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

In the Matter of	
DARLENE V. SOLLIE and SOLLIE REALTY	HUDALJ 89-1327-DB (LDP)
Respondents	

Richard T. Ince, Esquire
For the Respondent

Geoffrey T. Roupas, Esquire
For the Government

Before: William C. Cregar
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose as a result of an appeal by the Respondents of a limited denial of participation ("LDP") issued by the Minneapolis Office of the Department of Housing and Urban Development ("HUD"). By letter dated January 27, 1989, Respondents were denied participation in Federal Housing Administration ("FHA") single-family insurance programs until July 1, 1989. A hearing on this matter was held on April 25, 1989, in St. Paul, Minnesota.1 The parties agreed to the following statement of issues:

1. Whether Respondents participated in a scheme which overstated the sales price of a property to be financed by an FHA loan, by taking a false or misleading action, and making at least one false statement concerning the amount of the sales price,

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1 The record was closed at the conclusion of the hearing. On May 3, 1989, Government's counsel filed a Motion to Reopen the Hearing Record for the purpose of supplementing his closing oral argument on the issue of intent. Attached to his Motion is the Government's "Additional Closing Statement". The Government has not supplied any reason why the record should be reopened or why the "additional closing argument" could not have been made at the conclusion of the hearing. Accordingly, the motion is denied. I have not given any consideration to the matters contained in the attached "Additional Closing Statement".

resulting in FHA insurance from HUD in excess of the amount it should have been; and whether these acts constituted irregularities as defined in 24 C.F.R. 24.26(a)(2), and are causes for a limited denial of participation.

2. Whether Respondents certified in connection with the HUD single family mortgage insurance program that the sales price of a property was in excess of what they knew it actually to be, and whether this was a false certification constituting cause for a limited denial of participation under 24 C.F.R. 24.26(a)(7).

3. Whether Respondents made and/or procured to be made one or more false statements concerning the sales price of the property for the purpose of influencing HUD to insure a larger loan than it should have insured, and whether this constitutes cause for a limited denial of participation under 24 C.F.R. 24.26 (a)(10).

This matter being ripe for decision, I now make the following findings of fact and conclusions based upon the record submitted:

Findings of Fact

Darlene and Orlin Sollie are real estate brokers in Fosston, Minnesota, doing business as Sollie Realty. On March 9, 1988, [redacted] Basinger visited the Sollies' office. The Basingers wished to purchase a single family residence listed with the Sollies and owned by [redacted] Luczak. This property had been listed for $37,000. An offer of $30,000 was made by the Basingers. The Sollies telephoned the Luczaks who advised that this offer would be acceptable to them. A purchase agreement on Sollie Realty's letterhead was drafted reflecting this amount. (Govt. Ex. 6). The agreement was signed by the Basingers and Orlin Sollie. At this point there was no discussion of obtaining FHA financing.

Later that evening, Ron Johnson, an employee of Valley Mortgage came by the office. Valley Mortgage is an FHA direct endorsement lender. A direct endorsement lender has authority to issue mortgage insurance commitments on behalf of FHA. 24 C.F.R. Sec. 200.163(a). Applicable regulations require that in order to act on behalf of HUD, a direct endorsement lender must be in strict compliance with HUD underwriting requirements and is held to a standard of "due diligence". 24 C.F.R. Sec. 200.163(b). An underwriting deficiency which "results in a significant increase in mortgage risk" is specifically defined in the applicable HUD Handbook as a deficiency. HUD Handbook 4000.4

Rev-1, paragraph 5-3 b. 1 (Sept. 2, 1988).2 This Handbook also states: "For endorsement purposes, HUD relies upon certifications by the mortgagee and the mortgagee's underwriter that the mortgage loan complies with HUD regulations and underwriting instructions," supra, paragraph 3-16 (Sept. 2, 1988); and that "Mortgagees are responsible for complying with all applicable HUD regulations and handbook instructions." supra, paragraph 1-3 (Govt. Ex. 9).

Johnson met with the Basingers and afterwards told Darlene Sollie that the Basingers wished to borrow an additional $4,000 to finance some home improvements (rugs, carpets, and cabinets). Ms. Sollie wanted to write an amendment to the original contract. Johnson told Ms. Sollie that it could not be done. He stated that FHA would not accept it with an amendment. As an alternative Ms. Sollie suggested submitting another purchase agreement for $34,000, specifically mentioning that it was "subject to improvements", and explaining what they were. (Tr., p. 82) Johnson also rejected this suggestion. Ms. Sollie discussed the situation with Sue Rasmussen, an attorney who rented space from the Sollies and did some of their work. Sollie was advised by Ms Rasmussen that she would "have to study the law to find out", but that someone working for the lender should know "what is right and what is wrong." (Tr. p. 83). Ms. Sollie requested for a third time that Johnson "spell out" the transaction and he told her not to do so.

