GEORGE SASSOWER
16 LAKE STREET
WHITE PLAINS, N.Y. 10603

914-949-2169

April 13, 1992

Hal R. Lieberman, Esq.
c/o Departmental Disciplinary Committee
41 Madison Avenue
New York, New York 10010

Re: Matter of Sam Polur, Esq.

Dear Mr. Lieberman,

Since my name was employed in the published decision of the Court in the above matter (173 A.D.2d 82, 579 N.Y.S.2d 3), I wish to examine all material disclosed during the hearings and proceedings related thereto.

I would appreciate your immediate attention to this matter.

Very truly yours,

GEORGE SASSOWER

[2, 3] As to the other issues before the court, it was not error to award interim use and occupancy (*see, Beacway Operating Corporation v. Concert Arts Society, Inc.*, 123 Misc.2d 452, 474 N.Y.S.2d 227), particularly in view of the directive that, pending receipt of the referee's report on reasonable use and occupancy, respondent nursing home pay use and occupancy in the last amount of rent due under the expired lease, plus an additional 20% to be held in escrow. The court also properly refused to appoint an interim receiver to operate the nursing home, there being no evidence that the patients need protection of that kind (*see, People v. Abbott Manor Nursing Home*, 70 A.D.2d 434, 421 N.Y.S.2d 451, *aff'd* 52 N.Y.2d 766, 436 N.Y.S.2d 614, 417 N.E.2d 1002).

[4–7] There were also no issues of fact requiring a trial, petitioner's right to repossession having been determined in the prior declaratory judgment action (*American Realty Co. v. 64 B Venture*, — A.D.2d —, 574 N.Y.S.2d 344), *lv. to appeal denied*, and the arguments raised herein thus being barred by the doctrine of res judicata (*Eidelberg v. Zellermayer*, 5 A.D.2d 658, 663, 174 N.Y.S.2d 300, *aff'd* 6 N.Y.2d 815, 188 N.Y.S.2d 204, 159 N.E.2d 691). The claim to a right of first refusal is similarly barred, since this issue could have been litigated in the declaratory judgment action (*O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158). Further, any oral offer of a right of first refusal is barred by the Statute of Frauds (*Kaplan v. Lippman*, 75 N.Y.2d 320, 325, 552 N.Y.S.2d 903, 552 N.E.2d 151). And, because of their active involvement in the prior action, respondents waived any right they might have had to arbitrate (*DeSapio v. Kohlmeyer*, 35 N.Y.2d 402, 362 N.Y.S.2d 843, 321 N.E.2d 770). The IAS court also previously determined that the Commissioner of Health was not a necessary party and pertinently noted that it had been properly notified of this holdover proceeding as required by 10 NYCRR § 600.2(d). Likewise, it was within the IAS's court's discretion to deny a stay pending appeal of the prior action if, in its view, which was borne out by our subsequent decision (*American Realty Co. v. 64 B Venture, supra*), respondents failed to show sufficient merit to that appeal (CPLR 5519[c]; *Application of Mott*, 123 N.Y.S.2d 603, 608). Finally, as termination of a primary lease terminates a sublease (*World of Food, Inc. v. New York World's Fair 1964–1965 Corporation*, 22 A.D.2d 278, 281, 254 N.Y.S.2d 658), the court properly dismissed the counterclaim for unjust enrichment by the nursing home against petitioner-landlord.

WEST KEY NUMBER SYSTEM

In the Matter of Sam POLUR, Esq. an attorney and counselor-at-law:

Departmental Disciplinary Committee for the First Judicial Department, Petitioner,

Sam Polur, Esq., Respondent.

Supreme Court, Appellate Division, First Department.

Jan. 14, 1992.

Departmental Disciplinary Committee instituted disciplinary proceedings. On Department's motion for order confirming Hearing Panel's report and imposing sanction, the Supreme Court, Appellate Division, held that repeated violations of disqualification order and permanent injunction order entered in receivership proceeding, counseling client to disobey court orders, and neglecting criminal matter involving a client warrant three-year suspension.

Suspension ordered.

Attorney and Client ⇐58

Repeated violations of disqualification order and permanent injunction order entered in receivership proceeding, counseling client to disobey court orders, and ne-

glecting criminal matter involving a client warrant three-year suspension. Code of Prof.Resp., DR 1–102(A)(5, 6), DR 6–101(A)(3), DR 7–101(A)(3), DR 7–102(A)(7), DR 7–106(A), McKinney's Judiciary Law App.

Andral N. Braton, of counsel (Hal R. Lieberman, attorney), for petitioner.

Sam Polur, pro se.

