

IN THE MATTER OF
MICHAEL EMERY LINK

Respondent

* BEFORE THE
* COMMISSIONER OF
* FINANCIAL REGULATION
* OAH NO.: DLR-CFR-76B-11-00838

* * * * *

OPINION AND FINAL ORDER

INTRODUCTION

This matter came before the Commissioner of Financial Regulation (the "Commissioner") for argument on exceptions filed by Michael Emery Link ("Respondent"). On June 23, 2011, Administrative Law Judge Marc Nachman (the "ALJ") issued a Proposed Decision (the "Proposed Decision") after a hearing on the merits in which the ALJ recommended that (1) Respondent cease and desist from "originating, brokering, lending, mitigating, or engaging in any other activities involving Maryland mortgage loans or otherwise pertaining to the mortgage[sic]", (2) Respondent's Maryland mortgage lender's license be suspended for 18 months from December 22, 2010,¹ and (3) Respondent pay to the Commissioner a civil penalty of \$20,000. The hearing before the ALJ on this matter was held on February 17, 2011, March 7, 2011, and March 25, 2011. On August 29, 2011, the Deputy Commissioner issued a Proposed Order (the "Proposed Order") adopting the ALJ's Findings of Fact (the "Findings of Fact") in their entirety and amending the ALJ's Conclusions of Law (the "Conclusions of Law") and Recommended Order (the "Recommended Order"). The Proposed Order adopted the penalty and the final cease and desist order but provided that (1)

¹ The Recommended Order refers to Respondent's mortgage lender license. However, it is clear from the Findings of Fact that the Respondent held a mortgage originator license. The Proposed Order, in amending the Recommended Order, refers correctly to the Respondent's mortgage originator's license.

Respondent's license is revoked, rather than suspended, and (2) Respondent make restitution to the Complainant, by transferring title to the subject property free of any debts, encumbrances, or liens, or in the alternative, if Respondent is unable to convey clear title or is otherwise not the current owner of the property, by paying Complainant \$225,545.80², which the Deputy Commissioner determined was the value of the property at the time of the theft, less the amount Complainant received from the transaction.

Respondent set forth his exceptions in Respondent's Exceptions to the Proposed Decision and Order (the "Exceptions") dated September 19, 2011. In a letter, dated September 27, 2011, Respondent's attorney stated that the Respondent waived his right to a hearing on his Exceptions. On September 29, 2011, the attorney for the Commissioner filed a Response in Opposition to Respondent's Request for Exceptions to the Proposed Decision of the Office of Administrative Hearings as Adopted and Modified by the Deputy Commissioner of Financial Regulation's Proposed Order (the "Response") setting forth the legal arguments in opposition to the Exceptions. The Deputy Commissioner has reviewed and considered the Exceptions and the Response. In light of Respondent's waiver of hearing, there was no hearing held on exceptions in this case. The Deputy Commissioner has decided this matter and issues this Opinion and Final Order (the "Final Order") based on the record in this case (set forth below).

The record before the Deputy Commissioner in considering the Exceptions in this case consisted of:

1. The Proposed Decision, including the Findings of Fact and the Discussion (the "Discussion");
2. The Proposed Order;

² The Proposed order imposed monetary alternative of \$225,548.80. The amount herein is corrected to be \$225,545.80.

3. The Exceptions;
4. The Response;
5. Letter of September 27, 2011 from Respondent's attorney waiving his client's right to a hearing; and
6. All exhibits admitted into the record in the hearing before the ALJ.

Unless otherwise defined herein, capitalized terms used herein shall have the meanings assigned to them in the Proposed Decision. All citations to statutes are to the Maryland Annotated Code.

FINDINGS OF FACT

The Commissioner adopts the Findings of Facts and the facts noted in the Discussion.

CONCLUSIONS OF LAW

Except as otherwise provided in the Proposed Order, the Commissioner adopts the Conclusions of Law.

