

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIKA TOLZ,

Petitioner,

vs.

Case No. 19-0165

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy by video teleconference with locations in Miami and Tallahassee, Florida, on March 6, 2019.

APPEARANCES

For Petitioner: Matthew J. Schlichte, Esquire
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For Respondent: Betty Zachem, Esquire
Assistant General Counsel
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STATEMENT OF THE ISSUE

Whether Petitioner was properly denied mortgage assistance through Florida Housing Finance Corporation's ("Florida Housing") Hardest-Hit Fund Elderly Mortgage Assistance

("ELMORE") program based on a conviction for fraud allegedly in connection with a real estate transaction.

PRELIMINARY STATEMENT

On or about November 8, 2018, Petitioner, Marika Tolz ("Tolz"), submitted an application for mortgage assistance through Florida Housing's Hardest-Hit Fund. On December 5, 2018, Florida Housing's Director of Homeownership Programs, David Westcott, issued a letter with an ineligibility determination to Tolz, which included a Notice of Rights. Petitioner Tolz timely filed a "Petition for Reconsideration and Approval of Applicants Eligibility to the State of Florida Elmore Program" with Florida Housing. On December 21, 2018, Florida Housing issued an Order Dismissing the Petition with Leave to Amend. Petitioner Tolz timely filed an Amended Petition.

Florida Housing referred the matter to the Division of Administrative Hearings ("DOAH") on January 9, 2019, for assignment of an administrative law judge. The final hearing took place as scheduled on March 6, 2019, via video teleconference in Miami and Tallahassee, Florida.

During the hearing, Tolz testified on her own behalf. Florida Housing presented the testimony of David Westcott. Tolz offered ten exhibits, all of which were admitted into evidence as Petitioner's Exhibits 1 through 10. Florida Housing offered

11 exhibits, all of which were admitted into evidence as Respondent's Exhibits 1 through 11.

The Transcript was filed with DOAH on March 28, 2019. The timely filed proposed recommended orders have been considered in the preparation of this Recommended Order. Unless otherwise noted, all references to the Florida Statutes and the Florida Administrative Code Rules are to those currently in effect.

FINDINGS OF FACT

The Parties

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes, to promote the public welfare by administering the governmental function of financing or refinancing housing. For purposes of this proceeding, Florida Housing is an agency of the State of Florida.

2. Florida Housing is also considered the state's housing finance agency which means Florida Housing, at times, conducts business as if it were a financial institution. Florida Housing administers the Hardest-Hit Fund, using funds appropriated by the United States Congress through the Emergency Economic Stabilization Act to help stabilize housing markets and prevent foreclosures. The Hardest-Hit Fund comes directly to Florida Housing from the United States Treasury through a Housing Finance Agency ("HFA") Participation Agreement.

3. The ELMORE program is one of the programs created under the umbrella of the Hardest-Hit Fund. The ELMORE program is designed to assist senior homeowners in Florida who are facing foreclosure due to the inability to pay property charges such as property taxes, homeowners insurance, and homeowners or condo association dues after the homeowner was paid all of the equity under a reverse mortgage.

4. The HFA agreement is a summary guideline for the ELMORE program and its general requirements. The stated goal of the program is to help senior homeowners remain in their homes. The Summary Guidelines include certain borrower eligibility criteria, property/loan eligibility criteria, and program exclusions, among other guidelines. The program exclusions reference the "Dodd-Frank exclusion for having been convicted of a mortgage-related felony in the past ten years."

5. The Dodd-Frank Act exclusion for criminal applicants is codified 12 U.S.C. § 5220b, and states in part:

(d) Prevention of qualification for criminal applicants

(1) In general

No person shall be eligible to begin receiving assistance from the Making Home Affordable Program authorized under the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5201 et seq.), or any other mortgage assistance program authorized or funded by that Act, on or after 60 days after July 21, 2010, if such person, in

connection with a mortgage or real estate transaction, has been convicted, within the last 10 years, of any one of the following:

(A) Felony larceny, theft, fraud, or forgery.

(B) Money laundering.

(C) Tax evasion.

6. On or about February 27, 2017, Betty Baldwin, Power of Attorney for Tolz, submitted an application for mortgage assistance through Florida Housing's Hardest-Hit Fund for ELMORE benefits. On or about May 11, 2017, the application was denied.

7. On or about November 8, 2018, Tolz submitted another application for mortgage assistance from the ELMORE program. On December 5, 2018, Florida Housing's Director of Homeownership Programs, David Westcott, issued a letter with an ineligibility determination to Tolz, which included a Notice of Rights.^{1/} Mr. Westcott is ultimately responsible for the final eligibility determinations on Hardest-Hit Fund mortgage assistance applications.

