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HUDBCA

In the Matter of:
THE MAYER COMPANY, INC. and CARL A. MAYER, JR.

(Activity No. 80-722-DB)

December 1, 1981

Mr. Carl A. Mayer, Jr.

[REDACTED]
For the Appellants, pro se
Edward Eitches, Esquire
Office of General Counsel
U. S. Department of Housing
and Urban Development
Washington, D. C. 20410
For the Government

INITIAL DETERMINATION

Statement of the Case

By letter dated August 18, 1980, the Department of Housing and Urban

Development ('HUD') notified Carl A. Mayer, Jr., President of the Mayer

Company, that it intended to debar him, The Mayer Company, and affiliates from

participation in departmental programs for a period of three years from March

11, 1980, the effective date of a Temporary Denial of Participation of the

Birmingham Office of The Mayer Company.

The grounds for the proposed debarment were alleged violations by The Mayer

Company of HUD management contracts for A.M.E. Homes of Decatur, Pinewood

Apartments, and Wesley Chapel Apartments. Specifically, The Mayer Company was

charged with failure to make the mortgage payments due for A.M.E. Homes of

Decatur, which resulted in an assignment of the mortgage to HUD; and failure to

obtain Comprehensive General Liability Insurance policies that included the

Secretary of HUD as a beneficiary for the Pinewood Apartments and Wesley Chapel

Apartments, which resulted in HUD being sued for injuries incurred by third parties at those two projects.

Carl A. Mayer, Jr. made a timely request for a hearing on the proposed

debarment of The Mayer Company and him, pursuant to 24 C.F.R. s 24.7. A

hearing was subsequently held in Tampa, Florida to determine whether debarment

of the Appellants, Carl A. Mayer, Jr. and The Mayer Company, was in the best

interest of the public and the Government.

FINDINGS OF FACT

The Mayer Company is an Ohio corporation formed in 1966 to manage urban properties. It is authorized to do business in nine states, including

Louisiana and Alabama. Carl A. Mayer, Jr. is the President of The Mayer Company. (Tr. 110.) At the present time, The Mayer Company is an inactive corporation, having sold all of its assets, including existent management contracts. Carl A. Mayer, Jr. conducts seminars in condominium management, doing business as an individual. (Tr. 160.) Prior to February 29, 1979, The Mayer Company was an active corporation with a large portfolio of management contracts for rental units and condominiums, including properties owned, insured, or subsidized by HUD (Tr. 112, 120).

I. A.M.E. Homes of Decatur

On February 19, 1979, The Mayer Company entered into a Management Agreement with the A.M.E. Church of Decatur, Alabama to act as management agent for A.M.E. Homes of Decatur, a project owned by the Church and insured by HUD under Section 221(d)(3) of the National Housing Act. The Agreement was signed by Thomas Creekmore, Jr., Executive Vice President of The Mayer Company and the head of its Birmingham office. (G-1A.) Paragraph 16(a)(2) of the Management Agreement required The Mayer Company, as agent for A.M.E. Homes of Decatur, to promptly make monthly disbursements when payable to the mortgagee to cover the principal, interest, mortgage insurance, and other financial obligations owed by the mortgagor. The Management Agreement was endorsed in writing by both the mortgagee, American Savings and Loan Association of Florida, and HUD. (G-1A.)

On December 10, 1979, The Mayer Company submitted a check to cover the November mortgage payment, then overdue. The check was returned for insufficient funds. (G-4.) The Mayer Company did not present a check covered by adequate funds until December 17, 1979. The mortgagee had filed a default notice but agreed to withdraw it when payment was made by the second check (G-1B). The mortgagor had supplied to The Mayer Company adequate

funds by a check

dated November 13, 1979 to cover the mortgage payment when it was due. (G-4.)

