

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

RT FUNDING GROUP, INC.,

Respondent.

HUDALJ 10-M-079-MR/44

August 12, 2010

**DECISION AND ORDER GRANTING GOVERNMENT'S
MOTION TO DISMISS**

BACKGROUND. This case arises from administrative action taken by the Mortgagee Review Board of the United States Department of Housing and Urban Development (“the Government”), withdrawing Respondent’s approval to initiate HUD/FHA insured mortgages for a period of one year because of the Respondent’s alleged failure to file acceptable audited financial statements (“AFS”) within 90 days of the end of its 2008 fiscal year, in compliance with HUD Handbook 4060.1 Rev-2 ¶¶ 4-4, as required by 24 C.F.R. § 25.6(j).

PROCEDURAL HISTORY. The following events are uncontested in the administrative record. The Government provided Respondent with a Notice of Administrative Action, dated March 24, 2010. Respondents received the Notice of Administrative Action on March 29, 2010, and immediately requested a hearing to contest the administrative action.

On March 31, 2010, this Court issued a Notice of Hearing and Order, which set a hearing date of April 27, 2010. The Notice of Hearing and Order required both parties to: (1) exchange witness lists on or before April 12, 2010; and (2) exchange documents to be offered as exhibits on or before April 21, 2010. The Notice of Hearing and Order also required each party to submit to the docket clerk: (1) pre-hearing statements on or before April 19, 2010; (2) binders containing each party’s exhibits on or before April 21, 2010; and (3) any dispositive motions and motions in limine on or before April 12, 2010 and April 21, 2010, respectively.

On April 12, 2010, Government Counsel sent its witness list to Respondent and filed a copy with this Court. Respondent did not send its witness list to Government Counsel.

On April 15, 2010, the parties filed a Joint Motion to Stay Proceedings. The motion requested a stay of the proceedings for 60 days to allow the parties to reach a settlement agreement. On April 16, this Court granted the Motion to Stay and ordered the parties to notify the Court of the status of the proposed settlement and, if necessary, propose a hearing date and schedule of pre-hearing deadlines on or before June 21, 2010.¹

On June 2, 2010, Government Counsel filed its Status Report stating: (1) that a settlement had not been reached; (2) that Government Counsel has been unable to contact Respondent; and (3) that Government proposed a hearing date of July 30, 2010. Respondent did not file a status report, nor did it propose a hearing date.

On June 4, 2010, this Court issued an order that established the hearing schedule as proposed by Government Counsel. In compliance with the hearing schedule, Government Counsel filed a witness list, prehearing statement, and exhibits binder. Government Counsel also filed a motion in limine to preclude Respondent from introducing any witness testimony into evidence. Respondent did not file any of the required pre-hearing documents with the Court, and Respondent did not file a response to the Motion in Limine.

On July 22, 2010, Government Counsel filed a motion to dismiss with this Court. In the Motion to Dismiss, Government Counsel requested that this Court dismiss Respondent's appeal with prejudice, or in the alternative, order Respondent to show cause as to why it has not filed a pre-hearing statement or provided the HUD with a list of witnesses or exhibits to be introduced at the hearing, and why a decision dismissing its appeal should not be granted.

On July 28, 2010, in response to the Motion to Dismiss, this Court issued a Show Cause Order requiring Respondent to show cause—on or before August 6, 2010—as to why the motion to dismiss should not be granted. Respondent has not responded to the Government's Motion to Dismiss or to the Court's Show Cause Order.² Accordingly, a ruling on the Motion to Dismiss is ripe.

¹ Counsel for the Government avers that the Respondent was notified that settlement could not occur until Respondent filed an audit acceptable to HUD. Government Counsel then explained the deficiencies in Respondent's previous audit that needed curing. Respondent never responded to HUD. On 14 separate occasions, Government Counsel attempted to contact Respondent by voicemail and/or e-mail but, again, Respondent did not respond.

² In the Show Cause Order, the Court also cancelled the hearing scheduled for July 30, 2010 because the matter would not be ready for hearing due to Respondent's failure to comply with the Court's pre-hearing scheduling order.

APPLICABLE RULES OF PROCEDURE. Title 24, Code of Federal Regulations, § 26.34—implementing the Administrative Procedure Act for matters brought before Administrative Law Judges (ALJs)—provides for the imposition of sanctions:

(a) The ALJ may sanction a person, including any party or representative, for failing to comply with an order, rule, or procedure governing the proceeding; failing to prosecute or defend an action; or engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any sanction, including, but not limited to, those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order compelling discovery, the ALJ may impose an appropriate sanction for such noncompliance, including, but not limited to, the following:

(1) Drawing an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deeming any matter about which an admission is requested to be admitted;

(3) Prohibiting the party failing to comply with the order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; or

(4) Striking any part of the pleadings or other submissions of the party failing to comply with the order.

(d) If a party fails to prosecute or defend an action brought under subpart B of this part, the ALJ may dismiss the action or may issue a decision against the non-prosecuting or defending party. Such decision of the ALJ shall constitute final agency action and shall not be appealable to the Secretary under § 26.52 of this part.

(e) The ALJ may refuse to consider any motion, request, response, brief, or other document that is not filed in a timely fashion.

DISCUSSION. The ALJ may dismiss an action, or issue a decision against the interests of a party, for failure to comply with an order, or failure to defend or to prosecute. In this case, Respondent asked for a hearing to contest the adverse administrative action taken by the Government, and Respondent participated in preliminary settlement discussions with the Government. However, when those discussions broke down, Respondent failed to comply with the scheduling order established by the Court as necessary for the conduct of a hearing, and failed to respond to the Government’s motion to dismiss or the Court’s Order to Show Cause.

FINDINGS OF FACT. Respondent made a timely request for a hearing to contest the appropriateness of the administrative action taken by the Government.

This Court promptly set a hearing date and established filing deadlines for the orderly conduct of a hearing.

Despite ample opportunity for the hearing it requested Respondent has repeatedly failed to comply with deadlines and Court orders essential to the conduct of a meaningful hearing.

Respondent has failed to present a defense against the administrative action taken by the Government and failed to prosecute its appeal of that action. Accordingly, dismissal of this matter is warranted. 24 C.F.R. § 26.34(d).

DECISION. Consistent with the foregoing the Court has determined that Respondent has forfeited its right to a hearing, and therefore:

1. the appeal inherent in Respondent's request for a hearing is **DISMISSED**; and
2. the Mortgagee Review Board's administrative action of March 24, 2010, shall become final as if a hearing was not requested. 24 C.F.R. § 25.10(a).

So **ORDERED**,

[signed]

J. Jeremiah Mahoney
Administrative Law Judge

Finality of Decision. This Decision and Order constitutes the **final agency action** and is not appealable to the Secretary. 24 C.F.R. § 26.34(d).