

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**



TRANSCONTINENTAL LENDING
GROUP, INC.,
Petitioner,

v.

DEPARTMENT OF BANKING AND
FINANCE,
Respondent.

OSAH-DBF-MLL-1016085-60

FILED

MAR 11 2010

**GEORGIA DEPARTMENT OF
BANKING AND FINANCE**

JAMES P. GARDNER,
Petitioner,

v.

DEPARTMENT OF BANKING AND
FINANCE,
Respondent.

OSAH-DBF-MLL-1016084-60

EARL S. WILEY,
Petitioner,

v.

DEPARTMENT OF BANKING AND
FINANCE,
Respondent.

OSAH-DBF-MLL-1016083-60

INITIAL DECISION

These matters were filed with this Tribunal on December 17, 2009 and consolidated on December 21, 2009. On December 22, 2009, the Georgia Department of Banking and Finance (“Department” or “Respondent”) filed motions for summary determination in each of these matters. None of the Petitioners have filed a response to the pending motions. For the reasons stated below, the Department’s motions for summary determination are **GRANTED**.

I. Findings of Fact

The following facts are undisputed:

1.

On September 29, 2008, the Department initiated its examination of Transcontinental Lending Group, Inc. (“Transcontinental Lending”), a licensed mortgage lender. (Affidavit of Hester, ¶ 4). During the examination, the Department requested that James P. Gardner, the chief executive officer and 50% owner of Transcontinental Lending, complete the Officer’s Questionnaire. (Affidavit of Hester, ¶ 4). According to the Officer’s Questionnaire, Earl S. Wiley is the other 50% owner and president of Transcontinental Lending, and Jackie Free was employed by the company as a branch manager. (See Exhibit C, p. 4-23).

2.

Jackie Free pleaded guilty to two counts of bank fraud and one count of wire fraud on May 17, 2002. Ms. Free was sentenced to imprisonment for a term of time-served, supervised release (i.e., probation) for a term of five years, of which six months were to be served in the Home Detention Electric Monitoring program, and 100 hours of community service. Additionally, she was ordered to pay an assessment of \$300.00 and restitution in the amount of \$98,608.72. (Exhibit D.)

3.

Ms. Free was hired by Transcontinental Lending on July 8, 2002. According to the Officer’s Questionnaire, she was still employed with the company as of October 9, 2008. Transcontinental Lending did not perform a criminal background check on Ms. Free. However, Transcontinental Lending was aware of Ms. Free’s criminal history. A copy of a December 3, 2003 letter from a probation officer, addressed to Skip Wiley, President,

Transcontinental Lending Group, was found in Ms. Free's personnel file. The letter "advised" Transcontinental Lending that Ms. Free was under "federal supervision for Counts I & II Bank Fraud and Count III Wire Fraud." (Exhibits C, E.)

4.

As part of the examination of Transcontinental Lending, the Department reviewed the loan file of Winston Goodall for the property located at 100 Mildred Lane, Covington, Georgia 30016. (Affidavit of Hester, ¶ 7; Exhibit F.) The settlement statement indicates that Transcontinental Lending was compensated as both the mortgage broker and the mortgager lender for Mr. Goodall's loan. (See Exhibit F, lines 801, 809, 810, 811, 812, 813, 814). However, as indicated on the settlement statement, Mortgage Loan Processing Services, Inc. was paid a \$500.00 "processing fee" related to Mr. Goodall's loan application. (Exhibit F, line 808). Because Transcontinental Lending acted as both the mortgage broker and mortgage lender on this transaction, the only party that could have retained Mortgage Loan Processing, Inc. to provide processing services was Transcontinental Lending.¹

5.

Mortgage Loan Processing, Inc. is not licensed or registered with the Department as a mortgage broker or mortgage lender. (Affidavit of Shelley, ¶ 4). In fact, Mortgage Loan Processing, Inc. has never been individually licensed or registered with the Department as a mortgage lender or mortgage broker. (Affidavit of Shelley, ¶ 4).²

¹ Transcontinental Lending apparently does not dispute that it used an unlicensed third party to process loans. (See Exhibit B) ("In regard, to using a contract processing company, it was the interpretation of both our outside compliance and licensing source, as well as our inside compliance manager, that as long as the contract processing company was not a resident of Georgia [Transcontinental Lending] has no requirement to license these individuals with the Georgia Department of Banking and Finance.")

6.