Carl A. Mayer, Jr. had no knowledge or information about the reasons why the

first check tendered by The Mayer Company did not clear if sufficient funds had

been supplied by the mortgagor. He surmised that the bookkeeping staff

responsible for making the payment was in disarray because the corporate

headquarters and accounting operations were being moved from Cincinnati, Ohio

to St. Petersburg, Florida during that period. (Tr. 115, 118.)

The Mayer Company was again late with payment of the December mortgage payment

and the mortgagee issued a default notice. The Mayer Company assured the

mortgagee that payment would be made by January 9, 1980. The December payment

was not made until January 10, 1980, and the mortgagee elected to assign the

mortgage to the Secretary of HUD. (G-14; Tr. 41-44.) HUD had to pay the

mortgagee approximately \$1,600,000 upon assignment (G-11). On January 18,

1980, HUD cancelled the Management Agreement with The Mayer Company. (G-1F, G-

1G; Tr. 45.)

At no time during the period when The Mayer Company was failing to make timely

mortgage payments was Carl A. Mayer, Jr. notified of the problem by either

Mayer Company personnel or HUD officials. His knowledge of the default on the

mortgage was after the fact. However, Mayer testified that once he was notified

of the problem, payment was made within three days that brought the account

current. (Tr. 118.)

II. Pinewood Apartments

On April 1, 1977, The Mayer Company was awarded a HUD contract for the

management of Pinewood Apartments, Metairie, Louisiana. Gary L. Marcum,

Executive Vice-President of The Mayer Company, signed the bid and contract.

Article 7(b) of the contract required The Mayer Company to carry General

Liability Insurance on Pinewood Apartments in the name of The Mayer Company

'and the Secretary shall be covered thereunder as a party insured.' (G-2A.)

The Mayer Company believed that it had a contract for liability insurance with

U.S. Underwriters Insurance Agency. James T. Justice, Senior Vice President of

The Mayer Company, Cincinnati (headquarters) office, ordered the policy (A-2B)

and copies should have been received simultaneously by Justice and the

Birmingham office (Tr. 146). Apparently, no policies were physically received

by either office although U.S. Underwriters Insurance Agency did send The Mayer

Company an invoice for the policy on June 22, 1977 (A-2C; Tr. 134-135, 146).

Carl A. Mayer, Jr. had no personal knowledge of whether Mayer Company officials

inquired as to the whereabouts of the policy for Pinewood Apartments. Mayer

would not have been told of any problems concerning the policy unless there was

a lawsuit filed. (Tr. 145.)

On April 20, 1977, less than a month after The Mayer Company took over the

management of Pinewood Apartments, an alleged property loss to a third party

occurred on the premises (A-2D, 2E). On October 27, 1977, the Management

Contract for Pinewood Apartments was terminated by HUD, apparently for reasons

unrelated to the property loss (G-2B). In 1979, both The Mayer Company and HUD

were sued in Federal District Court for the alleged property loss (A-2G). HUD

wrote The Mayer Company two letters demanding that its defense be taken by The

Mayer Company, through its insurer, but The Mayer Company failed to respond to

HUD (A-25). The Mayer Company filed a cross-suit against U.S. Underwriters but the Secretary of HUD remains a defendant in the lawsuit. (A-2J, 2K; Tr. 135.)

III. Wesley Chapel Apartments

On October 15, 1976, a project management contract was awarded by HUD to The Mayer Company for the management of Wesley Chapel Apartments, Baton Rouge, Louisiana. Article 7(b) of the contract required The Mayer Company to carry Comprehensive General Liability Insurance, and the Secretary of HUD was to be covered under the policy as a party insured. (G-3A.) The Mayer Company obtained liability insurance from Maryland Casualty Company but that policy failed to provide coverage for the Secretary as a party insured (A-3C). Donald Ray Moore, a minor, was injured by broken glass on the premises of the Wesley Chapel Apartments during the period when The Mayer Company was the project manager. In May, 1978, a tort claim was filed against HUD, The Mayer Company, and Maryland Casualty Company on behalf of the injured minor. (G-3E.) Maryland Casualty and The Mayer Company subsequently settled the lawsuit by paying the claim in late September, 1979 (A-3F). Prior to the filing of the lawsuit, The Mayer Company's management contract for Wesley Chapel was terminated at its request as of August 31, 1977 (G-3C, 3D). Carl A. Mayer, Jr. had no personal knowledge of why the Secretary was not named as an insured party in the policy for Wesley Chapel Apartments. He never saw the policy either at the time it was purchased or at any time since. (Tr.

