

STATE OF OHIO
DEPARTMENT OF COMMERCE
Division of Financial Institutions
Consumer Finance

In the matter of:

KEVIN J. GAINER
1317 Deepwood Drive
Macedonia, OH 44056

) Case No. M2009-571
)
) **DIVISION ORDER**
) **Refusal to Renew Loan Officer License**
) **and Imposition of Fine**
) **&**
) **Notice of Appellate Rights**

The Ohio Department of Commerce, by and through the Superintendent of the Division of Financial Institutions (the "Division"), is charged with the responsibility of administering and enforcing the Ohio Mortgage Broker Act ("OMBA"), codified in Ohio Revised Code ("R.C.") Chapter 1322, and finds that this Order is necessary and appropriate, in the interest of the public, and is consistent with the purposes of the OMBA.

Respondent, Kevin J. Gainer ("Respondent"), held a loan officer license ("License") issued by the Division pursuant to the OMBA. Respondent submitted an application to renew his License on April 29, 2009. The Division notified Respondent that it intended to deny the renewal of his License and impose a fine pursuant to R.C. 1322.10(A)(1)(a) and -.10(A)(2), respectively, via a Notice of Intent to Deny Loan Officer Renewal and Impose a Fine & Notice of Opportunity for a Hearing. On July 16, 2009, the Division issued Respondent an Amended Notice of Intent to Deny Loan Officer Renewal and Impose a Fine & Notice of Opportunity for a Hearing ("Notice") that set forth the following allegations and findings:

- A. The Division is authorized by R.C. 1322.10(A)(1)(a) to refuse to renew an applicant's loan officer license if the Division finds that the applicant has violated "or failed to comply with any provision of sections 1322.01 to 1322.12 of the Revised Code or the rules adopted under those sections or any other law applicable to the business conducted under a certificate of registration[.]"
- B. The Division is authorized by R.C. 1322.041(B) to issue a renewal loan officer license if the applicant complies with R.C. 1322.01 to 1322.12 and his character and general fitness commands the confidence of the public and warrants the belief that the business will be operated honestly and fairly in compliance with the purposes of sections 1322.01 to 1322.12.

The Division is authorized by R.C. 1322.10(A)(2) to "[i]mpose of fine of not more than one thousand dollars, for each day a violation of law or rule is committed,

repeated or continued. If the registrant or licensee engages in a pattern of repeated violations of law or rule, the Division may impose a fine of not more than two thousand dollars for each day the violation is committed, repeated, or continued.”

- C. R.C. 1322.072 prohibits persons from knowingly circumventing, interfering with, obstructing, or failing to cooperate, including making a false or misleading statement, failing to produce records, or intimidating or suborning any witness in connection with any examination or investigation conducted by the superintendent of financial institutions under sections 1322.01 to 1322.12 of the Revised Code.
- D. Following the Division’s February 2008 Examination of Triton Financial Group, LLC, on May 14, 2008, Richard Keck, Chief Examiner for Consumer Finance wrote Kevin Gainer of Triton Financial Group a letter addressing the issues raised in the February compliance examination. At this time, Kevin Gainer was the individual designated as Triton Financial Group, LLC’s Operations Manager. (He became Triton Financial Group, LLC’s approved Operations Manager in July 2008). The letter was sent by US regular mail and requested a response within thirty days. The Division did not receive a letter from Triton Financial Group, LLC in response to the Division’s May 14, 2008 letter addressing the issues found in the Division’s examination.
- E. Subsequently, on August 20, 2008, Richard Keck, Chief Examiner for Consumer Finance, wrote another letter to Kevin Gainer of Triton Financial Group, LLC, again requesting Triton Financial Group, LLC address the issues raised in the Division’s examination and respond to the Division’s letter on or before September 3, 2008. This letter was sent by Certified Mail to Kevin Gainer, the Operations Manager of Triton Financial Group, LLC at Respondent’s business address and received on August 22, 2008. The Division received no response to its August 20, 2008 letter from any representative of Triton Financial Group, LLC.
- F. By failing to respond to the Division’s May 14, 2008 and August 20, 2008 letters that addressed the compliance issues found during the February 2008 examination and that were sent to him while he performed the Operations Manager duties of Triton Financial Group, LLC, Respondent violated R.C. 1322.072.
- G. R.C. 1322.064(A) states: “[n]o registrant or licensee shall fail to do either of the following: (1) Timely inform the buyer of any material change in terms of the loan.” This statute defines “material change” as the following: (a) A change in the type of loan being offered, such as fixed or variable rate loan or a loan with a balloon payment; (b) a change in the term of the loan, as reflected in the number of monthly payments due before a final payment is scheduled to be made; (c) a change in the interest rate of more than .15%; (d) a change in the regular monthly payment of principal and interest of more than five percent; (e) a change regarding the escrow of taxes or insurance; (f) a change regarding the payment of private mortgage insurance.

