UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE ADMINISTRATIVE LAW JUDGE

In the Matter of: **Ofori & Associates, PC** Respondent.	HUDOHA 14-AF-0070-MR-006 May 8, 2014

ORDER GRANTING THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND INITIAL DECISION

Currently before this Court is the *Government's Motion for Summary Judgment* ("Motion"), filed on March 25, 2014. In the *Motion*, the U.S. Department of Housing and Urban Development ("HUD") asks this Court to find that no genuine issue of fact exists concerning whether Ofori & Associates, PC ("Respondent") has failed to have as its principal activity the lending or investing of funds in real estate mortgages or a directly related field.

On April 21, 2014, Respondent filed an *Opposition to Government's Motion for Summary Judgment* ("Opposition") wherein Respondent alleges that it complies with HUD regulations, because it derives over 50 percent of its revenue from real estate activities. [Opp. at 3].

On April 28, 2014, HUD moved for leave to file a reply to Respondent's *Opposition.* HUD's request for leave is **GRANTED.**

Applicable Law

Standard of Review. Pursuant to 24 C.F.R. § 26.32(l), this Court is authorized to "decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact." The Court may exercise its discretion in application of Rule 56 of the Federal Rules of Civil Procedure. 24 C.F.R. § 26.40(f)(2).

Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Fed. R. Civ. P. 56(a). A "genuine" issue exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 249. Additionally, a fact is not "material" unless it affects the outcome of the suit. Id.

Summary judgment is a "drastic device" because, when exercised, it diminishes a party's ability to present its case. Selva & Sons, Inc. v. Nina Footwear, Inc., 705 F.2d 1316, 1323 (Fed. Cir. 1983). Accordingly, the moving party bears the burden of demonstrating the absence of any material issues of fact. See Anderson, 477 U.S. at 256. Rule 56 provides that when a party asserts that a fact cannot be genuinely disputed, that party must: (i) cite to materials in the record;

or (ii) show the cited materials do not establish the presence of a genuine dispute. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, the Court's function is not to resolve any questions of material fact, but to ascertain whether any such questions exist. In re Beta Dev. Co., HUDBCA No. 01-D-100-D1, at *12 (February 21, 2002). Therefore, when the moving party has carried its burden under Rule 56(c), the nonmoving party may not rest upon mere allegations or denials, but must come forward with "specific facts showing that there is a *genuine* issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (emphasis added) (citing Fed. R. Civ. P. 56(e)).

FHA Requirements. HUD has promulgated regulations that establish the minimum standards and requirements for approval of mortgagees to participate in the Title I and Title II programs. See 24 C.F.R. Part 202. To be approved, and maintain approval, for participation in the Title I or Title II programs, a mortgagee must meet and continue to meet the general requirements set forth by HUD. 24 C.F.R. § 202.5.

Lenders and mortgagees are classified under one of five categories, with each category having additional requirements to obtain and maintain approval for participation in the Title I or Title II programs. One classification concerns nonsupervised lenders and mortgagees. A nonsupervised lender or mortgagee is "a lending institution which has as its principal activity the lending or investing of funds in real estate mortgages, consumer installment notes, or similar advances of credit, or the purchase of consumer installment contracts. . . ." 24 C.F.R. § 202.7(a). HUD more specifically defines the term "nonsupervised mortgagee" as being "a financial entity that has as its principal activity the lending or investing of funds in real estate mortgages." HUD HANDBOOK 4060.1 REV-2 ("HUD HANDBOOK"), Paragraph 2-27. A nonsupervised mortgagee is required to "spend a majority of its time and assets in the production of real estate mortgages and in the lending or investment of funds in real estate mortgages, or a directly related field." Id. at Paragraph 2-27(D). The HUD Handbook adds that "[f]or FHA purposes, the principal activity of a non-supervised loan correspondent . . . must contribute at least one-half of the entity's gross revenues, unless otherwise approved by HUD." Id.

UNDISPUTED FACTS

1. On January 4, 2006, Ofori & Associates ("Respondent") was approved by HUD for participation in the Title I program as a non-supervised mortgagee.

2. On January 29, 2008, Respondent was approved by HUD for participation in the Title II program as a non-supervised mortgagee.

3. On June 10, 2011, Respondent submitted audited financial statements to HUD.

4. Based upon this submission, HUD determined that Respondent did not derive at least 50 percent of its revenue from the lending or investing of funds in mortgages or a directly related field.

5. On October 23, 2012, HUD issued a Notice of Violation that notified Respondent that the Mortgage Review Board ("Board") was considering taking administrative action against Respondent for failing to meet the FHA's principal business activity requirements.

