OAH 80-1005-31977

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF COMMERCE

In the Matter of Best Assets, Inc.

ORDER DENYING MOTION FOR SUMMARY DISPOSITION

This matter is pending before Administrative Law Judge LauraSue Schlatter pursuant to a Notice and Order for Hearing filed with the Office of Administrative Hearings (OAH) on November 12, 2014.

Oliver J. Larson, Assistant Attorney General, represents the Department of Commerce (Department). David J. McGee, attorney with Chestnut Cambronne P.A., represents Best Assets, Inc. (Respondent).

On April 8, 2015, Respondent filed a Motion for Summary Disposition. On May 6, 2015, the Department filed a response to the Respondent's motion. Oral argument took place on May 8, 2015, and the record closed on that date.

Based upon the motion and the record, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED THAT:

1. Respondent's request for summary disposition is **DENIED**. A prehearing conference via telephone shall take place to discuss further scheduling of this matter.

Dated: June 16, 2015

s/LauraSue Schlatter
LAURASUE SCHLATTER
Administrative Law Judge

MEMORANDUM

I. Factual and Procedural Background

Respondent is a real estate owned (REO) property management company with corporate headquarters located in Sugar Land, Texas.[1] In June 2010, Respondent entered into an agreement with the U.S. Department of Housing and Urban Development (HUD) to be a "Management and Marketing III Asset Manager" for a period of one year for payment of $4,297,615.64.[2] According to the agreement, the five primary objectives for "Asset Managers" are to ensure that: (1) properties are accurately and competitively valued, (2) sales achieve the highest net return, (3) holding time is minimized, (4) sales create owner-occupant opportunities, and (5) closing proceeds are properly accounted for and delivered to HUD in a timely manner.[3] In essence, the agreement delegated authority from HUD to Respondent to assist in the sale of HUD real estate properties subject to foreclosure.[4] Respondent has handled foreclosed properties owned by HUD in Minnesota pursuant to the agreement.[5] Each property is appraised by a Federal Housing Authority (FHA) approved appraiser and then listed for sale by a real estate broker licensed by the State.[6]

The Department conducted an investigation into Respondent's activities, and based on the investigation, charged Respondent with two violations: (1) failure to obtain a license as an appraisal management company prior to providing appraisal management services in Minnesota in violation of Minn. Stat. § 82C.03, subd. 1 (2014); and (2) failure to obtain a license as a real estate broker prior to providing brokerage services in Minnesota in violation of Minn. Stat. § 82.81, subd. 1 (2014).[7] Pursuant to statute, Respondent may be subject to civil penalties of up to $10,000 per violation.[8] On November 12, 2014, the Department filed a Notice and Order for Prehearing Conference setting forth the alleged violations and potential penalties.[9]

On April 8, 2015, Respondent filed a Motion for Summary Disposition. On May 6, 2015, the Department filed a response to the Respondent's motion. Oral argument took place on May 8, 2015, and then the record closed.

---

[1] *See* www.best-assets.com (June 8, 2015).
[2] Affidavit of James Rist (Rist Aff.), Ex. A at 1.
[3] Rist. Aff., Ex. A at A-8.
[4] Affidavit of Charles Newcomb (Newcomb Aff.) ¶ 4.
[5] Newcomb Aff. ¶¶ 4-5.
[6] Newcomb Aff. ¶¶ 6-7.
[7] NOTICE AND ORDER FOR HEARING at 4 (October 15, 2014); Rist Aff. ¶ 1.
[8] Minn. Stat. § 45.027, subd. 6 (2014). NOTICE AND ORDER FOR HEARING at 7 (October 15, 2014).
[9] NOTICE AND ORDER FOR HEARING (October 15, 2014).

II. Motion for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.[10] A motion for summary disposition may be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.[11] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition of contested case matters.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine factual issues exist.[12] In other words, the Administrative Law Judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.[13]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[14] A fact is material if its resolution will affect the outcome of the case.[15] If the moving party meets the initial burden, then the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[16] A genuine issue is not a "sham or frivolous" one and it cannot rely on mere allegations or denials.[17] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[18]

Ultimately, summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[19] Thus, summary disposition is only proper when no fact issues need to be resolved.[20]

III. Legal Arguments

In its Motion for Summary Disposition, Respondent asserts summary disposition of both claims in this case is appropriate. First, Respondent believes summary disposition should be granted on the real estate broker issue because "it was not acting as a real estate broker" as defined by Minnesota law.[21] Respondent argues that it is not a "person"

