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

U. S. DEPT. OF HOUSING AND
URBAN DEVELOPMENT,

Complainant,

vs.

PROFESSIONAL AMERICAN
MORTGAGE INSTITUTE, INC.,

Respondent.

HUDALJ No. 06-033-PF
OGC Case No. 06-335 1 -PF

ORDER
GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

The U. S. Department of Housing and Urban Development ("the Government" or "HUD") filed a Complaint against Respondent, Professional American Mortgage Institute ("PAMf"), which alleged that PAMI, through its employee Mark Cohen ("Cohen"), submitted or caused to be submitted, a false claim to HUD in connection with an FHA-insured property located in North Miami, Florida in FHA case #092-7183335 in violation ofthe Program Fraud Civil Remedies Act of 1986 ("PFCRA"), 31 U. S. C. §§ 3801-3812, as implemented by 24 C.F.R. Part 28. HUD paid the claim for $202,066.78 in May 2001. HUD seeks a civil money penalty from Respondent of $5,500 plus an assessment of twice the amount of the claim that HUD paid, less an amount recovered on the sale of the property and restitution previously paid in connection with the property, for a total award of $1 17,304.28. Cohen was convicted in the United States District Court for the Distri of Miami for conspiring with others to commit the fraudulent acts alleged in this case. HUD contends that PAMI is liable for the criminal acts of Cohen, a loan officer working tor PAMI, because Cohen's criminal acts were committed within the scope of his employment as a loan officer for PAMI.

The Government moves this Court for an Order of Partial Summary Judgment. It contends that there are no genuine issue of material fact concerning PAMI's liability and

that the only remaining issue to be determined is the amount of penalty and assessment that should be awarded to the Government. Respondent opposes the Motion, asserting that there are issues of material fact, the primary one being whether the actions of Cohen were within the scope of his employment with PAMI which would render PAMI liable for the actions of Cohen. PAMI counters that it is entitled to summary judgment because the Complaint was filed after the statute of limitations had run. Accordingly, it prayed that the Government's motion for partial summaryiudgment be denied and, in the alternative, that summary judgment be entered in favor of PAMI.

After careful consideration of the motions and the arguments of both parties, I conclude that the Government's motion for partial summary judgment must be denied. PAMI's motion for dismissal based on the running of the statute of limitations must also be denied. However, PAMI's motion for summary judgment on the basis that PAMI is not liable to HUD in this case because the employee, Cohen, acted outside the scope of his employment with PAMI has merit. Accordingly, PAMI's motion to dismiss on that basis will be Granted.

FACTUALBACKGROUND

Mark Cohen and the conspiracy:

Cohen was employed by PAMI as a loan officer. He was loan officer for FHA-approved loan #092-7183335. G's Ex. 3. FHA Loan #092-7183335 was originated on September 11, 1997, and endorsed by HUD on November 21, 1997. The borrower, Anibal Georges, later defaulted on the loan and on May 5, 2000 a claim was submitted to HUD for the amount of $101,033.39. G's Ex. 1. HUD paid the claim on FHA loan #092-7183335. G's Ex. 1.

By Superceding Indictment ("SI"), Cohen and two co-conspirators, Bruce Hollander and Jean Lindon, were charged in the U. S. District Court for the Southern District of Florida with 13 counts of crin-final code violations relevant to this case, including conspiracy, five counts of wire fraud, six counts of false statements to HUD, and money laundering. On September 20, 2001, Cohen pled guilty in the same court to a count in the indictment alleging that he participated in a conspiracy to defraud HUD that involved the submission of a false Uniform Residential Loan Application ("URLA") and a false gift letter in support of the borrower's application for FHA-insured loan #092-7183335. G's Exs. 4,5,6. He signed a written plea agreement which charged that he conspired to commit mail fraud, wire fraud, and the making of false statements to HUD as alleged in the indictment, in violation of Title 18, U. S. Code § 371. See G's Ex. 5. He was sentenced on December 11, 2001.

The indictment, and Cohen's subsequent admission, shows that he was a mortgage loan officer who did business with at least seven mortgage lenders, including PAMI. Sl §8. While acting as a mortgage loan officer, Cohen conspired with several other persons, including Eric Silverman, Bruce Hollander and Jean Linclor, to defraud the lenders involved and HUD and to unlawfully enrich themselves by obtaining money from the lenders with whorn Cohen worked. The scheme was to obtain mortgage funding from lenders and to obtain mortgage insurance frorn HUD by submitting and causing to be submitted false documentation in support of mortgage applications, inducing the lenders to fund, and HUD to insure, mortgages exceeding $1 1, I 00,000 to at least 120 borrowers. One of the borrowers - Anibal Georges - was sponsored by PAMI in FHA-loan #092-7183335.