- H. In arranging mortgage loans secured by real estate, Respondent failed to timely inform the buyer(s) of any material change(s) to the loan, in violation of R.C. 1322.064(A).
- a. For the mortgage loan secured by 1890 Woodbrook Lane, Lyndhurst, Ohio 44124, Respondent failed to notify the buyer of the following material changes to the loan:
 - i. A change in interest rate from .149% fixed to 7.25% variable (first mortgage and 11% variable (second mortgage).
 - ii. A change in the type of loan being offered. On November 14, 2006, the buyer signed preliminary disclosures for a fixed rate thirty year loan with an APR of .149%. On January 23, 2007, the buyer signed settlement documents for a first mortgage in the amount of \$880,000 with a variable interest rate of 7.25% with a balloon and also signed settlement documents for a second mortgage in the amount of \$220,000 with a variable interest rate of 11%.
 - iii. A change in the regular monthly payment of principal and interest of more than five percent. The initial disclosures list a monthly mortgage payment of \$1350 for the entire amount borrowed. At settlement, the borrower agreed to a first and second mortgage for which the monthly payments combined were \$9,369 (plus balloon payments).
- I. R.C. 1322.064(A)(2) states: [n]o registrant or licensee shall fail to...[t]imely inform the buyer if any fees payable by the buyer to the registrant or lender increase by more than ten percent or one hundred dollars, whichever is greater.
- J. In arranging mortgage loans secured by real estate located at 1890 Woodbrook Lane, Lyndhurst, Ohio 44124, Respondent failed to timely inform the buyer(s) of any fees payable by the buyer to the registrant that increased by more than ten percent, in violation of R.C. 1322.064(A)(2).
- K. Respondent is a “supplier” as defined in R.C. 1345.01(C).
- L. R.C. 1345.031(A) states: “No supplier shall commit an unconscionable act or practice concerning a consumer transaction in connection with a residential mortgage. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.”
- M. R.C. 1345.031(B)(14) and O.A.C. 109:4-3-27(A) defines an unconscionable act or practice as including: “[e]ntering into the consumer transaction knowing there was no reasonable probability of payment of the obligation by the consumer.”
- N. O.A.C. 109:4-3-27(B) states that “[t]he supplier’s analysis of the reasonable probability of payment of the obligation by the consumer may include, but shall not be limited to, verification of the borrower’s current and expected income, current and expected cash flow, net worth and other financial resources (other than the consumer’s equity in the dwelling that secures repayment of the loan), current

financial obligations, property taxes and insurance, assessments on the property, employment status, credit history, and other relevant factors such as debt-to-income ratio, credit score, tax returns, pension statements, employment payment records, and statements or information submitted by the consumer in their mortgage loan application, provided that no supplier shall disregard facts and circumstances that indicate that the financial or other information submitted by the consumer is inaccurate or incomplete.”

- O. O.A.C. 109:4-3-27(E) states that “[a]ll records, worksheets, or supporting documentation used by the supplier in conducting an analysis of the reasonable probability of payment of the obligation by the consumer shall be maintained by that supplier in the consumer’s loan file for each residential mortgage loan transaction for a period of at least two years from the date of closing, or as required by other applicable state or federal law, whichever time period is greater....”
- P. R.C. 1322.07(C) prohibits a licensee from engaging in conduct that constitutes improper, fraudulent, or dishonest dealings.
- Q. An act or practice by a licensee that is unconscionable under R.C. 1345.031(B) is also prohibited conduct under R.C. 1322.07(C).
- R. In arranging mortgage loans secured by real estate located at 1890 Woodbrook Lane, Lyndhurst, Ohio 44124, and 2574 Fairwood Drive, Pepper Pike, Ohio 44124, Respondent originated the mortgage loan without regard to whether the buyer was able to repay the loan and failed to use any reasonable method to determine a borrower’s ability to repay the mortgage loan in violation of R.C. 1345.031(B)(14), O.A.C. 109:4-3-27(A) and (C), 1345.031(A) and 1322.07(C).

