Office of Appeals
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of:

JOY SMITH and LULA WILLIAMS,

Petitioners.

HUDOA No. 10-H-CH-LL05
Claim No. 7-21006191-0B

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DECISION AND ORDER ON RECONSIDERATION

In the Decision and Order ("Decision") dated July 29, 2010, this Office found that "Petitioners have failed to show that the title agent's statement has led Petitioners to reasonably infer that HUD's right to enforce the debt will not be asserted against Petitioners." *Joy Smith and Lula Williams*, HUDOA No. 10-H-NY-LL05, at p. 6 (Jul. 29, 2010). On August 30, 2010, Petitioner, through counsel, filed a Motion for Reconsideration of the Decision, which was held in abeyance. (Pet'r's Mot. for Recons., dated Jul. 29, 2010; Ruling on Mot. for Recons., dated Sept. 3, 2010.)

On September 14, 2010, the Secretary, through counsel, filed a Motion in Opposition to Petitioner's Motion for Reconsideration ("Motion in Opposition") and argued that, "Petitioners have failed to set forth any new facts or applicable law which they seek to advance on reconsideration. Petitioners merely seek a second bite at the proverbial apple to rehash what this court has already fully considered." (Sec'y Mot. in Opp'n, dated, Sept. 14, 2010, ¶ 10.)

Petitioners assert that their "main reason for seeking reconsideration is because [Petitioners'] claim of equitable estoppel was summarily denied by the Office of Appeals without rational basis and was arbitrary and capricious and not in accordance with the law...." (Pet'rs' Br. in Supp. of Mot. for Recons., dated Oct. 8, 2010, ¶ 4.) Specifically, Petitioners argue that:

> While the decision on appeal acknowledges that it has considered petitioners' claim of equitable estoppel and petitioner's argument following Lincoln Logs Ltd. v. Lincoln Pre-Cut Homes [971 F.2d 732, 734 (Fed. Cir. 1992)] in relation to that claim, the decision merely points out that petitioners failed to show that Lincoln applies in their particular situation, when in fact, Lincoln squarely applies to their situation and petitioners have clearly shown—contrary to the holding of the Office of Appeals—that petitioners were mislead [sic] by the statements of the title agent, which the Secretary ignored by its silence.

(*Id.* at ¶ 5.) Although the *Lincoln Logs Ltd.* case accurately sets forth the elements of an equitable estoppel claim between private litigants, *Lincoln Logs Ltd.* does not "squarely apply" to this case because in this case, Petitioners are seeking to assert a claim of equitable estoppel against the government, not against a private party.

The U.S. Supreme Court has stated that "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Comty Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). When asserting equitable estoppel against the government, "at a minimum, [Petitioner] must show some *affirmative misconduct* by the government in addition to establishing the other elements of estoppel. (emphasis added, internal quotation marks omitted) *Premo v. United States,* 599 F.3d 540, 547 (6th Cir. 2010) (citing *Mich. Express Inc. v. United States*, 374 F.3d 424, 427 (6th Cir. 2004)). "Affirmative conduct is more than mere negligence. It is an act by the government that either intentionally or recklessly misleads the claimant." (internal quotations omitted) *Premo v. United States,* 599 F.3d 540, 547 (quoting *Mich. Express Inc. v. United States*, 374 F.3d 424, 427). In addition to "affirmative misconduct going beyond mere negligence," Petitioners must show that "the government's act will cause a serious injustice and the imposition of estoppel will not unduly harm the public interest." *Pauly v. U.S. Dep't of Agric.*, 348 F.3d 1143, 1149 (9th Cir. 2003) (quoting *S & M Inv. Co. v. Tahoe Reg'l Planning Agency*, 911 F.2d 324, 329 (9th Cir. 1990)).

Petitioners' allege that they relied, to their detriment, upon "instructions given to the title agent by HUD representatives" (Pet'r's Resp. to Sec'y Stat., ¶ 6) and that:

> the title agent made numerous contacts with [HUD] concerning the debt, and HUD, in effect, waived its right to collect it. This point was lodged in the petition and HUD failed to deny it. Accordingly, by failing to deny this claim when petitioners raised it in its petition, the Secretary was, in effect, admitting to the communication. Because petitioners relied upon this waiver to their detriment, ...they meet the requirements of Lincoln.

(Pet'rs' Br. in Supp. of Mot. for Recons., ¶ 7.) It should be noted that Petitioners never proffered any evidence that HUD actually made these representations to Petitioners. The only evidence Petitioners have to support their argument is an unsworn letter from the title agent stating that HUD had made these representations to the title agent, not that such statements were made directly to Petitioners. (Pet'r's Resp. to Sec'y Stat., Ex. C.) Regardless, even if Petitioners could prove that HUD made these representations to them or otherwise prove that HUD acknowledged that such representations had been made to Petitioners, such alleged representations still do not rise to the level of "affirmative misconduct" as established by case law precedent.

