

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



SUNNYMTG.COM
866-768-CASH, LLC,

Petitioner,

v.

GEORGIA DEPARTMENT OF
BANKING AND FINANCE,

Respondent.

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* **Docket Number:**
* **OSAH-DBF-MBL-0903552-60-Schroer**
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**MEMORANDUM OPINION AND ORDER GRANTING IN PART
RESPONDENT’S MOTION FOR SUMMARY DETERMINATION**

Petitioner SunnyMTG.com 866-768-CASH (“SunnyMTG.com”) appeals a Notice of Intent to Revoke Annual License issued by Respondent, the Georgia Department of Banking and Finance (“Department”). The Department filed a Motion for Summary Determination, supported by affidavits, on August 8, 2008. After careful consideration of the briefs submitted by the Parties, and for the reasons stated below, the Department’s Motion for Summary Determination is **GRANTED** in part and **DENIED** in part.

I. FINDINGS OF UNDISPUTED FACT

A. Employment of a Convicted Felon

1.

On January 30, 2008, the Department initiated an examination of SunnyMTG.com, a licensed mortgage lender. (Thomas Aff., ¶ 4.)

2.

During the examination, the Department requested that a responsible officer complete an Officer's Questionnaire for SunnyMTG.com. (Thomas Aff. ¶ 5, Ex. C.)

3.

Sumit Gaddh, the president of SunnyMTG.com, completed the Officer's Questionnaire. (Thomas Aff. ¶ 5, Ex. C.)

4.

As indicated in the employee portion of the Questionnaire, SunnyMTG.com employed Marie Mahan as a loan officer beginning on December 1, 2006. (Ex. C at 4-23.)

5.

On November 3, 1989, Ms. Mahan (a/k/a Marie McCoy) was convicted of issuing a bad check, a felony. (Ex. D.)

6.

As part of the examination, the Department's examiner requested that SunnyMTG.com produce the criminal background check that it had conducted on Ms. Mahan. (Thomas Aff., ¶ 6.)

7.

The background check indicated Ms. Mahan's November 3, 1989 conviction. (Thomas Aff., ¶ 6, Ex. E.)

8.

The examiner asked Mr. Gaddh why SunnyMTG.com hired Ms. Mahan after receipt of the background check. Mr. Gaddh replied that he was aware of the felony conviction but wanted to give Ms. Mahan a second chance. (Thomas Aff., ¶ 6.)

B. Control of Unlicensed Mortgage Brokers

9.

During the course of the examination, SunnyMTG.com provided the Department with the 1099 forms issued to twenty-six individuals for 2007 (hereinafter the “1099 Recipients”).¹

10.

Along with the 1099 forms, SunnyMTG.com also provided a letter to the Department that stated “[w]e were unaware the GA files are to be paid 1099 – in Dec 2007 – I found that GA LO’s are to be W-2 . . . Upon finding this out, we immediately took corrective measures and paid GA files via W-2” (Thomas Aff., ¶ 7, Ex. G.)

11.

SunnyMTG.com provided the Department with a copy of its mortgage transaction journal for 2007. (Thomas Aff., ¶ 8, Ex. H.) The journal lists twenty-two of the twenty-six 1099 Recipients as the “loan officer” on at least one loan brokered by SunnyMTG.com. (See Ex. H.) Further, the Officer’s Questionnaire identifies all of the 1099 Recipients as “L.O.” (Ex. C at 4-23.) As twenty-two of these individuals were identified as “loan officer” on mortgage transaction journal, it follows that the abbreviation “L.O” in the Officer’s Questionnaire is an abbreviation for loan officer.²

¹ (Thomas Aff., ¶ 7, Ex. F.) SunnyMTG.com issued 1099 forms to Aaron Dubitzky, Angela McMahon, Anthony Grazier, Caroline Morrison, Chanel Uboh, Corey Brown, Elizabeth Paige, Fernando Membreno, Grace Cowins, Gressey Bryant, Jr., Jacqueline Dosumu, Jerry Cooper, Katasha Hicks, Linda Fortenberry, Marc Lubin, Marie Mahan, Mark Hall, Michael Swint, Nica Rourk, Pamela Jones, Pierre Michel, Ratiya Parker, Renee Black, Sadie Middlebrooks, Shaun Williams, and Steve Knight. (Thomas Aff., ¶ 7, Ex. F.)

² Moreover, during the examination, the Department reviewed certain loan files provided by SunnyMTG. The loan applications in those files indicated that Chanel Uboh, Fernando Membreno, Gressey Bryant, Katasha Hicks, Linda Fortenberry, and Tia Parker a/k/a Ratiya

12.

