Docket
Foreman
Roman

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

In the Matter of:	)	
	)	HUDALJ 11-F-024-CMP-6
MATTHEW KOLAKOWSKI	)	
	)	
	)	July 12, 2011
Respondent.	)	

Counsel: Terri L. Roman
Department of Housing and Urban Development

Before: Alexander Fernandez
Administrative Law Judge
Department of Housing and Urban Development

DEFAULT JUDGMENT AND ORDER

This case arises from a Complaint filed by the United States Department of Housing and Urban Development ("HUD," or the "Department") against Respondent Mathew Kolakowski, wherein HUD seeks civil money penalties pursuant to 24 C.F.R. Part 30.

On July 19, 2010, HUD issued a written notice ("Notice") dated July 16, 2010, as required by 24 C.F.R. § 30.70, that it intended to seek civil money penalties against Respondent for his false certification on page three to the Addendum to Uniform Residential Loan Application (HUD Form 92900A) in three cases. The Notice offered Respondent an opportunity to reply in writing before HUD took further action. The Notice stated, pursuant to 24 C.F.R. § 30.70(d), that Respondent's reply was due within 30 days of Respondent's receipt of the Notice.

HUD determined that Respondent may not have received the Notice, and issued a second copy of the Notice on September 4, 2010, which was delivered to Respondent's residence on September 28, 2010. Respondent did not reply to the Notice.

On April 4, 2011, HUD filed a Complaint for Civil Money Penalties. Respondent was personally served with the Department's Complaint on April 8, 2011. Therefore, Respondent had until at least April 25, 2011, to submit a written response to HUD's Complaint. Respondent failed to do so. Thereafter, on June 1, 2011, in response to this Court's *Order to Show Cause*, HUD filed its instant Motion for Default Judgment.

Program Background

HUD has the authority to insure single-family mortgages pursuant to the National Housing Act. 12 U.S.C. § 1707 *et. seq.* Under the Direct Endorsement Program ("DE"), HUD allows the mortgagee to determine that the proposed mortgage is eligible for insurance under the applicable program requirements. The Department does not review the application for mortgage insurance before the application is executed. 24 C.F.R. § 203.5. In accordance with HUD regulations, the Secretary publishes guidelines for Direct Endorsement underwriting procedures in handbook form. Id.

HUD regulations provide that the underwriter must render an underwriting decision in accordance with applicable regulations, policies and procedures. See 24 C.F.R. § 203.5(d). The DE Underwriter's general responsibilities include:

> 1) Compliance with HUD instructions, the coordination of all phases of underwriting, and the quality of decisions made under the program[;] 2) [t]he review of appraisal reports, compliance inspections, and credit analyses performed by fee and staff personnel to ensure reasonable conclusions, sound reports, and compliance with HUD requirements[;] 3) [t]he decisions relating to the acceptability of the appraisal, the inspections, the buyer's capacity to repay the mortgage, and the overall acceptability of the mortgage loan for HUD insurance[;] 4) [t]he monitoring and evaluation of the performance of fee and staff personnel used for the Direct Endorsement program[; and] 5) [a]wareness of the warning signs that may indicate irregularities, an ability to detect fraud, and responsibility for performing underwriting decisions with due diligence in a prudent manner.

HUD Handbook 4000.4 REV-1, CHG-2, ¶ 2-4(C). The DE Underwriter is required to certify that he reviewed the application and supporting documentation and found the mortgage eligible for insurance. See 24 C.F.R. § 203.255(b)(5).

HUD requires the DE Underwriter to evaluate the borrower's credit history and explain negative credit information to ensure compliance with HUD/FHA credit requirements. See HUD Handbook 4155.1 REV-5, ¶ 2-3. HUD provides guidance for evaluating credit by stating:

> The basic hierarchy of credit evaluation is the manner of payments made on previous housing expenses, including utilities, followed by the payment history of installment debts, then revolving accounts. Generally, an individual with no late housing or installment debt payments should be considered as having an

> acceptable housing credit history, unless there is a major derogatory credit on his or her revolving accounts.

Id. When delinquent accounts are revealed, the underwriter must determine whether the late payments were due to a disregard for, or an inability to manage financial obligations, or to factors beyond the control of the borrower including delayed mail or disputes with creditors. Id. Major indications of derogatory credit, including judgments and collections, and any other recent credit problems, require sufficient written explanation from the borrower. Id. The borrower's explanation must make sense and be consistent with other credit information in the file. Id.

