

ENTERED
SEP 15 2014
COMMISSIONERS OFFICE

COMMONWEALTH OF KENTUCKY
PUBLIC PROTECTION CABINET
DEPARTMENT OF FINANCIAL INSTITUTIONS
AGENCY CASE NO. 2012-AH-0131
ADMINISTRATIVE ACTION NO. 12-PPC-0312

DEPARTMENT OF FINANCIAL INSTITUTIONS

COMPLAINANT

v.

HBNC, INC. d/b/a MORTGAGE LENDERS, INC., and
HENRY BART NALLY, Individually

RESPONDENTS

**COMMISSIONER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND FINAL ORDER GRANTING DEFAULT JUDGMENT
AGAINST RESPONDENTS**

* * * * *

This matter is before the Commissioner of the Department of Financial Institutions ("DFI"), pursuant to KRS 13B.120. For the reasons set forth herein, the Commissioner hereby enters his **Findings of Fact, Conclusions of Law, and Final Order** adopting the Recommended Order Denying Motion for Summary Judgment and Granting Motion for Default Judgment issued by the Hearing Officer, making additional findings of fact, imposing the payment of fines and restitution pursuant to KRS 286.8-046, and ordering Respondents to cease and desist from doing business in Kentucky pursuant to KRS 286.8-090.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. The Department of Financial Institutions (DFI) is responsible for regulating and licensing mortgage loan companies, mortgage loan brokers, mortgage loan originators, and mortgage loan processors in accordance with the provisions of KRS Chapter 286.8.

2. Respondent, HBNC, Inc., d/b/a Mortgage Lenders, Inc. (HBNC), operated as a mortgage loan broker in Kentucky under a claim of exemption held pursuant to KRS 286.8-

020(2)(a) for the period of April 20, 2004, to December 31, 2010. HBNC's exemption expired on December 31, 2010. HBNC is not currently authorized to do business as a mortgage loan broker in Kentucky.

3. Respondent, Henry Bart Nally (Nally), was the sole owner and control person of HBNC. Nally was also registered to conduct business as a mortgage loan originator in Kentucky for the period of July 28, 2005, to December 31, 2009. Mr. Nally is not currently authorized to conduct business as a mortgage loan originator in Kentucky.

4. This Administrative Proceeding was initiated on May 14, 2012, when the Division of Nondepository Institutions of the Department of Financial Institutions filed an Administrative Complaint against Respondents seeking fines, restitution, and an order to cease and desist. The May 14, 2012, Administrative Complaint was subsequently withdrawn and replaced by an Administrative Complaint filed by the Division of Nondepository Institutions on July 25, 2012, seeking the same relief.

5. The July 25, 2012, Administrative Complaint alleged multiple violations of KRS Chapter 286.8 by Respondents concerning the following: failure to comply with notification procedures related to the cessation of business, failure to comply with records retention requirements, use of unregistered loan originators by HBNC, unregistered loan origination activity by Respondent Nally, charging of excessive origination fees in violation of KRS 286.8-125, and fraudulent submission of loan applications whereby Respondents repeatedly mischaracterized multiple properties owned by the same borrowers as the primary residence of the borrowers.

6. Respondent, HBNC, Inc. d/b/a Mortgage Lenders, Inc., failed to file an answer to either complaint or to participate in these proceedings. Respondent, Henry Bart Nally, in his

individual capacity, filed an answer to the Department's complaint on September 11, 2012. Upon receipt of Respondent Nally's answer, the DFI requested the Administrative Hearings Branch of the Office of the Attorney General to assign a hearing officer to the case.

7. On September 25, 2012, the Administrative Hearings Branch of the Office of the Attorney General assigned Hearing Officer, Stuart W. Cobb, to hear the case.

8. From September 2012 through July 2013, multiple telephonic prehearing conferences were held by the hearing officer. At one point, Respondent Nally engaged the services of an attorney and efforts were made to prepare the case for hearing. However, on May 20, 2013, the hearing officer entered an order permitting Respondent Nally's attorney to withdraw from the case.