Therefore, SunnyMTG.com had 26 loan officers on staff during various time periods who were compensated on a 1099 basis. (See Exs. C & H.) None of those 1099 Recipients have ever been individually licensed or registered with the Department as mortgage lenders or mortgage brokers. (Shelley Aff., ¶ 4.)

13.

As a result of the investigation, the Department issued a Notice of Intent to Revoke Annual License to SunnyMTG.com on May 15, 2008. Petitioner timely requested a hearing. (See Exs. A-B.)

II. CONCLUSIONS OF LAW

A. Standard for Summary Determination

1.

On a motion for summary determination, the moving party must show by supporting affidavits or other probative evidence that there is no genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(1).

2.

When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit(s) or other probative evidence that there is a genuine issue of material fact for determination. GA. COMP. R. & REGS. r. 616-1-2-.15(3). See also Ward v. Morgan, 280 Ga. 569 (2006), citing Lau's Corp., Inc. v. Haskins, 261 Ga. 491 (1991); O.C.G.A. § 9-11-56.

Parker – all 1099 Recipients – were the interviewers for those loans and that their employer was SunnyMTG. (Thomas Aff., ¶ 9, Exs. I-N.)

B. Employment of a Convicted Felon

The Department asserts that SunnyMTG.com violated Georgia Code Section 7-1-1004(d) by employing an individual who was convicted of a felony involving moral turpitude.

3.

Section 7-1-1004 provides, in pertinent part:

The department may not issue or may revoke a license if it finds that the applicant or licensee, or any person who is a director, officer, partner, agent, employee, or ultimate equitable owner of 10 percent or more of the applicant or licensee or any individual who directs the affairs or establishes policy for the applicant or licensee, has been convicted of a felony involving moral turpitude in any jurisdiction or of a crime which, if committed within this state, would constitute a felony involving moral turpitude under the laws of this state. For the purposes of this article, a person shall be deemed to have been convicted of a crime if such person shall have pleaded guilty to a charge thereof before a court . . .

O.C.G.A. § 7-1-1004(d) (emphasis added).

4.

A crime involves moral turpitude if the crime is “contrary to justice, honesty, modesty, good morals or man’s duty to man.” Jarrard v. Clayton County Board of Registrars, 262 Ga. 759, 761 (1993). Crimes designated as felonies are crimes involving moral turpitude. See Rehberger v. State, 269 Ga. 576 (1998); Lewis v. State, 243 Ga. 443, 445-446 (1979); Hall v. Hall, 261 Ga. 188 (1991). Therefore, the felony crime of issuing of a bad check is a crime involving moral turpitude. Cf. Carruth v. Brown, 202 Ga. App. 656, 658-59 (1992) (finding that a misdemeanor conviction for issuing a bad check was a crime involving moral turpitude for impeachment purposes).

5.

Ms. Mahan was employed by SunnyMTG.com despite the fact that she had been convicted of the felony of issuing a bad check, which constitutes a crime involving moral turpitude under Georgia law. Id.

6.

Accordingly, SunnyMTG.com violated Code Section 7-1-1004(d) by hiring an individual who had been convicted of a felony involving moral turpitude.

C. Control of Unlicensed Mortgage Brokers

The Department asserts that SunnyMTG.com violated Code Section 7-1-1002 by paying employees who performed mortgage brokering functions on a 1099 basis, thereby directly or indirectly controlling numerous unlicensed parties.

7.

Code Section 7-1-1002 provides, in pertinent part:

(a) On and after July 1, 1993, it is prohibited for any person to transact business in this state directly or indirectly as a mortgage broker or a mortgage lender unless such person:

(1) Is licensed or registered as such by the department;

(2) Is a person exempted from the licensing or registration requirements pursuant to Code Section 7-1-1001; or

(3) In the case of an employee of a mortgage broker or mortgage lender, such person has qualified to be relieved of the necessity for a license under the employee exemption in paragraph (11) of Code Section 7-1-1001.

O.C.G.A. §§ 7-1-1002(a)(1)-(3). Therefore, a person is prohibited from brokering mortgage loans unless the individual is licensed or is exempt from the licensing requirement.

8.

The term “person” includes “any individual, sole proprietorship, corporation, limited liability company, partnership, trust, or any other group of individuals, however organized.” O.C.G.A. § 7-1-1000(14). The term “mortgage broker” includes “any person who directly or indirectly solicits, processes, places, or negotiates mortgage loans for others.” O.C.G.A. § 7-1-1000 (11).

9.

