Department of Banking and Finance

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Sonny Perdue
Governor

Robert M. Braswell
Commissioner

June 3, 2009

VIA CERTIFIED MAIL – 7005 1820 0006 4358 8436

FILED

AUG 05 2011

GEORGIA DEPARTMENT OF
BANKING AND FINANCE

Mr. James Schwartz
Mortgage Now, Inc.
750 West Resource Dr, Ste 300
Brooklyn Heights, Ohio 44131

ORDER TO CEASE AND DESIST

Pursuant to O.C.G.A. § 7-1-1018(a), the Georgia Department of Banking and Finance ("Department") hereby orders you, James Schwartz, to cease and desist from engaging in activities in violation of the Georgia Residential Mortgage Act ("GRMA"), O.C.G.A. § 7-1-1000 *et seq.* Specifically, the Department has evidence that you employed a felon in violation of O.C.G.A. § 7-1-1004(d); failed to report any knowledge or discovery of an act prohibited by O.C.G.A. § 7-1-1013 in violation of O.C.G.A. § 7-1-1007(d); purposefully made false statements or material misrepresentations to the Department in violation of O.C.G.A. § 7-1-1013(11); and, transacted business in violation of O.C.G.A. § 7-1-1002(a) and (b) with a person who is unlicensed and unregistered, not exempt from licensing and registration requirements and who is not an employee of a mortgage broker or lender. Further, in violation of O.C.G.A. § 7-1-1002(c), you directly or indirectly controlled a person who violated O.C.G.A. § 7-1-1002(a) and (b).

Pursuant to the provisions of O.C.G.A. § 7-1-1018, you may request a hearing to contest this Order. The hearing will be held before an administrative law judge of the Office of State Administrative Hearings. You may retain counsel of your choice and subpoena witnesses and documentary evidence. The Office of the Attorney General will represent the Department.

The request for a hearing must be made in writing within twenty days of the date of this Order. Please be advised that if you do not request a hearing in writing within twenty days of the date of this Order, this Order shall become a final order. As a result, a licensed mortgage broker or mortgage lender will be prohibited from employing you for a period of five years to perform any functions governed by the GRMA. O.C.G.A. § 7-1-1004. This restriction in no way prohibits you from engaging in business with a mortgage broker or mortgage lender that is not licensed or required to be licensed by this Department. Should you have any questions concerning this matter, please contact Felicia Faison-Holmes, Non-Depository Financial Institutions Division Attorney, at (770) 986-1648.

Rod Carnes, CFE
Deputy Commissioner
Non-Depository Financial Institutions Division

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

FILED
JUN 30 2011
OFFICE OF STATE
ADMINISTRATIVE HEARINGS

JAMES SCHWARTZ,	:	
Petitioner,	:	
	:	**Docket No.:**
v.	:	**OSAH-DBF-MLL-1132260-60-Miller**
	:	
DEPARTMENT OF BANKING AND	:	
FINANCE,	:	
Respondent.	:	

FILED
AUG 05 2011
GEORGIA DEPARTMENT OF
BANKING AND FINANCE

INITIAL DECISION

ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DETERMINATION

I. SUMMARY OF PROCEEDINGS

This matter is an appeal by the Petitioner, James Schwartz, of a proposed Cease and Desist Order issued to him by the Georgia Department of Banking and Finance ("Department"), Respondent herein. On May 19, 2011, the Department filed a Motion for Summary Determination and supporting Memorandum of Law.[1] The Petitioner has not filed a response.[2] In its Motion, the Department contends that it is authorized to issue a Cease and Desist Order to the Petitioner based on his partial ownership of a mortgage company that employed a convicted felon. After careful consideration of the Department's arguments and pleadings, and for the reasons set forth below, the Department's Motion for Summary Determination is hereby **GRANTED.**

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[1] On May 19, 2011, the instant case was consolidated with the related matter of Bice v. Department of Banking and Finance, Docket No. OSAH-DBF-MLL-1132261-60-Miller. However, inasmuch as the Department has filed separate motions for summary determination, each case will be decided separately. See Court file.

[2] On May 25, 2011, the Court entered a scheduling order directing the Petitioner to respond to the Department's Motion on or before June 13, 2011. See Court file.

II. STANDARD ON SUMMARY DETERMINATION

Summary determination in this proceeding is governed by OSAH Rule 15, which provides, in relevant part:

> A party may move, based on supporting affidavits or other probative evidence, for summary determination in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

Ga. Comp. R. & Regs. r. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." Pirkle v. Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); see generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-05 (2006) (noting that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary adjudication).

Further, pursuant to OSAH Rule 15:

> When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

Ga. Comp. R. & Regs. r. 616-1-2-.15(3). See Lockhart v. Dir., Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)).

In this case, the Department's Motion was properly supported, and the Petitioner failed to show that a genuine issue of material fact remains for determination. Accordingly, the Court

concludes that the undisputed facts warrant judgment as a matter of law in the Department's favor.

III. Findings of Undisputed Material Fact

Viewing the evidence in the light most favorable to the Petitioner, the following facts are undisputed:[3]

1.