DISCUSSION

I. Factual Basis for the ALJ's Proposed Decision

While it is not entirely clear, the Respondent seems to assert that because the Discussion, rather than the Findings of Fact, contains various inferences on which the Conclusions of Law are based, the Commissioner should ignore these inferences. The Respondent further argues that without the inferences, there is not a sufficient basis for the Conclusions of Law. Exceptions, ¶ 7. Respondent neither cites authority for this position nor sets forth any argument regarding why the Findings of Fact provide an insufficient basis for the Conclusions of Law. Additionally, Respondent overlooks the

fact that the ALJ based his Conclusions of Law on *both* the Findings of Fact and Discussion. Accordingly, the foregoing exception to the Proposed Order is rejected.

II. Standard of Proof Applied by the ALJ

Respondent argues that all of the findings in the ALJ's Proposed Decision and the Proposed Order are based on findings of fraud or theft. Respondent further argues a finding of fraud in an administrative action requires "clear and convincing proof" and that theft requires evidence "beyond a reasonable doubt." Exceptions, ¶ 9. By basing the Conclusions of Law on a "preponderance of the evidence," the Respondent concludes that the ALJ applied an incorrect standard.

Title 10, Subtitle 2 of the State Government Article (the "Administrative Procedure Act" or "APA") sets forth the statutory law governing contested administrative cases. Specifically, §10-217 of the APA provides that "[t]he standard of proof in a contested case shall be the preponderance of the evidence unless the standard of clear and convincing evidence is imposed on the agency by regulation, statute, or constitution." Moreover, the Department of Labor, Licensing and Regulation, in which the Division of Financial Regulation resides, has adopted regulations governing contested administrative actions. COMAR 09.01.02.16(A) provides that, in a contested case "involving allegations that the respondent violated a law or regulation, the presenter of evidence for the administrative unit shall bear the burden of proving, by a preponderance of the evidence, that the respondent committed the violations set forth in the charging document."

Respondent fails to cite any regulation, statute, or provision of the Maryland or United States Constitution that would require the imposition of a different standard of

proof in this case than what is required by State Government Article § 10-217 or COMAR 09.01.02.16(A). Instead, Respondent cites *Garris v. Dickey*, 22 Md. App. 618 (1974), a private civil action in the Prince George's Circuit Court in which fraud was alleged. The Court found that in a civil action for fraud, the standard of proof is clear and convincing evidence. However, the case involving Respondent was brought and enforced through administrative proceedings, not judicial action. Therefore, *Garris* is inapplicable to the Respondent. Respondent also cites *Suburban Properties Management, Inc. v. Johnson*, 236 Md. 455 (1964) and *Colandrea v. Colandrea*, 42 Md. App. 421 (1979). While *Suburban* addresses the elements of fraud in a civil action, *Suburban* does not address the standard of proof in an administrative proceeding. *Colandrea* addresses a fraudulent transaction among shareholders in a civil action, not an administrative proceeding. Like *Suburban*, *Colandrea* does not touch on the standard of proof in an administrative action under Maryland law. The Commissioner cites *Coleman v. Anne Arundel County Police Department*, 369 Md. 108 (2002), as judicial authority for applying a preponderance of evidence as the standard of proof in a contested administrative proceeding. In *Coleman*, the APA did not apply directly to the Anne Arundel County employee. However, the Court of Appeals spent considerable time analyzing the standard of proof under the APA. The Court explained that before 1993, the Judiciary did not have the "benefit of a broad public policy pronouncement by the State legislature that expressed a particular standard of proof requirement relative to contested administrative cases." *Coleman* at 135. The Court continued:

It is instructive that the General Assembly, in its 1993 revision of Maryland's Administrative Procedure Act . . . established, for the first time, preponderance of the evidence as the generally

applicable standard of proof to be used by covered state administrative agencies in contested case hearings

Id. at 136.

Even if Respondent's cases supported his arguments, the cases, all being decided *before* the enactment of APA §10-217, would not have applied. Accordingly, the foregoing exception is without merit and rejected.

