In the matter of:

FRANK and JESSIE COLLINS,

Petitioners

HUDBCA No. 02-C-CH-CC053
Claim No. 7-802454750

Frank and Jessie Collins
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Petitioners, Pro se

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For the Secretary

DECISION AND ORDER

Petitioners were notified by Due Process Notice that the Secretary of the U.S. Department of Housing and Urban Development ("HUD" or "Department") intended to seek administrative offset of any Federal payments due to Petitioners in satisfaction of a delinquent and legally enforceable debt allegedly owed to HUD. Administrative offset is authorized by 31 U.S.C. § 3720A.

Petitioners have made a timely request for a hearing concerning the existence, amount or enforceability of the debt allegedly owed to HUD. The Administrative Judges of this Board have been designated to conduct a hearing to determine whether the debt allegedly owed to HUD is legally enforceable. 24 C.F.R.§ 17.152(c). As a result of Petitioners' request, referral of the debt to the Internal Revenue Service ("IRS") or to the U.S. Department of the Treasury for adminstrative offset was temporarily stayed by the Board.

Discussion

31 U.S.C § 3720A provides Federal agencies with a remedy for the collection of debts owed to the United States Government. The Secretary has filed a Statement with documentary evidence in support of his position that Petitioners are indebted to the Department in a specific amount.

Petitioners contend that the debt claimed by the Secretary is not enforceable in its entirety against them because the home improvement work performed with the proceeds of the loan insured against non-payment by HUD was not acceptable. They also contend that they were misinformed and misled by the contractors who performed the home improvement work as to HUD's warranty of the work and as to using part of the loan proceeds to pay taxes. Finally, Petitioners describe a period of financial hardship that made continued payments on the loan difficult.

On July 1, 1994, Petitioners executed an installment note with American Eagle for a property improvement loan that was insured against non-payment by the Secretary of HUD pursuant to Title I of the National Housing Act, 12 U.S.C. § 1703. American Eagle assigned the loan note to Statewide Mortgage. (Attachment to Secretary's Statement.) According to Petitioners, in 1996 they started to have trouble with the property improvement work that had been performed. They state that they tried to locate the contractors who performed the work, but were unsuccessful. (Petitioners' Submission dated August 17, 2002.) Petitioners submitted two photographs to illustrate the problems to which they refer in their submission. One photo shows water damage to a floor or carpet and the other shows outside wood paneling that is warped and water-stained from the top of the window toward the peak of the roof. (Petitioners' Exhibit 4.) Petitioners later complained to HUD about the problems, and state that they were told by HUD that HUD does not warranty the work performed with loan proceeds. Petitioners state that the contractors who performed the work misled Petitioners as to any warranty on the work and HUD's role in the loan. They also state that they believed that the contractors would use part of the loan proceeds to pay taxes due on the property, but later found out that no property taxes had been paid by the contractors on behalf of Petitioners. (Petitioners' Submission dated August 17, 2002.)

In January, 1999, Petitioners executed a Modification Agreement which allowed Petitioners to make up payments they had missed on the 1994 loan. (Secretary's Exhibit E). At some point, Respondent Frank Collins became ill and Respondents fell behind on their loan payments. Frank Collins was also unemployed for a year. (Petitioners' submission dated August 17, 2002.) Petitioners state that they are now "willing to work out payments [on the debt] with HUD, instead of Income Tax offset being enforced," but they believe that they should not be responsible for the entire debt because of "the breach of contract" by the contractors who performed the home improvement, alleging that the contractors "swindled" them. (Petitioners' submission dated August 17, 2002, and Secretary's Exhibit A.)

The Due Process Notice, dated June 3, 2002, shows the date of execution of the loan at issue as January 20, 1999. It was classified as a home improvement loan, and

default occurred on October 1, 1999. It is clear that the Due Process Notice refers to Petitioners' original loan agreement whose terms were modified by the 1999 Modification Agreement to the original 1994 loan note. (Secretary's Exhibits D,G,E.) The Lender's Consolidated Default Log shows frequent contacts with Petitioners during the period January-October 1999, and almost every entry on the log refers to difficulties Petitioners were having in making the loan payments. The first recordation of any complaint by Petitioners to the lender about problems with the home improvement work is noted in the log in September, 1999. The log entry for September 1, 1999, reads as follows:

> Also Title I demand letter shown sent this is my guess is this what prompted the work complaint if borrower was having problems should have made this known 1st year work was incompleted… 90+ show work dispute after 5 yr. borrower complained of incompleted work. (Secretary's Exhibit C.)