9. On July 23, 2013, after entry of several additional prehearing conference orders, the Hearing Officer entered an order permitting Respondent Nally to submit a written record and to move for summary judgment. DFI was also permitted to file a counter-motion for default judgment. In so ordering, the Hearing Officer explained that Respondent Nally had represented that he was both unable to obtain counsel to represent him and unable to travel to Kentucky to participate in a hearing.

10. Respondent Nally filed his motion for "dismissal" on August 22, 2013. DFI filed a motion for judgment of default, a response to Respondent Nally's motion, and a supporting affidavit on September 18, 2013. Thereafter, on October 28, 2013, Respondent Nally filed a final response to the hearing officer's conference order.

11. On August 21, 2014, the hearing officer issued his Recommended Order Denying Motion for Summary Judgment and Granting Motion for Default Judgment.

12. No exceptions were filed.

13. Having considered the entire record in this matter, consisting of the pleadings and affidavits of both parties, I hereby adopt as my own and incorporate herein the Recommended Order Denying Motion for Summary Judgment and Granting Motion for Default Judgment issued by the Hearing Officer on August 21, 2014, in its entirety.

FINAL ORDER

THEREFORE, based upon the foregoing findings of fact and conclusions of law and pursuant to KRS 286.8-046, KRS 286.8-090, and KRS 13B.120, **IT IS HEREBY ORDERED AS FOLLOWS:**

1. The Recommend Order Denying Motion for Summary Judgment and Granting Motion for Default Judgment issued by the Hearing Officer on August 21, 2014, and attached hereto, is adopted in full and incorporated herein by reference into this Final Order;

2. Respondent Henry Bart Nally's motion for judgment as a matter of law is **DENIED.**

3. DFI's motion for default judgment against HBNC, Inc., d/b/a Mortgage Lenders, Inc. and Henry Bart Nally is **GRANTED**, and the allegations set forth in the July 25, 2012, Administrative Complaint against Respondents are deemed true.

4. Pursuant to KRS 286.8-046(1), Respondents, HBNC, Inc. d/b/a Mortgage Lenders, Inc. and Henry Bart Nally, jointly and severally, shall pay a **civil penalty in the amount of fifty-five thousand dollars (\$55,000.00)** for the following conduct:

a. HBNC violated KRS 286.8-160(2), (6), and (7), and 808 KAR 12:023, and Nally violated KRS 286.8-220(2)(i) by failing to properly preserve records, to notify the Commissioner of the location of records, to designate a records custodian, and to submit necessary notifications regarding the cessation of business;

b. HBNC violated KRS 286.8-170(1) and Nally violated KRS 286.8-220(2)(i) by failing to keep correct and complete records of its business transactions, books of accounts, and minutes of proceedings of its directors, principals, or partners;

c. HBNC violated KRS 286.8-030(1)(d) by employing an unregistered mortgage loan originator;

d. Nally violated KRS 286.8-030(1)(c) and KRS 286.8-255 by acting as an unregistered mortgage loan originator;

e. HBNC violated KRS 286.8-125(1) and Nally violated KRS 286.8-220(2)(i) by charging loan origination fees to borrowers on at least four (4) loans in excess of that allowed by the statute; and

f. Respondents violated KRS 286.8-220(2)(a) and (b) by engaging in a pattern of fraudulent loan submissions for multiple properties owned by the same borrowers by repeatedly mischaracterizing each property submitted as the borrowers' primary residence.

5. Pursuant to KRS 286.8-046(2), Respondents, HBNC, Inc. d/b/a Mortgage Lenders, Inc. and Henry Bart Nally, jointly and severally, shall pay **restitution** in the amount of \$917.36 to the borrowers who paid excess fees in violation of KRS 286.8-125.

6. Pursuant to KRS 286.8-090, Respondents, HBNC, Inc. d/b/a Mortgage Lenders, Inc. and Henry Bart Nally, are ordered to **CEASE AND DESIST** from participating in any business activity in the mortgage lending process in Kentucky or with respect to a Kentucky borrower or property, and from participating in any business activity of any kind at or upon any premises where a licensee or registrant under KRS Chapter 286.8 is conducting any part of its business and to **CEASE AND DESIST** from committing any other violations of the Act.

