

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

UNITED STATES DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,

Petitioner,

v.

JOHN HENDERSON

Respondent.

15-AF-0025-PF-002

December 16, 2015

**ORDER GRANTING GOVERNMENT'S MOTION FOR SUMMARY
JUDGMENT**

The above-entitled matter is before this Court on a *Motion for Summary Judgment or Sanctions* ("Summary Judgment Motion" or "Motion"), filed on October 27, 2015, by the United States Department of Housing and Urban Development ("HUD" or "the Government"). The Government contends that it is entitled to judgment as a matter of law because Respondent John Henderson ("Respondent") has confirmed his primary residence. His statements that he lived elsewhere during the relevant periods were therefore necessarily false.

A response to the *Summary Judgment Motion* was due on or before November 10, 2015. 24 C.F.R. §§ 26.31(c); 26.40(b). The Court did not receive any response by that date. On November 30, 2015, the Court issued an *Order to Show Cause* ordering Respondent to respond to the *Summary Judgment Motion* on or before December 7, 2015. Respondent did not file any response by that date. Accordingly, the Summary Judgment Motion will be **GRANTED**.

PROCEDURAL HISTORY

On December 12, 2014, HUD served upon Respondent a *Complaint* seeking civil penalties and assessments pursuant to the Program Fraud Civil Remedies Act of 1986 ("PFCRA"), 31 U.S.C. §§ 3801-3812, and the applicable regulations at 24 C.F.R. Part 28. The *Complaint* alleged that Respondent was ineligible to participate in HUD's Housing Choice Voucher Program ("HCVP" or "Voucher Program") because he resided in the dwelling unit along with the subsidized tenant. The *Complaint* therefore sought \$116,090 in civil penalties and assessments for 20 false claims submitted to HUD.

On February 19, 2015, HUD filed a *Motion for Default Judgment* ("First Default Motion") citing Respondent's failure to respond to the *Complaint*. This Court denied the *First Default Motion* on April 17, 2015, based largely on a handwritten letter sent from Respondent to HUD on or about March 9, 2015. The letter stated that Respondent had resided at [REDACTED], MA 02656 ("the Nelson Avenue address"),

since 2004. The *Complaint* and all subsequent documents had been sent to 52 Cedar Street, Hyannis, MA 02601 (“the Cedar Street address”), the property that was the subject of the Voucher Program. Although Respondent received these documents, the Court could not determine whether the Cedar Street address was his primary residence, and so could not state with certainty that he had been given adequate notice of the *Complaint*.

On June 2, 2015, HUD filed an *Amended Complaint*, delivered to both the Nelson Avenue and Cedar Street addresses. The *Amended Complaint* incorporated the residency assertions made in Respondent’s letters, and added a claim for false statements made in relation to HUD’s Home Equity Conversion Mortgage Program (“HECM” or “Equity Conversion Program”). HUD filed another Motion for Default (“Second Default Motion”) on August 14, 2015, again citing Respondent’s failure to file a timely response to the *Amended Complaint*. The Court agreed that default was warranted. However, it denied the *Second Default Motion* because the *Amended Complaint* had alleged factually incompatible theories of liability. Both sets of facts could not be deemed admitted.

On September 30, 2015, Respondent filed a document that the Court deemed to be responsive to the *Amended Complaint*. The assertions contained in that Response form the basis for HUD’s *Summary Judgment Motion*.

LEGAL FRAMEWORK

Summary Judgment

Pursuant to 24 C.F.R. § 26.32(l), this Court is authorized to “decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact[.]” The Court may exercise its discretion in application of Rule 56 of the Federal Rules of Civil Procedure. 24 C.F.R. § 26.40(f)(2).

Summary judgment will be granted where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574 (1985); Celotex Corp. V. Catrett, 477 U.S. 317 (1986). Summary judgment is a “drastic device” because, when exercised, it cuts off a party’s right to present its case. Nationwide Life Ins. Co. v. Bankers Leasing Ass’n. Inc., 182 F.3d 157, 160 (2d Cir. 1999). “Accordingly, the moving party bears a heavy burden of demonstrating the absence of any material issues of fact.” Id. In reviewing a motion for summary judgment, the reviewing court must find “all ambiguities and draw all reasonable inferences in favor of the party defending against the motion.” Id.; see also, Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 888 (1990) (“where the facts specifically averred by [the nonmoving] party contradict facts specifically averred by the movant, the motion must be denied”).

Program Fraud Civil Remedies Act

Respondent is charged with multiple violations of the PFCRA. The PFCRA imposes liability on “[a]ny person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know — (A) is false, fictitious, or fraudulent; [or] (B) includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent....” 31 U.S.C. § 3802(a)(1)(A)-(B).