On April 2, 2009, the Department issued a Notice of Intent to Revoke Annual License to Transcontinental Lending and Orders to Cease and Desist to James Gardner and Earl Wiley. (Exhibits A to the respective summary determination motions.) Petitioners timely requested a hearing to contest the Department's decision to issue the Notice of Intent to Revoke Annual License to Transcontinental Lending and the Orders to Cease and Desist to Mr. Gardner and Mr. Wiley.

II. Conclusions of Law

1.

On 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). 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).

Violation of O.C.G.A. § 7-1-1004(d)

2.

The Department asserts that Transcontinental Lending, James Gardner, and Earl Wiley violated the prohibition contained in Georgia Code Section 7-1-1004(d) by employing a convicted felon. Section 7-1-1004(d)³ provides, in pertinent part:

² As a result of the findings made during the examination, the Department issued an Order to Cease and Desist to Mortgage Loan Processing, Inc. on April 2, 2009. (Affidavit of Sheley, ¶ 4). This Order to Cease and Desist became final against Mortgage Loan Processing, Inc. on May 4, 2009. (Affidavit of Sheley, ¶ 4).

³ Effective July 1, 2009, the law precluding licensees from employing felons was slightly modified and re-codified. See O.C.G.A. § 7-1-1004(h) (2009). As the Department has not alleged or presented evidence that Transcontinental Lending employed a convicted felon after June 30, 2009, this Tribunal will apply the law in effect at the time of the violation.

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 . . . irrespective of the pronouncement of sentence or the suspension thereof, and regardless of whether first offender treatment without adjudication of guilt pursuant to the charge was entered, unless and until such plea of guilty, or such decision, judgment, or verdict, shall have been set aside, reversed, or otherwise abrogated by lawful judicial process or until probation, sentence, or both probation and sentence of a first offender have been successfully completed and documented or unless the person convicted of the crime shall have received a pardon. . . .

O.C.G.A. § 7-1-1004(d)(2005) (emphasis added). The express terms of Section 7-1-1004(d) prohibit a licensee from having an officer, owner, or employee that has been convicted of a felony, unless the conviction has been abrogated or pardoned or the felon received first offender treatment and has completed his probation or sentence.

3.

There is no dispute that Jackie Free was employed by Transcontinental from July 8, 2002 through, at least, October 9, 2008. Nor is there any dispute that at the time Ms. Free was hired, she had pleaded guilty to two counts of violating 18 U.S.C. § 1344 (bank fraud) and one count of violating 18 U.S.C. § 1343 (wire fraud). Ms. Free's guilty pleas are considered convictions. O.C.G.A. § 7-1-1004(d)(2005).

4.

Convictions for bank fraud, in violation of 18 U.S.C. § 1344, and wire fraud, in violation of 18 U.S.C. § 1343, are felony convictions. The federal bank fraud statute, 18 U.S.C. § 1344, provides, as follows:

Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than \$ 1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344. As 18 U.S.C. § 1344 authorizes imprisonment for up to thirty years, a bank fraud conviction is a felony conviction under federal law. 18 U.S.C. § 3559(a)(2) (“[a]n offense that is not specifically classified by letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is ... twenty-five years or more, as a Class B felony”).⁴ The federal wire fraud statute, 18 U.S.C. § 1343, provides, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343. A wire fraud conviction is also a felony conviction under federal law. 18 U.S.C. § 3559(a)(3) (“[a]n offense that is not specifically classified by letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is ... less than twenty-five years but ten or more years, as a Class C felony”).

5.

Furthermore, Ms. Free’s felony convictions for bank fraud and wire fraud involved moral turpitude. “[F]raud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of

⁴ Under Georgia law, Ms. Free’s conviction for bank fraud would also constitute a felony. See O.C.G.A. § 16-1-3(5) (“a crime punishable by death, imprisonment for life, or by imprisonment for more than 12 months” is a felony).

moral turpitude.” Jordan v. DeGeorge, 341 U.S. 223, 229, 71 S.Ct. 703, 706 (1951); see also Huff v. Anderson, 212 Ga. 32, 34 (1955); United States v. Khan, 238 Fed. Appx. 192, 193 (9th Cir. 2007). Accordingly, by employing Ms. Free, a convicted felon, Transcontinental Lending, Gardner and Wiley violated the prohibition contained in Georgia Code Section 7-1-1004(d).

Violation of O.C.G.A. § 7-1-1002

6.

Georgia Code Section 7-1-1002⁵ 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.

