

STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE SERVICES

Before the Commissioner of Financial and Insurance Services

Office of Financial and Insurance
Services,

Petitioner,

v

Case No. 04-426-L
Docket No. 2004-1013

Brian Winborn,

Respondent.

For the Petitioner:

Laurence S. Wood (P34745)
Office of Financial and Insurance Services
611 W. Ottawa, 3rd Floor
Lansing, MI 48933
(517) 373-2887
FAX (517) 241-3953
lwood@michigan.gov

For the Respondent:

Elias Muawad (P41632)
Muawad & Muawad, P.C.
260 E. Brown Street, Suite 320
Birmingham, MI 48009
(248) 540-9270
FAX (248) 433-1989
Elias@muawadpc.com

Issued and entered
this 24th day of February 2005
by Linda A. Watters
Commissioner

FINAL DECISION

The Administrative Law Judge issued a Proposal for Decision dated January 5, 2005. She recommended that the Commissioner issue an order of prohibition pursuant to MCL 445.1668a.

The Respondent filed Exceptions. He seeks to have the default set aside and to be allowed time to complete negotiations with the consumers involved in this matter. He

anticipates the negotiations will resolve a civil lawsuit filed against him and that the parties will request that this contested case matter be dismissed.

The Respondent has presented no reasons to justify his default in this matter. The Notice of Intent to Issue Order of Prohibition Pursuant to MCL 445.1668(a) stated:


FAILURE TO APPEAR AT THE HEARING WILL RESULT IN THE
ISSUANCE OF AN ORDER IN ACCORDANCE WITH THIS NOTICE.

Moreover, there is nothing in the Exceptions to contradict the findings of fact that the Respondent admitted he took money from the consumers and that he mismanaged the loan.

The factual findings in the PFD are in accordance with the preponderance of the evidence and the conclusions of law are supported by reasoned opinion. The PFD is attached, adopted, and made part of this final decision.

II ORDER

Therefore, it is ORDERED that the Respondent is prohibited from being employed by, an agent of, or control person of a licensee or registrant under the Mortgage Brokers, Lenders and Servicers Licensing Act or licensee or registrant under a financial licensing act.


Linda A. Watters
Commissioner

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
BUREAU OF HEARINGS

In the matter of

Office of Financial and Insurance
Services

Petitioner

v

Brian Winborn,
Respondent

Docket No. 2004-1013

Agency No. 04-426-MB

Agency: Office of Financial &
Insurance Services

Case Type: Intent to Deny/Refusal to License

Issued and entered
this 5th day of January, 2005
by Renée A. Ozburn
Administrative Law Judge

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

On September 8, 2004 an Order Referring Notice of Intent to Issue Order of Prohibition for Hearing, and a Notice of Intent to Issue Order of Prohibition Pursuant to MCL 445.1668(a) were issued by the Commissioner of the Office of Financial and Insurance Services (OFIS/Petitioner). On September 23, 2004, a Notice of Hearing was issued. An Amended Notice of Hearing was issued on September 27, 2004 scheduling a hearing for November 9, 2004. By Order Granting Adjournment issued on November 9, 2004, the hearing was rescheduled to be heard on January 5, 2005. All Orders and Notices have been mailed, and/or personally served, to Brian Winborn (Respondent) at all of his last known addresses of record.

On January 5, 2005, the Respondent did not appear for the scheduled hearing. Attorney Laurence Wood was present and ready to proceed on behalf of OFIS.

The undersigned Administrative Law Judge deemed that the Respondent had been duly served with notice and the hearing could proceed in his absence pursuant to Section 72 of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.201 *et seq.* (APA) Mr. Wood motioned for a default judgment. The undersigned Administrative Law Judge granted a default pursuant to Section 78 of the APA. A default judgment constitutes a decision that all allegations in the Notice of Intent to Issue Order of Prohibition Pursuant to MCL 445.1668(a), are deemed true.

ISSUES AND APPLICABLE LAW

The issues are whether the Respondent has violated Section 22 of the Mortgage Brokers, Lenders and Servicers Licensing Act, (MBLSLA), MCL 445.1651 *et seq.*, and whether he should be subject to the prohibitions outlined in Section 18(a) of the MBLSLA. Sections 22 and 18(a) provide:

445.1672 Violations generally.

Sec. 22.

