UNITED STATES OF AMERICA

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BOARD OF CONTRACT APPEALS

WASHINGTON, D. C.

In the Matter of: BERTRAM A. BRUTON, Rotella Park Associates, Ltd.; Bertram A. Bruton & Associates and Mitchell Management, Respondents	HUDBCA No. 87-2322-D10 (Docket No. 87-1095-DB)

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DETERMINATION AND ORDER

Statement of the Case

By letter dated August 1, 1986, Bertram A. Bruton was notified that a Temporary Denial of Participation ("TDP") had been imposed on him by the Colorado Regional Office of the U.S. Department of Housing and Urban Development ("HUD") for causing an encumbrance on property, in violation of the Regulatory Agreement for Rotella Park Manor. The TDP was affirmed on October 29, 1986, and Bruton requested a hearing on it pursuant to 24 C.F.R. §24.7. On January 12, 1987, HUD proposed the debarment of Bruton and his affiliates for a period of three years. The grounds for the TDP and the proposed debarment were the same. The parties agreed to consolidate the cases for hearing and decision. The proposed debarment included as

Bruton's affiliates, Rotella Park Associates, Ltd., Bertram A. Bruton & Associates, and Mitchell Management.

At the end of the consolidated hearing, findings of facts and conclusions of law were made on the record. In summary, it was found that the record supported imposition of the TDP, and that debarment was also warranted. The parties were given leave to file post-hearing briefs, at Bruton's request, on the limited subject of the enforceability under Colorado law of certain provisions in the contract addendum between Bruton, Davis and Ruxin that resulted in an encumbrance on the property, in violation of the Regulatory Agreement for Rotella Park Manor.

The findings of fact and conclusions of law entered at pages 226-231 of the transcript of the hearing are incorporated in this Determination and Order as though fully set forth, and are adopted, as amplified in this Determination and Order.

Findings of Fact

1. Rotella Park Manor is a multi-family housing project constructed with a mortgage insured by HUD under Section 221(d)(4) of the National Housing Act. The owner of Rotella Park Manor is Rotella Park Associates, Ltd. ("RPA"), a Colorado limited partnership. Bertram Bruton is the sole general partner of RPA. Bruton is also the owner of Mitchell Management, the management agent for Rotella Park Manor. (Exh. G-2.)

2. The land on which Rotella Park Manor was constructed was purchased by Bruton from Michael Ruxin and T. Steven Davis. On March 12, 1979, Bruton entered into an installment land contract with Davis and Ruxin for purchase of the land. As part of the contract terms, Bruton assumed four deeds of trust on the land, which he was to pay off by not later than September 12, 1979. A contemporaneous addendum to the contract provided that Bruton would form a limited partnership and construct a building on the land. It further provided that Bruton would act as a general partner for the limited partnership, and that Davis and Ruxin would receive 19 percent of the total partnership interest. (Exh. J-10.)

3. Bruton encountered difficulty in meeting the payment terms of the installment land contract. On October 29, 1979, Davis and Ruxin gave Bruton a written extension until November 6, 1979 to satisfy the payment terms of the contract. As consideration for the extension, Ruxin and Davis required that the 19 percent limited partnership referred to in the March 12 addendum to the contract be described in detail and made a part of the contract. (Exhs. J-1 at 71-74; J-12.)

4. On October 26, 1979, the date of the closing, Bruton, Ruxin and Davis executed the second addendum to the contract. The terms of the addendum were as follows:

a. Bruton agreed that, in the event he received a firm commitment for the construction of an FHA-insured project on the land within one year from October 26, 1979, he would form a limited partnership with Ruxin and Davis, as set forth in the contract addendum dated March 12, 1979. Upon that event, he was to transfer title to the land to the partnership, which would pay Bruton the appraised value of the land, so long as it was appraised for at least $140,000.

b. In the event that Bruton failed to secure a firm commitment from HUD within one year, he was to sell the property. If the property was sold within five years from the date of the addendum, Ruxin and Davis were to be paid 19 percent of the sale proceeds over $140,000.

c. In the event that the property was sold, Bruton was not to have any further interest, including a partnership or corporate interest, in owning or developing the property. If Bruton violated this provision, Ruxin and Davis would retain a 19 percent ownership interest in the real property.

d. If Bruton held the property for a period of five years without selling it, at the end of five years he was to pay Ruxin and Davis $25,000 to extinguish all of their rights under the contract and the addendum. (Exhs. J-1, at 58; J-13.)