III. Violation of Duty of Good Faith and Fair Dealing

Respondent argues that the ALJ was incorrect as a matter of law in finding that the Respondent violated his duties of good faith and fair dealing under COMAR 09.03.09.04(A),³ which provides:

A mortgage loan originator has a duty of good faith and fair dealing in communications and transactions with a borrower, including, but not limited to:

-
- (1) The duty to recommend to a borrower or induce a borrower to enter into only a mortgage loan refinancing that has a net tangible benefit to a borrower, considering all of the circumstances, including the terms of a loan, the cost of a loan, and the borrower's circumstances; and
 - (2) The duty to provide to a borrower who is offered a higher-priced mortgage loan information about the non-higher-priced mortgage loans that the licensee can make available and for which the borrower may qualify.

Notwithstanding the expansive language in 09.03.09.04(A) describing good faith and fair dealing as "*including, but not limited to*" recommending or inducing borrowers to enter into mortgage loan refinancing that has "net tangible benefit" to the borrower or providing information with respect to higher priced mortgage loans, Respondent argues that good faith and fair dealing in 09.03.09.04(A) should be limited to the terms of the loan. Exceptions, ¶ 11. Contrary to Respondent's position, the plain language of

³ Exceptions ¶ 11.

09.03.09.04(A), specifically the words "*including, but not limited to*" dictates an expansive, rather than restrictive, reading. The Respondent has failed to produce any authority for narrowing the scope of good faith and fair dealing under 09.03.09.04(A). Accordingly, the Respondent's argument is without merit and the request for the foregoing exception is denied.

Respondent was licensed as a mortgage loan originator under Title 11, Subtitle 6 of the Financial Institutions Article (the "Maryland Mortgage Originator Law" or "MMOL"). Respondent argues that his duties as licensed mortgage loan originator were limited to dealings with borrowers and Complainant was not a borrower as contemplated by 09.03.09.04(A). Section 11-601(b) of the MMOL provides that borrower has the meaning stated in § 11-501 of the Financial Institutions Article. Section 11-501(b) defines borrower as "a person who makes a loan application for or receives a loan or other extension of credit that is or intended to be secured in whole or in part by any interest in a dwelling or residential real estate located in Maryland." COMAR 09.03.09.04(A) is adopted pursuant to the Commissioner's authority to regulate mortgage loan originators under the MMOL and must, as such, be read and interpreted in the context of the MMOL. As described in the ALJ's Findings of Fact, ## 16 - 27, the transactions between Complainant and Respondent began with and flowed from Complainant's submission of a mortgage loan application to Respondent. The entire relationship was predicated on Complainant's attempt to obtain mortgage financing through Respondent. Accordingly, the Deputy Commissioner upholds the ALJ's conclusion that Complainant was a borrower for purposes of COMAR 09.03.09.04(A) and the MMOL. Respondent's exception is rejected.

IV. Maryland Mortgage Fraud Protection Act and Maryland Mortgage Originator Law

Respondent argues that the ALJ erred as a matter of law in finding that the Respondent violated Title 7, Subtitle 4 of the Real Property Article (the "Maryland Mortgage Fraud Protection Act" or "MMFPA"). Exceptions ¶¶ 12 - 15. Respondent argues that the Commissioner did not have the power to act under the MMFPA until the Commissioner was vested with enforcement powers under the MMFPA by legislation enacted in 2011.⁴ While the ALJ found that the Respondent violated the MMFPA by a fraudulent course of conduct in connection with the transactions involving Complainant, the ALJ based the sanctions and penalties against the Respondent on relevant provisions of the MMOL. Specifically, the ALJ found that Respondent violated the MMOL by committing mortgage fraud under the MMFPA. Proposed Decision, p. 63. Moreover, the ALJ based sanctions on the following provisions of the MMOL: (1) §11-615(a)(3), which covers fraud, illegal or dishonest activities, making misrepresentations or failing to disclose material facts, (2) § 11-615(a)(4), which covers a violation of any provision of the MMOL, or regulation adopted thereunder, including COMAR 09.03.09.04(A), and any other law regulating mortgage lending in Maryland, and (3) § 11-615(a)(5), which covers other demonstrated acts of "unworthiness, bad faith, dishonesty or other quality that indicates that the business of the licensee has not been or will not be conducted honestly." Proposed Decision, pp. 59 - 62. The ALJ also cited § 2-115 of the Financial Institutions Article, which vests the Commissioner with general powers, inter alia, to

