

Lawyer Suspended For Releasing Escrow Funds

BY LAZAR EMANUEL

The Second Department recently suspended a lawyer in the Ninth Judicial District for conduct related to an escrow deposit under a real estate contract. *Matter of John A. Tartaglia*, NYLJ, July 5, 2005. Tartaglia was suspended for five years. The facts are required reading for every lawyer who has ever agreed to hold a client's funds in escrow.

Tartaglia represented the sellers of property in the Bronx. Under the terms of the contract, Tartaglia received a down payment of \$68,500, which he deposited to his IOLA account at JPMorgan Chase. The contract contained the usual provision that if the closing failed to occur for any reason and either party demanded the down payment, Tartaglia was required to give notice to the other party. If the other party failed to object within 10 business days, Tartaglia was authorized to release the down payment to the party making the demand. But if the other party did object within the ten days, Tartaglia was required to continue to hold the down payment until otherwise directed by the parties or until a final, nonappealable judgment, order or decree of court.

After an exchange of letters about the closing date, buyer's attorney wrote to Tartaglia warning him that release of the down payment would be an act of bad faith and would result in litigation. Tartaglia responded by a fax stating that the contract was cancelled and the down payment was forfeited to his clients. On the same day, Tartaglia issued a check on his IOLA account to one of the sellers in the amount of \$15,000.

These actions by Tartaglia resulted in three separate Charges by the Grievance Committee: I) that he had "misappropriated funds belonging to another person...by releasing a real estate down payment...directly to his client in contravention of the applicable...contract and/or the instructions of the other party...(DR 9102(a)); II) that he had engaged in conduct that adversely reflected on his fitness as a lawyer by releasing the down payment (DR 1102(a)(7)); and III) that he had misappropriated funds belonging to another which were in his possession incident to his practice of law (DR 9102(a)).

When the buyer brought an action against the sellers and Tartaglia to recover the down payment of \$68,600, instead of retaining the undisbursed balance in his escrow account, Tartaglia disbursed \$53,500 to another attorney who agreed to defend the sellers and Tartaglia in the buyer's law suit. Tartaglia wrote two checks to this attorney. The first, for \$20,000, was in payment of the attorney's retainer; the second, for \$33,500 was payable to the attorney as "Attorney and Escrow." These actions resulted in a fourth Charge by the Grievance Committee – again, that he had released escrow funds directly to his clients in contravention of the contract and the buyer's instructions. (DR 1102 (a) (7)).

Compounding his actions, Tartaglia then tried to interfere with an investigation of the Grievance Committee in response to a grievance complaint by the buyer by insisting that the buyer withdraw her complaint with prejudice before he would permit his clients to enter into a stipulation settling the

litigation. This resulted in a fifth Charge – engaging in conduct prejudicial to the administration of justice under DR 1102(a)(5)).

Finally, Tartaglia was charged with conduct adversely reflecting upon his fitness as an attorney by improperly interfering with the investigation of the Grievance Committee. (DR 1102 (a) (7)). The Special Referee sustained all six Charges and the Appellate Division concurred. The Court said, "...the respondent's claims regarding the propriety of his interpretation of the contract erroneously presume that the escrowee is empowered to unilaterally determine who is entitled to receive disputed funds."