

**BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA**

In the Matter of the First Amended Accusation Against:

SKYLINE FINANCIAL CORPORATION, Respondent

Case No. 23331

OAH No. 2019061262

DECISION

PROCEDURAL HISTORY

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on September 11, 2019, in Sacramento, California.

Charles Carriere, Senior Counsel, represented complainant, the Commissioner (Commissioner) of the Department of Business Oversight (Department).

Joseph Cunningham and Zar Aamer appeared on behalf of respondent Skyline Financial Corporation.

Evidence was received, and the record was left open to allow the parties to submit legal briefs addressing the issue of the applicable standard of proof. Complainant's brief is marked

as Exhibit 12, and respondent's brief is marked as Exhibit B.¹ The record was closed, and the matter was submitted for written decision on September 17, 2019.

The Proposed Decision was issued by Administrative Law Judge Coren D. Wong on October 1, 2019. The Proposed Decision upheld the Commissioner's First Amended Accusation to revoke respondent's mortgage lender and servicer license because respondent failed to comply the Commissioner's April 5, 2019 orders to submit its annual report and pay a \$1,000 fine.

The Proposed Decision, however, decided no additional cause exists to revoke respondent's license because the new control person and not respondent was required to file an application for change of control and pay an investigation fee to the Commissioner. The Proposed Decision also decided no cause exists to revoke respondent's license because respondent was not required to provide fingerprints of the new control persons, pay fingerprint processing fees or update its license application since the change of control occurred after respondent was issued a license.

On December 17, 2019, all parties were served with an Order of Rejection of Proposed Decision in accordance with Government Code section 11517, subdivision (c)(2)(E). The parties were notified that the Proposed Decision was rejected for the following reasons and the case would be decided by the Commissioner upon the record, and upon any written argument offered by the parties:

1. Whether respondent was required to submit an application for change of control or an investigation fee of \$100 due to the change of control pursuant to Financial Code

¹ Respondent's brief was not considered to the extent it included evidentiary matters.

section 50206, subdivision (a), and Section 1950.206 of title 10, California Code of Regulations.

2. Whether respondent was required to submit fingerprints or fingerprint processing fees due to the change of control pursuant to Sections 1950.122.4, subdivision (a)(3)(A) and (d); 1950.122.9, subdivision (a); and 1950.206 of title 10, California Code of Regulations.

The written arguments were due to the Commissioner by January 21, 2020.

Complainant submitted timely written arguments. Respondent did not provide any written argument.

SUMMARY

Complainant seeks to discipline respondent's residential mortgage lender and servicer license based on allegations respondent failed to: 1) comply with the Commissioner's April 5, 2019 orders; 2) file its 2018 annual report; and 3) submit an application for change of control, an investigation fee, fingerprints, or fingerprint processing fees. Complainant proved all but one of the allegations by a preponderance of the evidence. Respondent did not produce evidence of its continued ability to perform the duties authorized by its license in a manner consistent with public health, safety, and welfare. Therefore, its license should be revoked.

FACTUAL FINDINGS

Jurisdictional Background

1. Respondent is a licensed residential mortgage lender and servicer under the California Residential Mortgage Lending Act (Fin. Code, § 50000 et seq.; CRMLA). Complainant authorized the filing of the First Amended Accusation on August 26, 2019, solely in his official capacity.

Annual Report

2. No later than March 1, every CRMLA licensee is required to file an annual report containing information the Commissioner specifies for the prior calendar year. The report is used to calculate the particular licensee's share of the Commissioner's anticipated costs of administering the CRMLA for the fiscal year in which the report is filed.

3. The Commissioner sent respondent reminders to file its 2018 annual report on December 17, 2018, January 2, 2019, and February 1 and 28, 2019. Respondent did not file its 2018 annual report by March 1, 2019. On April 5, 2019, the Commissioner issued orders requiring respondent to immediately file its 2018 annual report, and to pay a \$1,000 fine for not filing the report in a timely manner. Respondent did not appeal the orders.