It is a violation of this act for a licensee or registrant to do any of the following:

- (a) Fail to conduct the business in accordance with law, this act, or a rule promulgated or order issued under this act.
- (b) Engage in fraud, deceit, or material misrepresentation in connection with any transaction governed by this act.
- (c) Intentionally or due to gross or wanton negligence, repeatedly fail to provide borrowers material disclosures of information as required by law.
- (d) Suppress or withhold from the commissioner any information that the licensee or registrant possesses and that, if submitted, would have made the licensee or registrant ineligible for licensing or registration under this act or would have warranted the commissioner's denial of a license application or refusal to accept a registration.
- (e) Fail to comply with 1966 PA 125, MCL 565.161 to 565.164, regulating the handling of mortgage escrow accounts by mortgagees.

(f) Until proper disbursement is made, fail to place in a trust or escrow account held by a federally insured depository financial institution in a manner approved by the commissioner any money, funds, deposits, checks, drafts, or other negotiable instruments received by the licensee that the borrower is obligated to pay to a third party, including amounts paid to the holder of the mortgage loan, amounts for property taxes and insurance premiums, or amounts paid under an agreement that requires if the mortgage loan is not closed the amounts paid shall be refunded to the prospective borrower or if the mortgage loan is closed the amounts paid shall be applied to fees and costs incurred at the time the mortgage loan is closed. Fees and costs include, but are not limited to, title insurance premiums and recording fees. Fees and costs do not include amounts paid to cover costs incurred to process the mortgage loan application, to obtain an appraisal, or to receive a credit report.

(g) Refuse to permit an examination or investigation by the commissioner of the books and affairs of the licensee or registrant, or has refused or failed, within a reasonable time, to furnish any information or make any report that may be required by the commissioner under this act.

(h) To be convicted of a felony, or any misdemeanor of which an essential element is fraud.

(i) Refuse or fail to pay, within a reasonable time, those expenses assessed to the licensee or registrant under this act.

(j) Fail to make restitution after having been ordered to do so by the commissioner or an administrative agency, or fail to make restitution or pay damages to persons injured by the licensee's or registrant's business transactions after having been ordered to do so by a court.

(k) Fail to make a mortgage loan in accordance with a written commitment to make a mortgage loan issued to, and accepted by, a person when the person has timely and completely satisfied all the conditions of the commitment before the expiration of the commitment.

(l) Require a prospective borrower to deal exclusively with the licensee or registrant in regard to a mortgage loan application.

(m) Take a security interest in real property before closing the mortgage loan to secure payment of fees assessed in connection with a mortgage loan application.

(n) Except as provided under section 18e, knowingly permit a person to violate an order that has been issued under this act or any other financial licensing act that prohibits that person from being employed by, an agent of, or a control person of the licensee or registrant.

445.1668a Fraud; prohibition; notice; hearing; order.

Sec. 18a.

(1) If in the opinion of the commissioner a person has engaged in fraud, the commissioner may serve upon that person a written notice of intention to prohibit that person from being employed by, an agent of, or control person of a licensee or registrant under this act or a licensee or registrant under a financial licensing act. For purposes of this section, "fraud" shall include actionable fraud, actual or constructive fraud, criminal fraud, extrinsic or intrinsic fraud, fraud in the execution, in the inducement, in fact, or in law, or any other form of fraud.

(2) A notice issued under subsection (1) shall contain a statement of the facts supporting the prohibition and, except as provided under subsection (7), set a hearing to be held not more than 60 days after the date of the notice. If the person does not appear at the hearing, he or she is considered to have consented to the issuance of an order in accordance with the notice.

(3) If after a hearing held under subsection (2) the commissioner finds that any of the grounds specified in the notice have been established, the commissioner may issue an order of suspension or prohibition from being a licensee or registrant or from being employed by, an agent of, or control person of any licensee or registrant under this act or a licensee or registrant under a financial licensing act.

(4) An order issued under subsection (2) or (3) is effective upon service upon the person. The commissioner shall also serve a copy of the order upon the licensee or registrant of which the person is an employee, agent, or control person. The order remains in effect until it is stayed, modified, terminated, or set aside by the commissioner or a reviewing court.

(5) After 5 years from the date of an order issued under subsection (2) or (3), the person subject to the order may apply to the commissioner to terminate the order.

(6) If the commissioner considers that a person served a notice under subsection (1) poses an imminent threat of financial loss to applicants for mortgage loans, the commissioner may serve upon the person an order of suspension from being employed by, an agent of, or control person of any licensee or registrant. The suspension is effective on the date the order is issued and, unless stayed by a court, remains in effect pending the completion of a review as provided under this section and the commissioner has dismissed the charges specified in the order.

