

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF COMMERCE

In the Matter of Michael Fiorito

**RECOMMENDATION ON ORDER
FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Eric L. Lipman upon the Motion of the Minnesota Department of Commerce (Department) for Summary Disposition.

Christopher M. Kaisershot, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Michael Fiorito appeared on his own behalf and without counsel (Respondent).

Based upon all of the files, records, and proceedings in this matter, and for the reasons detailed in the Memorandum below,

IT IS HEREBY ORDERED THAT:

1. The evidentiary hearing scheduled for June 10, 2008 is CANCELLED.
2. Mr. Fiorito's Motion to Compel the Production of Documents is DENIED.

IT IS HEREBY RECOMMENDED THAT:

1. The Department's Motion for Summary Disposition be GRANTED.
2. The Commissioner impose appropriate regulatory discipline upon the Respondent, Michael Fiorito.

Dated: May 29, 2008

/s/ Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Recommendation made in this Report. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of the Commissioner of Commerce, 85 East Seventh Place, Suite 500, St. Paul, Minnesota 55101, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

MEMORANDUM

I. Factual and Regulatory Background

In 1998, the Legislature enacted the Minnesota Residential Originator and Servicer Licensing Act (“the Act”), a measure that regulates the practice of originating residential mortgages. Under the Act, residential mortgage originators must either be directly licensed by the Department or covered by a specific statutory exemption.^[1]

Moreover, the Act imposes upon those who are directly licensed and otherwise exempt from licensure certain standards of professional conduct; and these professional standards extend to matters that relate directly to residential mortgage origination and other non-mortgage-related volitional acts.^[2]

Mr. Fiorito has been convicted of a number of crimes involving dishonesty. Respondent has convictions for burglary;^[3] fraud;^[4] possession of counterfeit securities;^[5] and “criminally violating the social security statute codified at Title 42 by using a false social security number to obtain a mortgage.”^[6]

Notwithstanding these convictions, Mr. Fiorito obtained employment as an exempt mortgage originator, working under the auspices of his employers’ mortgage originator licenses.^[7] He performed this work in calendar year 2003 through 2006.^[8]

On or about July 12, 2005, Mr. Fiorito applied for a mortgage originator’s license in his own name. On his license application, Respondent certified that he had never been charged with or convicted of any felony or gross misdemeanor.^[9] This information was false.

Had he accurately detailed his criminal history, Respondent’s convictions which pre-date July 12, 2005, would preclude him from serving as a mortgage originator.^[10] Moreover, the Commissioner did not provide special written consent for Respondent to act as a mortgage originator – a prerequisite for persons having a criminal history involving crimes of “dishonesty or a breach of trust”^[11]

On March 3, 2006, the Department issued Mr. Fiorito a mortgage originator’s license – No. 20568108.^[12]

Following his licensure, Mr. Fiorito has received additional criminal charges and convictions.

On January 6, 2006, Respondent was charged with Felony Pattern of Harassing Conduct and Terroristic Threats in Dakota County District Court for a series of threats against a nineteen year old woman, K.L. According to the

criminal complaint, from July 23 to August 25, 2005, Respondent repeatedly “threatened to cut off [K.L.’s] head and limbs as well as blow up her car.”^[13] On August 3, 2007, after a jury trial, the jury returned a verdict of guilty on Count 1 - Felony Pattern of Harassing Conduct. On September 28, 2007, the District Court imposed a 120-month sentence upon Respondent and ordered him to pay restitution for his victim’s out-of-pocket counseling costs.^[14]

In a related criminal matter, on or about November 1, 2006, Respondent was charged with Felony Bribery-Witness Tampering. According to the criminal complaint, from May 18 to July 18, 2006, Mr. Fiorito repeatedly attempted to enlist K.L.’s friend to offer \$5,000 to K.L. in exchange for refusing to testify against him in the Felony Pattern of Harassing Conduct criminal trial.^[15] On February 6, 2008, Respondent pled guilty to Felony Bribery/Witness Tampering and the District Court imposed a 30-month sentence.^[16]