Before MURPHY, P.J., and ELLERIN, KUPFERMAN, ROSS and RUBIN, JJ.

Respondent is suspended from practice as an attorney and counselor-at-law in the State of New York for a period of three years, effective as of February 14, 1992, until the further order of this Court. Opinion Per Curiam. All concur.

PER CURIAM.

Petitioner, Departmental Disciplinary Committee (DDC), for the First Judicial Department, moves for an order, pursuant to section 603.4, subdivision (d) of the Rules Governing the Conduct of Attorneys in the Appellate Division, First Judicial Department (22 NYCRR): (1) confirming a report of a Hearing Panel (Panel), only insofar as the findings, and (2) imposing such sanction upon respondent Sam Polur (respondent), as this Court deems appropriate. In response, respondent, *pro se*, in substance, opposes the DDC motion to confirm, and seeks dismissal of the proceeding.

Respondent was admitted to practice by the Fourth Judicial Department, on December 10, 1963. During the period covered by the charges, respondent maintained an office for the practice of law within the First Judicial Department.

On or about April 25, 1989, the DDC served respondent with a Notice of, and a Statement of Charges, which contained seven separate charges, most of which alleged more than one violation of the Disciplinary Rules (DR) of the Code of Professional Responsibility of the New York State Bar Association, effective January 1, 1970, and as amended. After the commencement of the hearing before the Panel, on August 8, 1989, the DDC filed an eighth charge against respondent.

Mr. George Sassower, then an attorney in good standing, in approximately 1979, commenced his representation of Mr. Hyman Raffe, a 25% shareholder in Puccini Clothes, Ltd. (Puccini). Subsequently, Puccini was judicially dissolved on June 4, 1980, and placed into receivership. Due to inherent conflicts of interest, an order (Disqualification Order), Supreme Court, New York County (Thomas V. Sinclair, Jr., J.), was entered February 1, 1982, disqualifying Mr. Sassower, or any attorney affiliated or in any way associated with him, from representing Mr. Raffe in any action, wherein Mr. Sassower would represent an interest adverse to Puccini or to the other shareholders.

Notwithstanding the Disqualification Order, Mr. Sassower continued to engage in extensive litigation ostensibly on behalf of Mr. Raffe and adverse to Puccini, and, on or about December 14, 1984, Mr. Sassower retained respondent to serve as Mr. Sassower's affiliate and associate in Puccini proceedings, undertaken on behalf of Mr. Raffe.

Subsequently, on or about January 23, 1985, New York County Supreme Court Justice Ira Gammerman issued an order (Permanent Injunction Order), permanently enjoining Messrs. Sassower and/or Raffe, or any person acting in their behalf from, *inter alia*, filing any complaint or proceeding concerning Puccini, its shareholders, the conduct of the Receiver for Puccini or its legal representation by the law firm of Feltman, Kersh & Major. In 1987, the Appellate Division, Second Judicial Department disbarred Mr. Sassower (see, *Matter of Sassower*, 125 A.D.2d 52, 512 N.Y.S.2d 203 (1987), *app. dism.* 70 N.Y.2d 691, 518 N.Y.S.2d 964, 512 N.E.2d 547 (1987)).

Charges one through four relate to respondent's misconduct in connection with Raffe/Puccini Litigation. Specifically, charge one alleges repeated violations of the Disqualification Order, charge two alleges repeated violations of the Permanent Injunction Order, charge three deals with

an order, Supreme Court, New York County (Arthur F. Klein, J.), entered July 1, 1985, which held respondent in criminal contempt of court for violation of the Permanent Injunction Order, and sentenced him to thirty days in prison, of which he actually served twenty days, and charge four alleges post-incarceration violations by him of the Permanent Injunction Order.

Charge five alleges, in substance, that respondent, counselled a client to disobey Court orders entered, in the Supreme Court, New York County, relating to a rent receivership matter.

Charges six and seven allege that respondent improperly failed to appear before or to contact Justice Ray Shoemaker, Town of Walkill, Justice Court, Orange County, concerning a criminal matter involving a client, and, as a result he neglected that matter.

Charge eight alleges that respondent neglected another legal matter of a client, pending in the United States District Court for the Southern District of New York.

In his, *pro se*, answer, respondent, in substance, denied the charges, and claimed that he had been "unlawfully imprisoned" for contempt of court.

Following the joinder of issue, over a period of more than eleven months, extending from July 18, 1989 to June 19, 1990, the Panel held seven sessions concerning the matter. During those sessions, respondent represented himself.

