

By Mangano, P.J.; Thompson, Bracken,
Sullivan and Rosenblatt, JJ.

NYLJ 9/16/94
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MATTER OF JENNY M. MAIOLO, an attorney and counselor at law. Grievance Committee for the Second and Eleventh Judicial Districts, pet (Maiolo, res)—Motion by the petitioner (1) to suspend the respondent, Jenny M. Maiolo, from the practice of law until further order of this court, pursuant to 22 NYCRR 691.4(1), upon a finding that she is guilty of professional misconduct immediately threatening the public interest, based upon her failure to cooperate with the legitimate investigation of the Grievance Committee into several complaints of professional misconduct against her and upon uncontroverted evidence of professional misconduct; and (2) to authorize petitioner to institute and prosecute a disciplinary proceeding against her. The respondent was admitted to the practice of law by this court on March 25, 1959.

Upon the papers filed in support of the motion and the papers submitted in opposition thereto, it is

ORDERED that the motion is granted to the extent that the respondent is immediately suspended based upon uncontroverted evidence of professional misconduct; and it is further,

ORDERED that the respondent, Jenny M. Maiolo, pursuant to 22 NYCRR 691.4(1), is immediately suspended from the practice of law in the State of New York, until the further order of this court; and it is further,

ORDERED that the respondent, Jenny M. Maiolo shall promptly comply with this court's rules governing the conduct of disbarred, suspended and resigned attorneys (22 NYCRR 691.10); and it is further,

ORDERED that, pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this court, the respondent, Jenny M. Maiolo, is commanded to desist and refrain (1) from practicing law in any form, either as principal or as agent, clerk or employee of another, (2) from appearing as an attorney or counselor-at-law before any court, Judge, Justice, Board, Commission or other public authority, (3) from giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) from holding herself out in any way as an attorney and counselor-at-law; and it is further,

ORDERED that the Grievance Committee for the Second and Eleventh Judicial Districts is hereby authorized to institute and prosecute a disciplinary proceeding in this court, as petitioner, against Jenny M. Maiolo, based on the charges of professional misconduct set forth in the affirmation in support of the motion to suspend; and it is further,

ORDERED that Robert H. Straus, Chief Counsel to the Grievance Committee for the Second and Eleventh Judicial Districts, 210 Joralemon Street, Room 1200, Brooklyn, New York 11201, is hereby appointed as attorney for the petitioner in the proceeding; and it is further,

ORDERED that the petitioner Grievance Committee shall serve upon the respondent, the Special Referee, and file, with this court, a petition within 10 days after receipt of this decision and order on motion; and it is further,

ORDERED that the respondent shall serve an answer to the petition upon the petitioner and the Special Referee and file same with this court within 10 days after her receipt of the petition; and it is further,

ORDERED that the issues raised by the petition and any answer thereto are referred to the Honorable Harwood, a retired Associate Justice of the Appellate Division, Second Judicial Department, c/o Jaspan, Ginsberg, Schlesinger, Silverman & Hoffman, 300 Garden City Plaza, Garden City, New York 11530, as Special Referee to hear and report, together with his findings on the issues; and it is further,

ORDERED that a hearing shall be conducted with respect to the basis of the suspension, within 30 days after service of this

decision and order on motion upon the respondent.

The complaints of professional misconduct pending against the respondent allege numerous instances of dishonored checks, and failure by the respondent to safeguard escrow funds.

When questioned under oath concerning her escrow account and the allegations of conversion, the respondent asserted her Fifth Amendment privilege against self-incrimination. The respondent's attorney stated on the record that his client would assert that privilege with regard to all questions concerning the escrow funds entrusted to her. The respondent also asserted her Fifth Amendment privilege when asked to produce the records of her escrow account.

The requested records are required to be maintained pursuant to DR 9-102. DR 9-102(h) (22 NYCRR 1200.46[h]) specifically states that all financial records required to be kept pursuant to the Rule, shall be produced in response to a notice issued in connection with a complaint before, or any investigation by, the appropriate Grievance Committee. The respondent and her counsel were advised of this rule but continued to assert the privilege.

When the respondent would not turn over her bank records, counsel served a subpoena duces tecum on Chase Manhattan Bank, and has received the respondent's escrow records from December 1992 through June 10, 1994. These bank statements reveal over 20 dishonored checks, as well as numerous instances in which the account was overdrawn.

With respect to one complaint, the bank records indicate a deposit of \$16,558.55 into the respondent's attorney trust account on June 9, 1993. \$16,345.14 of these funds represent fire insurance proceeds on behalf of the client. By June 15, the balance in that account had been depleted to \$14,816.43. By June 22, the balance was only \$14.43, well below the amount the respondent was required to be holding in escrow for her client.

As to a second complaint, the respondent acknowledges that between September 16, 1993, and at least November 9, 1993, she was required to hold in escrow approximately \$161,000 in proceeds from a real estate transaction. The balance in the respondent's escrow account on October 13, 1993, was \$13,476.76.

As to a third complaint, the respondent has acknowledged in her answer to that complaint that she is required to be holding a down payment of \$40,000 plus interest in escrow. The balance in the respondent's attorney trust account has repeatedly fallen below that amount.

In her affirmation in opposition, the respondent argues that the Grievance Committee is improperly attempting to have her disciplined for asserting her constitutional privilege against self-incrimination with respect to her escrow records.

With respect to the evidence of conversion in the bank records, the respondent explains that on November 24, 1993, the respondent's office was burglarized and her escrow checkbook was stolen. The respondent reported the burglary to the New York City Police Department. As a result, in December 1993 the respondent was forced to close her escrow account and open another. The respondent relies on this fact to explain the escrow difficulties.

The respondent's papers fail to explain where the moneys are which were entrusted to the respondent as fiduciary. It is clear from the bank records that all escrow monies in question were depleted shortly after their deposit. Further, there is no question that the account was overdrawn on numerous occasions. The respondent has refused to provide her escrow records and has failed to account for thousands of dollars of escrow funds. In a surreply, the respondent again argues that she is entitled to invoke the Fifth Amendment privilege with respect to her escrow records. She also argues that the financial records subpoenaed from the bank, without substantiating affidavits from the aggrieved parties, do not rise to the level necessary to grant the relief requested.

Nevertheless, the bank records reveal that on numerous occasions the respondent's escrow account fell far below the amount she was required to be holding for her clients. The respondent's explanation that the burglary of her escrow checkbook required her to close her account does not explain the depletion of funds from her escrow account.

We find prima facie evidence that the respondent is guilty of professional misconduct immediately threatening the public interest based upon the aforesaid uncontroverted evidence of professional misconduct. This evidence has led us to find that the respondent constitutes an immediate threat to the public interest if not suspended from the practice of law. Accordingly, respondent is suspended pursuant to 22 NYCRR 691.4(1)(1)(III), effective immediately and continuing until further order of this court. The petitioner is directed to conduct a hearing with 30 days after service of this decision and order on motion upon the respondent.

EX "B"