

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

United States Department of Housing
and Urban Development,

Plaintiff,

v.

John Wayne Dillard and
Avanti Financial Services, Inc.,

Defendants.

HUDALJ 93-1916-PF

Decided: February 8, 1993

John Wayne Dillard, *pro se*

Philip A. Kesaris, Esquire
For the Government

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

On November 3, 1992, Plaintiff, the U.S. Department of Housing and Urban Development ("the Department" or "HUD") issued a Complaint seeking a civil penalty of \$20,000 against John Wayne Dillard ("Defendant Dillard") and Avanti Financial Services, Inc., ("Defendant Avanti")¹, pursuant to the Program Frauds Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812 ("the Act"), and HUD's implementing regulations, 24 C.F.R. Part 28. The Complaint notified Defendants of their right to request a hearing by filing an answer, and that failure to answer the Complaint within 30 days would result in imposition of the maximum of civil penalties without right to appeal. 24 C.F.R.

¹Defendant Dillard and Defendant Avanti will be referred to jointly as "Defendants."

§ 28.13(b)(4). Defendants received the Complaint by certified mail on November 6, 1992, but never filed an answer. On January 5, 1993, this tribunal notified Defendants of its intent to issue an Initial Decision on or after February 1, 1993. The notice informed Defendants that the Decision would assume the facts as alleged in the Department's Complaint as true, and that if such facts established liability, the Decision would impose the maximum amount of penalties allowed under the Act. See 24 C.F.R. § 28.19(b) and (c). Defendants have yet to answer or to demonstrate that any extraordinary circumstances have prevented them from filing an answer. See 24 C.F.R. § 28.19(d) and (e). Accordingly, this matter is ripe for decision.

Findings of Fact

1. Defendant Dillard is an individual residing at 2129 Glyndon Avenue, Venice, California. Defendant Dillard is a licensed real estate broker in the State of California, and is an officer of Defendant Avanti.

2. Defendant Avanti is a corporation licensed in the State of California, with a main office located at 118 North 5th Street, Montebello, California.

3. HUD, through the Federal Housing Administration ("FHA"), insures loans pursuant to section 203 of the National Housing Act, 42 U.S.C. § 1709(b). In the course of administering its mortgage insurance programs, HUD will on occasion acquire title to properties as a result of defaults and foreclosures, among other things. In order to recoup its losses, HUD sells the properties in its inventory pursuant to its Property Disposition Program.

4. Under the Property Disposition Program, HUD solicits sealed bids from members of the public, through real estate brokers, for the purchase of properties in HUD's inventory. Such sealed bids consist of: (a) a Standard Retail Sales Contract (HUD Form 9548); (b) an Addendum-A, entitled Earnest Money Certification (HUD Form 9556); and (c) an Addendum-B, entitled Forfeiture and Extension Policy.

5. The Standard Retail Sales Contract submitted by Defendants in each of the four transactions described below in paragraphs 8 to 11 states, among other things, the amount of the earnest money deposit and identifies where such earnest money is held. This contract also contains a statement, signed by the broker, that "he is in compliance with HUD's earnest money policy as set forth in [the] Agreement to Abide."

6. The Earnest Money Certification submitted by Defendants in each of the four transactions described below in paragraphs 8 to 11 is signed by the broker and states:

I hereby certify that I have collected from the above purchaser(s), in connection with their offer to purchase the above property, an earnest money deposit in the amount of _____, in the form

of a cashier's check or money order deposited in the trust fund of this brokerage. Upon being notified that this is a successful offer, this amount shall be deposited into the title company, HUD's closing agent. The deposit of this fund shall be made by the sales broker only after the purchaser(s) have been determined to be the winning bidder(s) and HUD has signed the HUD-9548 Standard Retail Sales Contract, together with the attachments accepting the transaction.

WARNING: Section 1010, Title 18, U.S.C., Department of Housing and Urban Development and Federal Housing Administration Transaction provides: 'Whoever, for the purpose of influencing in any way the action of such Department . . . makes, passes, utters, or publishes any statement, knowing the same to be false . . . shall be fined not more than \$5,000 or imprisoned not more than two years, or both.'

I have fully explained HUD's Earnest Money Forfeiture Policy to the purchaser(s) and I agree to immediately comply with HUD's instructions for the ultimate disposition of this earnest money deposit.

7. The Forfeiture and Extension Policy, signed by the purchaser, and submitted in each of the transactions described below in paragraphs 8 to 11, states, among other things, that "[s]hould the purchaser fail or refuse to perform his/her part of the sales contract promptly, at the time or in the manner specified, the earnest money deposited . . . shall be retained by the Seller as liquidated damages."

8. On November 29, 1988, Defendants submitted a sealed bid on behalf of two purchasers, Drina Ochoa and Etelvina Ochoa, for the purchase of a HUD-owned property, 21185 Long Eagle Road, Apple Valley, California (HUD Case No. 046-476507-270). This bid consisted of: (a) a Standard Retail Sales Contract (HUD Form 9548); (b) an Addendum-A, Earnest Money Certification (HUD Form 9556); and (c) an Addendum-B Forfeiture and Extension Policy. The contract was accepted by the Property Disposition Branch of the HUD Santa Ana Office on December 1, 1988.