---

[10] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2013).
[11] *See Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp*., 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).
[12] *See e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[13] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[14] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[15] *See O'Malley v. Ulland Bros*., 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976)).
[16] *See Thiele,* 425 N.W.2d at 583.
[17] *See Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) (citing *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970)).
[18] *See* Minn. R. Civ. P. 56.05.
[19] *See Sauter*, 70 N.W.2d at 353.
[20] *See id*.
[21] Respondent's Memorandum of Law in Support of Motion for Summary Disposition (Resp. Mem.) at 3.

acting "for another" in the foreclosed real estate transactions it handles for HUD. Instead, Respondent claims it is "acting as an agent of HUD," a federal government agency, and therefore is not required to obtain a real estate broker license.[22] Second, Respondent believes summary disposition should be granted on the appraisal management company claim "because it was not providing appraisal management services" as defined by Minnesota law.[23] Respondent argues HUD is not "a lender, financial institution, client, or any other person" within the meaning of the statute, which defines appraisal management services as "the process of directly or indirectly performing any of the following functions on behalf of a lender, financial institution, client, or any other person."[24] Moreover, Respondent claims it never engaged in any of the enumerated appraisal management activities listed in the statute.[25] Thus, Respondent requests that summary disposition be granted in this matter.

The Department opposes Respondent's Motion for Summary Disposition on both grounds. First, the Department argues that a "real estate broker" as defined by statute includes "a natural person, firm, partnership, corporation or association" listing <u>or</u> managing real estate.[26] "[E]ven if [Respondent] never served as a listing agent for a property in Minnesota, it was still managing properties and required to obtain a license."[27] The Department notes that "[n]othing in the regulatory statute suggests the obligation to obtain a license or otherwise follow the law can be evaded through the artifice of structuring the agency relationship as a delegation of authority," and "nothing in the statute suggests that an agent can operate without a license if the principal is a federal agency."[28] Second, the Department argues that Respondent provided appraisal management services to its client, HUD, a government entity.[29] "[Respondent's] suggestion that its involvement in the appraisal process was *de minimus* is not supported by the evidence" because the Department's "investigation revealed that [Respondent] was directly involved in contacting appraisers and managing the content and form of the appraisals."[30] Overall, the Department points to a provision in the agreement with HUD requiring Respondent to comply with all local and state laws, and argues there would be "no need to include such a provision if [Respondent] was shielded" from the license requirements of the statutes. Therefore, the Department requests a denial of summary disposition in favor of Respondent in this matter.

IV. Legal Analysis

A. Real Estate Broker license

Under Minnesota law, a "real estate broker" is defined as

---

[22] *Id.* at 6-8.
[23] *Id.* at 9.
[24] *Id.* at 9.
[25] *Id.* at 11-12.
[26] Department's Response to Motion for Summary Disposition (Dept. Resp.) at 2-4.
[27] *Id.* Resp. at 3.
[28] *Id.* Resp. at 4.
[29] *Id.* Resp. at 6.
[30] Dept. Resp. at 6.

> any person who for another and for commission, fee, or other valuable consideration or with the intention or expectation of receiving the same directly or indirectly lists, sells, exchanges, buys or rents, manages, or offers or attempts to negotiate a sale, option, exchange, purchase or rental of an interest or estate in real estate, or advertises or holds out as engaged in these activities.[31]

The term "person" is further defined by the same statute as "a natural person, firm, partnership, corporation or association, and the officers, directors, employees and agents thereof."[32] The law prohibits any person from acting as a "real estate broker" without a license.[33] The Commissioner of Commerce and the Department have the authority to impose a civil penalty "not to exceed $10,000 per violation" of the real estate broker licensure requirement.[34]

In this case, the Department conducted an investigation and charged Respondent with "failure to obtain a license as a real estate broker prior to providing brokerage services in Minnesota" in violation of Minn. Stat. § 82.81, subd. 1 (2014).[35] Respondent has handled foreclosed properties owned by HUD in Minnesota pursuant to the June 2010 agreement designating Respondent as an "Asset Manager" for HUD.[36] Each property is appraised by a FHA approved appraiser and then listed for sale by a real estate broker licensed by the State.[37] The Department claims Respondent "was required to obtain a license as a real estate broker to manage properties for HUD in Minnesota."[38] Respondent believes summary disposition should be granted because "it was not acting as a real estate broker" as defined by Minnesota law.[39] Respondent argues that it is not a "person" acting "for another" in the transactions it handles for HUD. Instead, Respondent claims it is "acting as an agent of HUD," a federal government agency, and therefore not required to obtain a real estate broker license.[40]

The Administrative Law Judge concludes that granting Respondent summary disposition on the real estate broker claim is not warranted in this case. The statutory definition of "real estate broker" clearly includes the term "manages" real estate transactions in addition to listing or selling real estate.[41] As pointed out by the Department, "even if [Respondent] never served as a listing agent for a property in Minnesota, it was still managing properties."[42] Whether or not Respondent's actions in dealing with HUD properties in Minnesota included "management" as contemplated by the statute is a disputed genuine issue of material fact in this proceeding. If Respondent's

