

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, D.C.

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| In the Matter of: | : | |
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| STANLEY A. MONTZ, | : | HUDBCA No. 91-5843-D28 |
| | : | Docket No. 91-1607-DB (LDP) |
| Respondent. | : | |
| | : | |

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For the Government

DETERMINATION BY ADMINISTRATIVE JUDGE TIMOTHY J. GRESZKO

March 7, 1991

Statement of the Case

By letter dated October 5, 1990, Stanley A. Montz ("Respondent") was notified by James M. Wilson, Manager, Houston Office, U.S. Department of Housing and Urban Development ("HUD," "Department," or "Government") that a twelve month Limited Denial of Participation ("LDP") was being imposed on him because of his failure to timely submit earnest money to HUD's designated closing agent in twenty cases. On October 30 1990, the LDP was affirmed by Wilson. Respondent made a timely request for a hearing on the propriety of the LDP and a hearing was conducted in Houston, Texas on February 13, 1991. Both parties to this proceeding elected to waive the filing of briefs. This determination is based upon the consideration of the entire record in this case.

Findings of Fact

1. This matter arises in the context of the Department's single-family property sales program. Under this program, HUD acquires single-family homes, townhomes, and condominiums when lenders file a claim based upon a delinquent mortgage under the FHA-insured mortgage plan. HUD pays the claim, receives title, and places the property on the market for sale. HUD relies upon real estate professionals to provide the link between the Department and the prospective home buyer. Any real estate agent who signs the "HUD Broker Certification/Non-Discrimination Form" and the "Agreement to Abide By HUD's Earnest Money Policy (9/87)" is eligible to advertise and submit offers to purchase HUD homes. (Govt. Exh. 1).

2. Respondent has been a licensed real estate broker since 1971 and has been a participant in the HUD single-family property sales program since early 1987. Respondent attended an orientation course in 1987, conducted by the Department for new participants in the program. These orientations are conducted to fully acquaint participants in the program with the program requirements set forth in the Department's "sales-broker booklet." The "sales-broker booklet" contains two paragraphs which set forth the broker's requirement to forward the earnest money deposit (\$1000) to the appropriate HUD closing agent¹ within one business day of HUD's acceptance of an offer. (Tr., Montz, pp. 33-34; Govt. Exh 1, pp. 4, 15).

3. On December 19, 1989, Respondent executed an "Agreement to Abide By HUD's Earnest Money Policy (9/87)," which states, in relevant part, that:

As a condition to participate in HUD's Single Family Property Sales Program, I agree to comply with that Department's Earnest Money Policy.

I agree to collect Earnest Money from prospective buyers at the time the contract is written and do so according to HUD's instructions.

I understand that it is my responsibility to collect and accept Earnest Money only in the form of a Cashier's Check, certified check, or postal money order with no termination date or cancellation provision.

¹ The "closing agents" in these transactions are not employees of the Department, but are private attorneys who perform real estate closings under contract with the Department. (Transcript ("Tr."), Fought, pp. 29-30).

I understand that I am fully responsible for any deposit accepted and I will tender such Earnest Money deposit, along with a copy of the HUD Form 9548, Sales Contract, to the chosen closing agent within one business day after contract is verbally 'accepted' at the bid opening, to be deposited in his/her escrow account. (emphasis supplied) (Govt. Exh. 2).

4. By memorandum dated March 9, 1990, Louis J. Fought, Chief, Property Disposition Branch, HUD Houston Office, informed Respondent that HUD's closing agent had not received the required \$1000 earnest money deposit on an offer that had been accepted by HUD on February 23, 1990. The memorandum demanded that Respondent present a cashier's check to the HUD closing attorney within three days of receipt of the memorandum and further advised that: (1) non-presentation of these funds may result in denial of Respondent's participation in HUD programs; (2) failure to comply with this demand may result in Respondent's suspension from doing further business with any federal agency; and (3) the United States Attorney's office may pursue collection of these monies, as well as criminal prosecution of the offender.

On at least nineteen occasions thereafter, in every month from April, 1990 to September, 1990, Fought issued similar memoranda to Respondent, seeking payment of overdue earnest money deposits relative to other contracts. During this time-frame Respondent was, on the average, about twenty-three days late in tendering the earnest money deposit when Fought sent a memorandum demanding payment of a deposit. Respondent was not less than eleven days late on any of these occasions, and, in one instance, was fifty-one days late. (Govt. Exhs. 2-57).

5. The purpose of HUD's earnest money policy is important, because the earnest money indicates the purchaser's intent to proceed with the transaction, and because the earnest money provides funds for the seller to use as liquidated damages. The earnest money also protects other bidders from insincere offers. (Tr., Fought, p. 13).

6. All of the monies in question were deposited by Respondent in an escrow account at the Charter Bank in Houston, Texas. There is no evidence that Respondent ever applied any of this money to his personal use. Respondent testified that as a matter of custom and practice in the community, and because of his good standing in the community, closing agents at HUD and VA (U.S. Department of Veterans Affairs) closings would deduct the earnest money at closing, and take it out of his commission. (Tr., Montz, pp. 36-38).