Beginning in February 2009, the Department conducted an examination of Mortgage Now, Inc. ("Mortgage Now"), the holder of mortgage lender license 15583. (Affidavit of Fernando Ornelas ["Ornelas Aff."] ¶ 4; Affidavit of Sandra Sheley ["Sheley Aff."] ¶ 4.)

2.

As part of its examination, the Department requested that a responsible officer of Mortgage Now complete an Officer's Questionnaire. Evert Bice, the company's executive vice president, completed the Officer's Questionnaire on behalf of Mortgage Now. (Ornelas Aff. ¶ 5 and Ex. 1; Ex. C, attached to Resp.'s Memorandum of Law.)

3.

According to the Officer's Questionnaire, at the time of the examination, the Petitioner was the president and part owner of Mortgage Now, holding a 38% stake in the ownership of the company. Mr. Bice held another 38% stake, while the remaining 24% interest was divided among eight other shareholders. (Exhibit C at 4-10, 4-24 [attachment].)

4.

Mortgage Now employed Alicia McClendon beginning on August 19, 2008. (Ex. C at 4-24 [attachment].)

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[3] Because the Petitioner did not respond to the Department's Motion, the facts set forth therein, to the extent properly evidenced, are deemed established for purposes of the Motion.

5.

Alicia McClendon is a convicted felon. On July 27, 1994, in the State of Wisconsin, she pleaded guilty to a felony charge of Possession With Intent To Deliver Cocaine. She was sentenced to five years imprisonment, which sentence was stayed, and three years probation. (Ex. D, attached to Resp.'s Memorandum of Law.)

6.

On June 3, 2009, the Department issued a proposed Cease and Desist Order to the Petitioner.[4] The Petitioner timely requested a hearing. (Exs. A, B, attached to Resp.'s Memorandum of Law.)

IV. CONCLUSIONS OF LAW

The Department is authorized to issue cease and desist orders pursuant to O.C.G.A. § 7-1-1018, which provides, in relevant part:

> Whenever it shall appear to the department that any person required to be licensed . . . under this article or employed by a licensee or registrant pursuant to Code Section 7-1-1001 . . . has violated any law of this state or any order or regulation of the department, the department may issue an initial written order requiring such person to cease and desist immediately from such unauthorized practices.

O.C.G.A. § 7-1-1018(a) (2008).[5] The statute defines the term "person" as "any officer, director, employee, agent, or other person participating in the conduct of the affairs of the person subject to the orders issued pursuant to this Code section." O.C.G.A. § 7-1-1018(f). In this case, the Petitioner, in his capacity as an owner and officer of Mortgage Now, is a person against whom

[4] On the same date, the Department issued a Notice of Intent to Revoke Annual License to Mortgage Now. On May 13, 2011, Mortgage Now entered into a Consent Order whereby it voluntarily surrendered its mortgage lender's license. (Sheley Aff. ¶ 4 and Ex. 1.)

[5] This version of the statute was in effect when Ms. McClendon was hired by Mortgage Now and at the time of the Department's examination of the company. The provision has subsequently been amended, but the changes are not material for purposes of this proceeding. See O.C.G.A. § 7-1-1018(a) (2011).

the Department may issue a cease and desist order for a violation of the laws or rules governing mortgage lenders or brokers.

Mortgage Now, as a licensee of the Department, was prohibited from hiring a convicted felon as its employee. Under O.C.G.A. § 7-1-1004(d):

> The department may not issue or may revoke a license if it finds that the applicant or licensee, or any person who is a[n] . . . employee . . . of 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.

O.C.G.A. § 7-1-1004(d) (2008).[6] In Georgia, all felonies punishable by imprisonment, including those involving the sale or distribution of cocaine, are crimes of moral turpitude. Lewis v. State, 243 Ga. 443, 445-46 (1979); Mann v. State, 240 Ga. App. 809, 810-11 (1999); Gordon v. State, 204 Ga. App. 62, 64 (1992).

Here, it is undisputed that Ms. McClendon has been convicted of Possession With Intent To Deliver Cocaine, which is a felony involving moral turpitude. It is further undisputed that she was an employee of Mortgage Now. By hiring her as its employee, Mortgage Now violated O.C.G.A. §§ 7-1-1004(d); and the Petitioner, as an owner and officer of Mortgage Now, was responsible for the company's actions under O.C.G.A. § 7-1-1018(a) and (f). Therefore, the Department properly issued a cease and desist order to the Petitioner pursuant to O.C.G.A. § 7-1-1018(a).

[6] This version of the statute was in effect when Ms. McClendon was hired by Mortgage Now and at the time of the Department's examination of the company. The provision has subsequently been amended and re-codified, but the changes are not material for purposes of this proceeding. See O.C.G.A. § 7-1-1004(h) (2011).

V. DECISION

In accordance with the foregoing, the Department's Motion for Summary Determination is **GRANTED**. The Department's issuance of a Cease and Desist Order to the Petitioner was proper.

SO ORDERED, this 29th day of June, 2011.

KRISTIN L. MILLER
Administrative Law Judge

RE: MR JAMES SCHWARTZ, Petitioner

DOCKET NO.: OSAH-DBF-MLL-1132260-60-Miller

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