---

[31] Minn. Stat. § 82.55, subd. 19(a) (2014).
[32] Minn. Stat. § 82.55, subd. 14 (2014).
[33] Minn. Stat. § 82.81, subd. 1.
[34] Minn. Stat. §§ 45.027, subd. 6; 82.55, subd. 5 (2014).
[35] NOTICE AND ORDER FOR HEARING at 4 (October 15, 2014).
[36] Newcomb Aff. ¶¶ 4-5.
[37] *Id.* at ¶¶ 6-7.
[38] Dept. Resp. at 4.
[39] Resp. Mem. at 3.
[40] *Id.* at 6-8.
[41] Minn. Stat. § 82.55, subd. 19(a).
[42] Dept. Resp. at 3.

actions did include management, then whether its delegation from HUD served to transform it into HUD's proxy for property management purposes presents an additional genuine issue of material fact. Thus, summary disposition is not appropriate.

B. Appraisal Management Company license

Under Minnesota law, an "appraisal management company" means "a corporation, partnership, sole proprietorship, subsidiary, unit, or other business entity" that "directly or indirectly performs" the following appraisal management services:

> (1) administers networks of independent contractors and/or employee appraisers to perform residential real estate appraisal assignments for clients;
>
> (2) receives requests for residential real estate appraisal services from clients and, for a fee paid by the client, enters into an agreement with one or more independent appraisers to perform the real estate appraisal services contained in the request;
>
> (3) serves as a third-party broker of appraisal management services between clients and appraisers.[43]

The law prohibits any "person, corporation, partnership, sole proprietorship, subsidiary, unit, or other business entity to directly or indirectly engage or attempt to engage in business as an appraisal management company . . . without first obtaining a license."[44] The Commissioner of Commerce and the Department have the authority to impose a civil penalty "not to exceed $10,000 per violation" of the appraisal management company licensure requirement.[45]

In this case, the Department conducted an investigation and charged Respondent with "failure to obtain a license as an appraisal management company prior to providing appraisal management services in Minnesota" in violation of Minn. Stat. § 82C.03, subd. 1.[46] Respondent has handled foreclosed properties owned by HUD in Minnesota pursuant to the June 2010 agreement designating Respondent as an "Asset Manager" for HUD.[47] Each property is appraised by a Federal Housing Authority (FHA) approved appraiser and then listed for sale by a real estate broker licensed by the State.[48] The Department claims Respondent "was required to obtain a license as an appraisal management company" to manage properties for HUD in Minnesota.[49] Respondent believes summary disposition should be granted "because it was not providing appraisal management services" as defined by Minnesota law.[50] Respondent argues that HUD is not "a lender, financial institution, client, or any other person" within the meaning of the

---

[43] Minn. Stat. § 82C.02, subd. 4 (2014).
[44] Minn. Stat. § 82C.03, subd. 1.
[45] Minn. Stat. §§ 45.027, subd. 6; 82.55, subd. 5.
[46] NOTICE AND ORDER FOR HEARING at 4 (October 15, 2014).
[47] Newcomb Aff. ¶¶ 4-5.
[48] *Id.* at ¶¶ 6-7.
[49] Dept. Resp. at 4.
[50] Resp. Mem. at 9.

statute, which defines appraisal management services as "the process of directly or indirectly performing any of the following functions on behalf of a lender, financial institution, client, or any other person."[51] Moreover, Respondent claims it never engaged in any of the enumerated appraisal management activities listed in the statute.[52]

The Administrative Law Judge concludes that granting Respondent summary disposition on the appraisal management company claim is not warranted in this case. A genuine issue of material fact exists regarding whether Respondent provided appraisal management services to its client, HUD, a government entity. Respondent claims it did not engage in appraisal management services because it "ordered" appraisals "on behalf of a government agency" where the "FHA appraiser would transmit the appraisal report directly to HUD and HUD would pay the FHA appraiser."[53] However, the Department claims "[Respondent's] suggestion that its involvement in the appraisal process was *de minimus* is not supported by the evidence" because its "investigation revealed that [Respondent] was directly involved in contacting appraisers and managing the content and form of the appraisals."[54] This disputed issue of material fact is not properly decided as a matter of law on summary disposition. Thus, Respondent's request for summary disposition is denied.

Conclusion

For the foregoing reasons, Respondent's Motion for Summary Disposition is DENIED. A prehearing conference via telephone shall take place to discuss further scheduling of this matter.

L.S.

---

[51] Resp. Mem. at 9.
[52] Resp. Mem. at 11-12.
[53] *Id.* at 10-11.
[54] Dept. Resp. at 6.