In the Matter of:	:	
Susquehanna Mortgage Corp. (Claim A),	:	HUDBCA No. 04-A-NY-EE048
Petitioner	:	Claim No. 7-207015960A

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For the Secretary

DECISION AND ORDER

Petitioner was notified by Due Process Notice that, pursuant to 31 U.S.C. §§ 3716 and 3720, the Secretary of the U.S. Department of Housing and Urban Development ("HUD") intended to seek administrative offset of any Federal payments due to Petitioner in satisfaction of a delinquent and legally enforceable debt owed to HUD. The claimed debt is an amount that the Secretary claims is due under an indemnification agreement executed by Petitioner.

Petitioner has 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 Petitioner's request, the Board temporarily stayed referral of the debt to the U.S. Department of the Treasury for offset.

Summary of Facts

In October 1996, Petitioner, Atlantic First Mortgage Corporation, now Susquehanna Mortgage Corporation, as mortgagee, entered into a HUD-insured loan agreement ("FHA Case Number 241-4204206") with a borrower, Shawn P. Mahn, in the amount of $57,200.00. (Petitioner's Response To Secretary's Statement That Petitioner's Debt Is Past Due And Legally Enforceable, hereinafter, "Pet. Resp.," p. 2). On or about February 1, 1997, the mortgagor-borrower defaulted on the loan. (Secretary's Statement That Petitioner's Debt Is Past Due And Legally Enforceable, hereinafter, "Secy. Stat.," Exh. B, Declaration of Stephanie Brewer, hereinafter, "Brewer Decl.," ¶ 5). A review of the loan in 1997 by HUD's lender monitoring team found that non-compliant lending activities by Petitioner made the loan ineligible for insurance benefits. (Brewer Decl., ¶ 4). To resolve these findings, Petitioner agreed to indemnify HUD for any loss HUD incurred as insurer of this loan by executing an indemnification agreement on January 8, 1998. Id.

Under the terms of the indemnification agreement, Petitioner agreed to indemnify HUD "for losses which have been or may be incurred…." (Secy. Stat., Exh. A, ¶ 1.). The indemnification agreement provided that "where a HUD/FHA insurance claim has been paid in full and the property has been sold by HUD to a third party, the amount of indemnification is HUD's investment … minus the sales price of the property." (Secy. Stat., Exh. A, ¶ 1. (c)). The agreement further provided that "HUD's investment include[d], but [was] not limited to: the full amount of the insurance claim; any loss mitigation partial claims; all taxes and assessments; all maintenance and operating expenses, including costs of rehabilitation and preservation; and all sales expenses, where applicable." (Secy. Stat., Exh. A, ¶ 1. (b)). The indemnification agreement provided, in the alternative, that " where a HUD/FHA insurance claim is pending or has been paid in full and the property is owned by HUD, conveyance of the property will be accepted by [Petitioner] and indemnification will be made to HUD for its investment." (Secy. Stat., Exh. A, ¶ 1. (b)).

"On August 18, 1999 [an insurance] claim was received [from Petitioner] with payments made by HUD on August 23, 1999 and on January 13, 2000 for the government's losses as insurer of this loan …." (Secy. Stat., ¶ 6).

> On February 29, 2000, an inspection of the property disclosed damage had occurred subsequent to the January appraisal. The property did not sell for the original list price of $40, 000.00. In May 2000, the property was listed at $32,000.00. In June 2000, [an] offer of $27,500.00 was accepted consistent with HUD guidelines.

(Secy. Resp. 3/10/05, pp. 1-2; See also Secretary's Response to Order filed January 13, 2005, hereinafter "Secy. Resp. 1/13/05, pp. 1-2; Supp. Goodman Decl., Exh. C, Property Maintenance Inspection Report).

HUD subsequently sold the subject property on September 7, 2000 for $27,500.00. (Brewer Decl., ¶ 5; Pet. Resp., p. 2). Since proceeds from the sale of the property did not provide enough funds to cover all of HUD's losses, HUD sought indemnification from Petitioner for the remaining loss balance in accordance with the terms of the indemnification agreement. (Brewer Decl. ¶ 7).

