In the Matter of:	:	
	:	
	:	HUDBCA No. 04-A-NY-EE043
Homestead Funding Corporation,	:	Claim No. 7-207007000A
	:	
Petitioner	:	
	:	

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 allegedly 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.

Background

On September 17, 1996, Homestead Funding Corporation ("Petitioner" or "HFC"), as mortgagee, entered into a HUD-insured loan agreement with borrower, Tonya McQueen for an unspecified amount. (Secretary's Statement, hereinafter "Secy. Stat.," Exh. B, Declaration of Stephanie Brewer, hereinafter "Brewer Decl.," ¶ 5; Letter from Petitioner filed September 15, 2004, hereinafter "Pet. Ltr.," Attachment, Statement of Richard C. Miller, Jr., hereinafter "Miller Statement," ¶ 1). On or about August 1, 1997, the borrower-mortgagor defaulted on the loan. (Secy. Stat., ¶ 3; Brew. Decl., ¶ 5). At some time following default, Petitioner apparently assigned the loan to HUD.

The Secretary claims that a review of Petitioner's loan by HUD's lender monitoring team in 1998 found "non-compliant lending activities" by Petitioner which exposed HUD to an unacceptable level of financial risk. (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 April 16, 1999. HUD paid

Petitioner's insurance claim for this loan on July 17, 2000 and sold the property on October 4, 2000 for $16,000.00. (Brewer Decl., unmarked Exh.). Since the 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 HUD's remaining loss in accordance with the terms of the indemnification agreement. Id. at ¶ 7.

Documents in the record list differing amounts for the sums due and owing to the Secretary. (See Amended Secretary's Response to Order dated November 5, 2004, Exh. C; Notice of Intent dated July 12, 2004; and Brewer Decl., unmarked Exhibit, letter dated November 19, 2001.) However, a subsequent clarifying document filed pursuant to the Board's order states:

> The Demand Letter dated November 19, 2001 indicates that the Total Due HUD was $82,467.65 and that Sales Expenses were $1,622.49. These figures were calculated using the SAMS Statement of Account dated May 31, 2001 …. The $82,154.53 Total Due HUD … was calculated from the updated SAMS Statement of Account dated July 31, 2004, which indicated that allowable advertising expenses had been reduced from $329.49 to $16.37. This adjustment to advertising expenses reduced total sales expenses by $313.12 to $1,309.37, and thereby reduced the Total Due HUD from $82,467.65 to $82,154.53.

(Secy. Resp. to Order, Exh. C, Supplemental Declaration of Glenn Goodman, (hereinafter "Supp. Goodman Decl.,")). (capitalizations in original).

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 disputes the validity of the debt.

The salient issue in this case involves the rights and obligations of the Secretary and Petitioner under the terms of the indemnification agreement. According to the language of the indemnification agreement, Petitioner agreed to indemnify HUD "for losses which have been or may be incurred in accordance with FHA Case No. 371-2393435 where this loan goes into default within five years from the date of endorsement." (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)). According to the agreement, HUD's investment "include[d], but [was] not limited to: the full amount of the insurance claim; 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 that "conveyance of the property [by HUD] will be accepted by [Petitioner] and indemnification will be made to HUD for its investment." (Secy. Stat., Exh. A, ¶ 1 (b)).

I

Petitioner contends that under the terms of the indemnification agreement, HUD had a duty to demand that Petitioner accept title to the property, and Petitioner was, in turn, obligated to "1) accept title to the mortgaged premises after title was vested in HUD; and 2) to pay to HUD the amount of the insurance claim paid out by HUD within the scope contemplated…. [and that] only if Petitioner failed to accept the tender of title and pay the insurance claim paid out by HUD on this loan, would a sale occur under the terms of the Indemnification Agreement." (Miller Statement, ¶ 3). Petitioner submits that:

> HUD did not insist that Petitioner accept title and reimburse HUD the amount of the insurance claim paid, as provided for in 1(b) of the Indemnification Agreement, nor did it even notify Petitioner of the fact that it held title or was intending to do anything with the property. Instead, HUD sold the property to a third party…. This unilateral action by HUD, with no involvement or notification of Petitioner beforehand, is contrary to the letter and spirit of the Indemnification Agreement. The sale of the property by HUD to a third party prevented Petitioner from having any ability to control the outcome of the sale, or to make improvements to the property before marketing the property, or doing anything else to mitigate the loss…. Petitioner respectfully submits that this is not a valid debt or obligation, or at the very least, it should be entitled to a partial credit against the obligation.