This is a **FINAL AND APPEALABLE ORDER**. The **EFFECTIVE DATE** of this order shall be the date reflected on the certificate of service attached to this order.

NOTICE OF APPEAL RIGHTS

Pursuant to KRS 286.8-210, you are hereby notified that any person aggrieved by this Final Order of the Commissioner may obtain a review of the Order by the Franklin Circuit Court. If you chose to appeal, you must file a written petition asking that the order be modified or set aside in whole or in part in the Franklin Circuit Court within sixty (60) days after the date reflected on the certificate of service attached to this Final Order. A copy of the petition must be served upon the Commissioner.

SO ORDERED this 12th day of September, 2014.



CHARLES A. VICE
COMMISSIONER

Certificate of Service

I hereby certify that a true and correct copy of the foregoing **Final Order** was entered by the Commissioner and sent by certified mail, return receipt requested, on this the 15 day of September, 2014, to:

Henry Bart Nally, individually,
and as registered agent for HBNC, Inc.
P.O. Box 2464
Ponte Vedra Beach, FL 32004-2464

And by hand-delivery to:

Walker C. Cunningham
Department of Financial Institutions
1025 Capital Center Drive, Suite 200
Frankfort, KY 40601
Counsel for Complainant

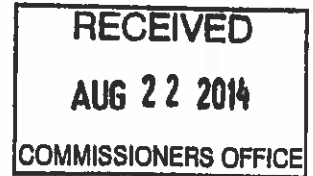
And by messenger mail to:

Stuart Cobb
Division of Administrative Hearings
Office of Attorney General
1024 Capital Center Drive
Frankfort, KY 40601



Christina Hayden
Department of Financial Institutions
1025 Capital Center Drive, Ste. 200
Frankfort, KY 40601
(502) 573-3390, ext. 282
(502) 573-2183 (fax)

COMMONWEALTH OF KENTUCKY
PUBLIC PROTECTION CABINET
DEPARTMENT OF FINANCIAL INSTITUTIONS
AGENCY CASE NO. 2012-AH-0131
ADMINISTRATIVE ACTION NO. 12-PPC-0312



DEPARTMENT OF FINANCIAL INSTITUTIONS

COMPLAINANT

vs. **RECOMMENDED ORDER DENYING MOTION FOR SUMMARY JUDGMENT
AND GRANTING MOTION FOR DEFAULT JUDGMENT**

HBNC, INC. D/b/a MORTGAGE LENDERS, INC., and
HENRY BART NALLY, Individually

RESPONDENTS

* * * * *

This matter came before the hearing officer on dispositive motions by the parties. The Complainant, Department of Financial Institutions ("DFI"), was represented by Hon. Walker C. Cunningham III. The Respondent HBNC, Inc. ("HBNC") did not participate in the proceedings. The Respondent Henry Bart Nally appeared on his own behalf. Mr. Nally moved for a judgment on the written record pursuant to KRS 13B.090(2). DFI moved for default judgment pursuant to KRS 13B.080(6) on the grounds that there are material issues of fact for a hearing, but Mr. Nally will not travel from Florida to appear in person or hire an attorney to appear on his behalf and DFI refused to allow him to appear telephonically, as is its right pursuant to 13B.080(7). This matter came before the hearing officer concerning charges made by DFI against the Respondents for alleged violations of KRS Chapter 286, Kentucky Financial Services Code. Having read the parties' briefs and attachments thereto, the hearing officer, being sufficiently advised, DENIES Respondent Nally's motion for summary judgment and GRANTS DFI's motion for default judgment against HBNC and Nally based on the following:

OPINION

In his briefs and affidavit in support of his motion for judgment as a matter of law, Mr. Nally asserted he is entitled to judgment because he was never an owner of HBNC, and his employment with HBNC ended in June 2010. However, the allegations against HBNC concern actions and omissions committed prior to Mr. Nally leaving HBNC, and during 2010 before he left when he allegedly closed ten (10) loans despite not being licensed as a mortgage loan originator, and Mr. Nally admits to having held positions with HBNC and acting on its behalf during the period of time in question. Also, despite claiming he never owned HBNC, Mr. Nally submitted documents with his affidavit showing the one thousand (1,000) shares in the corporation were transferred to him on May 1, 2008 by Angela Rae (Nally) Davis, which he held until he transferred them to Felipe Sarracen on September 1, 2010. DFI submitted the affidavit of Gayle Keltner, its investigator, in support of the charges against the Respondents, thus there clearly are issues of material fact and Mr. Nally is not entitled to judgment as a matter of law.