> As a result of the damage that occurred to the property subsequent to the January appraisal, which may have impacted the final sales price, the Secretary…. recalculated the debt owed by the Petitioner using not the sales price of the property, but the January appraisal value of the property…. This recalculation [reduced] the principal balance due from $54,289.53 to $41,789.53. (Secy. Resp. 1/13/05, p. 2).

Petitioner is delinquent in paying HUD's claim under the indemnification agreement and is indebted to HUD for the following amounts: $27,984.91 as the unpaid principal balance as of July 30, 2004; $93.24 as the unpaid interest on the principal balance from August 1, 2004, at 1% per annum through July 30, 2004; and interest on said principal balance from August 1, 2004, at 1% per annum until paid. (Brewer Decl., ¶ 7).

Discussion

31 U.S.C. §3716 provides federal agencies with the remedy for collecting debts owed to the United States Government. The Secretary has filed a Statement with documentary evidence in support of his position that Petitioner is indebted to HUD in a specific amount. Petitioner does not deny the existence of a debt, but argues that the Secretary is not entitled to the total amount it is attempting to collect because actions taken by HUD caused Petitioner's debt to HUD to be unreasonably high. Petitioner claims:

> HUD … is not entitled to the total amount it seeks for three principal reasons. First, HUD is estopped from recovering the total amount claimed because it failed to act in accordance with its own Claims Disposition program to ensure a maximum return on the sale of the mortgaged property that collateralized the loan. Second, HUD failed to mitigate its damages by allowing the collateral property to sell for an amount far below the property's fair market value. Third, by acting in such a manner, HUD similarly failed to abide by the implied covenant of good faith and fair dealing when carrying out the agreed terms of the Indemnification Agreement.

(Pet. Resp., p. 1-2).

First, Petitioner claims that HUD violated the standards of its Claims Disposition Program set forth in HUD's Property Disposition Handbook – One to Four Family, 4310.5 Rev-2, Chapter 1, Paragraph 1-1, which "states that as a general policy 'the purpose of the Single Family Property Disposition (SFPD) Program is to reduce the inventory of acquired properties in a manner that expands home ownership opportunities, strengthens neighborhoods and communities, and ensures a maximum return to the mortgage insurance fund.'" (emphasis supplied by Petitioner). (Pet's Resp., p. 4). Petitioner contends that HUD's sale of the property for a price significantly below its fair market value did not ensure a maximum return for the mortgage insurance fund, thereby violating its Claims Disposition Program guidelines.

The Secretary contends that "HUD did not violate its Claims Disposition Program, or any other Federal Statute, regulation, fair business practice or obligation to act in the best interest of the public when it sold the subject property." (Secy. Resp. 3/10/05). The Secretary submits that:

> Single-family properties sold pursuant to an indemnification agreement are sold like other single-family properties that have entered HUD's inventory. Accordingly, this property was sold consistent with HUD's property disposition guidelines. As recognized by Petitioner in its Response, HUD's duty is to recover the highest amount recoverable to mitigate loss to the Government, not to sell the property at its "market value." Single-family properties are initially listed at its appraised value. After a property is listed for over 120 days, the Management and Marketing contractor must accept offers which produce a net return to HUD equal to or greater than 60 percent of the list price. Exhibit B.
>
> On January 3, 2000, the property was appraised for $40,000.00. Exhibit C. On February 29, 2000, an inspection of the property disclosed damage had occurred subsequent to the January appraisal. Id. The property did not sell for the original list price of $40,000.00 Id. In May 2000, the property was listed at $32,000.00 Id. In June 2000, the offer of $27,500.00 was accepted consistent with HUD guidelines. There is no evidence to the contrary that HUD's sale of the property was inconsistent with any

> other Federal Statute, regulation, fair business practice or obligation to act in the best interest of the public when it sold the subject property.

(Secy. Resp. 3/10/05, pp. 1-2; Secy. Resp. 1/13/05, pp. 1-2).

It would appear that the property disposition procedures set forth in the Property Disposition Handbook are reasonable, consistent with the Department's obligation to act in the best interest of the public, and do not provide an entitlement or cause of action for lenders who claim that such a practice is a commercially unreasonable manner of property disposition.