(7) Unless otherwise agreed to by the commissioner and the person served with an order issued under subsection (6), the hearing required under subsection (2) to review the suspension shall be held not earlier than 5 days or later than 20 days after the date of the notice.

(8) If a person is convicted of a felony involving fraud, dishonesty, or breach of trust, the commissioner may issue an order suspending or prohibiting that person from being a licensee or registrant and from being employed by, an agent of, or control person of any licensee or registrant under this act or a licensee or registrant under a financial licensing act. After 5 years from the date of the order, the person subject to the order may apply to the commissioner to terminate the order.

(9) The commissioner shall mail a copy of any notice or order issued under this section to the licensee or registrant of which the person subject to the notice or order is an employee, agent, or control person.

FINDINGS OF FACT

1. The Office of Financial and Insurance Services received a complaint from [REDACTED] against First Mountain Mortgage Corporation (FMMC).

2. FMMC, a first mortgage licensee, license number FL-0577, brokered a first mortgage home loan between CIT Group and the [REDACTED]

3. The [REDACTED] were approved for the loan at 7.25%, however when the loan closed the loan rate was 10.11%.

4. The monthly loan payments were \$2,219.33. This amount is more than the monthly income of the [REDACTED]

5. The [REDACTED] submitted checks totaling \$106,503.95 to [REDACTED] and Brian Winborn (Respondent) to be applied to their loan balance. The checks were not made out to FMMC but to either [REDACTED] or Respondent.

6. Only one check was written to [REDACTED], which was voided. The rest of the checks were written to Respondent.

7. Respondent was the manager of one of FMMC's branches and [REDACTED] was an employee of the branch.

8. Only \$42,535.47 of the \$106,503.95 the [REDACTED] submitted to [REDACTED] and Respondent was applied to the loan, leaving \$63,968.48 unaccounted for.

9. FMMC fired Respondent after discovering the allegations contained in the [REDACTED] complaint were correct.

10. Respondent subsequently admitted to Brian Seiferlein, FMMC's president, that he took money from the [REDACTED]

11. The [REDACTED] filed a complaint with the Prosecutor's office and also filed a civil law suit in Washtenaw County against Respondent, [REDACTED] and FMMC for misrepresentation and fraud.

12. Under oath in a deposition Respondent admitted to mismanaging the loan, but placed most of the blame for the missing funds on [REDACTED].

13. The [REDACTED] and their attorney have come to an agreement with Respondent to resolve the matter. Respondent is to pay the [REDACTED] what they are owed.

14. The actions of Respondent and [REDACTED], employees of FMMC, are a violation of Section 22(b) of the MBLSLA.

CONCLUSIONS OF LAW


The Petitioner has the burden of proving that Respondent violated the MBLSLA as alleged. Having granted a default on behalf of Petitioner, the undersigned Administrative Law Judge concludes that the Petitioner has met its burden of proving that Respondent violated Section 22(b) of the MBLSLA as alleged.

PROPOSED DECISION

The undersigned Administrative Law Judge recommends that the Commissioner proceed to issue an Order of Prohibition pursuant to Section 18(a).

EXCEPTIONS

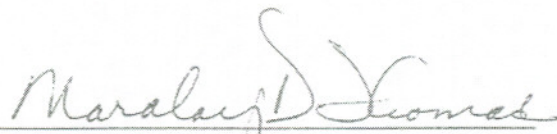
The parties may file Exceptions to this Proposal for Decision within 20 days after it is issued and entered. Exceptions should be addressed to the Office of Financial and Insurance Services, 611 Ottawa Street, 3rd Floor, P.O. Box 30220, Lansing, Michigan 48909; Attention Dawn Kobus.



Renee A. Ozburn
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on the 5th day of January, 2005.



Maraloy D. Thomas
Bureau of Hearings

Brian Winborn
8766 Trillivan Drive
Ypsilanti, MI 48197

Laurence S Wood
Office of Financial and Insurance
Services
Division of Insurance
611 W Ottawa, 3rd Floor
P.O. Box 30220
Lansing, MI 48909

Office of Financial and Insurance
Services
Division of Insurance
c/o Dawn Kobus
611 W Ottawa, 3rd Floor, Box 30220
Lansing, MI 48909