A borrower with an unpaid judgment is not eligible for an FHA-insured mortgage. Id. at ¶ 2-3(C). A borrower who has experienced a bankruptcy may qualify for an FHA-insured mortgage, but must either re-establish good credit or choose not to incur new credit obligations. Id. at ¶ 2-3(E).

Legal Framework

The applicable statutory authority for penalty imposition is found at 12 U.S.C. §1735f-14(b). It states, in pertinent part:

> (2) The Secretary may impose a civil money penalty under subsection (a) of this section for any knowing and material violation by a principal, officer, or employee of a mortgagee or lender, or other participants in either an insured mortgage or subchapter I loan transaction under this chapter or provision of assistance to the borrower in connection with any such loan, including sellers of the real estate involved, borrowers, closing agents, title companies, real estate agents, mortgage brokers, appraisers, loan correspondents, and dealers for--
>
> (A) submission to the Secretary of information that was false, in connection with any mortgage insured under this chapter, or any loan that is covered by a contract of insurance under subchapter I of this chapter;
>
> (B) falsely certifying to the Secretary or submitting to the Secretary a false certification by another person or entity. . . .

"Knowingly" was defined as "having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section." 12 U.S.C. § 1735f-14(g).[1] "Material" is defined as "[h]aving the natural tendency or potential to influence, or when

[1] The definition of "knowingly" was amended in 2009 to "a person acts knowingly when a person has actual knowledge of acts or should have known of the acts." It is unclear from the Complaint when the transactions at issue actually took place.

considering the totality of the circumstances, in some significant respect or to some significant degree." 24 C.F.R. § 30.10.[2] The Secretary may impose a civil money penalty in the amount of $5,500 for each violation of § 1735f-14. See 12 U.S.C. § 1735-14(a)(2); 24 C.F.R. § 30.36

In evaluating HUD's Motion, the Court looks to 24 C.F.R. § 26.41. It states, in *toto*:

> (a) General. The respondent may be found in default, upon motion, for failure to file a timely response to the Government's complaint. The motion shall include a copy of the complaint and a proposed default order, and shall be served upon all parties. The respondent shall have 10 days from such service to respond to the motion.
>
> (b) Default order. The ALJ shall issue a decision on the motion within 15 days after the expiration of the time for filing a response to the default motion. If a default order is issued, it shall constitute the final agency action.
>
> (c) Effect of default. A default shall constitute an admission of all facts alleged in the Government's complaint and a waiver of respondent's right to a hearing on such allegations. The penalty proposed in the complaint shall be set forth in the default order and shall be immediately due and payable by respondent without further proceedings.

Findings of Fact

1) The factual findings stated above are incorporated herein by reference.[3]

2) At all relevant times, Respondent was a DE Underwriter employed by USA Home Loans, Inc., an FHA-approved mortgagee at the time of the origination of the loans discussed herein.

3) Respondent acted as the DE Underwriter in the following loans:

FHA Case Number	Mortgagor
241-7715776	Buffalo/Dudley
241-7730363	Diaz/Frontera
241-7727971	Ellis

4) Respondent signed the DE Underwriter Certification contained on page three of HUD Form 92900-A in the loans referenced in paragraph 3, certifying that "I have personally reviewed the appraisal report (if applicable), credit application, and all associated

[2] Under 12 U.S.C. § 1735f-14(a)(1), HUD can impose a civil money penalty on a person participating in an insured mortgage transaction, as well as employees of FHA-approved mortgagees.
[3] All facts alleged in the Complaint are deemed true by operation of 24 C.F.R. § 26.41(c).

documents and have used due diligence in underwriting this mortgage. I find that this mortgage is eligible for HUD mortgage insurance under the Direct Endorsement program . . . ."

5) The loans referenced in paragraph 3 were submitted to HUD for FHA insurance.

6) In the Buffalo/Dudley loan, Respondent failed to obtain an explanation from the borrower for derogatory credit, including delinquent payments for an installment loan and two credit card accounts.

7) In the Buffalo/Dudley loan, Respondent failed to obtain a sufficient explanation from the co-borrower for five collections.

8) In the Diaz/Frontera loan, Respondent approved the borrowers' credit despite the fact that they had four unsatisfied judgments totaling $8,833.00

9) In the Diaz/Frontera loan, Respondent approved the borrower's credit despite the fact that their care had been repossessed.