In any event, although HUD may defer to the guiding policies set forth in its Property Disposition Handbook, the provisions of the indemnification agreement are controlling in this matter. Petitioner has failed to cite any language in the indemnification agreement that required HUD to sell the subject property at a price that would have ensured a maximum return on the sale of the mortgaged property. Under the terms of the indemnification agreement, HUD was simply required, following a default, to either convey the property to Petitioner, or to sell it to a third party before seeking indemnification from Petitioner for its losses. (Secy Stat., Exh. B, (1)b and (1)(c)). The Board finds that HUD's sale of the property was consistent with the terms of the indemnification agreement and was not violative of the Department's guidelines set forth in HUD's Property Disposition Handbook.

Second, Petitioner claims that:

> HUD's unilateral reduction of the Claim Amount based on the discovery of factors that may have impacted the final sales price of the Subject Property is a tacit admission that the Subject Property's sales price is not the appropriate benchmark for calculating the Claim Amount. Rather, the appropriate benchmark as evidenced in this case by the January, 2000 appraisal conducted by HUD is the fair market value of the Subject Property at the time of sale. (Pet. Reply, p. 3).

As a result of the damage that occurred, presumably subsequent to the January appraisal, "the Secretary recalculated the debt owed by Petitioner using not the sales price of the property, but the January appraised value of the property…." (Petitioner's Reply to the Secretary's Response to Order filed January 28, 2005, hereinafter "Pet. Reply," p. 3). Petitioner has not submitted any documentary evidence which would show that the price at which the Secretary sold the subject property was not based on the fair market value of the property at that time. Petitioner has not shown that there was no change in the value of the subject property from January 2000, the date of the appraisal, through September

2000, when the property was sold, even though Petitioner has not contested the Secretary's averments that the property sustained damage during that period. Nevertheless, Petitioner's claim that HUD sold the subject property for an amount far below its fair market value challenges the commercial reasonableness of the sale. Petitioner has provided documentary evidence showing that:

> The subject property was foreclosed and sold in September, 2000 for $27,500.00.… A property located at 4917 Greencrest was sold in April, 2000, for $65,900.00. Additionally, a property located at 4906 Greencrest was sold in November,2001, for $67,000.00. The Subject Property was subsequently resold in January, 2002 for $72,900.00….

(Pet. Resp., p. 2).

The Secretary has submitted documentary evidence showing that the subject property was appraised in January 2000 for $40,000.00. (Secy. Resp. 3/10/05, Supp. Goodman Decl., Exh. B, Uniform Residential Appraisal Report). The record does not disclose any offers shortly thereafter to purchase the property at or near this amount. The property was subsequently listed in May 2000 for $32,000.00. (Secy. Resp. 3/10/05). Petitioner has not shown that HUD's decision to sell the property for $27,500.00 in September of 2000, eight months after it was appraised for $40,000.00, was commercially unreasonable.

In order for Petitioner to prove that the sale was not commercially reasonable, Petitioner must submit evidence controverting the accuracy of the Government appraisal. Martin Greer, HUDBCA No. 88-3032-H547 (March 31, 1988). However, Petitioner's documentary evidence fails to meet this requirement. Petitioner has offered no documentary explanation as to why surrounding properties were sold at substantially higher values than the subject property. Petitioner has offered no documentary explanation as to why it was not in HUD's best interest to re-list the property for sale at $32,000 after the property was not sold for an amount at or near $40,000. Petitioner has offered no documentary evidence which would show that the condition of the property at the time of sale at the amount of $27,500 would have justified an appraisal at, or at a significantly higher amount than, $40,000. Finally, Petitioner has offered no documentary evidence which would show that repairs and renovations to the admittedly damaged property might have sufficiently improved the market value of the property to justify its sale by another party sixteen months later in the alleged amount of $72,900.00.

Petitioner has submitted as Exhibit 1, attached to the Petitioner's Response to the Secretary's Statement filed on October 19, 2005, three pages of a Maryland Department of Assessments and Taxation Real Property Data Search for Baltimore City. On page 2 of Exhibit 1, a nearby property, located at 4917 Greencrest Road Baltimore, MD, is referenced as being was sold by the Federal National Mortgage Association ("FNMA") on December 3, 1999 for $32, 000.00 and the property was resold on April 12, 2000 for $65,900.00. This sale of the property located at 4917 Greencrest Road in this higher

amount would suggest that an investment of capital, labor, and materials may have been made in the property which resulted in that property's enhanced value at resale.