Darlene Sollie again called the Luczaks. They agreed to the terms of the new transaction as long as they received the $30,000 originally agreed to. The Sollies prepared another purchase agreement on their letterhead showing an offer of $34,000. This agreement was also signed by the Basingers and Orlin Sollie. (Govt. Ex. 4). Both purchase agreements were sent to the Luczaks and returned to the Respondents. Both were then given to the Basingers.

Valley Mortgage's records establish that the Basingers submitted only the purchase agreement for $34,000 along with their loan application. (Govt. Exs. 8, 2). The borrowers, not the broker arrange FHA financing. (Tr. p. 40). The Sollies never saw the loan application. (Govt. Ex. 2). Valley Mortgage's records also establish that the company was aware of the additional $4,000 being requested for repairs at least as of March 29, 1988, when the loan application was being discussed with Mr. Johnson. (Govt. Ex. 8).

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2 I have taken official notice of both this Handbook and its predecessor dated May 5, 1983.

The property was appraised on April 7, 1988, as part of the FHA loan commitment process as having a market value of $34,000. (Govt. Ex. 3). The appraisal was based in part on comparables which establish that the higher figure was not beyond the average market value for similar single-family homes in that area.

Ms. Sollie again tried to have the documents reflect the home improvement loan transaction beforeOand during the closing. After three postponements the closing took place on July 14, 1988, in Grand Forks, North Dakota. The sellers were not present; Darlene Sollie was authorized to act on their behalf. Gerald O'Neil, an attorney, handled the closing for Valley Mortgage. Prior to the closing Ms. Sollie telephoned the lender and inquired how the home improvement loan was to be handled. She was told by a Valley Mortgage employee named Lori Banazak that she (Banazak) did not know but that the matter would have to be "taken care of at closing." Ms. Sollie also telephoned Mr. O'Neil and asked if a separate check was being made out for the repair money. She was told that it was included in the total amount to be paid to the Luczaks and that "you will just have to send it to her and she'll have to send it back. . ." (Tr. p. 89). Mr. O'Neil stated that if they didn't close on that day, the whole matter would have to be resubmitted. This would cause an additional delay. Ms. Sollie signed the settlement statement. A sentence preceding the signature line sets forth the following certification: "I have carefully reviewed the HUD-1 (settlement statement) and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction." (Govt. Ex. 1).

The loan was approved for $34,000. An FHA insurance commitment was issued by Valley Mortgage on September 12, 1988. (Govt. Ex. 5). Had the property been sold for $30,000, the mortgage commitment would have been for that amount. (Tr. p. 22).

Following an investigation by HUD's Office of Inspector General (OIG), various documents concerning this transaction were submitted to the HUD Minneapolis Office. These included the purchase agreement in the amount of $30,000 and an undated document signed by Darlene Sollie which itemizes a $4,000 amount to be included in the buyer's loan. This amount was to be sent back to the buyers (less $573.20 which was the buyer's share of the expenses). (Govt. Ex. 7).

The HUD Minneapolis Office issued an LDP on October 26, 1988. This action suspended the Respondents from all housing programs for a period of 12 months. The LDP alleged that the Respondents cooperated with the Basingers to "conceal" the actual terms of the purchase. Following a conference between HUD officials and the Respondents, the LDP was withdrawn "pending further review." (Res. Ex. A). A more limited version of this LDP was reimposed on January 27, 1989. Denial of further

participation was limited to single family insurance programs and the expiration date was advanced to July 1, 1989. The review which resulted in the modification was conducted by John Buenger, Director, Housing Development Division. He testified at the hearing that he did not believe Respondent's actions were intentional. (Tr. p. 67).

Discussion

The Department relies on the causes stated in 24 C.F.R. Secs. 24.26(a)(2), (7), (10). These regulations provide for issuance of limited denials of participation for irregularities in a participant's past performance in a HUD program; making a false certification in connection with a HUD program; and making or procuring to be made any false statement for the purpose of influencing in any way the action of the Department. There must be "adequate evidence" to support the action. 24 C.F.R. Sec. 24.26(a). HUD regulations further provide "In each case . . . the decision to order a Limited Denial of Participation shall be . . . in the best interests of the Government. 24 C.F.R. Sec. 24.25.

