

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas B. McCloskey,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2469 C.D. 2009
	:	
Pennsylvania Housing	:	Submitted: April 23, 2010
Finance Agency,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: June 11, 2010

Thomas B. McCloskey, proceeding *pro se*, petitions for review of a final order of the Pennsylvania Housing Finance Agency (Agency), which denied his application for a Homeowner’s Emergency Mortgage Assistance Program Loan (mortgage assistance loan). We affirm.

McCloskey owns property located at 298 McCombs Road, Venetia, Pennsylvania 15367 (Property), where he resides with his family. In March 2009, McCloskey applied to the Agency for a mortgage assistance loan pursuant to the Housing Finance Agency Law (HFA Law).¹ By letter dated September May 27, 2009, the Agency denied McCloskey’s application on the following grounds:

¹ Act of December 3, 1959, P.L. 1688, as amended, 35 P.S. §§ 1680.101-1680.603a.

1. No reasonable prospect of applicant resuming full mortgage payments within thirty-six (36) months from the date of the mortgage delinquency and paying the mortgage(s) by maturity based on: Applicant's income is insufficient to maintain mortgage. Total monthly expenses: \$10,724.13. 2005 net monthly income: \$2,284.50, 20[0]6: \$2,056.96, 2007: \$1,756.65.
2. Property is encumbered by more than two mortgages/liens. The Agency's mortgage must be no worse than a third lien position. Since you already have more than two mortgages/liens against your property, you are not eligible for mortgage assistance. Property is secured by: Countrywide (9/26/05), Select Portfolio (3/17/06), and Hardy Credit Co (9/27/07).

Supplemental Reproduced Record (S.R.R.) at 20, 78. McCloskey appealed. A hearing before an Agency hearing examiner ensued.

At the hearing on July 21, 2009, McCloskey testified. Donald Goss, a loan officer with the Agency, also testified. McCloskey provided his federal income tax returns for the years 2005 through 2008. Based upon the testimony and evidence presented, the hearing examiner made the following findings of fact.

McCloskey has two mortgages secured by the Property. The first mortgage is held by Countrywide, which was executed in September 2005 as a refinancing of an existing mortgage. The amount financed was \$500,000, which has a monthly payment of \$2,069. The second mortgage is held by Select Portfolio. This mortgage note was executed in March 2006 in the amount of \$100,000, with monthly payments of \$1,032.13. Both mortgages have been delinquent since December 2008.

McCloskey also has two mortgages secured by another property located at 6316 Irishtown Road Extension, which was McCloskey's previous residence. The 6316 Irishtown Road Extension property is still owned by

McCloskey and was vacant at the time of the hearing. The first mortgage on 6316 Irishtown Road Extension is held by Countrywide and was executed in August 2003 in the amount of \$105,000, with monthly payments of \$924. The second mortgage is held by HSBC; this mortgage was executed in December 2005 in the amount of \$25,000, with monthly payments of \$184. McCloskey filed an application for a mortgage assistance loan on this property, which was denied. The hearing examiner included these mortgages as installment debt as they are not secured by the Property.

McCloskey testified that he has been self-employed in new home construction and residential land development business since 1999. McCloskey attributes his mortgage delinquency to the steady decline in the housing industry.

McCloskey provided his federal income tax returns over the past four years. The tax returns reveal that in 2005, the average net monthly income was \$2,280; in 2006, the average net monthly income was \$1,376; in 2007, it was \$1,459; and in 2008, a loss was reported. Following the appeal hearing, McCloskey provided an income statement for his business, after allowing for the deduction of taxes, the average net monthly income is \$1,109.75.

At the time of the application, McCloskey's overall monthly expenses totaled \$10,724.13. At the time of the hearing, McCloskey monthly expenses totaled \$9,178.30. McCloskey's monthly housing expenses alone total \$4,393.13, which far exceeds his average net monthly income as reported on his federal income tax returns over the past four years.

Based upon the comparison of historical income versus monthly expenses, the hearing examiner concluded McCloskey has never demonstrated a reasonable prospect of maintaining full mortgage payments. Based upon the income history, the income at application, and the current net monthly income, the

hearing examiner concluded that it does not appear likely that McCloskey will be able to fully resume and maintain his monthly obligations. The hearing examiner ultimately concluded that the mortgage assistance loan was properly denied because “[n]o reasonable prospect of applicant resuming full mortgage payments within thirty-six (36) months from the date of the mortgage delinquency and paying the mortgage(s) by maturity.” S.R.R. at 25. Accordingly, the hearing examiner affirmed the Agency’s original decision of May 27, 2009 and denied McCloskey’s mortgage assistance loan application. McCloskey now appeals to this Court.²

McCloskey contends that the hearing examiner erred in evaluating McCloskey’s ability to resume full mortgage payments within 36 months without giving appropriate consideration to his 50% interest in a new, 61-lot residential subdivision, which was approved on April 21, 2009 and on which lots deposits are being accepted.³ We disagree.