In any event, Petitioner has cited no language in the indemnification agreement or any applicable law that would justify reducing Petitioner's debt because the appraised value of the property in January 2000 was higher than the actual selling price of the property in September of 2000. The Secretary submits that:

> [V]acant properties in foreclosure decline in value, and are sought by savvy purchasers seeking deals. Additionally, the property disposition process adds to the overall HUD loss and expense related to the defaulted HUD-insured indebtedness. The Agency attempts to sell its inventory within a six-month period, to avoid additional expense related to a vacant property beyond that period.

(Secy. Resp. to Order). The Board finds this rationale persuasive given the circumstances of this case.

In a similar case, the Secretary, when discussing his reason for selling property at a price that Petitioner claimed was "most inappropriate," stated that "the sale of the property was the result of a business decision consistent with applicable HUD policy and regulation. That decision-making process considered the costs of holding the property and the risk of letting it sit vacant." Crest Mortgage Company, HUDBCA No. 04-K-CH-EE021, at 5 (November 3, 2004). Petitioner has submitted no evidence of valuation of the property at that time of the sale which would prove that HUD's sale of this specific property was commercially unreasonable. Additionally, Petitioner "cites no legal authority that would have precluded the sale of the property for the sales price obtained by HUD…." Id. Consequently, I find that Petitioner's claim that the sale of the property by HUD was commercially unreasonable has not been substantiated.

Third, Petitioner asserts that HUD failed to mitigate its damages by allowing the collateral property to sell for an amount far below the property's fair market value and that by selling the property for an unreasonably low price, HUD caused Petitioner's debt to be unreasonably high. (Pet. Resp., pp. 1-5). Initially, the Board notes that the indemnification agreement is void of any provision that required HUD to sell the property for an amount which would ensure a minimal loss to Petitioner. Nevertheless, the Secretary contends that "HUD met its duty … to recover the highest amount recoverable to mitigate loss to the Government." (Secy. Resp. to Order) (emphasis supplied). The Board finds that the Secretary's incentive to first mitigate any loss to the Government is properly prioritized, and finds merit in the Secretary's argument that:

> HUD may only expend funds according to Congressional appropriations and within the guidelines and policies regulating the Agency. Aside from the obvious duty to protect agency

> resources, the Federal Anti-Deficiency Act, 31 U.S.C. 1341, bars a Federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation …. Therefore, neither the law or the property disposition program support the assertion that HUD is required to expend funds on home improvement contracts to increase the value of a defaulted HUD-insured vacant property that entered its inventory. Neither could the Petitioner allege that such an assumption was held by any party to this, or any, indemnification agreement entered into for the purpose of selling a defaulted HUD-insured property, particularly given the historical reality of sales of HUD-held properties.

(Secy. Resp. to Order citing Hercules, Incorporated v. United States, 516 U.S. 417 (1996)).

Fourth, Petitioner argues that "HUD cannot recover the total Claim Amount it seeks because HUD failed to act in a manner that is consistent with the implied covenant of good faith and fair dealing." (cited cases omitted). (Pet. Resp., p. 9). Petitioner contends that:

> [B] oth HUD and Susquehanna necessarily contemplated that HUD, when conducting sales of Properties that are subject to the Indemnification Agreement, would act in a manner that would effectuate the purpose of the agreement, i.e., maximize the return on the sale of the Subject Property, and minimize the amount of loss sustained by HUD and Susquehanna. HUD failed to fulfill its obligation to act in good faith by failing to take such action.

(Pet. Resp., p. 10).

The Secretary responds by stating that: "Petitioner has failed to provide credible evidence of the value of the subject property upon transfer to HUD (i.e., an appraisal of the subject property, including an internal inspection of the property), or evidence that HUD's $40,000.00 January appraisal of the property was erroneous." (Secy. Resp. to Order). Contrary to what Petitioner has characterized as the purpose of the indemnification agreement, Petitioner was explicitly obligated under that agreement "to indemnify HUD for losses which have been or may be incurred" when specified loans went into default. (Secy. Stat., Exh. A, ¶ 1). HUD properly exercised its discretion under the agreement by selling the property once the loan went into default. (Secy. Stat., Exh. A, ¶ 1 (c)). There was a foreclosure, the defaulted loan, ineligible for insurance benefits, was assigned to HUD, and Petitioner subsequently agreed to pay HUD for its investment minus the sales price of the property as defined in the indemnification agreement. (Secy.

