

Re: A Lawyer

*Citation dismissal**

Discipline hearing: December 18, 2001

Panel: Gerald J. Lecovin, QC, as a one-Bencher panel by consent

Report issued: January 8, 2002; indexed as [2001] LSBC 39

Counsel: Jessica S. Gossen, for the Law Society; Christopher Hinkson, QC, for the respondent

Summary

The respondent lawyer represented the second mortgagee in the foreclosure of a farm property. The court had ordered that the second mortgagee and fourth mortgagee have joint conduct of the property sale. As disagreements had arisen between these two mortgagees, the respondent applied to the court for the second mortgagee to have exclusive conduct of the sale. Prior to the hearing of the application, the mortgagor told the respondent lawyer he was expecting new funds that would allow him to bring the mortgages up to date. He asked for an adjournment of the hearing. The morning of the hearing, the respondent lawyer received instructions from the second mortgagee to adjourn the matter, and she subsequently contacted counsel for the fourth mortgagee to so advise him. Although he was not in his office, the respondent lawyer left a message with his staff about her instructions to adjourn the matter and asked for a call back if there was any difficulty with that plan. The respondent lawyer then advised the court registry that the application had been adjourned for a week by consent. Counsel for the fourth mortgagee did not actually learn about the adjournment until he appeared in court that morning.

The hearing panel found that, in the circumstances, the respondent lawyer had not deliberately lied to the registry but in fact had reason to believe that counsel for the fourth mortgagee had consented to the adjournment, including the fact that he had previously agreed to all adjournments requested by the mortgagor. The panel found that the respondent lawyer's actions did not amount to professional misconduct, and ordered that the citation be dismissed and the respondent be awarded costs.

Facts

In 2000 the respondent lawyer represented the second mortgagee in a foreclosure of a farm property. The court had ordered that the second mortgagee and fourth mortgagee have joint conduct of the sale of the property. As certain disagreements had arisen between the mortgagees in this respect, the respondent lawyer set down an application in court for December 7 for her client to have exclusive conduct of the sale. That motion was adjourned to December 14 by consent.

Prior to the new hearing date, the mortgagor told the respondent lawyer he was expecting new funds that would allow him to bring the mortgages up to date. He asked for an adjournment of the hearing. The respondent lawyer sought instructions from the second mortgagee and, on the morning of December 14, she received the instructions to adjourn.

The respondent lawyer subsequently contacted counsel for the fourth mortgagee. Although he was not in his office, the respondent lawyer left a message with his staff about her instructions to adjourn the matter and asked for a call back if there were any difficulty with that plan. The respondent lawyer later called the court registry to advise that the application had been adjourned to December 22 by consent. She did so before 9:00 a.m. so that the registry would accept the adjournment by telephone.

Counsel for the fourth mortgagee did not actually learn about the adjournment until he appeared in court that morning and he subsequently complained to the Law Society.

Decision

The hearing panel found that the respondent lawyer did not deliberately lie to the court registry, a fact acknowledged by Law Society counsel in the hearing.

The panel further found that the respondent had grounds to believe that counsel for the fourth mortgagee had consented to the adjournment. First, the respondent had asked counsel's staff to advise him of the plan to adjourn and to call back if there was a problem.

Second, as there was insufficient security in the property, it was in the fourth mortgagee's interests that the property not be sold but rather that the mortgagor make payments as long as possible.

Third, counsel had, on all previous occasions, acceded to the mortgagor's requests for adjournments.

Fourth, counsel for the fourth mortgagee in fact later confirmed that in all likelihood he would have agreed to this adjournment if requested, although to a date other than December 22. Finally, the respondent gained no advantage from her actions but sought to save counsel from travelling to court for nothing on what was her application.

The panel found that the respondent lawyer's actions did not amount to professional misconduct, and ordered that the citation be dismissed and that costs be awarded to the respondent.

** Law Society Rule 4-38(1)(a) requires publication to the profession of summaries of citation dismissals, as well as citations resulting in disciplinary action. Rule 4-38(2)(c) provides that citation dismissals must be published anonymously unless the respondent lawyer consents in writing to being identified.*

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