In *Clason v. Johanns*, 438 F.3d 868 (8th Cir. 2006), the appellant alleged that he had spoken with an Farm Service Agency ("FSA") employee who made assurances that physical delivery was not necessary for his crop of corn to be considered "delivered" under the terms of a marketing assistance loan given to him by the Commodity Credit Corporation, a federal corporation within the U.S. Department of Agriculture ("USDA"). *Clason v. Johanns*, 438 F.3d 868 at 870. Relying on that alleged misrepresentation, the appellant maintained possession of a portion of the corn crop, and as a result, the FSA determined that the appellant owed an outstanding balance of $9,703.62 to the USDA. *Id.* The FSA officer stated that she could not recall making such representations to the appellant. *Id.* at 872. In any event, the court in *Clason*, held that "[e]ven if [the FSA officer] had made such statements...[t]he record here does not contain any evidence of affirmative misconduct. At most, the FSA officer's comments were the product of negligence which is insufficient to satisfy [appellant's] heavy burden of proof." *Id.*

Further, in *Pauly v. U.S. Department of Agriculture*, 348 F.3d 1143, the plaintiffs were farmers who were delinquent on their loans from the USDA and entered into a Shared Appreciation Agreement ("SAA") to avoid foreclosure. *Pauly v. U.S. Dep't of Agric.*, 348 F.3d 1143, at 1146. "Despite the express terms of the SAA," FMHA County Supervisor Kuhn, a local USDA official, informed the plaintiffs that they would not have to repay the debt "if they continued farming through the tenth and final year of the agreement and did not convey their property or repay their loans in the interim." *Id.* at 1147. The plaintiffs were later sent a letter acknowledging that misrepresentations may have been made concerning repayment of the SAA, and confirming that repayment for the loan would still be due from the plaintiffs. *Id.* The court in *Pauly* determined that the plaintiffs offered no evidence that the alleged misrepresentation was deliberate or fraudulent. *Id.* at 1149. The court pointed out that plaintiffs, "do not attempt to demonstrate that Kuhn was aware of the correct terms of the SAA, let alone that he deliberately misled them." *Id.* "At most," the court reasoned, "Kuhn's actions amount to negligence, which does not satisfy the 'affirmative misconduct' requirement." *Id. See also, Estate of James* v. *U.S. Dep't of Agric.*, 404 F.3d 989 (6th Cir. 2005) (finding that misrepresentations made by local Department of Agriculture officials were not proved by plaintiff to be deliberate or fraudulent and were only inadvertent or, at worst, negligent.)

This case is analogous to the facts as presented in the *Clason* and *Pauly* cases. The debt in this case arises from a Note that expressly and clearly sets forth the requirements for when repayment is to be made and where the funds for repayment should be sent. (Sec'y Stat., Ex. A, Note, ¶ 4.) Petitioners allege that their title agent was "not sure whether HUD had to be paid any funds, as the FHA mortgage that was recorded was unclear." (Pet'r's Resp. to Sec'y Stat., ¶ 3)

After "exhaustive enquir[ies] into this loan with both Countrywide Home Loans as well as the [D]epartment of Housing and Urban Development," Petitioners' title agent was informed that Petitioners' debt to HUD had been included with the Countrywide Home Loans loan and paid off at closing. (emphasis in original) (*Id.* at ¶ 4.) Like the plaintiffs in both *Clason* and *Pauly*, Petitioners have failed to prove that the alleged misrepresentations, even if actually made by HUD, were more than mere negligence and thereafter somehow rose to the level of "affirmative misconduct." As such, I find that Petitioners still have failed to prove their claim of equitable estoppel against HUD.

Further, this Office would be remiss if it did not note that "to analyze the nature of a private party's detrimental change in position, we must identify the manner in which reliance on the government's misconduct has caused the private citizen to change his position for the worse." *Heckler v. Comty Health Serv. of Crawford County, Inc.*, 467 U.S. 51, at 61. In *Heckler*, the U.S. Supreme Court found that "the consequences of the Government's misconduct were not entirely adverse. Respondent did receive an immediate benefit as a result of the double reimbursement. Its detriment is the inability to retain money that it should never have received in the first place." *Id.* In this case, money that was held in escrow to pay Petitioners' substantial debt to HUD was released to Petitioners by the title agent. (Pet'r's Resp. to Sec'y Stat., ¶ 6.) Giving that money to Petitioners when it should have been paid to HUD can hardly be considered detrimental to Petitioners. *See Pauly v. U.S. Department of Agriculture*, 348 F.3d 1143, at 1150 (finding that estoppel was unnecessary to prevent a serious injustice because the Paulys were only required to repay a debt that they had already incurred).

ORDER

For the reasons set forth above, it is hereby **ORDERED** that the administrative offset order authorized by the Decision and Order, *Joy Smith and Lula Williams*, HUDOA No. 10-H-NY-LL05 (Jul. 29, 2010) **SHALL NOT BE MODIFIED** and **SHALL REMAIN IN FULL FORCE AND EFFECT.**

Vanessa L. Hall
Administrative Judge

January 6, 2011