The evidence establishes that the Respondents knowingly submitted a false certification on at least one occasion. The settlement statement sets forth a purchase price which is $4,000 in excess of that actually agreed upon. In addition, the Respondents knowingly permitted the buyers to execute and deliver a false purchase agreement to the lender. That Respondents knew these actions were improper is established by Darlene Sollie's testimony concerning her repeated attempts to get the lender and the lender's attorney to execute documents accurately reflecting the transaction. The record establishes that the HUD mortgage insurance commitment was based upon the stated purchase price, and would have been issued for $30,000 had the actual facts been known by HUD. Accordingly, I find that there is adequate evidence to support a finding that the Respondent's were responsible for irregularities in connection with a HUD program; that they submitted a false certification; and made a false statement for the purpose of influencing an action of the Department. I further find that the evidence is not adequate to establish that Respondents procured the making of any false statements.

Although the evidence is adequate to prove that these violations occurred, it also establishes that the primary cause was HUD's own agent, i.e., its direct endorsement lender. No witness from the lender was called to rebut the Respondent's claims that the actions were procured by Mr. Johnson an employee

of the mortgagee acting within the scope of his employment.3 Despite its claim that it never received a copy of the purchase agreement for $30,000, Valley Mortgage had at least constructive knowledge that $4,000 was to be used for home improvements. (Govt. Ex. 8).4 Once the two purchase agreements were submitted at Mr. Johnson's urging, the signing of the false settlement statement followed as a natural consequence. Even at this point in the process, Ms. Sollie tried several times to get the lender to reflect the accounting for the $4,000 on the settlement statement. In addition, the evidence establishes that the Respondents did all they could to account for this money short of not going through with the transaction. The lack of intent to conceal is also demonstrated by the accounting made by Respondents. (Govt. Ex. 7). Even the government's own witness, Mr. Buenger acknowledged that the Respondents' actions were not "intentional".

Valley Mortgage as a direct endorsement lender acted as HUD's agent. By issuing the LDP against the Respondents, HUD has taken an action to remedy a situation caused by the misrepresentations of its own agent. While the Respondents have committed the offenses charged, their defense that these actions

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3 I find the testimony of Darlene Sollie to be credible. I base this finding upon the consistency of her testimony with the other evidence in the record, the absence of any unreliable or unbelievable aspects to her testimony and my observation of her demeanor. At one point during her testimony she was in tears as she described her frustrations in dealing with Mr. Johnson and Mr. O'Neil.

4 On August 12, 1988, Craig Johnson, Vice President of Valley Mortgage sent a letter to the Basingers. This letter states: "Our representative, Ron Johnson, took the loan application on March 29, 1988, at which time there was oral discussion from the buyers about the need for repairs which would total approximately $4,000. At this discussion, Valley's procedure, if the repair provision was wanted and if agreed to by all parties, was explained: Another purchase agreement superceding the one dated March 10, 1988 would have to be submitted to Valley after being signed by all parties concerned." I credit Darlene Sollie's testimony that the home improvement loan was first discussed with Mr. Johnson on March 9, 1988. Accordingly, Mr. Johnson knew that the $34,000 purchase price included the loan for home repairs. There was a discussion of this loan on March 29, 1988 which was acknowledged by Valley Mortgage. It is unlikely that any discussion of this loan would have occurred without it also being known that this was a part of the total $34,000 being requested. Since Mr. Johnson was the employee of Valley Mortgage, this knowledge must be imputed to his employer.

were caused by HUD's own agent raises the question of whether HUD should be estopped from taking this action. Estoppel is an equitable doctrine invoked to avoid injustice in particular cases. Heckler v. Community Health Services, 467 U.S. 51 (1984). The Supreme Court's analysis of the estoppel doctrine in Heckler leaves open the question of whether estoppel can ever be applied against the Federal government. We need not reach this question. For the reasons discussed below this case does not present a situation where the application of the doctrine is appropriate.

The doctrine of equitable estoppel is applied only when certain elements are present:

> "If one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act that would not constitute a tort if the misrepresentation were true, the first person is not entitled. . . to maintain an action of tort5 against the other for the act. . ." Restatement, Torts, 2d Sec 894 (1).