In or around 2007, SunnyMTG.com had twenty-six unlicensed mortgage brokers on staff during various time periods who were compensated on a 1099 basis.³

10.

Code Section 7-1-1001 includes the following exemption for employees of a licensee:

The following persons shall not be required to obtain a mortgage broker or mortgage lender license . . .

(11) A natural person employed by a licensed mortgage broker, a licensed mortgage lender, or any person exempted from the licensing requirements of this article when acting within the scope of employment and under the supervision of the licensee or exempted person as an employee and not as an independent contractor.

O.C.G.A. § 7-1-1001(11).

11.

However, Department Rule 80-11-4-.03 limits the above exemption as follows:

(2) The exemption from licensing provided pursuant to O.C.G.A. § 7-1-1001(11) to an employee of a licensee or exemptee applies only to natural persons who meet all of the following criteria:

³ Federal regulations require payors of wages to report such information to the Internal Revenue Service on a return called a “1099” form. However, the regulations state that if the payor-payee relationship is that of an employer and employee (as opposed to a payor and independent contractor), such information must be reported on a W-2 or W-3 form instead of a 1099 form. See 26 C.F.R. §§ 1.6041-1(a)(2), 1.6041-2(a)(1).

...

(d) An employee may not be paid or compensated for performance of mortgage activity as an independent contractor or on a 1099 basis . . .

GA. COMP. R. & REGS. r. 80-11-4-.03(2)(d).

12.

In this case, Department Rule 80-11-4-.03 precludes application of the Code Section 7-1-1001(11) exemption because the twenty-six 1099 Recipients were compensated on a 1099 basis.

13.

Therefore, the twenty-six unlicensed 1099 Recipients affiliated with SunnyMTG.com were transacting business in this state as mortgage brokers in violation of Code Section 7-1-1002(a).

14.

In the event a company directly or indirectly controls a person who violates Code Section 7-1-1002(a), then the company also violates Code Section 7-1-1002(a). See O.C.G.A. § 7-1-1002(c). Accordingly, pursuant to Code Section 7-1-1002(c), SunnyMTG.com also violated Code Section 7-1-1002(a).

D. Notice of Intent to Revoke Annual License

Respondent asserts that its decision to issue a Notice of Intent to Revoke Annual License to SunnyMTG.com was valid because SunnyMTG.com violated the Georgia Residential Mortgage Act.

15.

Pursuant to Code Section 7-1-1017, the Department may revoke a license for any violation of the Georgia Residential Mortgage Act, O.C.G.A. § 7-1-1000, et seq. See O.C.G.A. § 7-1-1017(a)(1).

16.

As set forth supra, SunnyMTG.com violated Code Sections 7-1-1004(d) and 7-1-1002(a). Accordingly, the Department has the authority to revoke SunnyMTG.com's license.

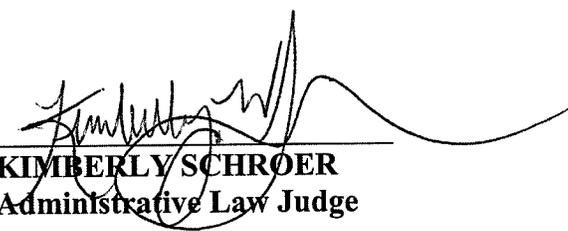
17.

However, because the decision to revoke a license is left to the discretion of the Department,⁴ the Court concludes, pursuant to OSAH Rule 15(6), that the issue relating to the appropriateness of this sanction is "better [] resolved via an evidentiary hearing and is inappropriate for resolution by a summary determination motion." GA. COMP. R. & REGS. r. 616-1-2-.15(6).

DECISION

Based on the undisputed material facts, Petitioner violated Code Sections 7-1-1004(d) and 7-1-1002(a). Accordingly, Respondent's Motion for Summary Determination is hereby **GRANTED** as to the issue of violations and **DENIED** as to the issue of sanctions. A sanctions hearing will be conducted pursuant to the Notice of Hearing issued separately.

SO ORDERED, this 5th day of November, 2008.


KIMBERLY SCHROER
Administrative Law Judge

⁴ Code Section 7-1-1018 provides that "[t]he department may suspend or revoke an original or renewal license . . . for a violation of any provision of this article or of Chapter 6A of this title or any rule or regulation issued under this article or under Chapter 6A of this title." O.C.G.A. § 7-1-1017(a)(1) (emphasis added). See Hardison v. Fayssoux, 168 Ga. App. 398 (1983); Smith v. State Bd. of Medical Examiners, 46 Ga. App. 456 (1933).