

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

In the Matter of:

CAPITOL STATE MORTGAGE
CORPORATION,

Respondent.

HUDALJ 04-061-MR
HUDALJ 04-156-MR
(Consolidated)
Decided: March 30, 2005

Ana I. Fabregas, Esq.
For the Government

James O. Okorafor, Esq.
For the Respondent

Before: ROBERT A. ANDRETTA
Administrative Law Judge

**DECISION AND ORDER
ON SUMMARY JUDGMENT**

Statement of the Case

On November 10, 2003, the United States Department of Housing and Urban Development (HUD) notified Capital State Mortgage Corporation (CSMC) that it was being permanently withdrawn from HUD programs for violation of HUD regulations. The violations alleged, pursuant to 24 CFR Part 202, are the submission of falsified financial statements for fiscal years ending June 30, 1995 – 1999 and continued employment of a suspended individual as a director and principal. CSMC filed a timely appeal on December 8, 2003, and the matter docketed as HUDALJ 04-156-MR was referred to this forum for hearing.

On December 19, 2003, HUD filed a complaint against CSMC seeking civil money penalties in the amount of \$5,500. This is based on the government's claim that CSMC violated 24 CFR Part 202 by filing a financial

statement for the

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fiscal year ending June 30, 1999, that was false and was not audited by a licensed certified public accountant. This matter was docketed as HUDALJ 04-061-MR.

On July 2, 2004, upon motion by the government and assent of both parties, this forum issued an order consolidating the two proceedings.

There have been numerous pre-hearing motions, as follows: On August 27, 2004, the Respondent filed a Motion for Summary Judgment, a Motion to Refer to Settlement (ADR), and Respondent's First Supplemental Answer. On September 1, 2004, the Government filed a Motion for Summary Judgment, an Opposition to Respondent's Motion to Refer to Settlement (ADR), and a Motion to Strike Respondent's First Supplemental Answer. On September 13, 2004, the Government filed an Opposition to Respondent's Motion for Summary Judgment. On November 23, 2004, the Respondent filed a Response to HUD's Motion for Summary Judgment. On December 1, 2004, the Government filed a Motion for Leave to File a Reply to Respondent's Opposition to the Government's Motion for Summary Judgment and Issuance of Findings of Fact; the Government attached its Reply to Respondent's Opposition to the Motion requesting leave to file such Reply. On December 15, 2004, the Respondent filed an Opposition to Government's Reply to Respondent's Opposition to Motion for Summary Judgment.

Motions for Summary Judgment

In their respective Motions for Summary Judgment and Opposition to the opposing party's Motion for Summary Judgment, the Government and Respondent raise the following dispositive issues: whether the defenses asserted by the Respondent grounded in either statutes of limitation or equitable doctrines are applicable to this proceeding; whether there is sufficient admissible evidence to prove the allegations against CSMC; and whether there are any issues of material fact in dispute.

1. *Inapplicability of statutes of limitation and equitable doctrines.* The Government's Complaint for Civil Money Penalties is brought against CSMC pursuant to 24 CFR § 30.85, alleging that CSMC violated HUD

requirements that are imposed on HUD/FHA-approved mortgages; the violation was the submission of a false financial statement for the fiscal year ending June 30, 1999. The

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Mortgagee Review Board's permanent withdrawal action is based on allegations that CSMC submitted false financial statements to HUD for the fiscal years ending June 30, 1995 – 1999 and that CSMC knowingly retained a debarred or suspended individual as an officer, director or principal. CSMC argues, in both its own Motion for Summary Judgment and in its Response to HUD's Motion for Summary Judgment, that all of the claims alleged are barred by a statute of limitations that would exist if the Government's actions were brought pursuant to common law doctrines of breach of contract, fraud, or negligence. CSMC also asserts that the suit is barred by the doctrine of *res judicata* because of the existence of a settlement, effective August 14, 2002, between the two parties.

This action is a statutory action brought against CSMC on behalf of the United States. Common law defenses that would apply in suits involving negligence, breach of contract, or statute of fraud claims do not apply where the suit is brought on behalf of the United States government in its governmental capacity. In addition, the allegations against CSMC are based on violations of federal statutes that apply to HUD/FHA mortgagees, not common law tort doctrines.