Stat., Exh. A, 9 ¶ 1(b) & 1(c)). Nothing in this record suggest that HUD was obligated to sell the property for a price acceptable to Petitioner. (Secy. Stat., Exh. A). There is simply insufficient evidence in the record of this case to conclude that HUD acted unfairly or in bad faith when it exercised its option to sell the subject property pursuant to the terms of the indemnification agreement.

Fifth, it would appear that Petitioner now desires to exercise rights under the agreement which were not explicitly included when the agreement was executed. In Homestead Funding Corporation, HUDBCA No. 04-A-NY-EE044 (February 1, 2005), the Board found that the parties were bound by the terms of the indemnification agreement and held that "[t]he Board is not authorized to create new contractual rights at the request of a party obligated under terms of a legally enforceable indemnification agreement." Id.

As the Board stated in Homestead Funding Corporation, HUDBCA No. 04-A-NY-EE043 (April 13, 2005), the Restatement (Second) of Contracts states that "[w]here the parties [to an agreement] reduce [the] agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression." (Restatement (Second) of Contracts § 209(3)). Under the parol evidence rule, "when parties to a contract have executed a completely integrated written agreement, it supersedes all other understandings and agreements with respect to the subject matter of the agreement between the parties' intent." Ozerol v. Howard University, 545 A.2d 638 (D.C., 1988) citing Restatement (Second) of Contracts § 213.

In any event, it is well established that written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered the contract, unless the written language is not susceptible of a clear and definite undertaking or unless there is fraud, duress, or mutual mistake. Howard University v. Best, 484 A.2d 958 (D.C., 1984). A contracting party's claimed intent in entering into a contract is immaterial, where the party has agreed in writing to a clearly expressed and unambiguous intent to the contrary. Hart v. Vermont Inv. Ltd. Partnership, 667 A.2d 578 (D.C. App., 1995). Parties to a contract will be held to a reasonable interpretation of that contract and will not be permitted to assert their individual subjective intent. NTA National, Incorporated v. DNC Services Corporation, 511 F.Supp. 210, 222 (D.C. D.C., 1981) citing Minmar Builders, Inc. v. Beltway Excavators, Inc., 246 A.2d 784 (C.A.D.C., 1968) and 1901 Wyoming Avenue Cooperative Association v. Lee, 345 A.2d 456 (C.A.D.C., 1975). This Board is neither willing nor empowered to create or enforce new terms in the indemnification agreement which might prove beneficial to Petitioner.

Conclusion

Financial institutions doing business with HUD often elect to enter into indemnification agreements with the Department in lieu of having allegations of non-compliant lending activities referred to the Department's Mortgagee Review Board for

review and a determination as to whether the imposition of an administrative sanction is warranted. The Mortgage Review Board is empowered to impose, where appropriate, administrative sanctions such as probation, debarment, or suspension. (HUD Handbook, 4000.4 Rev-1 Chg-2, Chapter 5, Program Management, Section 5-8, Indemnification Agreements). It seems apparent that Petitioner acted in its own best interest when it elected to execute the indemnification agreement. It seems equally apparent that Petitioner should be bound by the terms of that agreement as a matter of law.

The Board finds no impropriety in HUD's conduct under the circumstances of this case and concludes that HUD properly exercised its discretionary rights under the terms of the indemnification agreement by disposing of the foreclosed subject property in the manner in which it chose.

ORDER

Upon due consideration of the entire record of this proceeding, I find that the debt which is the subject of this proceeding is legally enforceable against Petitioner in the amount claimed by the Secretary.

The Order imposing the stay of referral of this matter to the Internal Revenue Service or to the U.S. Department of the Treasury for administrative offset 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 Petitioner.

_____
David T. Anderson
Administrative Judge

September 16, 2005