⁴ The Commissioner's powers of enforcement with respect to *non-licensees* was clarified by Chapter 127 of the Acts of 2011.

issue final cease and desist orders, suspend and revoke licenses, or impose penalties as sanctions. Proposed Decision, pp. 59 - 62. The MMOL clearly contemplates looking to violations of other laws on which to base sanctions. That is exactly what the ALJ did and that is exactly what was affirmed in the Proposed Order. The ALJ's conclusion that the Respondent, a licensed mortgage originator under the MMOL, violated laws related to mortgage lending and failed to uphold principles of good faith and honesty as required under the MMOL and accompanying regulations, did not extend beyond the Commissioner's statutory authority. Accordingly, the foregoing exception is rejected.

Again, Respondent asserts that the standard of proof applied by the ALJ with respect to findings of theft and fraud should be "beyond a reasonable doubt" or "clear and convincing evidence." Exceptions, ¶ 16. As discussed above, the Respondent fails to cite any authority, statutory or otherwise, for this position. Accordingly, the Respondent's exception is rejected.

V. Restitution

The Proposed Order overruled the ALJ's conclusion that Complainant was not entitled to restitution because Complainant would have lost the property even if he had not engaged in the transactions with Respondent. The Respondent argues that the Proposed Order overrules the ALJ's Findings of Fact without considering new evidence necessary to reach a contrary result. Exceptions, ¶ 18. No new evidence was required to accept the ALJ's Conclusions of Law that the Respondent committed fraud against Complainant, committed theft against Complainant's property, violated the MMOL by committing mortgage fraud, and violated Respondent's duties of good faith and fair dealing under the MMOL. Conclusions of Law, p. 63. As the Proposed Order explains,

Section 11-615(c)(1)(i)1 authorizes the Commissioner to require the violator to take affirmative action to correct a violation, including restitution. Proposed Order, p. 4. In this case, the violator, inter alia, stole Complainant's property. The Proposed Order requires him to return it. Respondent offers no authority, statutory or otherwise, to challenge the imposition of restitution. Accordingly, the foregoing exception is rejected.

VI. Revocation of License

The Respondent argues that the Proposed Order overruled the ALJ's Findings of Fact by overruling the ALJ's imposition of an 18-month suspension of Respondent's license in favor of revocation of the license. Exceptions, ¶ 20. The ALJ concluded, as a matter of law, that Respondent committed mortgage fraud, fraud, and theft. Conclusions of Law, p. 63. Respondent asserts that the Proposed Order provided "no real explanation for why the facts found by the ALJ should be ignored." Exceptions, ¶ 20. The Proposed Order states:

The judge recommended that the Respondent's license be suspended for eighteen months, instead of being revoked, because he did not have any prior violations of the licensing law. While Section 11-615(e) does include the violator's history of previous violations as a factor for the Commissioner to consider in determining the amount of the civil penalty, it is not a specific factor in the decision as to whether the Respondent should continue to be licensed. Relevant to that analysis is the provision of Section 11-605, which provides that an applicant for a license must demonstrate "financial responsibility, character, and general fitness sufficient to command the confidence of the community and to warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently." A licensee who has engaged in mortgage fraud, fraud and deceit involving misrepresentation of significant facts, and theft, no longer meets the qualifications for licensure, and therefore his license must be revoked. Even using the categories of Section 11-616(e) that the judge relied on, the seriousness of the violations, the total absence of good faith on the part of the Respondent, and the devastating effect of his actions on the Complainant far outweigh the fact that he had no previous violations. The citizens of Maryland simply cannot be protected if this individual continues to hold a mortgage originator license.

The Proposed Order weighs the seriousness of the violations and what those violations reveal about the Respondent's character against the licensee's history, as considered by the ALJ. Once again, Respondent has offered no authority for the position that the Proposed Order is prohibited from weighing the Findings of Fact in evaluating the penalties imposed by the ALJ. Accordingly, the foregoing exception is rejected.