The statements by Mr. Johnson which caused Respondents to believe that HUD would not accept documents which accurately reflected the home improvement loan transaction constituted misrepresentations as to the proper procedures to be followed in obtaining the FHA mortgage. The Sollies' reliance on these statements caused them to commit the improper acts. If their reliance were reasonable, the government would be precluded from taking the action.

The application of the Supreme Court's analysis in Heckler to the facts in this case compels the conclusion that Respondents' reliance was not reasonable. In Heckler a medicare "fiscal intermediary" (held to be an agent of the Department of Health and Human Services) responsible for administration of medicare payments supplied an erroneous interpretation of governing regulations to a medicare provider. The provider, relying upon the erroneous information, received money to which it was not entitled. In the case brought to recover the money the Court rejected the provider's estoppel arguments, in part, because there was no showing of an adverse impact on the provider since it was not entitled to the money. The opinion also contains a discussion of factors which comprise reasonable reliance when dealing with a government "agent".

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5 Although the LDP is not a tort action, it is analogous in that it attempts to correct a wrong committed against the party bringing the action.

The Court's analysis starts with the premise that participants in government programs have a duty to familiarize themselves with the legal requirements of the programs they deal with.6 Evidence of the requirement for ascertaining the meaning of the regulations is supplied when the party contacts a government entity with a question. This indicates that the inquiring party knows that this is a doubtful question not clearly covered by existing regulations. Id. at 64. It is also necessary for the participant to inquire whether the government agent is in a position to give the type of advice requested or relied upon. According to the Court reliance is further undermined if the advice is oral. "Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice. . . and subjects that advice to the possibility of review, criticism and reexamination." Id at 65.

As licensed brokers dealing with FHA the Respondents were participants in a Federal program and had a duty to find out what the proper procedures were. There was ample reason to believe that this advice was dubious. Ms. Sollie asked Sue Rasmussen about Mr. Johnson's suggestions. Although suggesting that an employee of the lender ought to know the rules, she also advised Ms. Sollie that she (Rasmussen) would "have to study the law to find out". (Tr. p. 83) Ms. Sollie's repeated questioning of the employees of Valley Mortgage is also strong evidence that she knew that Mr. Johnson's suggestions were questionable. Valley Mortgage, although a direct endorsement lender, is not HUD. Nothing prevented the Respondents from contacting the HUD office and inquiring whether the procedures were proper. Finally, the advice was oral. Had Ms. Sollie required this advice to have been put in writing, it would have been subject to the possibility of "review, criticism and reexamination." Any reluctance on the part of Valley Mortgage to put these instructions in writing after being requested to do so would have served as a warning that proper procedures were not being followed.7

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6 The Federal Circuit Court for the Eighth Circuit has gone even farther, holding that not only must there be a lack of knowledge of the facts, but there must also be the absence of the means to obtain them. United States v. Schoenborn, 860 F.2d 1448, 1452 (8th Cir. 1988), citing Ridens v. Voluntary Separation Program, 610 F. Supp. 770, 777 (D.C. Minn. 1985).

7 A showing of "affirmative misconduct" on the part of the government is also necessary for estoppel to apply. INS v. Miranda, 459 U.S. 14 (1982). See also McDermott v. United States, 760 F.2d 882 (8th Cir. 1985). Since the Respondents have not met the Restatement test, it is unnecessary to address this question.

Despite my conclusion that the doctrine of estoppel does not apply in this situation, mitigation of the sanction is appropriate for the following reasons: The acts resulting in the LDP were primarily caused by HUD's agent; the Respondents were only secondarily responsible. Respondents made repeated attempts to document the home improvement transaction. There was no attempt made at actual concealment. Respondents have been under a suspension from October 23, 1988, to November 23, 1988, and under a more limited suspension since January 23, 1989. Finally, I observed visible expressions of regret on the part of Darlene Sollie during her testimony. These considerations establish that the public trust and fisc will not be subjected to future risk by an immediate termination of the Limited Denial of Participation and that further continuation of the LDP would no longer be remedial but punitive.

Conclusion and Order

Upon consideration of the public interest and the entire record in this matter, I conclude that while adequate evidence supports the Limited Denial of Participation imposed on Respondents Darlene Sollie and Sollie Realty, further imposition of this sanction is not in the best interests of the government. Accordingly, it is hereby

ORDERED that the Limited Denial of Participation terminate effective this date.

William C. Cregar
Administrative Law Judge

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Dated: May 18, 1989