On June 19, 2007, Respondent was charged with one count of Felony Conspiracy to Commit Mail Fraud, three counts of Felony Mail Fraud, and one count of Engaging in a Financial Transaction with Criminally Derived Property in the United States District Court, District of Minnesota. The charges against Respondent related to his misconduct as a mortgage originator against five victims.^[17] For example, Count II of the federal indictment asserts that on or about July 19, 2005, Respondent intercepted, cashed, and converted two refinancing checks worth \$47,777 intended for his clients. In their place, on or about July 20, 2005, Respondent disbursed \$34,500 to his clients, retaining the balance of \$13,277 for himself, and falsely representing that the \$34,500 amount constituted the entire proceeds from the refinancing of a home located in Mound, Minnesota.^[18]

On October 2, 2007, Respondent pleaded guilty in U.S. District Court to Felony Mail Fraud as set forth in Count II of the federal Indictment.^[19]

Notwithstanding his statutory obligation under Minn. Stat. § 58.06, subd, 2(a)(2) (2006), however, Respondent failed to notify the Department of any of the above-referenced criminal charges or the later convictions.

Respondent is also the subject of two civil judgments. On or about March 19, 2007, Wells Fargo Bank, N.A., obtained a \$14,266 judgment against Respondent in Scott County District Court. Wells Fargo’s judgment relates to a July 18, 2006 loan that Respondent failed to repay. Respondent has failed to satisfy Wells Fargo’s judgment.^[20]

Additionally, on March 22, 2007, United Recovery, LLC, obtained a \$14,262 judgment against Respondent in Scott County District Court. United Recovery’s judgment relates to Respondent overstating a mortgage debt payoff amount and improperly receiving \$14,262 in “attorney fees” on August 22, 2006,

as part of the redemption of a property in foreclosure. Respondent has failed to satisfy United Recovery's judgment.^[21]

Respondent's license lapsed on October 31, 2007.^[22]

The Department seeks the imposition of regulatory discipline for violations of statute and rule "including debarment, revocation, suspension, censure and the imposition of civil penalties."^[23]

On May 1, 2008, the Department moved for summary disposition. Notwithstanding an extension to reply to this submission granted by the Administrative Law Judge, *sua sponte*,^[24] no reply to the Department's motion was made by Mr. Fiorito.

II. Analysis

Mr. Fiorito is subject to regulatory discipline from the Department of Commerce because his violations of applicable law occurred both while he worked as a mortgage originator exempt from licensure and during the period that he was a licensed mortgage originator.

Mr. Fiorito has not interposed a genuine issue of material fact to the Department's claims that he: (1) has multiple felony convictions – involving crimes of dishonesty and violence; (2) failed to disclose elements of his criminal history on his mortgage originator's license application; (3) failed to notify the Department regarding the criminal charges or convictions that followed his licensure; (4) pled guilty to both Felony Mail Fraud and Felony Bribery-Witness Tampering; and (5) failed to satisfy judgments totaling \$28,528.

Likewise, it does not appear that there is a genuine dispute that Mr. Fiorito did not accurately disclose his criminal history on his mortgage originator's application or that the Commissioner would not have approved Mr. Fiorito's license application had the true facts been disclosed.

The record demonstrates that Mr. Fiorito:

- (a) filed an application for a license that was incomplete in a material respect;
- (b) failed to maintain compliance with the affirmations made under section 58.06, subdivision 2;
- (c) engaged in a fraudulent, deceptive and dishonest acts involving the residential mortgage lending business;
- (d) engaged in an acts that demonstrate untrustworthiness, financial irresponsibility or incompetence;
- (e) pled guilty to a felony involving moral turpitude;^[25]
- (f) was convicted of additional felonies involving moral turpitude; and,
- (g) was found guilty by a court of competent jurisdiction to have engaged in conduct evidencing fraud, misrepresentation, or deceit.^[26]

In such a circumstance, regulatory discipline by the Department is warranted.

Summary disposition is appropriate in circumstances where the undisputed facts establish that the imposition of discipline is appropriate.^[27]

There being no genuine dispute as to Respondent's culpability for the violations listed in the Amended Statement of Charges, granting the Department's motion is appropriate.