6. On November 20, 2012, Respondent responded to HUD and claimed that it earned 61 percent of its FY 2011 revenue from "lending and real estate related activities" including the servicing of manufactured housing mortgages for Ginnie Mae, processing voucher funds under HUD's Transitional Housing Units ("THU") program, and processing housing funds advanced to tenants under the Disaster Housing Assistance Program ("DHAP").

7. In support of this claim, Respondent submitted a revised Audited Financial Statement, dated September 28, 2012, that reflected the following sources of revenue that totaled 61 percent of Respondent's FY 2011 revenue:

    (a) processed and collected mortgage payments from borrowers of GNMA's manufactured housing, which generated $1,437,721;

    (b) processed voucher funds advanced to tenants for housing relocation under HUD's THU program, which generated $582,406; and

    (c) processed housing funds advanced to tenants affected by hurricanes under the DHAP, which generated $1,877,931

8. On April 22, 2013, the Board met to review Respondent's matter.

9. During the meeting, the Board determined that "even viewing Ofori's revised Audited Financial Statements in the most favorable light, the percentage of revenue that Ofori derived from activities related to mortgage production, lending, or investment was, at most, 24.5 percent.

10. Accordingly, the Board determined that Respondent did not meet the revenue requirement for non-supervised mortgagees.

11. On May 10, 2013, HUD sent Respondent a letter informing it of the Board's determination and gave Respondent until October 31, 2013 to come into compliance with HUD's revenue requirement before the Board would reconsider withdrawing Respondent's FHA approval.

12. On October 29, 2013, Respondent responded to the Board's letter and informed HUD that Respondent had previously serviced loans under Ofori Lender Services ("OLS"), a branch of Ofori & Associates. The letter also explained that OLS has since become an independent company. In support of its claims, Respondent included three sets of copies of OLS's eight-month review Financial Statements for 2013.

13. On December 16, 2013, the Board met again to review Respondent's matter.

14. The Board noted that though OLS derived 100 percent of its revenue from mortgage related activities, OLS was not an FHA-approved entity and that OLS's revenue could not be considered in determining whether Respondent met FHA requirements.
15. On February 18, 2014, HUD issued a Notice of Administrative Action ("NOAA") informing Respondent that its FHA approval was being withdrawn because Respondent failed to derive at least 50 percent of its revenue from the lending or investing of funds in real estate mortgages or a directly related field.

16. HUD also stated that the withdrawal of Respondent's FHA approval is effective 30 days from Respondent's receipt of the NOAA unless Respondent requested a hearing.

17. On March 18, 2014 Respondent requested a hearing concerning HUD's decision to withdraw Respondent's FHA approval.

18. The *Hearing Request* specifically responded to the alleged violations set forth in the NOAA.

19. In the *Hearing Request*, Respondent acknowledged that it "never met the revenue requirement."

20. Respondent added that "Ginnie Mae was aware of [the fact that Respondent did not meet the revenue requirement] for a number of years and continued to recertify [Respondent]."[1]

21. Respondent also claimed that the six months it was given to comply with the revenue requirement was "arbitrary" and that Respondent required a full calendar year to comply.

DISCUSSION

In the *Motion*, HUD claims summary judgment is warranted because "the undisputed fact is that Ofori has never met the revenue/principal activity requirement set forth in 24 C.F.R. §§ 202.5 and 202.7." Specifically, HUD claims Respondent failed to comply with its requirement to have, as its principal activity, the lending or investing of funds in real estate mortgages, consumer installment notes, or similar advances of credit, or the purchase of consumer installment contracts. In response, Respondent maintains that it complied with HUD regulations because "it is undisputed that Ofori spends a majority of its time, and derives over 50 percent of its revenue, from real estate activities through its several contracts with HUD."

The conflicting arguments do not arise from a dispute as to the facts in this matter, but rather a dispute as to whether Respondent's "real estate activities" qualify as an acceptable principal activity in compliance with HUD regulations. The issue, therefore, is a dispute as to a legal conclusion, which the Court can reach without the need for a hearing. See Fox v. Johnson & Wimsatt, 127 F.2d 729, 737 (D.C. Cir. 1942) ("Conflict concerning the ultimate and decisive

[1] Respondent was notified of its revenue issue as early as 2010. Respondent informed HUD on several occasions since at least 2011 that it was attempting to correct the deficiency in its revenue.

conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court.")

The parties do not dispute that Respondent "must spend a majority of its time and assets in the production of real estate mortgages and in the lending or investment of funds in real estate mortgages, or a directly related field." HUD HANDBOOK, Paragraph 2-27(D). However, Respondent takes the position that the revenue it generated from contracts with HUD should be included towards the "majority" calculation, because it was derived from "real estate activities." Specifically, Respondent's *Opposition* refers to a loan-servicing contract awarded by Ginnie Mae and a Market and Management III Asset Manager ("M&M III") contract awarded by the FHA's Office of Single Family Asset Management.

