claudia Cammon owned the property located at 4119 East 102nd Street, Cleveland, Ohio 44105. (Report at §III, ¶12; Mot. Def. at Ex. 7.) That year, respondent negotiated and purchased the 4119 East 102nd Street property from Cammon for $100. (Report at §III, ¶13; Mot. Def. at Ex. 8.) To facilitate the sale of the 4119 East 102nd Street property, respondent prepared a quitclaim deed, which Cammon executed on December 7, 2008, transferring the property to respondent and Watson. (Report at §III, ¶14; Mot. Def. at Ex. 8.) The quitclaim deed was later filed with the Cuyahoga County Recorder's Office on March 19, 2009, record #200903190074. (Report at §III, ¶15; Mot. Def. at Ex. 8.)

In 2009, Cammon owned a second property located at 13115 Southview Avenue, Cleveland, Ohio 44120. (Report at §III, ¶16; Mot. Def. at Ex. 9.) Sometime that year, respondent negotiated and purchased the 13115 Southview Avenue property from Cammon for $100. (Report at §III, ¶17; Mot. Def. at Ex. 10.) To facilitate the sale of the 13115 Southview Avenue property, respondent and Watson prepared a quitclaim deed, which Cammon executed on March 10, 2009, transferring the property to respondent and Watson. (Report at §III, ¶18; Mot. Def. at Ex. 10.) The quitclaim deed was later filed with the Cuyahoga County Recorder's

Office on December 14, 2009, record #200912140436. (Report at §III, ¶19; Mot. Def. at Ex. 10.)

Based upon the sworn and certified evidence establishing the above facts, the board found by a preponderance of the evidence that respondent engaged in UPL activity by preparing four deeds on behalf of Triplett and Cammon. (Report at §IV, ¶9.)

Aggravation, Mitigation, and Sanction

In addition to the above misconduct, the board found the presence of the following aggravating factors under UPL Reg. 400(F)(3)(d) and (f): that respondent benefited from his UPL activity, and it involved the preparation of legal instruments for filing with the Cuyahoga County Recorder's Office, a governmental entity. (Report at §V, ¶3.) The board found no mitigating factors. *Id.* at §V, ¶2. Based on the misconduct and the aggravating factors, the board recommended that this Court (1) issue an order prohibiting respondent from engaging in UPL activity in the future, (2) impose a civil penalty totaling $10,000 ($2,500 for each deed respondent prepared), and (3) require respondent to reimburse the costs incurred by this Court. *Id.* at §VI.

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

Answer No. I
Relator proved by a preponderance of the evidence that respondent engaged in UPL activity by preparing four deeds for other individuals.

Respondent admits that he obtained blank forms from the internet and that he filled in the blanks on the forms to facilitate the property transfer to himself. (Respondent's Br. at 1.) However, in his only objection to the board's conclusions of law, respondent argues that this is

not UPL activity because using fill-in-the-blank forms to transfer property from someone else to himself is not the practice of law. *Id.*

Respondent's argument is neither novel nor persuasive. In fact, this Court in *Ohio State Bar Assn. v. Burdzinski, Brinkman, Czarzasty & Landwehr, Inc.*, stated, "[t]he drafting or writing of a contract or other legal instrument on behalf of another is the practice of law, even if the contract is copied from a form book or contract previously prepared by a lawyer." 112 Ohio St.3d 107, 2006-Ohio-6511, 858 N.E.2d 372, ¶23. *See also, Geauga Cty. Bar Assn. v. Canfield*, 92 Ohio St.3d 15, 2001-Ohio-138, 748 N.E.2d 23 (copying documents from a formbook and completing those forms for the benefit of another is the practice of law). Therefore, respondent's use of fill-in-the-blank forms to prepare deeds for Triplett and Cammon is without a doubt the practice of law. As clearly established by the evidence, respondent is not authorized to practice law.

Accordingly, this Court should overrule respondent's objection to the board's findings of fact and conclusions of law, and find that the sworn and certified evidence in this matter establishes by a preponderance of the evidence that respondent engaged in UPL activity by preparing four deeds for other individuals.

Answer No. II
Respondent's renewed motion to dismiss based on the affirmative defense of res judicata is improper because that defense cannot be raised in a motion to dismiss and respondent waived the defense by failing to file an answer to the complaint.

This is the third time respondent has requested dismissal of this matter. On January 19, 2012, respondent filed a motion to dismiss the complaint arguing that the complaint failed to state a UPL claim. (Report at 1.) The board denied the motion to dismiss and ordered respondent to file an answer by September 17, 2012. *Id.* Respondent did not file an answer.