Moreover, while Mr. Fiorito sought to compel the production of certain documents, and these requests arguably might lead to the discovery of relevant evidence if there were otherwise material disputes of fact between the parties, these inquiries do not warrant forestalling summary disposition. Where the sought-after detail will not alter the result on the summary disposition motion, resolution of the motion should not await the completion of discovery.^[28] Accordingly, Mr. Fiorito's motion to compel the production of documents is likewise denied.

E. L. L.

^[1] See, Minn. Stat. §§ 58.01 – 58.18 (2006).

^[2] See, Minn. Stat. § 58.04 (2006).

^[3] See, Affidavit of Matthew Boyer, Exhibit B, at 4-5.

^[4] *Id.*

^[5] *Id.*, at 5.

^[6] *Id.*

^[7] See, Boyer Aff., Ex. A at 14 and 17.

^[8] See, Boyer Aff., at ¶¶ 2 and 3.

^[9] See, Boyer Aff., Ex. A at 10, 12, 15 and 19.

^[10] See, Minn. Stat. § 58.125 (2) (2006).

^[11] See, Minn. Stat. § 58.125 (2) and (4) (2006).

^[12] *Id.*, at 10.

^[13] See, Boyer Aff., Ex. F at 1; see also, Boyer Aff., Ex. B at 5-6.

^[14] See, Boyer Aff., Ex. G.

^[15] See, Boyer Aff., Ex. H at 1-2.

^[16] See, Boyer Aff., Ex. I.

^[17] See, Boyer Aff., Ex. C.

^[18] See, Boyer Aff., Ex. C at 5-6.

^[19] See, Boyer Aff., Ex. D.

^[20] See, Boyer Aff., at ¶ 17.

^[21] See, Boyer Aff., at Ex. L.

- [22] See, Boyer Aff., at ¶ 3; *compare generally*, Minn. Stat. § 58.12 (3) (2006).
- [23] See, Boyer Aff., at ¶ 3; *compare generally*, Minn. Stat. § 58.12 (3) (2006).
- [24] *Notice and Order for Hearing*, OAH Docket No. 8-1005-19441-2 at 1 (2008).
- [25] *Compare, Matter of Primus*, 283 N.W.2d 519, 520 (Minn. 1979) (misappropriation of client funds constitutes willful misconduct involving moral turpitude); *Application of Strapp*, 71 N.W.2d 902 (Minn. 1955) (the offenses of misapplying moneys and securities entrusted to a bank and making a draft and false entry on the records of said bank were crimes involving moral turpitude); *In the Matter of the License and Application for Licensure of Joel Wells*, OAH Docket No. 7-1004-16567-2 (2006) (possessing child pornography is a crime of moral turpitude because it signifies “baseness and depravity ... by any commonly accepted measure”) (<http://www.oah.state.mn.us/aljBase/100416567.fng.htm>).
- [26] See, footnotes 3 through 6, 15 and 18, *supra*.
- [27] See, Minn. R. 1400.5500 (K) and 1400.6700 (2) (2007); *In the Matter of the Residential Building Contractor’s License of Wayne Evenson*, OAH Docket No. 1-1005-14691-2 (2002) (<http://www.oah.state.mn.us/aljBase/100514691.rt.htm>); *In the Matter of Larry Wasnick*, OAH Docket No. 1-1005-10550-2 (1996) (<http://www.oah.state.mn.us/aljBase/10050550.rt.htm>).
- [28] *McCormick v. Custom Pools, Inc.*, 376 N.W.2d 471, 477 (Minn. App.) *review denied* (Minn. 1985) (summary judgment granted before completion of discovery was not premature where additional discovery would have neither aided the district court in determining whether material fact issues existed nor changed the result of the summary judgment motion); *accord, Lewis v. St. Cloud State University*, 693 N.W.2d 466, 474-75 (Minn. App.) *review denied* (Minn. 2005) (“To the extent appellant speculates that discovery might have turned up evidence of [the University’s] liability ... appellant was on a ‘fishing expedition,’ and the district court did not abuse its discretion by denying a continuance based on appellant’s mere speculation that such evidence may exist”).