The PFCRA defines a “claim” as “[a]ny request, demand, or submission — ... (B) made to a recipient of ... money from an authority or to a party to a contract with an authority — ... (ii) for the payment of money ... if the United States — (I) provided any portion of the money requested or demanded....” 31 U.S.C. § 3801(a)(3)(B). Under the PFCRA, “each ... individual request or demand for ... money constitutes a separate claim. 31 U.S.C. § 3801(b)(1) (2012). Under the PFCRA, a person knows or has reason to know that a claim is false if the person: (a) has actual knowledge of the claim’s falsity; (b) acts in “deliberate ignorance” as to the truth or falsity of the claim; or (c) acts in “reckless disregard” of the truth or falsity of the claim. 31 U.S.C. § 3801(a)(5) (2012). Furthermore, “no specific intent to defraud is required.” Id.

A person found liable under the PFCRA may be subject to a civil penalty of not more than \$7,500.00 for each claim. 31 C.F.R. § 3802(a)(1)-(2) (2012); 24 C.F.R. § 28.10 (2012). In addition to the civil penalties imposed, a person found liable for making a false claim may also be “subject to an assessment, in lieu of damages sustained by the United States because of such claim, of not more than twice the amount of such claim.” 31 U.S.C. § 3802(a)(1); 24 C.F.R. § 28.10(a)(6).

HUD Housing Choice Voucher Program

The Housing Choice Voucher Program provides low-cost housing to low-income individuals or families. 42 U.S.C. § 1437(f). Under the program, a homeowner enters into a Housing Assistance Payments Contract (“HAP Contract”) with their local public housing authority and receives monthly rental payments from the housing authority on behalf of the low-income tenant. A housing unit that is occupied by the homeowner, a member of the homeowner’s family, or any person with an interest in the unit is ineligible to participate in the Voucher Program. 42 U.S.C. § 1437(f), 24 C.F.R. § 982.352(a)(6). Accordingly, prior to entering into a HAP Contract the homeowner must certify that no such individual will reside in the subject property.

HUD Home Equity Conversion Mortgage Program

The Equity Conversion Program allows elderly homeowners to convert the equity in their homes to monthly income. 12 U.S.C. § 1715z-20. To participate in the program, the homeowner must use the property as their principal residence. 24 C.F.R. §§ 206.39, 206.27(c)(2)(i). The homeowner must re-assert residency each year, and there can be only one permanent residence. 24 C.F.R. § 206.211.

DISCUSSION

The Court's *Order on the Government's Motion for Default or Sanctions and Scheduling Order* denied HUD's *Second Default Motion* because HUD alleged in its *Amended Complaint* that Respondent lived at both the Cedar Street Address and the Nelson Avenue Address simultaneously. By doing so, HUD created a question of material fact as to Respondent's residency. Respondent has since resolved that ambiguity. In his *Answer*, Respondent acknowledged that "I have not lived at [the Cedar Street Address] since 2004." He enclosed two letters, purportedly from his former neighbors on Cedar Street, reiterating that he no longer lived at that address. In addition, correspondence from Respondent to HUD Counsel in May 2015 also included a letter from his purported landlord stating that he had lived at the Nelson Avenue Address since 2004.

Respondent's repeated assertions constitute an admission that the Cedar Street Address has not been his principal place of residence since 2004. The HECM Program requires its participants to live in the subject property. Respondent certified on three separate occasions — in 2011, 2014, and 2015 — that he did so. His admissions, however, confirm that he did not.

There is no longer any dispute that Respondent's written certifications supporting his participation in the HECM program were false. There are no other material facts in dispute. Accordingly, HUD is entitled to judgment as a matter of law. The *Summary Judgment Motion* is therefore **GRANTED**.

PENALTY FACTORS

HUD seeks three civil penalties, totaling \$24,500.¹ The amount of penalties imposed shall be based on consideration of evidence in support of one or more of the factors as listed in 24 C.F.R. § 28.40(b) and enumerated below. The Government contends that Respondent's actions support a maximum penalty. For the reasons discussed below, the Court agrees.

(1) The number of false, fictitious, or fraudulent claims or statements.

Respondent made three written statements that each asserted a material fact that was false. Specifically, Respondent signed Annual Occupation Certifications in 2011, 2014, and 2015 certifying that the Cedar Street Address was his principal residence.

(2) The time period over which such claims or statements were made.

Respondent's false statements were made in three separate years.

¹ False statements made after February 19, 2013, carry a maximum civil penalty of \$8,500. Statements made prior to that date carry a maximum penalty of \$7,500. 24 C.F.R. § 28.10(b). Respondent is therefore liable for one statement at the \$7,500 level and two statements at the \$8,500 level.