Instead, respondent filed a second motion to dismiss, this time arguing that these issues were already adjudicated by this Court during a September 2011 contempt proceeding for disbarred attorney Michael Troy Watson in Case No. 2005-0398. *See* (Respondent's Mot. to Dismiss filed 9/17/12.) The board denied respondent's second motion to dismiss. (Report at 2.) Respondent never filed an answer causing relator to file a motion for default judgment.

Now, in section II of his brief, respondent attempts to renew his second motion to dismiss-again arguing that the issues in this case were already adjudicated by this Court in Case No. 2005-0398. However, respondent's renewed motion to dismiss based on res judicata lacks merit for two reasons.

First, this Court has held that a party cannot raise the defense of res judicata in a motion to dismiss under Civ. R. 12(B) as respondent is attempting to do in his objections. *See In State ex rel. Freeman v. Morris*, 62 Ohio St.3d 107, 109, 579 N.E.2d 702, 703 (1991). Second, respondent has waived any res judicata defense because he failed to plead it in a responsive pleading. Civ. R. 8(C) provides that "in pleading to a preceding pleading, a party shall set forth affirmatively ... res judicata ...." Civ. R. 8(C). Civ. R. 7 identifies a complaint as a preceding pleading and an answer as its responsive pleading in which res judicata must be pled. *See* Civ. R. 7. So a party who fails to plead res judicata either in an answer or by amendment has waived it and cannot raise it later in the proceedings. *See Jim's Steak House v. City of Cleveland*, 81 Ohio St. 3d 18, 20-21, 1998-Ohio-440; 688 N.E.2d 506. Respondent never filed an answer raising <u>any defense</u> in response to the complaint in this matter. Therefore, he has effectively waived the defense of res judicata in this matter.

Accordingly, this Court should overrule or strike respondent's renewed motion to dismiss based on res judicata because he cannot raise it in a motion to dismiss and he has already waived that defense.

Answer No. III
Respondent received notice of and ample opportunity to participate in these proceedings, but he chose not to file an answer to the complaint.

In section III of his brief, respondent requests a rehearing claiming that he was "ready willing and able" to participate in this matter. (Respondent's. Br. at 5.) But do the facts support respondent's claim of cooperation? No. Instead, they show the exact opposite.

On February 23, 2009, relator received a letter from Attorney Jason Whitacre alleging that respondent may have engaged in UPL activity concerning Triplett's foreclosure case. (Def. Mot. at Ex. 11.) Relator began his investigation, and on March 23, 2009, relator sent his first letter of inquiry by certified mail to respondent at his residential address – 2982 East 59th Street, Cleveland, Ohio 44127. Relator received a return receipt signed by respondent confirming that he received relator's first letter of inquiry. *Id.* Relator's letter asked respondent to provide a written response to the allegations that he engaged in UPL activity. (Def. Mot. at Ex. 12.) However, respondent did not respond to relator's first letter of inquiry at that time.

On April 14, 2009, relator sent his second letter of inquiry by certified mail to respondent at his residential address requesting that he respond to the allegations that he engaged in the unauthorized practice of law. (Def. Mot. at Ex. 14.) Relator's second letter of inquiry was returned to relator because respondent refused to claim it. *Id.*

On May 8, 2009, relator sent his third letter of inquiry by certified mail to respondent at his residential address requesting that he respond to the allegations that he engaged in the

unauthorized practice of law. (Def. Mot. at Ex. 15.) Relator received a return receipt signed by respondent indicating that he received relator's third letter of inquiry. *Id.* On May 22, 2009, relator received respondent's response to relator's letters of inquiry. (Def. Mot. at Ex. 16.)

Relator's investigation continued, and relator discovered that respondent had prepared quitclaim deeds on four occasions to facilitate the transfer of properties from Triplett and Cammon to himself and Watson. (Def. Mot. at Ex. 13.) On January 18, 2011, relator's office contacted respondent by telephone to schedule the taking of respondent's deposition at relator's office. *Id.* However, respondent refused to come to relator's office for a deposition. *Id.* Therefore, on January 24, 2011, relator served a deposition subpoena upon respondent that required respondent's appearance at relator's office on February 4, 2011 at 11:00AM to answer the UPL allegations. (Def. Mot. at Ex. 17.) In response, respondent filed a motion to quash the subpoena on January 31, 2011. *See Disciplinary Counsel v. Jones,* 128 Ohio St. 3d 1405; 2011 Ohio 807; 941 N.E.2d 1206. That same day, respondent, relator's counsel, and former Board Secretary, Michelle Hall, discussed the scheduled deposition and relator's counsel offered to travel to Cleveland to conduct respondent's deposition. *See* (Relator's Mem. in Opp. to Respondent's Mot. to Quash, Case No. 2011-0191 at Ex. 2, ¶¶8-9.) Respondent refused relator's offer and stated that he would wait for this Court's decision on the motion to quash. *Id.* This Court later denied respondent's motion to quash. (Def. Mot. at Ex. 20.)