VII. Expiration of License

Respondent argues that, because his license expired on December 31, 2010, the revocation of the license is void. Exceptions, ¶ 21. Citing only § 10-226(b) of the State Government Article, which simply provides for the timing of a license expiration, Respondent argues that the license revocation is moot. Contrary to Respondent's

argument that he should escape sanctions because he let his license expire, case law holds that the voluntary surrender or expiration of a license prior to a hearing date does not deprive a licensing authority from the authority to revoke or suspend a license. See *Nicoletti v. State Board of Vehicle Mfrs., Dealers and Salespersons*, 706 A.2d 891 (Pa Cmwlth. 1998) and *Wise v. Ohio Motor Vehicle Dealer Bd.*, 106 Ohio App. 3d 562 (1995). Accordingly, the foregoing exception is rejected.

VIII. The Significance of the Eviction Action

Respondent argues that the doctrine of res judicata or collateral estoppel apply under the circumstances of Respondent's case because of the Respondent's action for eviction of Complainant in the District Court of Maryland. Exceptions, ¶ 23, including fn 8. The facts presented by the Respondent are contrary to the ALJ's Finding of Facts and Discussion. Respondent asserts that there was a "successful" action in the District

Court for eviction. The ALJ found that the eviction action was dismissed on August 10, 2010. See Findings of Fact, # 76 and Discussion, p. 47, fn. 37. Even if the ALJ's facts supported Respondent's assertions in the Exceptions, Respondent offers no authority to support his implication that administrative action against the Respondent for fraud, theft, mortgage fraud, and violation of the duties of good faith and fair dealing are in some way inconsistent with or should be estopped by a District Court eviction action. Moreover, the Respondent claims that the action for eviction was successful and indicates that his attorney is endeavoring to obtain the docket and transcription for the case. Respondent has made no motion to introduce additional evidence into the record for this proceeding as required by and pursuant to COMAR 09.01.03.01(K) and (L).

IX. Conclusions of Law

Respondent argues that the Conclusions of Law are so against the weight of the evidence that the imposition of penalties is arbitrary and capricious. For example, see Exceptions, ¶ 26 - 49. In addition to trying to displace the ALJ as the neutral trier of fact and substitute himself in that position, Respondent attempts to introduce new evidence to the record. Exceptions, ¶ 34 and 46 (second sentence). The Deputy Commissioner does not find ALJ's Conclusions of Law against the weight of the evidence. Accordingly, Respondent's exception is rejected.

ORDER

The Deputy Commissioner having considered the Exceptions and Response, it is, by the Deputy Commissioner:

ORDERED, that Respondent's application be, and hereby is, **DENIED**;

ORDERED, that the Respondent cease and desist from originating, brokering, lending, mitigating, or engaging in any other activities involving Maryland mortgage loans or otherwise pertaining to mortgages, pursuant to § 2-115(b) of the Financial Institutions Article;

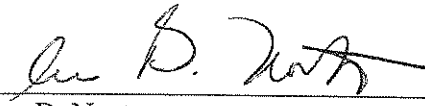
ORDERED, that the Respondent's Maryland Mortgage Originator's License be revoked;

ORDERED, that the Respondent pay to the Maryland Commissioner of Financial Regulation a civil penalty of \$20,000 within 30 days of the date of this Order;

ORDERED, that the Respondent make restitution to the Complainant by transferring title to the subject property to the Complainant free of any debts, encumbrances, or liens, or, in the alternative, if the Respondent or an entity controlled by the Respondent is not the current title holder of the property, or if the Respondent is unable to convey clear title to the property, that the Respondent pay the Complainant the value of the property at the time of the theft, less the amount the Complainant received from the transaction, for a total amount owed to the Complainant of \$225,545.80, and it is further

ORDERED, that the records and publications of the Commissioner reflect this decision.

12/21/11
Date



Anne B. Norton
Deputy Commissioner of Financial Regulation