148-149.) To the best of Mayer's knowledge, the Wesley Chapel policy was the only 'incomplete' policy obtained by The Mayer Company for all of its HUD projects (Tr. 156).

IV. Management Operation of The Mayer Company

Carl A. Mayer, Jr. ran The Mayer Company as an absentee president with little or no role in the day-to-day operation of the company. Regional Vice-

Presidents were totally responsible for the management of the widely dispersed local and regional offices that actually provided the on-site management

services. The regional Vice-Presidents prepared reports for Mayer but those reports were usually concerned with occupancy levels and rent collection information, rather than notice of problems at certain of the projects. (Tr.

111, 146, 150-151.)

James Justice was to keep Mayer informed of all problems. However, Justice did

not tell Mayer about problems until they reached a crisis level and usually

tried to shield Mayer from problems other than those that resulted in

litigation. Mayer's time was primarily spent on litigation arising out of

injuries at the various projects managed by The Mayer Company. (Tr. 152-154.)

Mayer never saw the management contracts entered into by The Mayer Company, nor

did he see copies of the policies of insurance purchased in regard to any

management contract. He trusted the Regional Vice Presidents to negotiate the

contracts and trusted Justice to obtain the required insurance. (Tr. 133,

146.) The bookkeeping functions, including the payment of mortgages and the

purchases of insurance, were all located at the corporate headquarters in

Cincinnati. Mayer had moved to St. Petersburg, Florida around 1976 but did not

move the corporate headquarters there until 1979. By early 1980, all of the

assets of The Mayer Company were being sold and the offices closed. (Tr. 114,

119-120.)

Mayer admitted at the hearing that he should have exercised greater control

and management over the day-to-day operations of The Mayer Company, including

more efficient reporting systems (Tr. 169). He acknowledged that his

abdication of these responsibilities to Justice and the Regional Vice-

Presidents was not a wise management decision (Tr. 134). He also acknowledged

that the president of a corporation is responsible for the acts and omissions

of corporate employees (Tr. 172). He testified that he now believes that he

should have seen copies of all contracts entered into by the company and the

certificates of insurance required by those contracts (Tr. 169). Mayer

testified that if he went back into the management business he would not

isolate himself as he did in his role as President of The Mayer Company. Mayer

testified that many of the problems encountered by The Mayer Company could have

been avoided if he had been more involved with the actual management of the

company. (Tr. 163.)

DISCUSSION

The purpose of debarment is to assure the Government that it only does

business with responsible contractors and grantees. 24 C.F.R. s 24.0.

'Responsible contractor' is a term of art in Government contract law denoting

primarily the ability of a contractor to properly and acceptably perform a

contract. Section 24.6(a)(3)(ii) of the departmental regulation applicable to

debarment provides that a record of failure to perform, or unsatisfactory performance on, one or more contracts is a ground for debarment, provided that

the failure to perform or unsatisfactory performance was not caused by events

beyond the contractor's control. Furthermore, Section 24.6(a)(4) of the

regulation provides that any other cause of such serious compelling nature,

affecting responsibility, may be determined to be a cause for debarment.

In the instant case, The Mayer Company failed to perform significant

requirements on three contracts. In each instance, the corporate headquarters

were the immediate source of the performance failures because the payment of

mortgage notes and the purchase of insurance were functions performed by the

headquarters office. The default on the A.M.E. Homes of Decatur mortgage

caused the Secretary of HUD to incur the expense of taking over that mortgage.