Actions brought on behalf of the United States in its governmental capacity are subject to time limitations only when Congress has imposed a statute of limitations. *United States v. Summerlin*, 60 S. Ct. 1019, 1020 (1940); *E.I. Dupont De Nemours & Co. v. Davis*, 44 S. Ct. 364, 366 (1924); *Guaranty Trust Co. v. United States*, 58 S. Ct. 785, 788-89 (1938). Congress has imposed no statute of limitations for Respondents' past activities that are considered by the Mortgagee Review Board in its decision whether to take a permanent withdrawal action or not. Therefore, the Board's inclusion of violations as far back as 1995 is permissible for the purposes of undertaking a permanent withdrawal action. Actions for civil money penalties are limited pursuant to 28 U.S.C. § 2462, which indicates that such actions must be brought within five years from the date on which the claim accrued. The claim accrues on the date of the violation. *United States v. Core Lab*, 759 F.2d 480, 482 (5th Cir. 1985). The violation is the *submission* of the false statement. In this instance the statement was submitted to HUD

on October 5, 1999. The complaint for civil money penalties was filed on December 19, 2003, within the five- year time limit.

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On August 14, 2002 a settlement agreement was signed between HUD and CSMC. The charges that resulted in a settlement were based on allegations that: CSMC had allowed non-HUD approved mortgagers to originate and process FHA loans; CSMC made prohibited payments in connection with HUD/FHA insured mortgages; CSMC failed to provide valid Mortgage Credit Analysis Worksheets signed by an FHA approved underwriter; CSMC charged excessive or unallowable fees to mortgagors; and CSMC failed to implement a Quality Control Plan in compliance with HUD/FHA requirements. Government Exhibit 10.

The Respondent argues that the equitable doctrines of *res judicata* and collateral estoppel bar the current actions against CSMC. The defenses of *res judicata* and collateral estoppel are only available against the government in unusual circumstances that are not present here. The Government argues that even if these defenses applied, the settlement does not have preclusive effect because the current suit arises out of different facts from those underlying the settlement agreement (See Government Exhibit 10) and because the settlement agreement includes the following statement:

“This Settlement Agreement does not affect any future administrative actions against CSMC or any future or currently pending administrative actions against CSMC’s principals, employees, or agents.” (Paragraph 12 in its entirety).

This limitation prevents any preclusive effect the prior proceeding may have had on the present case. In addition, the violation of retaining a debarred or suspended individual as an officer, partner, director or principal occurred after the settlement date and as such, could not have been included in any prior proceedings between the parties.

2. *Sufficient admissible evidence.* Respondent states, incorrectly, that the affidavits submitted in support of the Government’s Motion are

inadmissible because they are hearsay evidence. The Federal Rules of Civil Procedure specifically mention affidavits as one type of evidence that is admissible in summary judgment proceedings. Fed. R. Civ. P. 56. Accordingly, the affidavits submitted by the Government are admitted into evidence and are accepted as documentation of the facts of the case.

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3. *Lack of material facts in dispute.* The Federal Rules of Civil Procedure (FRCP) permit a party, including the Government, to dispose of an action in which there is no genuine issue of material fact remaining to be proven. Fed. R. Civ. P. 56. More specifically, the FRCP state that summary judgment shall be granted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Id.* at 56(c). Courts interpret this language to mean that a hearing is not necessarily required where the question is essentially one of law.¹ Although facts are to be construed in favor of the non-moving party, courts cannot use summary judgment to resolve factual disputes.² Finally, summary judgment “may be rendered on the issue of liability alone although there is a genuine issue remaining as to the amount of damages.” Fed. R. Civ. P. 56(c). In the instant case, there are no factual disputes in the evidence submitted by the parties.

CSMC submitted financial statements to HUD that purported to be audited by Certified Public Accountants, but in fact were not audited by any CPA and were not even prepared by the persons whose names appeared on the documents. This is supported by the affidavits of Mr. Kenneth Dike and Mr. Edward Apenteng, as well as documentation provided by the Texas State Board of Public Accountancy. See Government Exhibits M, N, O, and P. Although the Respondent asserted in its Opposition that these facts were incorrect, no evidence was introduced to support Respondent’s assertion.

¹ See *Persian Gulf Outward Freight Conference v. Federal Maritime Commission and United States of America*, 375 F.2d 335 (D.C. Cir. 1967); see also *National Trailer Convoy, Inc. v. United States of America and Interstate Commerce Commission*, 293 F. Supp. 634 (N.D. Okla. 1968) (holding that there is no right to cross examination and confrontation if there are no material facts in dispute); *Greene v. Finley*, 749 F.2d 467 (7th Cir. 1984) (holding that agencies, like courts, can grant summary judgment, and the Due Process clause does not require a hearing where there is no disputed issue of material fact to resolve).

² *TFWS, Inc. v. Schaefer*, 325 F.3d 234, 241 (4th Cir. 2003).