The indictment alleged, and by his plea Cohen admitted, that it was part of the conspiracy that Eric Silverman incorporated a business - American Redevelopment Corporation ("ARC") - to act as a real estate investment company to purchase single family homes that would immediately be resold, or "flipped," at inflated prices. The homes would be sold to borrowers who were assisted in qualifying for mortgage loans by the conspirators - Cohen, Silverman, Hollander and Linclor - throu,:,h the use of "false and fictitious means." As part of the conspiracy, ARC utilized the services of Linclor and others to recruit borrowers. ARC placed ads in local publications seeking borrowers. The conspirators promised the borrowers that they could purchase a house for a $1,000 clown payment and monthly mortgage payments comparable to their monthly rental payments. Cohen, Linclor, and others interviewed the borrowers as to their financial status in order to determine the price range of the houses that they would be offered. Cohen reviewed the borrower's financial information to determine what false and fictitious documentation was necessary for the potential borrower to qualify for a FHA-insured mortgage loan. It was further part of the conspiracy that a member of the conspiracy, acting as the real estate a-ent for ARC, would show borrowers homes based on a price range provided to him by Cohen. When the borrower selected a home, the co-conspirator ne-;-otiated a pUrchase/sale contract with the homeowner on behalf of ARC. At the direction of Cohen, the price was inflated by approximately $14,000 (average). The borrower signed a purchase/sales contract for the home reflecting ARC as the seller.

Cohen, Hollander, Linclor, Silverman and others created,and caused to be created, false and fraudulent documents which Cohen placed in the borrowers' loan files so that they would appear to qualify for an FHA-insurecl mortgage loan. These documents included verification of employment forms, letters of alternative credit, letters clocumentim, -ifts from borrowers' relatives, IRS Forms W-2, Uniform Residential Loan Application ("URLA") forms, and pay stubs.

Scope of Employment:

The Government relies on "well -established common law agency doctrine" that indicates that principals are liable for the acts of their agents who act within the scope of their agency. It states that the fact that the acts were fraudulent and crim~inal does not break the agency. It refers to "settled precepts of Florida" law that "a principal is liable to third parties for the fraudulent acts of its agents if *those acts were committed within the scope of the agents' employment and authority,* **"'(Emphasis added.) It also cites to the Restatement of the Law, Second, Agency (Sec. 261 comment a (1958)) for that same general proposition.** These references are barely useful. **The issue in this case goes beyond the general principal of vicarious liability and/or respondeat superior and requires a resolution of the factual/legal issue of whether Cohen's acts were, in fact, committed within the scope of his employment with PAMI. The determination on the issue must turn upon the facts and circumstances of each case.** *See Reece v. Ebersbach,* **9 So. 2d 805, at 806. And, the fact that Cohen's loan officer functions were within the scope of his employment with PANII, as argued by HUD, is not dispositive on the issue.**

I agree with HUD that the Restatement of the Law of agency should be sought for guidance in making the determination in this case. Restatements are highly regarded distillations of common law and are considered persuasive authority by many courts. The Florida courts have applied the Restatement in their rulings. *See City of Miami v. Simpson,* **172 So. 2d 435 (1965),** *Parsons v. Weinstein Enterprises, Inc.* **387 So. 2d 1044 (1980) and** *Dieas v. Associates Loan Company,* 99 So. 2d 279 (1957). **Although HUD has referenced the Restatement (Second), I have turned to the Restatement of the Law Third, Agency, (August 2006) ("Restatement"), for the most current statement on the subject.**

Section 7.07 of the Restatement discusses the basic doctrine of respondeat superior and vicarious liability and addresses when an employee's tortious conduct occurs within the scope of employment for purposes of subjecting the employer to liability. It discusses when an employee is acting within or without the scope of employment.

§ 7.07 Employee Acting Within Scope of Employment

(1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.

(2) An employee acts within the scope of employment when performing work assigned by the employer or engaging

> in a course of conduct Subject to the employer's control.
> *An employee's act is not within the scope of emplolyinent when it occurs within an in(lepen(lent course of conduct not intended by the employee to setTe anv purpose of the employer.* (Emphasis added.)
>
> (3) For purposes of this section,
>
> (a) an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance or work, and
>
> (b) the fact that work is performed gratuitously does not relieve a principal of liability.