The failure to obtain a liability insurance policy for Pinewood Apartments

resulted in the Secretary being sued for damages. The failure to insure the

Secretary under the policy purchased for Wesley Chapel Apartments subjected the

Secretary to suit without insurance, although in that case the Secretary

incurred no loss because of the settlement of the claim. None of these

failures of performance were merely technical failures. Their consequences had

a serious and direct impact on HUD. A period of debarment of The Mayer Company

is warranted, in light of the serious and compelling nature of the contract

violations, even though The Mayer Company is presently an inactive corporation.

The failures of performance were not directly caused by Carl Mayer, Jr.

However, his remote style of management as corporate President created an

atmosphere in which contract performance failures became more likely. By

Mayer's own admission, these performance failures could probably

have been

avoided if he had been a more active corporate manager. It was Mayer's

management design that his only real information source was James Justice.

Mayer assumed the risks of his own isolation when he chose to rely on Justice

so completely. Because Justice shielded Mayer from operational problems, Mayer

usually did not know of any problems until they had escalated to litigated

crises. Had Mayer assumed a more active managerial role as President, he might

have been more able to anticipate the operational problems of The Mayer

Company. Certainly, all three of the contract violations at issue could have

been avoided by alert management.

When Mayer personally moved to Florida three years in advance of moving the

Mayer Company corporate headquarters there, he assumed the risks inherent in

absentee management. Because he did not institute stricter reporting

procedures to offset the risks of his absentee management, Mayer put himself in

the impossible position of being both physically and operationally removed from

all but the most critical problems. The morale problems and lack of efficient

operations in the Cincinnati office occasioned by Mayer's physical absence and

the move of headquarters to Florida should certainly have been foreseeable by an

astute corporate management team. That team was head by Carl Mayer and the

risks were ultimately his.

The unique facts in this case merit more than a routine application of the

doctrine of respondeat superior. Carl A. Mayer, Jr. made a decision to manage

The Mayer Company in such a way that he delegaged all major responsibility

relating to his company's obligation to the Department. The Department of

Housing and Urban Development had every right to expect that Mayer would run

the corporation so that it could deliver on its contracts. The fact that

Mayer's chosen management role precluded him from dealing with problems

effectively before they resulted in contract defaults should not shield him

from ultimate responsibility. Mayer's personal conduct as President of The

Mayer Company was not that of a responsible contractor.

Therefore, it is in

the best interest of the public and the Government that Carl A. Mayer, Jr. be

debarred.

In the cases of John Harris Killingsworth, HUDBCA No. 77-522-DB, and Gerald

Sands, HUDBCA No. 77-357A-DB, corporate managers were held responsible for

corporate acts in which they were not direct participants.

Killingsworth was

debarred for a period of eighteen months for failing to exercise supervisory

control over his company, in much the same way as Carl A. Mayer, Jr. failed to

exercise sufficient control over The Mayer Company.

Carl A. Mayer, Jr., a sincere, intelligent man who has much to offer, is now

cognizant of the deficiencies of his performance as President of The Mayer

Company. His growing awareness of what he should have done to avoid the

contract performance problems of The Mayer Company mitigates somewhat the more

troubling aspects of this case. Furthermore, The Mayer Company Birmingham

office has already been temporarily denied participation in HUD's multi-family

programs for one year and the real functions of The Mayer Company have been

transferred to new owners or shut down. Therefore, I find that neither The

Mayer Company nor Carl A. Mayer, Jr. presently pose the same risks to the

Government and the public as they did in 1979. I find that a debarment period

of one year is sufficient to protect the public interest in the case of Carl A.

Mayer, Jr. Because The Mayer Company is presently inactive and Carl A. Mayer,

Jr. is its President, a like period of debarment is appropriate for the

corporate shell.

CONCLUSION

For the foregoing reasons, The Mayer Company and Carl A. Mayer, Jr. shall be

debarred for a period of one year from this date.

Jean S. Cooper

Administrative Judge

HUD Board of Contract Appeals

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