

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

In the Matter of:

Salvador Alvarez,

Respondent.

HUDALJ No. 04-025-PF
OGC Case No. 04-3101-PF
Decided: June 23, 2005

Todd Mailberger, Esq.,
For the Government

Louis P. Dell, Esq.,
For the Respondent

Before: ROBERT A. ANDRETTA
Administrative Law Judge

INITIAL DECISION AND ORDER

Procedural History

The Plaintiff, the U.S. Department of Housing and Urban Development (“the Department,” “the Government,” or “HUD”), seeks the imposition of damages and a civil money penalty against the Defendant, Salvador Alvarez, pursuant to the Program Fraud Civil Remedies Act of 1986 (“PFCRA”), 32 U.S.C. §§ 3801 - 3812 (“the Act”) and HUD’s regulations that are codified at 24 CFR Part 28, by which jurisdiction is obtained. The Department asserts that Defendant Alvarez knowingly submitted false and fraudulent forms in connection with mortgage applications for two HUD-insured loans.

This action was initiated by a Complaint filed and duly served upon the Defendant on October 17, 2003. The Government provided a copy of the applicable regulations with the complaint that, *inter alia*, explain Defendant's right to a hearing to contest the allegations contained in the Complaint. Further, the Complaint itself contains a section entitled "Notice Of Procedures," which states the Defendant's right to a hearing, specifies what the defendant must do to have a hearing, and informs him of the regulatory requirement that he file an Answer within 30 days. Defendant filed his Answer To Complaint on December 1, 2003. It was received by the Department on December 10, 2003, and accepted into the record by the Administrative Proceedings Division of HUD's Office of General Counsel. On December 12, 2003, this matter was referred to this forum for action in accordance with the regulations codified at 24 CFR 26.37 and 28.30(b).

On April 14, 2004, the Government filed its Government's Motion To Strike Affirmative Defenses ("Motion To Strike") in which it requested this forum to strike all eleven affirmative defenses put forth by Respondent in his Answer to HUD's Complaint: (1) failure to state a claim; (2) *res judicata*/collateral estoppel; (3) indemnification; (4) failure to mitigate damages; (5) laches; (6) contributory/comparative fault; (7) estoppel; (8) statute of limitations; (9) unclean hands; (10) statute of frauds; and (11) intervening cause. On May 24, 2004, Respondent filed his Memorandum Of Points And Authorities In Opposition To Plaintiff HUD'S Motion To Strike ("Opposition"). Notwithstanding that Respondent's Opposition was untimely filed under the regulation that is codified at 24 CFR 26.38(b), it was accepted for consideration because the time delay involved was deemed harmless to the Government's case. In an Order issued September 16, 2004, I granted the Government's Motion with regard to all defenses but for numbers one, seven and nine, and therefore struck the other defenses from the record. The rationale for the ruling on each defense is contained in the Order, which is of record.

On May 4, 2004, the Government filed a Motion For Partial Summary Judgment (the "Motion") and, on June 3, 2004, Respondent filed its Memorandum Of Points And Authorities In Opposition To Plaintiff HUD's Motion For Summary Judgment (the "Opposition"). HUD argued for the granting of its Motion that there is no genuine issue of material fact concerning whether Respondent caused the submission of two applications for HUD-insured mortgages that he knew or had reason to know were supported by documents that

contained false, fictitious, or fraudulent material facts, because Respondent previously pled guilty to causing false statements in connection with these applications. *United States v. Alvarez*, No. CR 01-609 GHK (C.D. Cal. 2001). The Motion was accompanied by documents that proved the allegations. Consequently, according to the Government, HUD was entitled to summary judgment as a matter of law.

Respondent's entire Opposition to the Motion was based upon the date of the Government's submission of its Motion. Respondent argued that the Administrative Law Judge previously assigned to this case ordered during a conference call that any motion for summary judgment should be filed on or before April 29, 2004, but the Government's Certificate of Service attests that the Motion was served on April 30, 2004. Respondent further argued that the Motion was not "actually mailed to counsel for defendant until May 3, 2004, and was not received until May 7, 2004." Respondent charged the Government with submitting a false document, demanded that the Government should be held to the time limit, and further demanded that the allegation of the "false certificate of service" should be referred to higher level officials for investigation.