In regards to DFI's motion for default judgment, HBNC never appeared to defend itself after it was served by certified mail the Notice of Administrative Hearing at the last known address of its registered agent, Henry Nally, pursuant to KRS 13B.050(2), thus default judgment against HBNC is proper.

Mr. Nally was also served by certified mail at his last known address to satisfy the service requirements of KRS 13B.050(2). Mr. Nally has appeared before the hearing officer to represent himself, however he has stated he will not travel to Kentucky from Florida to appear for a hearing and he will not hire an attorney to appear on his behalf. Mr. Nally cannot participate in a hearing telephonically or by other electronic means because KRS 13B.080(7) requires all parties

to consent to electronic participation, and DFI has exercised its right to refuse consent. Since Mr. Nally will not participate in a hearing even if the hearing officer schedules one, DFI's motion for default judgment is hereby GRANTED.

ORDER

Wherefore, based on the foregoing, the hearing officer RECOMMENDS as follows:

1. The Respondent Henry Bart Nally's motion for judgment as a matter of law is DENIED.
2. The Complainant DFI's motion for default judgment against HBNC, Inc. and Henry Bart Nally is GRANTED, and the charges filed against HBNC, Inc. and Henry Bart Nally set forth in the Administrative Complaint are deemed true.
3. That a judgment be entered against HBNC, Inc. and Henry Bart Nally, jointly and severally, in the amount of a civil penalty for fifty-five thousand dollars (\$55,000).
4. That HBNC, Inc. and Henry Bart Nally be held jointly and severally liable for excess fees in the amount of \$917.36 for four (4) loans to be refunded to the persons who paid the excess charges.
5. That HBNC, Inc. and Henry Bart Nally be ordered to cease and desist from participating in any business activity in the mortgage loan process in Kentucky or with respect to a Kentucky borrower or property, and from participating in any business activity of any kind at or upon any premises where a licensee or registrant under KRS Chapter 286.8 is conducting any part of its business.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110 (4) you have the right to file exceptions to this recommended

decision:

- (4) A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head.


In order to preserve a right to review by the circuit court, case law requires that a litigant must file exceptions with the board or agency if there is anything in the recommended order with which a party does not agree and desires to appeal.

You have a right to appeal the Final Order of the agency pursuant to KRS 13B.140 which reads in part:

- (1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

Pursuant to KRS 23A.010(4), "Such review [by the Circuit Court] shall not constitute an appeal but an original action." The Court of Appeals has suggested that an appeal to circuit court is commenced upon the filing of the appeal petition and the issuance of a summons within the 30-day time period for filing an appeal.

SO RECOMMENDED this 21 day of August, 2014.



STUART W. COBB
HEARING OFFICER
ADMINISTRATIVE HEARINGS BRANCH
OFFICE OF THE ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE, SUITE 200
FRANKFORT, KY 40601-8204
(502) 696-5442
(502) 573-1009 - FAX

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER was served this 21st day of

August, 2014, by messenger mail, to

GENERAL COUNSEL
DEPT OF FINANCIAL INSTITUTIONS
1025 CAPITAL CENTER DR STE 200
FRANKFORT KY 40601

for filing; and a true copy was served by first-class mail, postage prepaid, to:

HENRY BART NALLY
PO BOX 2464
PONTA VERDRA BEACH FL 32004-2464

and, by messenger mail, to:

WALKER C CUNNINGHAM
COUNSEL
OFFICE OF LEGAL COUNSEL
DEPT OF FINANCIAL INSTITUTIONS
1025 CAPITAL CENTER DR STE 200
FRANKFORT KY 40601

Brenda Edwards
DOCKET COORDINATOR

120312fc.swc.wpd