5. Ruxin called Bruton twice in 1980 to find out if Bruton was having any success getting the project started. Each time, Bruton told Ruxin that there were problems with financing but that he was working on them. Ruxin never heard anything further from Bruton about the status of the project. Davis had a similar conversation with Bruton in October, 1982. (Exhs. J-1, at 61-63; J-2 at 171-72.)

6. HUD did not give a firm commitment for the development of Rotella Park Manor in the year following the execution of the contract addendum. Bruton had obtained a conditional approval from HUD on February 7, 1979 to build 66 housing units that would receive a Section 8 subsidy. On that same date, an application to HUD for mortgage insurance was filed on behalf of RPA and signed by Bruton as general partner of RPA. HUD did not give a firm commitment for mortgage insurance until January 11, 1982. (Exhs. J-3 at 202-04, 213; J-14; J-19.)

7. RPA was not the name of the limited partnership which Bruton, Ruxin and Davis had agreed to use if they formed a limited partnership. (Exh. J-3 at 206.)

8. On August 10, 1982, Bruton formed RPA as a Colorado limited partnership with Jannen Southwest, Inc. Bruton was listed as the general partner. He owned 99.99 percent of RPA and made all decisions for it. On August 11, 1982, Bruton conveyed

by deed the land he had bought from Ruxin and Davis to RPA, valued at $140,000 for purposes of the transfer. (Exhs. J-3 at 206, 210-22; J-15.)

9. RPA, through Bruton, obtained a $3,329,000 mortgage for Rotella Park Manor from the Colorado Housing Finance Agency, dated August 4, 1982. The mortgage was insured by HUD-FHA under the §221(d)(4) program. (Exhs. G-2; R-3 at 207-08.)

10. On August 11, 1982, the Secretary of HUD and RPA, through Bruton, executed a Regulatory Agreement, as required for projects with mortgages insured by HUD-FHA. Paragraph 8(a) of the Regulatory Agreement provides that RPA could not, without the prior written approval of the Secretary of HUD, "convey, transfer, or encumber any of the mortgaged property, or permit the conveyance, transfer or encumbrance of such property." (Exh. G-1.)

11. In March, 1983, Ruxin drove by the property and observed a large apartment complex on the site. He notified Davis, who also had heard nothing on the matter from Bruton. Both Ruxin and Davis were amazed that a project had been built on the site without their knowledge. Ruxin and Davis called Bruton to ask about their 19 percent interest. Bruton told them that he would give them nothing and to sue him. (Exhs. J-1, at 61-63; J-2 at 171-72.)

12. Ruxin and Davis sued Bruton under the contract of March 12, 1979 and the addendums to it. Ruxin and Davis recorded a lis pendens against the property on June 24, 1983. On October 25, 1984, Ruxin and Davis won their lawsuit against Bruton, and obtained a judgment that they are entitled to 19 percent of the property, as improved, including the rental proceeds from Rotella Park Manor. The presiding judge found that Bruton had intended to defraud Ruxin and Davis by not honoring the provisions of either addendum as early as February, 1979, when Bruton listed RPA was the developer-owner entity for purposes of HUD-FHA mortgage insurance. (Exhs. G-2, J-5; J-6 at 55; R-2.)

13. HUD made numerous written and oral demands on Bruton to do whatever was necessary to have the lis pendens released from the property because it created a cloud on the title. Transamerica Title Insurance Company, insurer of the title for Rotella Park Manor, would not allow HUD to go to final endorsement on Rotella Park Manor because of the lis pendens and subsequent judgment. (Exhs. G-11, G-13, G-14.)

