

VIRGINIA:

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IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

JAN 22 2010

VIRGINIA STATE BAR *EX REL.*
FOURTH DISTRICT SECTION II COMMITTEE,

Complainant,

v.

JOHN FRANCIS GONZALES, ESQUIRE

Respondent.

VSB CLERK OFFICE

Case No. CL09003666

[VSB Docket Nos:
07-042-070753 and
07-042-2158]

MEMORANDUM ORDER

This matter came before the Three-Judge Court empaneled on December 9, 2009, by designation of the Chief Justice of the Supreme Court of Virginia, pursuant to Section 54.1-3935 of the 1950 Code of Virginia, as amended. A written Agreed Disposition was thereafter presented on behalf of the Virginia State Bar by Assistant Bar Counsel Kathleen Maureen Uston and Senior Assistant Bar Counsel, Seth M. Guggenheim, and by David R. Rosenfeld, Esquire, counsel for Respondent John Francis Gonzales, via teleconference on January 8, 2010, to the Three-Judge Court, consisting of the Honorable John J. McGrath, Jr. and the Honorable Thomas A. Fortkort, retired Judges of the Twenty-sixth and Nineteenth Judicial Circuits, respectively, and the Honorable Leslie M. Alden, Judge of the Nineteenth Judicial Circuit and Chief Judge of the Three-Judge Court.

The Court Reporter for the teleconference proceedings was Terry S. Griffith, Certified Court Reporter, Chandler & Halasz, P.O. Box 9349, Richmond, VA 23227, whose telephone

number is 804-730-1222.

Having considered the Agreed Disposition, it is the decision of the Three-Judge Court that the Agreed Disposition be accepted, and said Court finds by clear and convincing evidence as follows:

1. At all times relevant hereto, John F. Gonzales, Esquire (hereinafter the Respondent) has been an attorney licensed to practice law in the Commonwealth of Virginia.

As to VSB Docket Number 07-042-070753 (Complainants Dillahunt)

2. On or around September 21, 2006, a Virginia limited liability company known as "ProDev XXII, LLC" borrowed the sum of \$275,000.00 from First Mount Vernon Industrial Loan Association (hereinafter "FMV"), and the closing on this loan was held on that date (hereinafter this will be referred to as the "Dillahunt Closing"). ProDev XXII was a manager-managed LLC with two (2) members, Norris G. Dillahunt, Sr., who was appointed Manager, and the Respondent, who was the sole Member. The Articles of Organization for ProDev XXII were executed at the Dillahunt Closing, together with an Operating Agreement and an Organization Agreement for ProDev XXII.¹

3. The Articles of Organization (hereinafter the "Articles") recited that the business purposes for which ProDev XXII "is formed are to purchase and development [*sic*] real property." The Articles were signed only by the Respondent as agent for the Dillahunts and/or ProDev XXII.

4. The Operating Agreement for ProDev XXII named Norris G. Dillahunt, Sr. as the Managing Member of the LLC, required capital contributions by each Member, *to wit* \$400.00 by

the Dillahunts and \$600.00 by the Respondent, and contained other provisions relevant to the administration of the LLC. The Operating Agreement also identified the principal place of business of the LLC as the law office of FMV's counsel Dale E. Duncan, located at 6019 Tower Court, Alexandria, Virginia.

5. The Operating Agreement defined the respective ownership interests of Mr. Dillahunt and the Respondent in the LLC, assigning Mr. Dillahunt 40% interest and the Respondent 60% majority ownership interest.

6. The Organization Agreement for ProDev XXII (hereinafter the "Organization Agreement") recites that it was executed due to Mr. Dillahunt's "desir[e] to develop investment property in North Carolina," and states that Mr. Dillahunt sought the participation of the Respondent "to facilitate such development." Attached to the Organization Agreement was a legal description of certain real property located in New Bern, North Carolina (hereinafter identified as "169 Jasper Drive"), which was owned prior to, and at the time the LLC documents were signed, by Norris G. Dillahunt, Jr., Mr. Dillahunt's son. This is the real property referenced in the Organization Agreement.

7. The Organization Agreement went on to recite that, "Member [the Respondent] has the experience and ability to locate/obtain the required financing and will guarantee such financing, if required, to provide the capital necessary to acquire and develop the Property." The Organization Agreement provided specifically that the Respondent had already obtained a "loan commitment from First Mount Vernon Industrial Loan Association ("FMV")," which it was understood by the parties would be a lien on 169 Jasper Drive.

¹ Unless otherwise noted herein, all subsequent references to these LLC documents will refer to those documents executed on September 21, 2006 at the Dillahunt Closing, incident to the creation of ProDev XXII, all of which were

8. The Organization Agreement provided further that, “ProDev XXII, LLC will obtain title to the Property to facilitate the required financing. This financing will be used to pay for the LLC’s acquisition cost of the Property as well as the development costs.” The Organization Agreement required that Mr. Dillahunt, as Manager of the LLC, “make principal and interest payments on said loan as required by the FMV loan documents.”