10) In the Diaz/Frontera loan, Respondent approved the borrower's credit despite the fact that they had multiple collections that were opened or with activity within the 24 month period preceding loan approval.

11) In the Ellis loan, the borrower obtained a discharge of Chapter 7 bankruptcy in November 2002.

12) In the Ellis loan, the borrower was delinquent in making mortgage payments four times in the year preceding the closing on May 19, 2005.

13) In the Ellis loan, the borrower made multiple late payments on accounts opened subsequent to his bankruptcy.

14) In the Ellis loan, the borrower had several unsatisfied state tax liens.

15) In the Ellis loan, the borrower owed a past-due child support balance of $5,637.00.

Analysis

As Respondent has filed no response to the Secretary's Complaint, he is found in default under 24 C.F.R. § 26.41(a). Such default constitutes "an admission of all facts alleged in the Government's complaint and a waiver of respondent's right to a hearing on such allegations." 24 C.F.R. § 26.41(c). The facts establish that Respondent was an employee of a mortgagee or lender who made material and knowing violations of 12 U.S.C. §1735f-14(b)(2)(A) and (B).

Under the Direct Endorsement program, the underwriter is responsible for reviewing applications and determining eligibility for mortgage insurance. 24 C.F.R. § 203.5(a); HUD

Handbook 4000.4, REV-1, CHG-2, ¶ 3-16. The ultimate approval of the loan hinges on the underwriter's certification that due diligence has been performed and that the loan is based on sound underwriting principles. The certification does not just have the "natural tendency or potential" to influence an outcome, it is in fact the determining factor in the outcome. A false certification, therefore, puts HUD at significant risk of losses because it obligates HUD to insure the loans of dubiously qualified applicants. It is inevitable that the submission of such a certification will constitute a material violation under 12 U.S.C. § 1735f-14(b)(2).

Respondent's job description includes evaluating applicants' credit histories and investigating any negative information contained therein. 24 C.F.R. § 203.5(a). This analysis is a vital component of the overall appraisal. As an FHA-approved underwriter, Respondent agreed to follow all applicable HUD requirements. Moreover, Respondent admitted, in signing the DE Underwriter Certification contained on page three of HUD Form 92900-A in the loans referenced in paragraph 3, that he "personally reviewed the appraisal report (if applicable), credit application, and all associated documents and . . . used due diligence in underwriting [the] mortgages. He therefore knew or should have known that an evaluation of the credit histories in these cases was required before signing the certification. A proper analysis would have shown that these applicants were not qualified to receive an FHA-insured loan. Whether Respondent had actual knowledge of his obligation to conduct due diligence is immaterial; the knowledge is imputed to him as a function of his employment under either the pre or post 2009 definition of "knowingly." Whether or not this occurs through his own reckless disregard or because he should have known of the facts is irrelevant to the outcome at bar. 12 U.S.C. § 1735f-14(g)

Order

Respondent is liable for civil money penalties in the amount of $5,500 for the false certification made on page three of the Addendum to Uniform Residential Loan Application (HUD Form 92900A) in each of three loans identified in paragraph 3, supra, for a total judgment of $16,500.

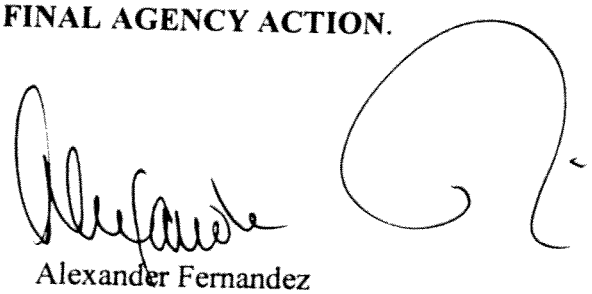
Accordingly, it is hereby **ORDERED:**

1) The Department's Motion for Default Judgment is **GRANTED**.

2) Respondent is found to have admitted the facts enumerated in the Complaint and discussed above.

3) Respondent shall pay to HUD civil money penalties of $16,500, with such amount due and payable immediately without further proceeding.

4) This Order constitutes **FINAL AGENCY ACTION**.



Alexander Fernandez
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing issued by Alexander Fernández, Administrative Law Judge, HUDALJ No. 11-F-024-CMP/6 were sent to the following parties on this 12th day of July, 2011, in the manner indicated:

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