In a summary judgment proceeding, mere assertions are not sufficient to prove facts or refute the Motion.

“... an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).

The fact that Respondent knowingly submitted false statements to HUD is further supported by the efforts on the part of Respondent to hide its submission of false financial statements by mimicking the signatures of Mr. Dike and Mr. Apenteng on the submitted financial statements. See Government Exhibits O and P, with attachments.

The submitted evidence further shows that Respondent has continued to knowingly retain a suspended individual as a director and principal. Mr. Frank Jeffreys was suspended by HUD in 2002. Respondent has continued to name Mr. Jeffreys as the President and sometimes Director of CSMC on its Franchise Tax Public Information Reports filed with the State of Texas. See Government Exhibits R and S. Mr. Jeffreys has been so named on these filings in every year since 2002. Respondent is aware of Mr. Jeffreys' status as a suspended individual, as shown by subpoenas of and other communication with Mr. S. Thomas Walker, Vice President of CSMC. See Government Exhibit T and attachments.

The pleadings and evidence in this case show that there is no genuine issue as to any material fact, and the Government, as the moving party, is therefore entitled to judgment as a matter of law. Accordingly, for the reasons cited above, and for the good cause shown in the Motion, the Government's Motion for Summary Judgment is **GRANTED**. It follows, for the reasons cited above, that the Respondent's Motion for Summary Judgment is **DENIED**.

As a consequence of granting the Government's Motion, I find that Respondent caused the submission to HUD of false and fraudulent financial statements for the fiscal years ending June 30, 1995 – 1999 and that Respondent knowingly continued employment of a suspended individual as a director and principal. These are violations of 24 CFR Parts 30.35 and 202 and HUD HANDBOOK 4060.1.

Civil Money Penalty

The Government requests imposition of a Civil Money Penalty in the amount of \$5,500 for the single violation that is not precluded by the Congressionally-imposed statute of limitations – that is, the submission of a false financial statement for the fiscal year ending June 30, 1999. This

request is made pursuant to 24 CFR Part 30. The submission of the false financial statement constitutes a violation of 24 CFR 30.35(a)(1), 12 U.S.C. § 1735f-14 (b)(1)(G)(I) and (H), and HUD Handbook 4060.1 REV-1. The factors to be considered in determining the amount of a civil money penalty are the gravity of the offense, any history of prior offenses, ability to pay the penalty, injury to the public, benefits received, deterrence of future violations, and such other factors as the Secretary may deem appropriate. 12 U.S.C. § 1735f-14(c)(3).

Based on the findings above, specifically the finding that Respondent caused the submission to HUD of a false and fraudulent financial statement for the fiscal year ending June 30, 1999, and considering the factors specified at 12 U.S.C. § 1735f-14(c)(3), a civil money penalty is appropriate for this offense. The evidence submitted in this case indicates the offense committed was grave because the submission of false, unaudited financial statements caused HUD to rely on false information, which increased the financial risk borne by HUD through the increased risk this action posed to the FHA Single Family Insurance Fund. This action also caused injury to the public because it interfered with HUD's ability to monitor an FHA approved mortgagee to ensure that the mortgagee continued to meet HUD requirements and followed sound business practices as it originated FHA-insured mortgages for the public. Submitting false, unaudited financial statements created benefits for the Respondent because the Respondent did not have to pay money to a certified public accountant to audit its business and Respondent avoided having its business independently audited. In addition, Respondent has the ability to pay the civil money penalty because its most recent financial statement submitted to HUD indicates that Respondent's net worth was \$872,943 and imposition of a civil money penalty will serve as a deterrent to future violations. There is no history of prior violations.

The violation alleged under 24 CFR 30.35 is the violation of 12 U.S.C. 1735f-14(b). The maximum penalty for a violation of this section is \$5,500. 12 U.S.C. § 1735f-14 (a)(2). The gravity of the offense, the harm to the public, the benefits that accrued to the Respondent, and the deterrent effect of the civil money penalty, in addition to the consideration of Respondent's ability to pay, justify imposition of the maximum penalty in this matter. Accordingly, a civil money penalty is hereby imposed in the amount of \$5,500.

Respondent Capitol State Mortgage Corporation shall forbear any HUD/FHA mortgage activities and shall pay the last-named amount to the Secretary of HUD without further proceedings and within 45 days of the date of this Order. In accordance with the regulation that is codified at 24 CFR 26.39, this Order constitutes the final agency action on this matter.

So **ORDERED**.

/s/

ROBERT A. ANDRETTA
Administrative Law Judge

Dated: March 30, 2005