Other than the two photographs, Petitioners have failed to illustrate or describe in detail the problems with the home improvement loan work. Petitioners waited five years to complain to the lender, and made the complaint to the lender after they were already unable to make the payments pursuant to the Modification Agreement. (Secretary's Exhibit C.) Petitioners have offered no explanation of why they waited so long to notify the lender of the alleged problems with the work. Petitioners state that they repaired some of the problems themselves when the problems began in 1996, but they offer no details as to what they repaired themselves. The only other information offered by Petitioners is that they could not locate the contractors who had originally performed the work and that T-11 plywood used for the outside of the rooms built onto the property with the loan proceeds began to buckle. Petitioners do not contend that the alleged defects of workmanship made their home uninhabitable. (Secretary's Exhibit A.)

The Secretary contends that Petitioners waived all rights when they signed the Completion Certificate for Property Improvements on June 29, 1994. (Secretary's Exhibit J.) However, the problem of a buckling outside wall and leakage is a latent condition that would not have been discoverable at the time the work was completed. The FHA Inspection Report, dated August 23, 1994, indicates that all of the improvements had been completed. The photograph of the room addition included in the FHA Inspection Report does not show the buckled exterior wood that the 1999 photograph filed by Petitioners illustrates. (Secretary's Exhibit K.) The Secretary has submitted documentary evidence that the taxes which Petitioner complain were unpaid, were paid as of 1994. (Secretary's Exhibit B.)

Petitioners live in Texas. The loan documents and Texas commercial law set out the rights and obligations that Petitioners assumed under the home improvement loan note and the Modification Agreement to it, to the extent that Federal law does not address the issues raised. The Completion Certificate for Property Improvements expressly states at Paragraph 4 of the "Notice to Borrowers: I(We) understanding that the selection of the dealer or contractor and the acceptance of the materials used and the work performed is my (our) responsibility, and HUD does not guarantee the quality

or workmanship of the property improvements." (Emphasis supplied) (Secretary's Exhibit J.) Petitioners signed that document, and are presumed to have understood the terms of the document that they signed.

The Texas Supreme Court has recognized the common law implied warranty of habitability. Humbert v. Morton, 426 S.W. 2d 554 (Tex. 1968) The implied warranty of habitability means that a building constructed for residential use has been constructed in a workmanlike manner and is fit for habitation. Id. Likewise, "latent defects not discoverable by a reasonably prudent inspection of the building" are also covered by the implied warranty. Gupta v. Ritter Homes, Inc., 646 S.W. 2d 168 (Tex. 1983). The implied warranty of habitability is implicit in the contract between the builder and the purchaser. Id. It does not automatically attach to a lender's assignee because the implied warranty is meant to hold builders accountable to innocent purchasers of construction work. Ibid.

In addition, Texas law creates a right of action of a consumer through the Texas Consumer Protection Division against a provider of goods or services if the provider engages in deceptive trade practices, including "causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services." Tex. Bus & Com. §17.46(b)(2). Petitioners allege that the contractors who performed the home improvements misled Petitioners as to HUD's warranty of the work, but they have failed to substantiate these allegations with any credible evidence which would prove that the contractors misled them as to any applicable warranties or as to HUD's role in the warranty of work performed. Inasmuch as Petitioners signed the Completion Certificate for Property Improvements, which states that HUD does not guarantee the quality or workmanship of the work, and it is difficult to credit their allegation as to any confusion about HUD's role in the warranty of the work performed. Rather, I find, based on the evidence before me, that Petitioners were having serious financial difficulties that made paying the loan a problem, and that they belatedly raised the issue of warranty with the lender five years after the fact in an attempt to be able to keep their home. This record does not support a finding of violation of Texas law such that the debt at issue would not be enforceable against Respondents.

Petitioners claim an inability to pay the debt because of financial hardship. This Board must determine whether, as a matter of law, this debt is legally enforceable against Petitioners. Unfortunately, evidence of hardship, no matter how compelling, cannot be taken into consideration in determining whether a debt is legally enforceable. Anna Filiziana, HUDBCA No. 95-A-NY-T11 (May 21, 1996).

If Petitioners wish to negotiate repayment terms with the Department, Petitioners should contact Lester J. West, Director, HUD Albany Financial Operations Center, 52 Corporate Circle, Albany, NY 122030-5121. His telephone number is 1-800-669-5152, extension 4206. A review of Petitioners' financial status may be conducted if Petitioners submit to that HUD office a Title I Financial Statement (HUD Form 56142).

ORDER

I find the debt which is the subject of this proceeding to be legally enforceable against Petitioners in the amount claimed by the Secretary. The Order imposing the stay of referral of this matter to the IRS for administrative offset or to the U.S. Department of Treasury is vacated. It is hereby **ORDERED** that the Secretary is authorized to seek collection of this outstanding obligation by means of administrative offset of any federal payments due to Petitioners.

Jean S. Cooper
Administrative Judge

March 19, 2003