9. The Organization Agreement specified further that:

a. The “LLC will purchase the Property and obtain a loan to facilitate the purchase and development of the Property”

b. The “LLC will be 40% owned by Manager (Mr. Dillahunt, Sr.) and 60% owned by Member (the Respondent). Once all loans from FMV are paid in full, Member (the Respondent) agrees to sell to Manager his 60% interest for one percent of the total loan amounts from FMV. If the loan is ever in default, Manager forfeits this right.”

c. “In consideration of Member’s [the Respondent’s] willingness to transfer his interest in LLC to Manager, Manager agrees to personally guarantee the loan and to provide/obtain any money in addition to the loan needed to operate/maintain/develop Property and to make required interest payments on said loan and to repay the principal when due.”

d. “During the life of this Agreement, the Manager will be permitted to make use of the Property in any legal manner and shall be solely responsible for all costs associated therewith . . .”

e. “If the loan from FMV is ever in default or property is subjected to possible liens for failure to pay taxes or other such liabilities, Manager agrees that by a

simple majority vote of all members he will be removed as Manager and a new Manager will be elected by a simple majority vote of the members.”

10. The Organization Agreement was signed by the Respondent.

11. As noted above, all of these legal documents were prepared for the Dillahunts' signatures by Mr. Duncan who specifically required in his letter of instruction to the closing attorney that each of these documents be executed in order for FMV to make the \$275,000.00 loan.

12. Upon FMV's claim that the loan was in default, on or around May 17, 2007, Kathleen Neary, an employee of FMV, sent a letter to Mr. Dillahunt informing him that the FMV loan “is now accelerated and payment in full is required.” The Respondent then sent an undated letter to the Mr. Dillahunt, referencing Ms. Neary's letter and inquiring as to his “intent” regarding bringing the FMV loan current. At FMV's direction, Respondent further advised Mr. Dillahunt that he (the Respondent) was “calling for a meeting of the Members of ProDev XXII on June 14, 2007 at 1:00 p.m.” at which time the Respondent intended to vote Mr. Dillahunt out as Manager of the LLC and to take other actions in order to “protect [the Respondent's] interests.”

13. On or around May 24, 2007, Norris Dillahunt, Jr. and his wife, Josietta, filed their complaint against the Respondent with the Virginia State Bar and the matter was subsequently referred for investigation.

As to VSB Docket No. 07-042-2158 (Complainants Brissett)

14. On or around January 9, 2006, a Virginia limited liability company known as “ProDev XVI, LLC” borrowed the sum of \$230,000.00 from FMV, and the closing on this loan

was held on that date (hereinafter this will be referred to as the “Brissett Closing”). ProDev XVI was a manager-managed LLC with two (2) members, Courtney T. Brissett, who was appointed Manager, and the Respondent, who was the sole Member. The Articles of Organization for ProDev XVI were executed at the Brissett Closing, together with an Operating Agreement and an Organization Agreement for ProDev XVI.²

15. The Articles of Organization (hereinafter the “Articles”) recited that the business purposes for which ProDev XVI “is formed are to purchase and development (sic) real property.” The Articles further recited that the principal office of the company was 6019 Tower Court, Alexandria, Virginia, which is the law office of Mr. Duncan, and designated Mr. Duncan as the Resident Agent of the LLC. The Articles were signed only by the Respondent as agent for Ms. Brissett and/or ProDev XVI.

16. The Operating Agreement for ProDev XVI named Courtney T. Brissett as the Managing Member of the LLC, required capital contributions by each Member, *to wit* \$400.00 by Ms. Brissett and \$600.00 by Mr. Gonzales, and contained other provisions relevant to the administration of the LLC. The Operating Agreement also identified the principal place of business of the LLC as the law office of Dale Duncan, 6019 Tower Court, Alexandria, Virginia.

17. The Operating Agreement defined the respective ownership interests of Ms. Brissett and Mr. Gonzales in the LLC, assigning Ms. Brissett 40% interest and the Respondent 60% majority ownership interest.

² Unless otherwise noted herein, all subsequent references to these LLC documents will refer to those documents executed at the Brissett closing incident to the creation of ProDev XVI, all of which were prepared by Mr. Duncan. It is noted that some of these documents are dated January 9, 2005. It is averred that this is a typographical error and that the documents were actually executed on January 9, 2006, the date of the Brissett Closing.