14. Bruton made attempts to negotiate the release of the lis pendens but was unsuccessful. The judgment that Ruxin and Davis obtained against Bruton and RPA has not been satisfied. The lis pendens remains on the property. (Exhs. G-2, R-7, R-8.)

15. On August 1, 1986, a TDP was imposed against Bruton by the HUD Denver Regional Office, applicable to Section 221 mortgage insurance programs within Regional VII of HUD, based upon the encumbrance of the property by the lis pendens and the judgment in favor of Ruxin and Davis, in violation of Paragraph 8(a) of the Regulatory Agreement for Rotella Park Manor. The TDP was affirmed by letter dated October 29, 1986, directly rejecting Bruton's legal argument that the judgment of the court was incorrect because the addendums to the contract merged with the warranty deed, negating the provisions of the addendums. (Govt. Exhs. 3, 4.)

16. By letter dated January 12, 1987, HUD proposed to debar Bruton and his affiliates, RPA, Bertram A. Bruton and Associates, and Mitchell Management from participation in HUD programs for three years from the date of the TDP. The notice of proposed debarment cited as grounds for the action the lis pendens as an encumbrance on the property which has prevented HUD from finally endorsing Rotella Park Manor, and the judgment that gave Davis and Ruxin a 19 percent ownership interest in the project, in violation of the Regulatory Agreement. (Exh. G-5.)

17. Mitchell Management has received consistently high ratings on HUD management review reports for its work at Rotella Park Manor. (Exh. R-1A, B, C.)

Discussion

The purpose of both debarment and more limited sanctions, such as a TDP, is to assure the Government that it only does business with responsible contractors and grantees. 24 C.F.R. §24.0. Responsibility is a term of art in Government contract law, including not only the ability to perform a contract, but the integrity and honesty of the contractor or grantee. Roemer v. Hoffman, 419 F. Supp. 130 (D. D.C. 1976). Bruton does not deny that he is a contractor or grantee subject to HUD's debarment regulations, nor does he deny that he controls all of the affiliates named in the notice of proposed debarment.

The grounds for the TDP and the proposed debarment are the same. In each case, the lis pendens and judgment are treated by HUD as encumbrances on the property of Rotella Park Manor, which are forbidden by the Regulatory Agreement. Bruton contends that neither the lis pendens nor the judgment are "encumbrances" within the meaning of the Regulatory Agreement. He further argues that the decision of the civil court that rendered the judgment in favor of Ruxin and Davis was incorrect as a matter of state law because the addendums to the contract were merged into the warranty deed for the property, and thus their specific provisions became a nullity. Finally, Bruton contends that even if the judgment is upheld, his breach of the second addendum to the contract is not an irregularity in a HUD program, as required by the regulation applicable to a TDP, 24 C.F.R. §24.18, because

it involved actions between Bruton and third parties, not between Bruton and HUD.

After careful consideration of the post-hearing legal memoranda and reply briefs filed by both parties, I conclude, as I did at the hearing, that both the TDP and debarment were warranted and in accordance with the law of both the United States and the State of Colorado.

Under Colorado law, a judgment lien is an encumbrance on the title to property. Colo. Rev. Stat. §13.32102; Spangler v. Sanborn, 43 P. 905 (1895). Although a lis pendens is only a notification to the public that a judgment is sought against a property, and is a technical, temporary encumbrance that may or may not have been caused or allowed to be placed on a property, a judgment is a different matter. In this case, title to Rotella Park Manor is no longer vested entirely in RPA. Ruxin and Davis own 19 percent of it, by virtue of the civil court judgment, which has not been reversed on appeal. HUD cannot go to final endorsement unless Ruxin and Davis agree to relinquish or sell their interest to RPA, which has not occurred. I, therefore, find as a matter of Colorado law that the judgment obtained by Ruxin and Davis constitutes an encumbrance on the property in violation of Paragraph 8(a) of the Regulatory Agreement for Rotella Park Manor. That judgment resulted directly from actions taken by Bruton on August 11, 1982 that violated the second addendum to the contract of March 12, 1979 between Bruton, Ruxin and Davis, by conveying the property to RPA, a company in which Bruton held a 99.99 percent interest.