9. On November 29, 1988, Defendants submitted a sealed bid on behalf of a purchaser, Louis V. Ruiz, for the purchase of a HUD-owned property, 22129 Kayenta Road, Apple Valley, California (HUD Case No. 046-569977-703). The bid consisted of: (a) a Standard Retail Sales Contract (HUD Form 9548); (b) an Addendum-A, Earnest Money Certification (HUD Form 9556); and (c) an Addendum-B, Forfeiture and Extension Policy. The contract was accepted by the Property Disposition Branch of the HUD Santa Ana Office on December 1, 1988.

10. On January 24, 1989, Defendants submitted a sealed bid on behalf of a purchaser, Drina Ochoa, for the purchase of a HUD-owned property, 14835 Flathead Road, Apple Valley, California (HUD Case No. 046-602569-203). The bid consisted of; (a) a Standard Retail Sales Contract (HUD Form 9548); (b) an Addendum-A, Earnest Money Certification (HUD Form 9556); and (c) an Addendum-B, Forfeiture and Extension Policy. The contract was accepted by the Property Disposition Branch of the HUD Santa Ana Office on January 26, 1989.

11. On January 24, 1989, Defendants submitted a sealed bid on behalf of a purchaser, Louis V. Ruiz, for the purchase of a HUD-owned property, 13220 Pueblo Road, Apple Valley, California (HUD Case No. 046-452910-203). This bid consisted of: (a) a Standard Retail Sales Contract (HUD Form 9548); (b) an Addendum-A, Earnest Money Certification (HUD Form 9556); and (c) an Addendum-B, Forfeiture and Extension Policy. The contract was accepted by the Property Disposition Branch of the HUD Santa Ana Office on January 26, 1989.

12. With respect to each of the sealed bids identified above in paragraphs 8 to 11, Defendants stated in the Earnest Money Certifications that they had "collected from the above purchaser(s), in connection with their offer to purchase the above property, an earnest money deposit in the amount of \$2,000, in the form of a cashiers check or money order deposited in the trust fund of this brokerage."

13. Defendants' statements in the Earnest Money Certifications were false because they never collected the required earnest monies from the purchasers.

14. After the purchasers identified above in paragraphs 8 to 11 did not follow through with the purchases of the four properties, HUD repeatedly demanded in writing that Defendants disperse the earnest monies to HUD. Defendants have not complied with these demands.

15. With respect to the bid to purchase 21185 Long Eagle Road (HUD case No. 046-476507-270), described above in paragraph 8, Defendants knew or should have known that the Earnest Money Certification, representing that they had collected the \$2,000 earnest money deposit, was false.

16. With respect to the bid to purchase 22129 Kayenta Road (HUD Case No. 046-569977-703), describe above in paragraph 9, Defendants knew or should have known that the Earnest Money Certification, representing that they had collected the \$2,000 earnest money deposit, was false.

17. With respect to the bid to purchase 14835 Flathead Road (HUD Case No. 046-602569-203), described above in paragraph 10, Defendants knew or should have known that the Earnest Money Certification, representing that they had collected the \$2,000 earnest money deposit, was false.

18. With respect to the bid to purchase 13220 Pueblo Road (HUD Case No. 046-452910-203), described above in paragraph 11, Defendants knew or should have known that the Earnest Money Certification, representing that they had collected the \$2,000 earnest money deposit, was false.

Discussion

Section 3802(a)(2) of the Act provides that any person who makes a written statement to the Government that the person knows or has reason to know is false or fraudulent shall be subject to a civil penalty of not more than \$5,000 for each statement. 31 U.S.C. § 3802(a)(2); *see also* 24 C.F.R. § 28.5(b). In this context each written representation and certification constitutes a separate statement. 24 C.F.R. § 28.5(b)(2). Further, where it is determined that more than one person is liable for making a false statement, each such person may be held liable for a civil penalty. 24 C.F.R. § 28.5(e).

The bids and the Earnest Money Certifications made by the Defendants in each of the four transactions described above are written statements within the meaning of § 3802(a)(2) of the Act. 24 C.F.R. § 28.5(b)(2).

In each of the four transactions that are the subject of this case, the Defendants submitted an Earnest Money Certification stating that they had collected \$2,000 earnest money which they knew, or should have known, was false. Accordingly the Defendants are jointly and severally liable for a civil penalty of \$5,000 for each false statement, a total of \$20,000.²

²Although certain factors may be considered in determining the amount of penalties, *see* 24 C.F.R. § 28.61, Defendants' failure to file an answer requires imposition of the maximum amount of penalties allowable under the Act, *see* 24 C.F.R. § 28.19.

DETERMINATION

Defendants' false statements in the Earnest Money Certifications (HUD Forms 9556) violate 24 C.F.R. § 28.5. Accordingly, Defendant Dillard and Defendant Avanti are jointly and severally liable under 31 U.S.C. § 3802(a)(2) for a civil penalty of \$20,000.

/s/

SAMUEL A. CHAITOVITZ
Administrative Law Judge

NOTICE

Defendants have the right:

- (1) within thirty (30) days of the issuance of this Initial Decision, to file with this tribunal a motion to reopen on the grounds that extraordinary circumstances prevented timely filing of an answer to the Department's Complaint; and
- (2) to file a notice of appeal with the Secretary or Deputy Secretary of HUD within fifteen (15) days after this tribunal denies any motion to reopen.