The one-day lapse as well as the further minor delay evidenced by the postmark on the envelope fall within the automatic and informal extension of time that I add to all time limits, including regulatory time limits, in recognition of the realities of the Government's mail room service, normal delays in the U.S. Postal Service, and the exacerbation of both since the well-known anthrax incidents of the year 2001. There was no evidence to support a claim that the Certificate of Service was fraudulently dated and, thus, the demand that I refer this incident to higher authority was denied.

Respondent failed to state how the minor time delay in receiving an expected motion for summary judgment had adversely effected him and, thus, this argument did not compel a ruling in his favor. Since there was no additional and substantive argument in the Opposition as to why the Motion should be denied and since there was no particularized responses to the Government's statements of facts in support of the Motion, I moved on to consideration of the sufficiency of the Motion itself.

Federal Rules of Civil Procedure (“FRCP”) provide guidance for the conduct of proceedings under 24 CFR Part 24. The Federal Rules of Civil Procedure 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 Finally, and of relevance to this case, 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)*.

The main thrust of the Motion For Summary Judgment was Defendant’s prosecution and guilty plea to HUD-related fraud in the case of *United States v. Salvador Alvarez*, No. CR 01-609 GHK (C.D. Cal.). Alvarez entered into the plea agreement with the United States Attorney’s Office for the Central District of California on or about June 20, 2001. Pursuant to the plea agreement, an Information was filed charging Alvarez with making false and fraudulent statements in connection with two loans insured by HUD, in violation of 18 U.S.C. § 1010, and aiding and abetting in violation of 18 U.S.C. § 2. By pleading guilty, Alvarez admitted to the facts recounted in the Information. Among other things, Alvarez admitted to the facts set forth, *supra*, and specifically acknowledged causing HUD to insure at least two loans in reliance on false employment documents and/or false statements.

Alvarez admitted that as a Remax real estate agent he was responsible for causing the submission of applications to obtain HUD-insured mortgages in connection with residential housing purchases. He admitted that he made, and

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).

aided and abetted in the making and submission of fraudulent FHA-insured home mortgage loan applications. These included false and fraudulent W-2 forms indicating the borrower was gainfully employed when, in fact, the borrower was not so employed. Alvarez admitted that his improper actions caused HUD to insure at least two loans in reliance on false employment documents and/or false statements of employment. Defendant also made the following admissions, which are contained in the Sentencing Memorandum that he filed on or about July 6, 2001, in the United States District Court for the Central District of California:

[He] submitted a fraudulent FHA-insured home mortgage loan application dated January 29, 1998 for the purchase of a property located at 3264 A-D Minnesota Avenue, Lynwood, CA, which included a false and fraudulent 1996 Form W-2 that indicated the borrower worked at CLR Water Purification Systems earning \$25,461.28, when in truth and in fact, the borrower was not so employed.

* * *

[He] submitted a fraudulent FHA-insured home mortgage loan application dated December 29, 1999 for the purchase of a property located at 1351 E. 49th Street, Los Angeles, CA 90011, which included a false and fraudulent 1998 Form W-2 that indicated the borrower worked at AR Dental Lab Systems earning \$31,953.28, when in truth and in fact, the borrower was not so employed.

A judgment of conviction was entered against Alvarez on or about February 13, 2002, in the United States District Court for the Central District of California.

After studying the record in this case, and especially the Government's Motion and attached Exhibits One through Eleven, including but not limited to Respondent's Judgment and Conviction order along with his plea agreement, I concluded that the pleadings and evidence in this case show that there is no genuine issue as to any material fact, and that the Government, as the moving party, was therefore entitled to judgment as a matter of law. Accordingly, for the reasons cited above, for the good cause shown in the Motion, and notwithstanding any apparent contradiction with the rulings on the Motion To Strike, the Government's Motion

For Partial Summary Judgment was granted.

Findings of Fact

As a consequence of the granting of the Motion, I found that Defendant caused the submission of false and fraudulent documents in connection with mortgage applications for two HUD-insured mortgage loans. While Mr. Alvarez was a real estate agent he acted on behalf of two prospective buyers seeking HUD-insured mortgages. In that capacity, Defendant caused the submission of two loan packages, FHA Loan No. 041-9991142 ("loan 142") and FHA Loan No. 197-1373004 ("loan 004"), each containing false written statements regarding the borrower's personal income and employment information. HUD relied upon these false statements when deciding whether to insure these loans and did insure them based on the statements and other information. HUD later paid a claim in connection with loan 142. I therefore found the Defendant liable for an assessment because the claim was supported by false statements. HUD did not pay a claim in connection with loan 004. However, I found Alvarez liable for his fraudulent activity. These facts, and other facts in support thereof, are stated with great particularity in the Motion For Partial Summary Judgement, pp. 8 - 14, Section IV, subparagraphs 1 - 41, and in the Complaint (pp. 6 - 12), and they are hereby incorporated into this Initial Decision And Order as my complete findings of fact. As a result of these false statements that he caused to be submitted to HUD, I found Defendant liable under the PFCRA, and the only remaining issues for this forum at hearing were the amounts of assessment and penalties to be imposed. That hearing was held in Los Angeles, California, on April 7, 2005.