(3) The degree of Respondent's culpability with respect to the misconduct.

Respondent is fully culpable for his conduct. He has not suggested that the certifications were made in error, nor could he plausibly do so. The sole purpose of the Annual Occupancy Certification is to ensure that the HECM borrower is actually living at the subject property. It is a simply worded one-page form, and clearly states what time period it encompasses. Respondent knew that he lived at the Nelson Avenue Address during the entire period in which he was enrolled in the HECM Program. Indeed, he was living at the Nelson Avenue Address before he ever enrolled in the HECM Program. He therefore had specific knowledge, at the time he signed the certifications, that they were entirely untrue.

(4) The amount of money or the value of the property, services, or benefit falsely claimed.

There are no false claims related to Respondent's three false statements.

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the cost of investigation.

HUD has not alleged any financial loss associated with Respondent's false statements. Benefits under the HECM Program are generally paid out in one lump sum after the death of the HECM borrower.

(6) The relationship of the civil penalties to the amount of the Government's loss.

The requested civil penalty of \$24,500 bears no relationship to the Government's loss because there is no evidence suggesting that the Government has experienced any loss.

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs.

"Fraud erodes public confidence in the government's ability to efficiently and effectively manage its programs." U.S. ex rel. Rosales v. San Francisco Hous. Auth., 173 F. Supp. 2d 987, 1019 (N.D. Cal. 2001) (citing S.Rep. No. 345, 99th Cong., 2d Sess. (1986), reprinted in U.S.C.C.A.N. 5266, 5268). It is clear from the evidence that Respondent deliberately entered into a scheme to defraud HUD. His written certifications were made with the intent to further that scheme. Had Respondent's deception not been discovered, HUD would almost certainly have paid out HECM

benefits after his death. His actions thus directly jeopardized HUD's ability to provide funds to the elderly citizens the HECM Program was designed to support.

(8) Whether Respondent has engaged in a pattern of the same or similar misconduct.

Respondent's three written certifications constitute a pattern of deliberate falsehoods designed to support his ongoing fraudulent conduct. His willingness to mislead HUD on these occasions suggests he would have continued to do so had he not been discovered.

(9) Whether Respondent attempted to conceal the misconduct.

Respondent has readily and repeatedly acknowledged his residency throughout the course of this proceeding. However, the sole purpose of the false certifications was to conceal the fact that he never lived at the Cedar Street Address.

(10) The degree to which Respondent has involved others in the misconduct or in concealing it.

There is no evidence that Respondent involved others in his misconduct.

(11) If the misconduct of employees or agents is imputed to Respondent, the extent to which Respondent's practices fostered or attempted to preclude the misconduct.

This factor is not applicable to the case at bar.

(12) Whether Respondent cooperated in or obstructed an investigation of the misconduct.

Respondent's admission of his principal place of residence was the result of HUD's investigation into his participation in the Housing Choice Voucher Program. By denying that he lived at the Cedar Street Address, Respondent avoided liability for false claims related to the HCVP, but ensured his liability under the HECM Program. This is neither cooperation nor obstruction.

(13) Whether Respondent assisted in identifying and prosecuting other wrongdoers.

This factor is not applicable to the case at bar.

(14) The complexity of the program or transaction, and the degree of Respondent's sophistication with respect to it, including the extent of Respondent's prior participation in the program or in similar transactions.

Respondent's fraudulent conduct did not require any degree of sophistication. He was presented with a clearly worded document asking him to certify his principal residence. He signed the certification despite his actual knowledge that his factual representations were untrue.

(15) Whether Respondent has been found, in any criminal, civil, or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly.

This factor is not applicable to the case at bar.

(16) The need to deter Respondent and others from engaging in the same or similar misconduct.

Respondent engaged in a plot to obtain benefits from HUD that he knew he did not qualify for. His false statements were in direct support of that scheme. A maximum penalty is necessary to dissuade Respondent or other similarly situated persons from engaging in similar misconduct.

(17) Respondent's ability to pay.

Respondent has provided no information about his ability to pay a penalty.

(18) Any other factors that may mitigate or aggravate the seriousness of the false claim or statement.

There are no other mitigating or aggravating factors in this case.

CONCLUSION

There are no material facts in dispute in the instant case. The evidence confirms that HUD is entitled to judgment as a matter of law. Respondent submitted three certifications that he knew to be false. He has therefore violated the PFCRA and is liable for three civil penalties. Accordingly, Respondent shall pay to the Secretary of HUD civil penalties of \$24,500, which are immediately due and payable without further proceedings.

So **ORDERED**,

/s/

Alexander Fernández
Administrative Law Judge