4. To date, respondent has not filed its 2018 annual report or paid the \$1,000 fine.

Change in Control of Respondent

5. On February 1, 2019, respondent submitted notice through the Nationwide Mortgage Licensing System that the direct owner and officers identified on its original application for licensure were replaced by First Capital Master Advisor, LLC (First Capital). First Capital did not apply to the Commissioner for approval of the change in "control persons". Neither respondent nor First Capital paid an investigation fee prior to making the change. To date, neither respondent nor First Capital has submitted fingerprints for each new control person or paid any fingerprint processing fees.

Respondent's Evidence

6. Mr. Cunningham was the sole witness to testify on respondent's behalf. He currently has no affiliation with respondent, but is in negotiations to become its president. He anticipates being appointed president in the near future.

7. Mr. Cunningham did not dispute any of the allegations in the First Amended Accusation. He explained that respondent's failure to file its 2018 annual report and comply with the Commissioner's April 5, 2019 orders was not motivated by an intent to avoid its obligations, but rather based on a lack of understanding of those obligations.

8. Mr. Cunningham has not made any attempts to comply with the Commissioner's April 5, 2019 orders, and is not aware of anyone attempting to do so on respondent's behalf. He explained that filing the 2018 annual report will be a "very high priority" once he becomes president, and submitted a draft report at hearing. He did not know what needed to be done to finalize the report, because he did not prepare it and saw it for the first time on the day of hearing. He requested more time to file the 2018 annual report.

Discussion

2018 Annual Report

9. It was undisputed respondent did not file its 2018 annual report by the statutory deadline. On April 5, 2019, the Commissioner issued orders requiring respondent to immediately file its 2018 annual report, and to pay a \$1,000 fine for failing to do so in a timely manner. To date, respondent has not complied with either order.

10. Mr. Cunningham's explanation that respondent's failure to timely file its 2018 annual report and subsequently comply with the Commissioner's orders was motivated by ignorance of its obligations was not persuasive. The Commissioner sent respondent four

reminder notices prior to March 1, 2019. There was no evidence anyone acting on behalf of respondent contacted the Commissioner to inquire about those notices. More importantly, Mr. Cunningham failed to explain how respondent's obligations under the April 5, 2019 orders are anything but clear.

Change in Control of Respondent

11. It was undisputed respondent underwent a change in its control persons on February 1, 2019, which was after it was issued its residential mortgage lender and servicer license.² First Capital did not file an application seeking the Commissioner's approval of the change. Neither respondent nor First Capital paid an investigation fee prior to the change. To date, neither respondent nor First Capital has submitted to the Commissioner fingerprints for the new control persons or paid any fingerprint processing fees.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Complainant has the burden of proving the grounds for disciplining respondent's license alleged in the First Amended Accusation. (*Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 536 ["When an administrative agency initiates an action to suspend or revoke a license, the burden of proving the facts necessary to support the action rests with the agency making the allegation".])

2. Two different standards of proof apply in license discipline proceedings: the clear and convincing to a reasonable certainty standard, and the preponderance of the

² Complainant failed to introduce evidence of the original date of licensure. A reasonable inference of the evidence as a whole, however, supports the conclusion that the date was prior to February 1, 2019.

evidence standard. In determining which standard applies, the courts draw “a distinction between professional licenses, such as those held by doctors (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856 [185 Cal.Rptr. 601]), lawyers (*Furman v. State Bar* (1938) 12 Cal.2d 212, 229 [83 P.2d 12]), and real estate brokers (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457 [94 Cal.Rptr. 136]) on the one hand, and nonprofessional or occupational licenses, such as those held by food processors (*San Benito Foods v. Veneman* (1996) 50 Cal. App.4th 1889, 1894 [58 Cal.Rptr.2d 571]) and vehicle salespersons (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 318-319 [90 Cal.Rptr.2d 277]), on the other hand.” (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916.) The clear and convincing standard applies when disciplining the former, whereas the preponderance of the evidence standard applies when disciplining the latter. (*Ibid.*)

3. Rationalizing the basis for applying a different standard depending on the type of license subject to discipline, the appellate court in *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, explained:

Because a professional license represents the licensee’s fulfillment of extensive educational, training and testing requirements, the licensee has an extremely strong interest in retaining the license that he or she has expended so much effort in obtaining. It makes sense to require that a higher standard of proof be met in a proceeding to revoke or suspend such a license. The same cannot be said for a licensee’s interest in retaining a [nonprofessional] license.