18. The Organization Agreement for ProDev XVI (hereinafter the “Organization Agreement”) recites that it was executed, ostensibly, due to Ms. Brissett’s “desir[e] to develop investment property in North Carolina,” and states that Ms. Brissett allegedly sought the participation of the Respondent “to facilitate such development.” Attached to the Organization Agreement were legal descriptions of five (5) pieces of real property located in New Bern, North Carolina, which were to be renovated and which were owned prior to, and at the time the LLC documents were signed, by Brissett Rental Properties, LLC and/or Courtney and Ladwin Brissett (hereinafter identified as “Kinston Street, Neuse Avenue, and 2nd Street properties”). This is the real property referenced in the Organization Agreement.

19. The Organization Agreement went on to recite that, “Member [the Respondent] has the experience and ability to locate/obtain the required financing and will guarantee such financing, if required, to provide the capital necessary to acquire and develop the Property.” The Organization Agreement provided specifically that the Respondent had already obtained a “loan commitment from First Mount Vernon Industrial Loan Association (‘FMV’),” which it was understood by the parties would be a lien on the Kinston Street, Neuse Avenue, and 2nd Street properties.

20. The Organization Agreement provided further that, “ProDev XVI, LLC will obtain title to the Property to facilitate the required financing. This financing will be used to pay for the LLC’s acquisition cost of the Property as well as the development costs.” The Organization Agreement required that Ms. Brissett, as Manager of the LLC, “make principal and interest payments on said loan as required by the FMV loan documents.”

21. The Organization Agreement specified further that:

a. The "LLC will purchase the Property and obtain a loan to facilitate the purchase and development of the Property"

b. The "LLC will be 40% owned by Manager (Ms. Brissett.) and 60% owned by Member (the Respondent). Once all loans from FMV are paid in full, Member [the Respondent] agrees to sell to Manager his 60% interest for one percent of the total loan amounts from FMV. If the loan is ever in default, Manager forfeits this right."

c. "In consideration of Member's [the Respondent's] willingness to transfer his interest in LLC to Manager, Manager agrees to personally guarantee the loan and to provide/obtain any money in addition to the loan needed to operate/maintain/develop Property and to make required interest payments on said loan and to repay the principal when due."

d. "During the life of this Agreement, the Manager will be permitted to make use of the Property in any legal manner and shall be solely responsible for all costs associated therewith . . ."

e. "If the loan from FMV is ever in default or property is subjected to possible liens for failure to pay taxes or other such liabilities, Manager agrees that by a simple majority vote of all members she will be removed as Manager and a new Manager will be elected by a simple majority vote of the members."

22. The Organization Agreement was signed by Ms. Brissett and the Respondent.

23. As noted above, all of these legal documents were prepared for the Brissetts' signatures by Mr. Duncan who specifically required in his letter of instruction to the closing

attorney that each of these documents be executed in order for FMV to make the \$230,000.00 loan.

24. On or around January 4, 2007, at the instruction of Mr. Duncan and/or FMV and/or Mr. Bennett, the Respondent wrote to Ms. Brissett and inquired "as the status of our business, ProDev XVI, LLC." The Respondent went on to state, "I have been reminded by First Mount Vernon, I.L.A. that our loan is due on February 1, 2007 and will not be extended." The Respondent then informed Ms. Brissett that, "If I do not hear from you by January 24, 2007, confirming your intentions and if the loan is not paid in full on or before February 1, 2007, I must take steps to protect myself in accordance with our agreement."

25. The Respondent further informed Ms. Brissett that, as the majority owner of ProDev XVI, he was calling a meeting of the Members of ProDev XVI to be held on February 2, 2007. The Respondent further informed Ms. Brissett of his intention to remove her as Manager of ProDev XVI and,

"... vot[e] to sell all assets of ProDev XVI to raise the capital necessary to pay off First Mount Vernon, I.L.A. or to transfer title of our property to First Mount Vernon, I.L.A."

26. On January 29, 2007, Mr. Bennett sent an email to the Respondent forwarding a letter from Ms. Brissett, and instructing the Respondent as to how to reply to Ms. Brissett.

27. On January 30, 2007, the Respondent responded to this correspondence received from Ms. Brissett, and his letter was copied from Mr. Bennett's email. The Respondent informed Ms. Brissett that she had not yet been removed as managing member, but would be on February 2nd. The Respondent went on to state "You were fully aware of the LLC, since it was

explained to you by the broker and the closing attorney. Additionally, you signed at least three documents relating to it before and during settlement.”

28. On June 29, 2007, again at the instruction of Mr. Duncan and/or FMV and/or Mr. Bennett, the Respondent wrote to Ms. Brissett demanding that she send to him keys to “all of our properties,” stating that, if she failed to do so, “I will have new locks installed on all buildings by a locksmith.”

29. The Respondent went on to inform Ms. Brissett, “Third, in order to satisfy our loan to First Mount Vernon, Industrial Loan Association, I intend to list all of our properties for sale and to sell them as quickly as possible.”