Remedies

The Act authorizes the imposition of an assessment of up to twice the amount of any false claim paid by the government, as well as the imposition of civil penalties. These are for the purposes of providing a remedy to reimburse the government for its losses and to deter the making, presenting and submitting of false claims to the government by others as well as the defendant in the instant case. Pub. L. 99-509, Section 6102(b); 31 U.S.C. § 3802(a)(1). In considering the False Claims Act, the Supreme Court has stated, "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages " *U.S. v. Halper*, 490 U.S. 435, 446 (1989). HUD's

formula comes in the form of factors to be considered in determining the amount of assessment and penalties under the PFCRA. They are listed at 24 CFR 28.40(b)(1) through (17) and discussed in the following paragraphs.

The Defendant plead guilty to, and was convicted of, two crimes of submitting false statements to ensure that two unqualified borrowers would qualify for HUD loans, and there are also the two instances of fraudulent activity that are the subject matter of this proceeding. In addition, Defendant Alvarez admitted to investigators that there were up to six similar instances. (T 85, 183)². Thus, it is clear that, rather than there being just two isolated instances of fraudulently acquiring HUD-insured loans, Defendant had established a pattern of operating in that manner. The fact that the two instances that are the subject matter of the confession and conviction occurred in a two-year period bolsters the view of the establishment of a pattern of fraudulent activity.

The properties for which HUD is seeking an assessment and penalties under the PFCRA relate to two incidents for which the Defendant was found guilty. As such, the Defendant is highly culpable with respect to the described misconduct. *See HUD v. Gurino*, 95-5058-PF (March 29, 1996) (Culpability is great when blame cannot be shifted to others and a Defendant cannot disassociate himself from his fraudulent activities.). Defendant's culpability is also exacerbated by the fact that he involved at least four other people in his misconduct; the forgers from whom he purchased the documents and the borrowers involved in the two loans for which he was convicted. (T 87).

As to the amount of money involved, HUD only paid a claim on one of the two properties that are the subject matter of this case, and that amount was \$325,149.49. (G Ex 1 and 2). The Government seeks \$64,80.89 of assessment and a penalty of \$5,500 for each of the two properties where the Defendant was found guilty of committing fraud. The amount sought by the Government is less than the amount paid on the loan. Because the claim amount exceeded \$150,000, the Reviewing Official reduced the amount of the claim to \$150,000, which was then doubled under the PRCFA to \$300,000. This amount was then reduced as shown in the following table:

² References to the Transcript of the hearing are indicated by a "T" and a page number. The Government's Exhibits are indicated by "G Ex" And an exhibit number.

Claim paid by HUD	150,000
PFCRA multiple of two	300,000
Less amount recovered by sale	225,045 ³
Loss to HUD	74,955
Less restitution paid to Court	10,146
Total loss to Government	64,809

In addition, the Government spent approximately 7,303 man-hours on the investigation of the criminal case. (T 233). This amount of time is only that spent by HUD's Office of Inspector General personnel. It does not include the time of FBI personnel involved in the case. Additional man-hours of labor were expended to prepare the criminal case and the instant case. (T 102). However, the Government does not seek an assessment for these additional personnel expenditures

The Government seeks the maximum civil penalty amount of \$5,500 for each of the two counts in this case because the Defendant intentionally procured and submitted false information to HUD, leading HUD to insure loans that it would have otherwise declined to insure. (T 57). Because of the \$150,000 limitation of jurisdiction imposed on HUD, the amount that HUD can seek in assessment and penalties is dwarfed by the amount lost to the Government. While it could be argued that the amount of the penalty is not meant to reimburse the Government for its losses, it has been found otherwise in *HUD v. Doris N. Weaver*, HUDALJ 92-1802-PF (January 15, 1993) (The amount of the claim compared to the amount of [assessment] sought is a factor for consideration in determining a penalty amount.). Note that the Government also has not pursued an assessment for at least six other instances of fraud.