(*Id.* at p. 1894).

4. Financial Code section 50121 *requires* the Commissioner to issue a license to act as a mortgage lender if the applicant: 1) files a complete and verified application for licensure;

2) pays the applicable fees; and 3) passes a background investigation. There are no “extensive educational, training [or] testing requirements.” (*San Benito Foods v. Veneman, supra*, 50 Cal.App.4th at p. 1894.) Therefore, the applicable standard of proof when disciplining a residential mortgage lender and servicer license is the preponderance of the evidence standard. This evidentiary standard requires complainant to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, complainant need only prove it is more likely than not respondent violated the CRMLA. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

Annual Report

5. Each year, every CRMLA licensee is required to pay the Commissioner the lesser of: 1) a pro rata share of the Commissioner’s anticipated costs and expenses for administering the CRMLA during the current fiscal year, adjusted by any deficit or surplus actually incurred during the previous fiscal year; or 2) \$5,000. (Fin. Code, § 50401, subd. (a).) “In order for the Commissioner to calculate the assessment under this section, each licensee shall file an annual report for the calendar year just ended containing the information required by the Commissioner on or before March 1 of the year in which the assessment is to be calculated.” (*Ibid.*) “The report shall be made under oath and in the form prescribed by the Commissioner.” (Fin. Code, § 50307, subd. (a).)

Licensee’s Control Persons

6. As used in the CRMLA, “control” is:

[T]he possession, directly or indirectly, of the power to direct, or cause the direction of, the management and policies of a licensee under this division, whether through voting or through the ownership of voting power of an entity that possesses voting power of the licensee, or otherwise. Control is presumed to exist if a person, directly or indirectly, owns, controls, or holds 10 percent or more of the voting power of a licensee or of an entity that owns, controls, or holds, with power to vote, 10 percent or more of the voting power of a licensee. No person shall be deemed to control a licensee solely by reason of his or her status as an officer or director of the licensee.

(Fin. Code, § 50003, subd. (e).)

7. “Person” is “a natural person, a sole proprietorship, a corporation, a partnership, a limited liability company, an association, a trust, a joint venture, an unincorporated organization, a joint stock company, a government or a political subdivision of a government, and any other entity.” (Fin. Code, § 50003, subd. (u).)

8. An application for a license to act as a mortgage lender and servicer must include the names of all of the applicant’s proposed control persons. (Cal. Code Regs., tit. 10 § 1950.122.4, subd. (a)(3).) The application must include all fees required for the criminal history background check of each control person. (Cal. Code Regs., tit. 10, § 1950.122.4, subd. (a)(3)(B).) Each proposed control person shall provide a set of fingerprints with the application. (Cal. Code Regs., tit. 10, § 1950.122.4, subd. (a)(3)(A).) A licensee must promptly file an amendment for any change in the information on its application for a license or the attached exhibits. (Cal. Code Regs., tit. 10, §§ 1950.122.4, subd. (d), and 1950.122.9, subd. (a).)

9. “Prior to a change of control of the business of a licensee, the person wishing to acquire control shall submit an application to the Commissioner and pay an investigation fee of

one hundred dollars (\$100).” (Fin. Code, § 50206, subd. (a).) The application must be accompanied by fingerprint processing fees. (Cal. Code Regs., tit. 10, § 1950.206.)