As a result of the findings listed above, the Division has determined that:

- 1. Respondent’s actions listed in paragraphs E-G violated R.C. 1322.072.
- 2. Respondent’s actions listed in paragraph I violated R.C. 1322.064(A)(1).
- 3. Respondent’s actions listed in paragraph K violated R.C. 1322.064(A)(2).
- 4. Respondent’s actions listed in paragraph O violated R.C. 1345.031(A), O.A.C. 109:4-3-27(A) and (C), 1345.031(B)(14) and 1322.07(C).
- 5. Because Respondent violated or failed to comply with R.C. sections 1322.072, 1322.064(A)(1) and (2), and 1322.031(A), Respondent’s character and fitness do not command the confidence of the public and warrant the belief that the business will be operated honestly and fairly in compliance with the purposes sections 1322.01 to 1322.12 of the Revised Code. See R.C. 1322.041(A)(6) and (B)(3).

6. Because Respondent violated or failed to comply with R.C. sections 1322.072, 1322.064(A)(1) and (2), and 1345.031(A), the Division is authorized under R.C. 1322.10(A)(1)(a) to deny the renewal of Respondent's loan officer license.

The Notice also informed Respondent that, in addition to denying the renewal of his License, the Division intended to impose a fine of \$5,000.00, and that he had thirty (30) days to request an adjudicatory hearing pursuant to R.C. Chapter 119 regarding the Division's allegations set forth in the Notice.

Respondent requested an administrative hearing, which was held on July 23, 2009 before an administrative hearing officer. Respondent appeared at the hearing. The hearing officer's report and recommendation (the "Report and Recommendation") was filed with the Division on December 16, 2009 (a copy is attached). The Report and Recommendation found that the Division's evidence supported a finding of violations of R.C. 1345.031(A) and -.031(B)(14), 1322.072(A), 1322.07(C), O.A.C. 109:4-3-27 and 1301:8-7-13(F). Moreover, the evidence of these violations supported the Division's refusal to renew Respondent's License and to impose a fine. The Report and Recommendation found that the Division's evidence did not support a finding of violations of R.C. 1322.064(A) or -.064(B).

The Division sent a copy of the Report and Recommendation to Respondent on December 16, 2009 via certified mail; however, the item was returned to the Division by the U.S. Post Office marked unclaimed. The Division published the Report and Recommendation in *The Akron Legal News* on February 11, 18 and 25, 2010. No objections to the Report and Recommendation were filed.

Pursuant to R.C. 119.09, the Division may approve, modify, or disapprove the recommendation of a hearing officer based upon the report, recommendation, transcript of testimony and evidence, or objections of the parties and any additional testimony and evidence permitted. In accordance therewith, the Division has considered the record, consisting of the Report and Recommendation, the transcript of testimony and exhibits, as well as all applicable laws. Any finding and/or conclusion not specifically addressed in the attached Memorandum in Support is approved, adopted and incorporated herein.

For the reasons provided herein and in the attached Memorandum in Support incorporated as if fully restated herein, the Division approves in part and modifies in part the Recommendation. The Division approves the Recommendation to deny the renewal of Respondent's License and hereby refuses to renew Kevin J. Gainer's License. The Division has

weighed the evidence and considered the factors enumerated in R.C. 1322.10(A)(2) and hereby imposes a fine of four thousand dollars (\$4,000.00) against Kevin J. Gainer.

Respondent, Kevin J. Gainer, is hereby ordered to pay the Division a fine in the amount of four thousand dollars (\$4,000.00). Payment shall be in the form of a cashier's check or money order, made payable to "Treasure of State," and, within ninety (90) days of Respondent's receipt of this Order, shall be submitted with a copy of this Order to: Ohio Division of Financial Institutions, Attn: Jacqueline Mallett, Consumer Finance Attorney, 77 South High Street, 21st Floor, Columbus, Ohio 43215-6120.

IT IS SO ORDERED.

NOTICE OF APPELLATE RIGHTS

Respondent is hereby notified that pursuant to R.C. 119.12, this Division Order may be appealed by filing a notice of appeal with the Division setting forth the order that Respondent is appealing from and stating that the Division's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may also include, but is not required to include, the specific grounds for the appeal. The notice of appeal must also be filed with the appropriate court of common pleas in accordance with R.C. 119.12. In filing the notice of appeal with the Division or court, the notice that is filed may be either the original notice or a copy of the original notice. The notice of appeal must be filed within fifteen (15) days after the date of mailing of this Division Order.

Signed and sealed this 18th day of October, 2010.

LEIGH A. WILLIS

Deputy Superintendent for Consumer Finance
Division of Financial Institutions
Ohio Department of Commerce