30. The Respondent acknowledges that all of the letters bearing the Respondent’s signature referenced above were drafted for him by Mr. Duncan and/or some other individual at First Mount Vernon, and were sent to the Complainants at their instruction.

**As to VSB Docket Number 07-042-070753 AND
VSB Docket No. 07-042-2158**

31. The Respondent admitted to Virginia State Bar Investigator David W. Jackson that FMV’s President, Arthur Bennett, paid him a fee for this service. The Respondent further informed Investigator Jackson that in 2005, Respondent was asked by Mr. Bennett to fill a position on FMV’s Board of Directors and he agreed.

32. The Respondent informed Investigator Jackson that, with regard to all of these transactions, including the Dillahunt and Brissett cases, once he votes the “manager” out of the LLC, the property is then solely controlled by the LLC and the Respondent.

33. The Respondent, although ostensibly an independent member of Pro Dev XVI and Pro Dev XXII, was in fact a straw man whose sole responsibility was to protect FMV. Further, Respondent did not have the experience or ability to locate or obtain financing for the entity despite the fact that he signed a document averring that he did; Respondent would not guarantee such financing or obtain a loan commitment despite the fact that the documents stated differently; Respondent did not contribute any capital to the LLC, did not know the identity of the borrowers with whom he became business partners by formation of the LLC's, and, in fact, had no contact with them; nor did Respondent intend to participate in the LLC except as directed by FMV to protect its interest, despite the language of the documents. The Respondent also did not consider himself to have fiduciary duties to his co-members of the LLC.

34. The following mitigating factors apply in determining the proper sanction to be imposed in this case:

- a. absence of a prior disciplinary record;
- b. full and free disclosure to disciplinary authorities and cooperative attitude toward proceedings;
- c. character and reputation.

THE THREE-JUDGE COURT finds by clear and convincing evidence that such conduct on the part of the Respondent, John Francis Gonzales, Esquire, constitutes a violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

- (c) engage in conduct involving . . . misrepresentation which reflects adversely on the lawyer's fitness to practice law[.]

UPON CONSIDERATION WHEREOF, the Three-Judge Court hereby ORDERS that the Respondent shall receive, and the Court hereby imposes, a **SUSPENSION, WITH TERMS**. Respondent John Francis Gonzales's license to practice law in the Commonwealth of Virginia is hereby suspended for a period of six (6) months, effective February 1, 2010, subject to the imposition of the sanction referred to below as an alternative disposition of this matter should Respondent fail to comply with the Terms referred to herein. The Terms which shall be met in accordance with the deadline set forth below are:

The Respondent shall pay the sum of \$500.00 by check made payable to the order of Courtnay and Ladwin Brissett, and the sum of \$500.00 by check made payable to the order of Norris G. Dillahunt, Jr., and said checks shall be delivered to Assistant Bar Counsel Kathleen M. Uston, at the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, no later than February 1, 2010.

Should the Respondent fail to comply with the terms set forth in the immediately preceding paragraph, his license to practice law in the Commonwealth of Virginia shall be suspended for a period of one (1) year, as an alternative disposition, in lieu of the six (6) month suspension, with Terms, as herein provided.

Following the proceedings on the 8th day of January, 2010, the Chief Judge of the Three-Judge Court entered a Summary Order suspending the Respondent's license to practice law in the Commonwealth of Virginia, effective February 1, 2010, and directing him to comply with the notice requirements contained in Part Six, Section IV, Paragraph 13-29 of the Rules of the

Supreme Court of Virginia; accordingly, it is

ORDERED, that the terms and provisions of the Summary Order heretofore entered in this cause directing Respondent's compliance with Part Six, Section IV, Paragraph 13-29 of the Rules of the Supreme Court of Virginia, be, and the same hereby are, reaffirmed and incorporated in this Memorandum Order by reference; and it is further

ORDERED, that pursuant to Part Six, Section IV, Paragraph 13-9 E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs against the Respondent; and it is further

ORDERED that four (4) copies of this Order be certified by the Clerk of the Circuit Court of the City of Alexandria, Virginia, and be thereafter mailed by said Clerk to the Clerk of the Virginia State Bar Disciplinary System at 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, for further service upon the Respondent and Bar Counsel consistent with the rules and procedures governing the Virginia State Bar Disciplinary System.

Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the Court dispenses with any requirement that this Order be endorsed by counsel of record for the parties.

Entered this 13 day of January, 2010

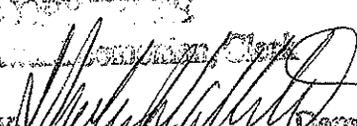
FOR THE THREE-JUDGE COURT:

By:



LESLIE M. ALDEN

Chief Judge of the Three-Judge Court

A COPY TO BE
BY:  Deputy Clerk