Cause for Discipline

10. “The Commissioner may immediately revoke a residential mortgage lender’s, residential mortgage loan servicer’s, or mortgage loan originator’s license if the licensee fails to comply with any order issued under Section 50318, 50319, 50321, 50322 or 50503.” (Fin. Code, § 50325.) The Commissioner’s April 5, 2019 order requiring respondent to immediately file its 2018 annual report was issued pursuant to Financial Code section 50321. Respondent violated that order because it has not filed its annual report as of the date of hearing. Therefore, cause exists to discipline its residential mortgage lender and servicer license pursuant to Financial Code section 50325, as that statute relates to Financial Code section 50321.

11. A residential mortgage lender and servicer license may be disciplined if the licensee fails to file any report the Commissioner requires within 10 days of its due date. (Fin. Code, § 50326.) Cause exists to discipline respondent’s residential mortgage lender and servicer license pursuant to Financial Code section 50326, because it has not filed its 2018 annual report as of the date of hearing.

12. A residential mortgage lender and servicer license may be disciplined if the licensee violates the CRMLA or any regulation adopted pursuant to it. (Fin. Code § 50327, subd. (a)(1).) Respondent violated the Commissioner’s April 5, 2019 order by not immediately filing its 2018 annual report as Financial Code sections 50307, subdivision (a) and 50401, subdivision (a) require. Respondent also violated the Commissioner’s April 5, 2019 order by not paying the \$1,000 fine as required by Financial Code section 50326. Therefore, cause exists to discipline

respondent's residential mortgage lender and servicer license pursuant to Financial Code section 50327, subdivision (a)(1), as that statute relates to Financial Code sections 50326, 50307, subdivision (a), and 50401, subdivision (a).

13. California Code of Regulations, title 10, section 1950.122.4, subdivision (a)(3), requires an applicant, as part of the license application, to provide the names and fingerprints of control persons and to pay all fees for purposes of the Commissioner conducting an investigation and criminal history background check of each control person. California Code of Regulations, title 10, sections 1950.122.4, subdivision (d), and 1950.122.9, subdivision (a), require a licensee to promptly amend its license application and accompanying exhibits if there has been any change to the information in the license application. Respondent failed to promptly file an amendment to its license application with information in connection with the change of control as required by California Code of Regulations, title 10, sections 1950.122.4, subdivision (d), and 1950.122.9, subdivision (a). Respondent failed to provide the names and fingerprints of the new control persons as required by California Code of Regulations, title 10, section 1950.122.4, subdivision (a)(3) and (a)(3)(A). Respondent failed to pay the investigation fee and fingerprint processing fees for the criminal history background check of each control person California Code of Regulations, title 10, section 1950.122.4, subdivision (a)(3)(B), requires. Cause exists to discipline respondent's residential mortgage lender and servicer license pursuant to Financial Code section 50327, subdivision (a)(1).

14. No cause exists to discipline respondent's residential mortgage lender and servicer license pursuant to Financial Code section 50327 based on the failure to file an application for change of control. First Capital, "the person wishing to acquire control" of

respondent, was required to file an application for change of control with the Commissioner pursuant to Financial Code section 50206, subdivision (a).

Conclusion


15. Cause exists to discipline respondent's residential mortgage lender and servicer license for the reasons explained in Legal Conclusions 10 through 13, individually and collectively. Respondent was required to file its 2018 annual report more than six months prior to the date of hearing, but did not do so. It also was required to pay a \$1,000 fine for not timely filing the report, file an amendment to its license application with information in connection with the change of control, provide fingerprints of the new control persons, and pay an investigation fee and fingerprint processing fees for each control person, but has not done that as of the date of hearing. Respondent has repeatedly demonstrated an inability and/or unwillingness to comply with the CRMLA. Therefore, revocation of its residential mortgage lender and servicer license is appropriate.

ORDER

Respondent Skyline Financial Corporation's mortgage lender and servicer license is REVOKED.

DATE: March 3rd, 2020




Manuel P. Alvarez
Commissioner
Department of Business Oversight