The Denial of ELMORE Program Benefits

8. Mr. Westcott denied Tolz's application for ELMORE program funds because she had, what Mr. Westcott determined to be, a disqualifying felony conviction in connection with a real estate transaction in violation of the Dodd-Frank Act provision. Mr. Westcott testified that pursuant to the HFA agreement with

the United States Treasury, Florida Housing is prohibited from using ELMORE funds to assist applicants that have a disqualifying Dodd-Frank Act conviction.

9. During the period of 2003 through 2010, Tolz used her position as a fiduciary in the role of bankruptcy trustee, receiver, and personal representative to misappropriate millions of dollars from bankruptcy estates, receiverships, and other matters, by writing or causing the writing of unauthorized checks from a variety of fiduciary accounts which contained funds she was appointed to safeguard.

10. Tolz then used the misappropriated money for her own benefit and to conceal her previous misappropriations by restoring the balances of other fiduciary accounts from which she had previously taken funds in a Ponzi scheme framework. To conceal this theft, Tolz falsified documents and used a fictitious bank account.

11. On or about December 12, 2011, Tolz was convicted in Broward County Circuit Court of grand theft in the first degree. Tolz was convicted on or about July 27, 2011, in the United States District Court for the Southern District of Florida of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349.

12. To secure a plea deal and in order to bolster her claim that her sentence should be reduced from the federal

guidelines, prior to sentencing, Tolz surrendered five real estate properties, which she owned, to the United States government. The value of these properties was then used to offset and lessen Tolz's restitution obligation to her victims. Tolz understood that these properties would not be accepted to satisfy her restitution obligation unless they were purchased, mortgaged, or improved with the assets of her victims.

13. In the federal criminal case, Tolz executed a Factual Basis Supporting Change of Plea ("Factual Basis") on or about April 15, 2011. Tolz agreed not to contest the information in the Factual Basis. Further, Tolz agreed that it provided a sufficient factual basis for her plea of guilty in the case, and had the case proceeded to trial, that the United States would have proven the facts beyond a reasonable doubt.

14. Paragraph 11 of the Factual basis states:

MARIKA TOLZ, directly or indirectly, utilized funds obtained through the fraudulent scheme to purchase, maintain and improve real properties, including, but not limited to the following real properties:

- a) 2344 North Federal Highway, Hollywood, Florida;
- b) 1804 Sherman Street, Hollywood, Florida;
- c) 704 SE 3rd Avenue, Hallandale, Florida;
- d) 815 SW 30th Street, Ft. Lauderdale, Florida; and
- e) 3031 North Ocean Blvd, Apartment 403, Fort Lauderdale, Florida 33308.

15. In making the ineligibility determination on Tolz's application for ELMORE program funds, Mr. Westcott determined that Tolz's conviction was in connection with a real estate transaction because Tolz agreed in the Factual Basis that she used funds obtained through the fraud to "purchase, maintain and improve real properties."

16. Florida Housing determined that Tolz's conviction disqualified her from receiving mortgage assistance from the ELMORE program because:

a) As part of the Hardest-Hit Fund, the ELMORE program funds are authorized by the Emergency Economic Stabilization Act of 2008;

b) Tolz was convicted of the enumerated offense of a "fraud;"

c) The conviction occurred on or about July 21, 2011, which is within the last ten years; and

d) The conviction was in connection with a real estate transaction because Tolz used funds obtained through the fraud to "purchase, maintain and improve real properties."

"In Connection With" A Mortgage or Real Estate Transaction

17. Tolz contends that her crimes were not "in connection with a mortgage or real estate transaction." At both her sentencing hearing in federal court and at the final hearing in this proceeding, Tolz stated that she owned these surrendered

properties for 30 or 40 years. Tolz now argues that because she owned these properties well before the fraud of which she was convicted occurred, no mortgage or real estate transaction was involved in the crime and, therefore, she should not be disqualified from ELMORE benefits.

18. Tolz now claims she surrendered these properties to facilitate the forfeiture on the advice of counsel, that she was heavily medicated at the time of sentencing, and that the prosecutor and the court knew that these properties were not associated with her underlying crimes. Tolz admitted at final hearing that she surrendered these properties to do an end-run around the system to reduce the more than two million dollars she owed in restitution.

19. However, in that same sentencing hearing, the prosecutor representing the United States stated "I'll also indicate, although it's clear from the record, that notwithstanding the picture that she's somehow a pauper, or was a pauper, the fact of the matter is the forfeiture properties indicated in the forfeiture which she agreed to were her properties, at least partially paid for by the offense."^{2/} An impartial reading of the sentencing transcript demonstrates that during sentencing the United States believed that the properties involved in the criminal forfeiture were, in part, paid for by the crime for which Petitioner was convicted.