The Government's need to deter others from committing similar acts and schemes, and to retain confidence in the public that HUD programs are free from fraud and abuse, are compelling reasons to impose the maximum penalty.

³ Defendant asserts that the fair market value of the property at the time of the sale was \$309,767. However, I take the view that a more accurate assessment of the value of the property at the time of the sale is the amount for which it was sold, \$253,000. The remaining difference is due to the interest on arrears, foreclosure costs, taxes, maintenance, and sales expenses.

See, HUD v. Borello, HUDALJ 94-0072-PF (June 6, 1995); *HUD v. Gurino*, HUDALJ 95-5058-PF (March 29, 1996). The fraudulent activities committed by the Defendant are detrimental to the Single Family Mortgage Insurance Program because they circumvent some of the most important requirements of the program. Defendant's actions contributed to a loss in the mortgage insurance account, thereby hurting the program designed to provide housing to moderate- and low-income individuals. (T 58).

Defendant was known to be dealing with at least six properties when he was stopped in his tracks by the HUDOIG investigation. (T 85-87, 183). He had to be spending a great proportion of his time and energies in arranging for forgeries and false documentation and getting it all properly submitted to HUD. His had to be a sophisticated and well-thought-out procedure and process. I must assume that his conduct would have continued had he not been caught. It is hard to imagine that he felt any remorse other than for having been caught and the consequences. This is bolstered by his own testimony, wherein he says that if he had know what the consequences to him would be, he would not have conducted his program of fraud. (T 180).

Defendant argued at the hearing that he and his family have been significantly effected, both economically and personally, by his criminal conviction, and that, therefore, I should consider this as a mitigating factor in my decision in this case. For example, the Defendant argues that HUD debarred him for a period of three years and he lost his real estate license, both of which facts had financial impact on him. However, debarment is not a mitigating factor. It is the Government's means of protecting itself from fraudulent participants in its programs.

Defendant testified that following his conviction, and as part of his probation, he could only work on a part-time basis during home detention. (T193-94, 199-201). However, there were no such restrictions in the sentencing order of the Court. (G Ex 3). In fact, the Defendant was specifically permitted to work six days per week and to attend church while serving his home detention period of six

months. *Id.* Defendant did work during his detention period and afterwards by purchasing homes, renovating them, and selling them for profit. (T 194-94). He further testified that he bought and sold property for gross profits of between \$15,000 and \$30,000 during that six months detention, he most recently sold a property for \$150,000 profit, and he owns a vacant lot, which he is developing. (T 193; 197-99). Finally, his own home is worth \$500,999. (T 199).

I find that the monetary and personal affects on the Defendant and his family should not be used to mitigate the amount of assessment and penalties, especially since the assessment amount is already limited by the jurisdictional amount of \$150,000 and so many Government expenses have not been requested for reimbursement. Rather, Defendant's apparent lack of genuine remorse for what he did, rather than simply for the consequences to him, and his wilful disregard for the committing of fraud and solicitation of his customers to commit fraud, encourage the imposition of the full assessment and penalties sought.

Order

I conclude that Defendant, Salvador Alvarez, falsified property sale closing forms on which HUD/FHA depend to decide whether to approve mortgage insurance under the FHA program, and further find that this conduct falls within the purview of the Program Fraud Civil Remedies Act. Therefore:

On the date that this decision becomes final, the defendant shall be liable to the United States for an assessment of \$64,808.89 and civil penalties in the total amount of \$11,000.

Defendant has the right:

- a. to file a motion for reconsideration with this forum, within twenty days of the receipt of this Decision, in accordance with 24 CFR 28.75; or
- b. to file a notice of appeal, pursuant to 31 U.S.C. § 3803(I), to the Secretary of HUD, within thirty days of the issuance of this Decision or a decision responding to a motion for reconsideration, in accordance with 24 CFR 28.77.

Unless this Initial Decision And Order is timely appealed to the Secretary of HUD in accordance with paragraph (b) of this Order, or a motion for reconsideration is filed in accordance with paragraph (a) of this Order, this Decision will become the final decision of the Secretary and be final and binding upon the parties thirty days after its issuance. *See* 24 CFR 28.73(d).

So ORDERED.

/s/

ROBERT A. ANDRETTA
Administrative Law Judge

Dated: June 23, 2005