Bruton created RPA and transferred the property to it with the intent to breach the addendums with Ruxin and Davis, to cut them out of any interest to which they were contractually entitled. Bruton's strained argument that the second addendum was void because it was obtained without consideration is patently ridiculous. Extensions of time in which to obtain financing and forbearances given by Ruxin and Davis to Bruton in exchange for the investment interest set out in the addendum were adequate consideration. The terms of the addendum were not voided or subsumed in the warranty deed transferring the property to Bruton, as found by the trial court.

The trial court found that Bruton defrauded Ruxin and Davis. I find likewise, based upon the record before me. Bruton admitted at his hearing that he would again transfer the property to RPA, in violation of the second addendum, if he were faced again with the same decision that he faced in August, 1982. Bruton never intended to honor the terms of the addendums at any time, as found by the trial judge, a finding in which I concur, based on statements made by Bruton at his hearing.

Bruton's conduct constitutes a serious lack of honesty and integrity. The acts committed by Bruton against Ruxin and Davis

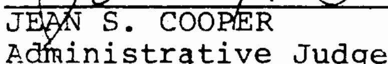
under their agreement has had a direct impact on HUD's ability to go to final endorsement on Rotella Park Manor. Bruton's breach of contract constitutes a violation of the Regulatory Agreement because it created encumbering property rights that have clouded title. It is insensitive at best to argue that HUD has not been one of the victims of Bruton's activities. Bruton is indifferent to the point of callousness to contractual obligations. He remains unconcerned about what he did; he simply does not like the consequences of his actions that have led to HUD sanctions and court judgments. His attitude is that of a contractor totally lacking in the honesty and integrity necessary to participate in Government programs. It is immaterial that his affiliate, Mitchell Management, has done an excellent job of managing Rotella Park Manor. So long as Bruton controls Mitchell Management, it too can be a staging ground for contract violations that affect a HUD program.

I find that there is adequate evidence of irregularities in Bruton's past performance in HUD's Section 221(b)(4) program to support the TDP as imposed. 24 C.F.R. §§24.18(a)(ii) and (iv) and §§24.13(a)(1)(i) and (2)(i). I further find that debarment is warranted and necessary to protect the public interest. Bruton has wilfully failed to perform in accordance with the strictures of Paragraph 8(a) of the Regulatory Agreement, a violation both serious and directly attributable to Bruton's breach and fraud on the contract with Ruxin and Davis. This constitutes a ground for debarment pursuant to 24 C.F.R. §24.6(a)(3)(i). It also constitutes a violation of procedures relating to the performance of obligations incurred pursuant to a final commitment to insure a mortgage, another ground for debarment. 24 C.F.R. §24.6(a)(5).

There is no evidence in the record that mitigates the serious nature of Bruton's actions. Therefore, I find that an exclusion from participation in HUD programs for three years from the date of the TDP is necessary and appropriate. Debarment of Bruton's affiliates, all of which he controls in every sense, is likewise warranted and necessary. Bruton and his affiliates shall be debarred up to and including August 1, 1989.

Conclusion

For the foregoing reasons, the Temporary Denial of Participation of Bertram A. Bruton was supported by adequate evidence of grounds for imposition of that sanction. Furthermore, Bertram A. Bruton and his affiliates Rotella Park Associates, Ltd., Bertram Burton and Associates, and Mitchell Management shall be debarred from participation in all programs of the the U.S. Department of Housing and Urban Development, up to and including August 1, 1989.



JEAN S. COOPER
Administrative Judge

July 25, 1988