7. Respondent testified that after he received Fought's March 1990 memorandum demanding payment of the earnest money deposit, his bookkeeper called HUD closing agent Forrest Clark,

who had conducted most of Respondent's closings over a two-year period. Respondent stated that Clark advised him not to be concerned with Fought's memorandum, and to submit the money in the next couple of days. Respondent stated that he felt Clark had the authority, as HUD's closing agent, to waive program-related requirements. Respondent's testimony is uncorroborated as to either the custom and practice in the community or any assurances given to him by Forrest Clark. (Tr., Montz, pp. 38-41).

8. Respondent stated that no losses have occurred with respect to any HUD program earnest money in his custody, that he has never failed to refund earnest money when required to do so, and that he has never been disciplined by state or local real estate authorities. Respondent also stated that the VA had also sanctioned him as a result of the HUD LDP, but had subsequently reinstated him because he had presented the VA with evidence proving that the monies in question had been deposited in an escrow account, which demonstrated that he had complied with the spirit of the escrow requirement. (Tr., Montz, pp. 41-46).

Discussion

An LDP may be imposed by a HUD Office Manager on participants in HUD programs for causes established by adequate evidence, including "[i]rregularities in a participant's . . . past performance in a HUD program." 24 C.F.R. § 705(a)(2). There is no dispute that Respondent is a participant within the meaning of the Department's regulations, because of his activities as a real estate broker in the Department's single family property sales program. 24 C.F.R. §24.110(a)(1)(ii)(C)(9). Respondent also admits that he committed the alleged irregular acts, but asserts that he should be reinstated on the grounds of mitigating circumstances. (Respondent's Answer, paragraphs 3, 4).

Underlying the Government's authority not to do business with an individual is the requirement that agencies only do business with "responsible" persons and entities. 24 C.F.R. § 24.115(a). The term "responsible," as used in the context of these regulations is a term of art, which includes not only the ability to perform a contract satisfactorily, but the honesty and integrity of the contractor as well. 48 Comp. Gen. 769 (1979). Like a debarment or a suspension, an LDP may not be used for punitive purposes, but only to protect the public interest. 24 C.F.R. §24.115(b). The test for the need for any of these sanctions is present responsibility. Gary Snider, HUDBCA No. 87-2407-D21 (Feb. 26, 1988). Although a finding of lack of present responsibility may be based on past acts, Schlesinger v. Gates, 249 F.2d 111 (D.C. Cir. 1957), all mitigating circumstances must

be taken into consideration in deciding whether a sanction is necessary. Gonzalez v. Freeman, 344 F.2d 570 (D.C. Cir. 1964).

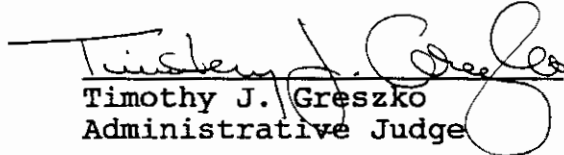
As Respondent admits that the alleged irregular acts occurred, Respondent has the burden of establishing mitigating circumstances. 24 C.F.R. § 24.313(b)(4). In this regard, Respondent asserts that (1) he and his staff have been substantial producers in HUD's single family property sales program; (2) all earnest money deposits were kept in an escrow account and no losses were ever sustained; (3) it is in the public interest that Respondent be allowed to resume participation in the program at the earliest possible date so as to continue contributing to the reduction of HUD's inventory of foreclosed homes; (4) the VA has lifted its sanction; and (5) Respondent is prepared to fully and completely comply with all applicable program requirements.

Even accepting all of the Respondent's allegations as true, I do not find these factors to be sufficiently mitigating. Respondent failed to comply with a program requirement to forward in a timely manner large earnest money deposits to the closing agent in virtually every transaction in which he participated in 1990. The importance of this requirement was repeatedly brought to Respondent's attention by the Department in an orientation session, a booklet, an agreement, and by twenty separate memoranda from Fought from April, 1990 to September, 1990. Respondent's asserted reliance on the advice of a closing agent is unsubstantiated by any corroborating evidence, and in any event, was clearly misplaced. Moreover, Respondent's reliance on this advice is indeed incredible, in light of the avalanche of notices to the contrary from the HUD Houston Office Chief of Property Disposition, all but one of which were sent after Respondent allegedly received the advice of the closing agent. These notices were explicit warnings, and mentioned the possibility of suspension, debarment from all Government programs, and even the possibility of criminal prosecution. In addition, the notices were signed by a HUD official with superior authority to that of a closing agent. By ignoring these notices for over six months, Respondent assumed all risks incident to his non-compliance. The evidence in this case establishes a profound lack of sound business judgement, and a serious breach of trust.

I do not find Respondent's evidence in mitigation sufficient to overcome the presumption of lack of present responsibility that flows from Respondent's numerous failures to comply with the Department's earnest money deposit requirements. As there is no evidence in this record of the VA's program requirements, testimony that the VA lifted its sanction is entitled to little evidentiary weight.

Conclusion

For the foregoing reasons, I find that the imposition of the LDP imposed on Stanley A. Montz is in the interests of the Department and the public, and that a reduction in the term of the LDP is not warranted at this time.


Timothy J. Greszko
Administrative Judge