20. The undersigned finds the facts, as offered by Tolz in her 2011 "Factual Basis" offered in support of a sentence reduction and reduction of her restitution obligation, to be more credible than her denial at final hearing that these properties were not purchased, improved, or maintained with the funds from her crimes.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction pursuant to sections 120.569 and 120.57(1), Fla. Stat.

22. Tolz, as the party asserting the affirmative, bears the burden of proof to go forward with the evidence. See Florida Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Envtl. Trust v. State, Dep't of Env'tl. Prot., 714 So. 2d 493, 497 (Fla. 1st DCA 1998) ("A party who asserts a disputed claim before an administrative agency generally has the burden of going forward with the evidence as well as the ultimate burden of establishing the basis for the claim.").

23. Tolz argues that although she was convicted of a conspiracy to commit wire fraud within ten years of her application for ELMORE program benefits, there was no evidence that said conspiracy was in any way related to, or in connection with, a transaction related to a mortgage or a transaction

related to the purchase or sale of real estate. According to the Petition, the offense was "wire fraud" and dealt with trust account checks which were never involved in any mortgage transactions.

24. Essentially, Tolz contends that the underlying crime of wire fraud associated with misappropriating funds had nothing to do with a mortgage or real estate transaction. Tolz suggests that what she did with the funds after the crime does not make the underlying crime "in connection with a mortgage or real estate transaction."

25. Florida Housing argues that the wire fraud of which Tolz was convicted necessarily was "in connection with" a mortgage or real estate transaction because, as stated in Tolz's Factual Basis, the proceeds of her crime were used to purchase, improve, or maintain her real property.

26. This dispute turns on the meaning of the phrase "in connection with." This phrase is not defined within the Dodd-Frank Act exclusion for criminal applicants.

27. "Where, as here, a statute does not define the phrase 'in connection with, "the words" should be accorded with their customary meaning.'" U.S. v. Costas-Torres, 2016 U.S. Dist. LEXIS 179469, at *7 (D.P.R July 18, 2016) (citing U.S. v. Thompson, 32 F.3d 1, 5 (1st Cir. 1994)). In Thompson, the First Circuit Court of Appeals held that, under the "plain meaning" of

that phrase, an act is committed "in connection with" another act whenever the first act "somehow aids or facilitates, or has the potential to aid or facilitate, the commission of [the other act]." Id. at 6.

28. Merriam-Webster's Collegiate Dictionary, 12th ed. (2016), defines "connection" as a "causal or logical relation or sequence." The critical inquiry is whether there is a facilitative nexus between the crime and a mortgage or real estate transaction. See Smith v. United States, 113 S. Ct. 2050, 2059, 124 L. Ed. 2d 138 (1993).

29. Tolz's Factual Basis statement that she, "utilized funds obtained through the fraudulent scheme to purchase, maintain and improve real properties" demonstrates that her crime facilitated a mortgage or real estate transaction. Despite Tolz's testimony that she owned these properties for many years prior to the crime, she failed to present evidence at the final hearing that the five surrendered properties were not, in fact, mortgaged, maintained, or improved by the proceeds of her crime. Securing a second mortgage, maintaining, or improving these real properties would constitute a real estate transaction.

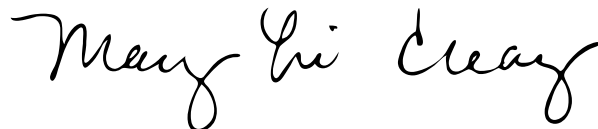
30. In light of this nexus between the fraud and a real estate transaction, Tolz failed to demonstrate by a preponderance of the evidence an entitlement to participate in

the ELMORE program and Florida Housing properly denied Tolz's eligibility to participate.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing enter a final order dismissing Petitioner's Amended Petition.

DONE AND ENTERED this 30th day of April, 2019, in Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2019.

ENDNOTES

^{1/} Other denial letters were sent to Petitioner from Florida Housing's advisors, but it was Florida Housing's denial letter that provided Petitioner with chapter 120, Florida Statutes, rights.

^{2/} See Petitioner's attachment to her Petition of Transcript of Sentencing Hearing in the United States District Court, Southern District of Florida, Miami Division, dated July 27, 2011, page 38. Although this document was not admitted into evidence, it is part of the record because it is incorporated by reference

in the Petition and was relied upon by both parties in the presentation of their cases at final hearing.

COPIES FURNISHED:

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NOTICE OF RIGHT TO FILE OBJECTIONS

All parties have the right to submit written objections within 5 days from the date of this Recommended Order. Any objections to this Recommended Order should be filed with the agency that will issue the final order in this case and shall be filed and served exclusively by email. Fla. Admin. Code R. 67-60.009(3) (b).