Thus, to be determined in this case is whether Cohen's actions took place "within an independent course of conduct not intended (by him) to serve any purpose" of PAMI. In comment (b) to Section 7.07, it states that the character, extreme nature. or other circumstances accompanying an employee's actions may demonstrate that the employee's conduct is independent of performing work assigned by the employer and intended solely to further the employee's own purposes. Such is the case before us. Nothing in the evidence suggests that Cohen intended the fraudulent scheme he and his co-conspirators concocted to further any purpose of PAMI. Quite the contrary, the facts of this broad-based conspiracy show convincing eidence that he was on a course, independent of PAMI's work, designed to serve solely his own self-enriching purposes. The scheme was massively devious. His conduct was of an extreme and outrageous nature. All of his fraudulent activities were intended to serve the purpose of the conspiracy, which was to create money-making, opportunities for him and his co-horts. And, he not only engaged in such fraudulent and criminal conduct while working for PAMI, he admitted to doing, the same while a loan officer for other lenders. In total, 120 borrowers and 14 lenders were affected. SI 918.

Cohen's conduct in soliciting an application from, and processing the Georges' application, was a part of the conspirators' scheme. That PAMI, unknowing of Cohen's fraudulent conduct, may have received a loan origination fee, paid at closing, does not detract from the conclusion that Cohen was on a course of conduct which was not intended by him to serve any purpose of PAMI. The loan ongination fee, if received, was incidental to, and a necessary by-product of, the conspiracy to make money for themselves. PAMI did not receive, and Cohen did not intend for PAMI to receive, any of the "excess" money that came from the "Flipping" of the property, which funds were the fruit of the conspiracy. The fact that he conspired with others about whom PAMI had no knowledge and over whose actions PAMI had no control is more evidence of his independent course. PAMI, itself, was a victim of the conspiracy and the fraudulent activities of the conspiracy. **PAMI's statement that Cohen and his co-conspirators "set up a procedure to fraudulently process false loans to HUD and then went looking for unsuspecting mortgage correspondents to process the loans" seems an accurate characterization of the scheme based on the record.**

I find that Cohen was acting outside the scope of his employment with PAMI in committing the fraudulent transactions in the Georges' case. [3]

Considerin(2 the evidence in a light most favorable to the nonmoving party (FfUD), I **conclude that the Government has failed to establish** that Cohen was acting within the scope of his employment with PAMI at the time that he committed the fraudulent activities which are the bases for the Complaint. Accordingly, it has **failed to establish the vicarious liability of PAMI for Cohen's fraudulent actions, and its motion for partial summary judgment must be Denied. PAMI** is **not liable to HUD under the PCFRA for a false claim to HUD on FHA loan** #092-71833335. **Accordingly, Respondent's counter motion** will **be Granted.** So **ORDERED.**

Constance T. O'Bryant

T. O'BRYANT

A dm.nistrative Law Judge

Dated: October 13, 2006

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[3] The result Would be the same under Restatement (Second) of Agency. Section 228(2) of the Restatement (Second) provides that conduct of a servant is not within the scope of employment if it is different in kind from that authorized by the master, far beyond the authorized time or space limits. 01, too little actuated by a purpose to serve the master. (Note: the Restatement (Third) of Agency does not use the terms master and servant, it uses the terms employer and employee.) Here, the facts show that Cohen's actions w-L,T(extremely different in kind from those authorized by PAML and it is clear that Cohen's conduct was not actuated, in any way, by a purpose to serve the interests of PAMI. *See (ilso* Dieas v. Associ(ites Loan Comp(my, 99 So. 2d 279 (Supreme Court of Fla. 1957), where the Court stated that "the liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do," at 28 1, and Cit-v *oj'Micnni v* Simpson, 172 So. 2d 435 (Fla. 1965) "we point out that a city is not liable for every wrong committed by a city employee. The limitations applicable to the liability of private employers are likewise applicable to municipalities. The liability of the master can arise in such instances only when the act of the servant is done within the real or apparent scope of the master's business. The master's liability dos not arise when the servant steps aside from his employment to commit the tort or does the wronp-ful act to accomplish some purpose of his own. If the tort is activated by a purpose to serve the master or principal, then he is liable, otherwise he is not." Again, Cohen's involvement in the conspiracy, with others who had no relationship to PAMI, and not limited to PAMI, shows that he stepped aside from his employment with PAMI to engage in an independent venture solely to enrich himself and his co-conspirators.