The General Assembly has enumerated detailed eligibility requirements for mortgage assistance in the HFA Law. Section 404-C of the HFA

² This Court's scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are not supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Johnson v. Pennsylvania Housing Finance Agency, 512 A.2d 1319 (Pa. Cmwlth. 1986).

³ McCloskey also raised the issue of whether the hearing examiner erred in attributing the Hardy Credit obligation (September 27, 2007) as a third mortgage on McCloskey’s Property, when the mortgage in question encumbers another property, not 298 McCombs Road. While McCloskey’s application was initially denied on two grounds, the hearing examiner affirmed the denial only on the basis that there is no reasonable prospect that McCloskey will resume full mortgage payments within 36 months, not the encumbrance of more than two mortgages. Moreover, the hearing examiner listed the Hardy Credit obligation as installment debt, not as a third mortgage against the Property. S.R.R. at 22-23. As the hearing examiner resolved this issue in McCloskey’s favor, we need not address this issue on appeal.

Law⁴ sets forth the primary standards for determining eligibility and provides, in pertinent part, that no assistance may be made with respect to a mortgage unless:

(5) The agency has determined that there is a **reasonable prospect that the mortgagor will be able to resume full mortgage payments within [thirty-six (36)]^[5]** months after the beginning of the period for which assistance payments are provided under this article and pay the mortgage or mortgages in full by its maturity date or by a later date agreed to by the mortgagee or mortgagees for completing mortgage payments.

Section 404-C(a)(5) of the HFA Law, 35 P.S. §1680.404c(a)(5), (emphasis added). The Agency cannot base its determination on speculative income. R.M. v. Pennsylvania Housing Finance Agency, 740 A.2d 302 (Pa. Cmwlth. 1999), petition for allowance of appeal denied, 563 Pa. 669, 759 A.2d 390 (2000); Cullins v. Pennsylvania Housing Finance Agency, 623 A.2d 951 (Pa. Cmwlth. 1993).

Here, McCloskey testified that he has begun developing a new 61-lot, residential subdivision in the high-end housing market of Pittsburgh. S.R.R. at 11, 25, 30. He explained that the high-end housing market, which ranges from \$650,000 to more than \$1,000,000, has remained steady in Pittsburgh. Id. He has received at least two lot deposits for homes. Id. McCloskey testified that he remains self-employed and is the only source of income to the household. S.R.R. at 11, 17. He testified that he “could potentially have maybe \$5,000 to \$8,000” in the next 60 to 90 days to apply towards the delinquency. S.R.R. at 16.

⁴ Added by the Act of December 23, 1983, P.L. 385.

⁵ The twenty-four (24) month limit on assistance available set forth in Section 404-C(a)(5) was increased to thirty-six (36) months pursuant to Section 405C(f.1) of the HFA Law, added by the Act of December 23, 1983, P.L. 385, as amended, 35 P.S. §1680.405c(f.1).

The hearing examiner considered McCloskey's testimony regarding his interest in the new development and potential for future income, but relied upon McCloskey's income history in denying the application. S.R.R. at 25. The hearing examiner is empowered to determine questions of evidentiary weight and matters of credibility. See Coyne v. Pennsylvania Housing Finance Agency, 826 A.2d 925 (Pa. Cmwlth. 2003). McCloskey's income history reveals that McCloskey has not had sufficient income over the last four years to cover his monthly expenses and has been financially overextended since the time he entered into the mortgages. McCloskey offered no evidence to support his belief that the new development will generate sufficient revenue within the next 36 months to resume full mortgage payments and satisfy his other monthly expenses. McCloskey's hope that he will be able to generate sufficient stream of income from his new development to cover his monthly financial obligations is speculative at best. We, therefore, conclude that the hearing examiner did not err or abuse its discretion in relying upon McCloskey's income history, as opposed to McCloskey's testimony regarding potential future income, to determine whether there is a reasonable prospect that McCloskey will be able to resume full mortgage payments within 36 months.

Accordingly, the order of the hearing examiner denying McCloskey's application for mortgage assistance is affirmed.

JAMES R. KELLEY, Senior Judge

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Finance Agency,	:	
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ORDER

AND NOW, this 11th day of June, 2010, the order of the Pennsylvania Housing Finance Agency, dated November 9, 2009, is AFFIRMED.

JAMES R. KELLEY, Senior Judge