HUD acknowledges Respondent's servicing of Ginnie Mae's manufactured housing loan portfolio qualifies as a "directly related field." However, based Respondent's FY 2010 Audited Financial Statements, the revenue generated from this contract equates to only 22 percent of Respondent's total revenue for that fiscal year.[2] HUD adds that Respondent's claimed revenue on the M&M III contract should not be counted towards Respondent's principal activity requirement, because the revenue was not generated from services falling within a directly related field to the production of real estate mortgages.

Respondent performs on the M&M III contract by "engaging in real estate related activities from marketing and sales services for HUD's Real Estate Owned [REO] properties." In carrying out such activities, Respondent "analyzes market, property, and lending conditions and develops a marketing strategy for the pricing and disposition of each property." Respondent then "markets and sells HUD's REO properties within specific geographic areas." While Respondent claims "these activities touch upon the production of real estate mortgages and the lending or investment of funds in real estate mortgages," the Court disagrees. Respondent describes its services as covering the marketing and sales of the properties. Of course, real estate mortgages are likely to be utilized in the purchase of an REO property. However, Respondent does not claim it has any involvement with the production of, lending or investing in real estate mortgages as required by HUD.

Insofar as Respondent claims that its activities under the M&M III contract fall under a "directly related field," the Court finds Respondent's reading of HUD's requirements to be too broad. The HUD Handbook, which details requirements for mortgagees, was "clarified to state that a non-supervised entity must have at least 50 percent of its gross revenues derived from mortgage lending activities." HUD HANDBOOK, at *vi*. The HUD Handbook also lists "permissible lending activities" and explains that mortgagee may "originate, underwrite, purchase, hold, service and sell FHA insured mortgages and submit applications for mortgage insurance." Id. at Paragraph 2-27(A). The emphasis is, therefore, on the fact that Respondent's activities must mostly concern mortgage lending activities, and not merely "real estate activities."

[2] Respondent reported $1,407,882 in revenue generated from the Ginnie Mae contract and total revenues of $6,339,092. (1,407,882/6,339,092 = .22)

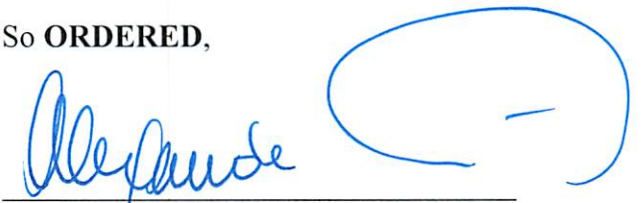
Therefore, even if Respondent's factual allegations that it performed on the Ginnie Mae and M&M III contracts were accepted as true, Respondent, still, has failed to demonstrate that its principal activity is the production of real estate mortgages and in the lending or investment of funds in real estate mortgages, or a directly related field.

CONCLUSION

For the foregoing reasons, the Court finds that no genuine issues of material fact exist as to whether Respondent has failed to have as its principal activity the lending or investing of funds in real estate mortgages or a directly related field. In addition, HUD is entitled to judgment as a matter of law. Accordingly, the *Government's Motion for Summary Judgment* is hereby **GRANTED** and the Mortgagee Review Board's withdrawal of Respondent's FHA approval for a period of one year is upheld.

It is hereby **ORDERED** that the *Revised Notice of Hearing and Order*, dated April 2, 2014, is **VACATED**.

So **ORDERED**,



Alexander Fernández
Administrative Law Judge

Notice of appeal rights. The appeal procedure is set forth in detail at 24 C.F.R. §§ 26.50, 26.52. This *Order Granting the Government's Motion for Summary Judgment* constitutes an initial decision that may be appealed to the HUD Secretary by petition for review. Any petition for review must be received by the Secretary within 30 days after the date of this *Initial Decision and Order*. An appeal petition shall be accompanied by a written brief, not to exceed 15 pages, specifically identifying the party's objections to this *Order* and the party's supporting reasons for those objections. Any statement in opposition to a petition for review must be received by the Secretary within 20 days after service of the petition. The opposing party may submit a brief, not to exceed 15 pages, specifically stating the opposing party's reasons for supporting the ALJ's determination.

Service of appeal documents. Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development
Attention: Secretarial Review Clerk
451 7th Street S.W., Room 2130
Washington, DC 20410
Facsimile: (202) 708-0019
Email: SecretarialReview@hud.gov