After hearing the evidence presented by both Staff Counsel for petitioner, and the respondent, including respondent's own testimony, the Panel found respondent guilty of six of the eight charges, dismissing charges four and eight, and recommends that respondent be suspended from practice for three years. Specifically, the Panel found respondent guilty of nineteen violations of the Disciplinary Rules, as follows: five violations of DR 1–102, subdivision (A), paragraph (5), in that he engaged in conduct that is prejudicial to the administration of justice, five violations of DR 1–102, subdivision (A), paragraph (6), in that he engaged in conduct that adversely reflects on his fitness to practice law, one violation of DR 6–101, subdivision (A), paragraph (3), in that he neglected a legal matter entrusted to him, two violations of DR 7–101, subdivision (A), paragraph (3), in that he intentionally engaged in conduct, which prejudiced or damaged his client during their professional relationship, one violation of DR 7–102, subdivision (A), paragraph (7), in that he counselled his client in conduct that he knew to be illegal or fraudulent, four violations of DR 7–106, subdivision (A), in that he advised his client to disobey a ruling of a tribunal, and one violation of DR 7–106, subdivision (C), paragraph (6), in that he engaged in undignified or discourteous conduct, which is degrading to a tribunal.

The Panel has submitted a fourteen page Report and Recommendation (Report), dated April 15, 1991, to this Court (see, for a copy of that Report, exhibit C to the Petitioner's moving papers). In the Report, the Panel states, at page 11, in pertinent part, that:

"The Charges sustained separately constitute serious violations of respondent's obligations as an attorney to his clients and to the court, and respondent was found to have repeatedly and vexatiously engaged in such professional misconduct ...".

Further, the Panel notes, at page 12 of the Report:

... respondent was found to be completely unrepentant and seemingly unaware, or at least unwilling to admit, that he had in any sense violated his oath as an attorney ...".

Our review of the more than six hundred page hearing transcript, and of the exhibits admitted into evidence, persuades us that overwhelming evidence supports the findings of the Panel as to the six charges and the nineteen Disciplinary Rule violations that were sustained. Further, in view of respondent's pattern of committing very serious acts of professional misconduct, over a three year period, we find appropriate the Panel's recommendation that respondent be suspended for a period of three years.

Accordingly, the motion of the petitioner to confirm the Panel's report, only insofar as to the findings of fact, is granted, and, it is ordered, that the respondent be, and hereby is, suspended from the practice of law for a period of three years, and until further order of this Court.

Respondent is suspended from practice as an attorney and counselor-at-law in the State of New York for a period of three years, effective as of February 14, 1992, until the further order of this Court.

All concur.

The PEOPLE of the State of New York, Respondent,

v.

Robert EMPHRAM, Defendant-Appellant.

Supreme Court, Appellate Division, First Department.

Jan. 14, 1992.

Defendant was convicted in the Supreme Court, New York County, Scott, J., of criminal sale of a controlled substance in the third degree, and he appealed. The Supreme Court, Appellate Division, held that: (1) defendant's claims that prosecutor denigrated his mistaken identification theory and integrity of defense counsel by vouching for credibility of his witnesses and appealing to jurors' emotions were not preserved for appellate review, but (2) sentence of from 12 and one half to 25 years' imprisonment was unduly harsh and severe.

Affirmed as modified.

1. Criminal Law ⇐1037.1(2)

Defendant's claims that prosecutor denigrated his mistaken identification theory and integrity of defense counsel by vouching for credibility of his witnesses and appealing to jurors' emotions were not preserved for appellate review, where defendant failed to object to prosecutor's comments.

2. Criminal Law ⇐726

Prosecutor's comments during closing argument, characterizing defendant's mistaken identity defense is a "smoke screen" and claiming that undercover police officer was best witness as to what happened during drug transaction, were reasonable responses to defense counsel's claim that defendant was ensnared and that arrest was product of police carelessness or disinterest.

3. Criminal Law ⇐787(2)

Trial court's "no inference" charge was not error in narcotics prosecution, although better practice would have been to limit charge to bare language of statute requiring such charge to be given upon defendant's request when defendant does not testify. McKinney's CPL § 300.10, subd. 2.

4. Criminal Law ⇐1119(1)

Defendant's claim that he was deprived of effective assistance of counsel could not be determined on direct appeal, where it was based on matters outside the record. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐1184(4)
Drugs and Narcotics ⇐133

Sentence of from 12 and one half to 25 years' imprisonment imposed upon defendant convicted of criminal sale of a controlled substance in the third degree was unduly harsh and severe, warranting modification on appeal to term of from 5 to 10 years, taking into account defendant's prior record and fact that he appeared to have been small-scale seller. McKinney's CPL § 470.15, subd. 6(b).

Before MURPHY, P.J., and MILONAS, ELLERIN, KASSAL and SMITH, JJ.