On the day of the scheduled deposition, relator's counsel called respondent and first confirmed with respondent that he had not received an order quashing the subpoena, and then advised respondent that he was required to appear at his deposition. (Def. Mot. at Ex. 13.) Despite this, respondent did not appear at his February 4, 2011 deposition. (Def. Mot. at Ex. 20.) Therefore, given the evidence of respondent's UPL activity and respondent's failure to cooperate

with relator's investigation, relator filed a formal complaint against respondent before the board on April 26, 2011. (Compl.) On May 24, 2011, former Board Secretary, Michelle Hall, served a copy of the complaint upon respondent. (Def. Mot. at Ex. 21.)

Respondent did not file an answer to the complaint. (Def. Mot. at Ex. 13.) Therefore, on January 5, 2012, relator's counsel called respondent, and advised him that relator intended to file a motion for default due to his failure to answer the complaint. *Id.* In response, respondent claimed that he had not received a copy of the complaint. *Id.* Therefore, counsel for relator told respondent that relator would send a copy of the complaint to him at his home address. *Id.* On January 5, 2012, counsel for relator sent a copy of the complaint to respondent by overnight mail. (Def. Mot. at Exs. 13 and 22.) Accompanying the complaint was a cover letter advising respondent that relator would file a motion for default if respondent did not file an answer by January 17, 2012. *Id.* Relator received confirmation that the complaint and cover letter were delivered to respondent's home address on January 9, 2012. On January 9 and 10, 2012, relator's counsel attempted to contact respondent to confirm delivery of the complaint; however, respondent did not answer. Relator's counsel left a voicemail message for respondent to contact relator's counsel to confirm receipt. (Def. Mot. at Ex. 13.)

On January 19, 2012, respondent filed a motion to dismiss the complaint in lieu of an answer. (Report at 2.) On February 8, 2012, relator filed a memorandum in opposition to respondent's motion to dismiss. *Id.* On August 27, 2012, the hearing panel denied respondent's motion to dismiss and ordered respondent to file an answer to the complaint by September 17, 2012. *Id.* However, instead of filing an answer, respondent filed a second motion to dismiss on September 17, 2012. *Id.* On October 2, 2012, relator filed a motion for default judgment due to respondent's failure to file an answer as ordered. *Id.* Respondent chose not to respond to the

default judgment motion. On December 13, 2012, the board denied respondent's second motion to dismiss and granted relator's motion for default judgment. *Id., see also,*(Order filed 12/13/12.)

As evidenced in the record, respondent received a subpoena commanding his attendance at a deposition during the investigatory stage, but he chose not to appear despite the lack of an order quashing the subpoena. It is also evident that respondent received a copy of the complaint once formal proceedings began, but chose not to file an answer despite the board ordering him to do so. Other than his conclusory, unverified and self-serving statements, respondent offers no evidence to refute these facts. Clearly, respondent has received notice of and ample opportunity to participate in these proceedings, but has chosen not to do so.

Accordingly, this Court should overrule respondent's request for a rehearing.

CONCLUSION

For the foregoing reasons, this honorable Court should overrule respondent's objections to the Report. The Court should adopt the findings of fact and conclusions of law in the Report and issue an order, (1) prohibiting respondent from engaging in UPL activity in the future, (2) imposing a civil penalty totaling $10,000 ($2,500 for each deed respondent prepared), and (3) requiring respondent to reimburse the costs incurred by this Court.

Respectfully submitted,

Jonathan E. Coughlan (0026424)
Relator

Philip A. King (0071895)
Assistant Disciplinary Counsel
Counsel of Record for Relator
Office of Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411
(614) 461-0256
P.King@sc.ohio.gov

CERTIFICATE OF SERVICE

I certify that an accurate copy of ***Relator's Answer Brief*** was served via U.S. Mail, postage prepaid, upon respondent Mr. Thomas Jones at 2982 E. 59th Street, Cleveland, OH 44127; and Richard A. Dove, Secretary, Board of Commissioners on Grievances and Discipline, at 65 S. Front Street, 5th Floor, Columbus, OH 43215 on May 28, 2013.

Philip A. King
Counsel of Record for Relator