* * *

(c) On or after July 1, 1996, every person who directly or indirectly controls a person who violates subsection (a) or (b) of this Code section, every general partner, executive officer, joint venturer, or director of such person, and every person occupying a similar status or performing similar functions as such person violates with and to the same extent as such person, unless the person whose violation arises under this subsection sustains the burden of proof that he or she did not know and, in the exercise of reasonable care, could not have known of the existence of the facts by reason of which the original violation is alleged to exist.

O.C.G.A. § 7-1-1002 (2003). The Georgia Residential Mortgage Act defines “mortgage broker” to include “any person who directly or indirectly solicits, processes, places, or negotiates mortgage loans for others.” O.C.G.A. § 7-1-1000 (11) (1996)⁶ (emphasis added). “Person” is

⁵ Effective July 1, 2009, the law related to conducting business without a license was modified. See O.C.G.A. § 7-1-1002 (2009). However, as the Department has not alleged or presented any evidence that Transcontinental Lending violated O.C.G.A. § 7-1-1002 after June 30, 2009, this Tribunal will apply the law in effect at the time of the violation.

⁶ Effective July 1, 2009, the definition of mortgage broker was re-codified. See O.C.G.A. § 7-1-1000(19) (2009).

defined in the Georgia Residential Mortgage Act as “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) (1996).⁷

7.

Therefore, pursuant to O.C.G.A. § 7-1-1002(a), a corporation is prohibited from processing, soliciting or negotiating mortgage loans unless the corporation is licensed or is exempted from the licensing requirement. In the event a company directly or indirectly controls a corporation that violates section 7-1-1002(a), the company is also guilty of violating O.C.G.A. § 7-1-1002(a). O.C.G.A. § 7-1-1002(c) (2003).

8.

Mortgage Loan Processing, Inc. processed the loan application for Mr. Goodall on behalf of Transcontinental Lending. Thus, Mortgage Loan Processing, Inc. was transacting business in this state as a mortgage broker in violation of O.C.G.A. § 7-1-1002(a). Georgia Code section 7-1-1002(c) makes it a violation of law for a licensee to directly or indirectly control a corporation that violates section 7-1-1002(a). Transcontinental Lending violated the prohibition in O.C.G.A. § 7-1-1002(c) by using Mortgage Loan Processing, Inc., an unlicensed entity, to process a loan on its behalf.

9.

Georgia Code Section 7-1-1002(c) makes it a violation of law for both a licensee and the “executive officer” and “every person occupying a similar status” of the licensee to directly or indirectly control a corporation that violates O.C.G.A. § 7-1-1002(a). Mr. Gardner is a 50% owner and chief executive officer of Transcontinental Lending. Mr. Wiley is the other 50% owner and president of Transcontinental Lending. As owners and officers of Transcontinental

⁷ Effective July 1, 2009, the definition of person was re-codified. See O.C.G.A. § 7-1-1000(25) (2009).

Lending, Mr. Gardner and Mr. Wiley violated the prohibition contained in section 7-1-1002(c) to the “same extent” as Transcontinental Lending.

10.

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.* O.C.G.A. §§ 7-1-1017(a)(1), 7-1-1000(6.1). For unlicensed individuals, such as officers, director, employees, or agents of a licensed broker, the Department may issue a cease and desist order when it appears that the unlicensed individual has violated any laws of this state or any order or regulation of the Department. See O.C.G.A. § 7-1-1018(a).

III. Decision

Based on the undisputed material facts, Petitioners Transcontinental Lending, Gardner and Wiley violated Georgia Code Sections 7-1-1004(d) and 7-1-1002(c). Petitioners did not oppose Respondent’s motion or present any mitigating evidence. Accordingly, the Department’s Cease and Desist Orders issued to Gardner and Wiley pursuant to Section 7-1-1018(a) and its Notice of Intent to Revoke Annual License issued to Transcontinental Lending were proper as to the violations herein established. The Department’s motions for summary determination are **GRANTED**. The license of Transcontinental Lending is hereby **REVOKED**, and the Cease and Desist Orders issued to Gardner and Wiley are **UPHELD**. This matter is hereby removed from the February 15, 2010 hearing calendar and **DISMISSED**.

SO ORDERED this 1st day of February, 2010.



STEPHANIE M. HOWELLS
Administrative Law Judge

Case: TRANSCONTINENTAL LENDING GROUP, INC.
JAMES P. GARDNER and
EARL S. WILEY
v.
DEPARTMENT OF BANKING & FINANCE

Docket No.: OSAH-DBF-MLL-1016085-60-HOWELLS
OSAH-DBF-MLL-1016084-60-HOWELLS
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