(Miller Statement, ¶¶ 4-6).

The Board finds that Petitioner's contention that the indemnification agreement bars HUD's recovery due to certain acts or omissions by HUD is unpersuasive. The agreement contains no explicit provisions that required HUD to offer the property to Petitioner, to convey the property to Petitioner, to ensure that "Petitioner [had the] ability to control the outcome of the sale, or to make improvements to the property before marketing the property," or to provide Petitioner an opportunity to reacquire the property before HUD could sell the property to a third party. Id. The Board has previously found that such an "indemnification agreement gave HUD the right to decide whether to sell the property to a third party or convey the property to Petitioner." First Millennium Mortgage Corp., HUDBCA No. 04-K-CH-EE023 (September 22, 2004) citing Indigo Mortgage Services, Inc., HUDBCA No. 95-C-132-MR4 (May 12, 1995) (WESTLAW) (where the Board found that the indemnification agreement did not obligate HUD to convey property that had not already been sold). In a similar case, the Board held that,

"HUD had no obligation under the indemnification agreement to offer Petitioner…the opportunity to repurchase the loan." Crest Mortgage Company, HUDBCA No. 04-K-CH-EE021 (November 3, 2004), citing First Millennium Mortgage Corp.

Petitioner insists that the indemnification agreement "specifically does not provide HUD with an election of remedies, to do either what is provided for under 1(b) or 1(c), and instead mandates that 1(b) shall apply." (Miller Statement, ¶ 7). However, the language of subsection 1(b) of the indemnification agreement does not require HUD to demand that Petitioner accept title. The agreement states: "conveyance of the property will be accepted by HFC and indemnification will be made to HUD for its investment." (Brewer Decl., Exh. A). (emphasis added). This language, per se, does not require HUD to convey the property to HFC as Petitioner has argued, but merely underscores the parties' agreement that HFC will accept "conveyance of the property" if tendered by HUD and will indemnify HUD for its investment.

The pertinent language at paragraph 1(c) of the indemnification agreement, which states: "Where . . . the property has been sold by HUD to a third party….," explicitly provides for HUD's right, without restriction or pre-condition, to sell the property to any "third party." Id. Petitioner cites no language in the agreement which requires HUD, before selling the property to a third party, to "make due demand that Petitioner accept title to the subject premises," or to "notify Petitioner of the fact that [HUD] held title or was intending to do anything with the property" as Petitioner has argued. (Pet. Stat., ¶ 6; Miller Statement, ¶ 7).

While the precise manner in which HUD sold the property is unclear from the record of this proceeding, Petitioner provides no evidence that it was precluded from exercising its rights as a willing and able buyer if the subject property was placed on the market by HUD or its agents for public sale, or that HUD was under any obligation to notify Petitioner of HUD's desire to sell the property.

II

Petitioner has cited no language in the indemnification agreement which requires HUD to mitigate damages in order to ensure that Petitioner can avoid certain losses. In fact, it does not appear that Petitioner was precluded from disposing of the property in a manner of its selection while it was in Petitioner's possession before, or in lieu of, assigning the property and defaulted loan to HUD and submitting its insurance claim to HUD.

Petitioner claims that:

> As a result of [the] deviation from the contractual provisions provided in 1(b) [of the agreement], HUD proceeded to market and sell this property for a gross consideration of $16,000.00…when this property was purchased for $18,000.00 only

> a few years before, and after $47,500.00 worth of improvements were made to the property in accordance with the provisions of the 203K loan. Petitioner believes that this is unfair, to the point of being unconscionable, for Petitioner to have to bear this loss entirely, based upon the language and intent of the Indemnification Agreement.

(Miller Statement, ¶ 8).

Petitioner makes several of these allegations without documentary proof. Nevertheless, the fact that HUD sold the subject property in October, 2000 for $2,000.00 less than what it was purchased for a few years before, even after improvements were made to the property, is no basis, per se, to conclude that HUD sold the property for a commercially unreasonable price or that HUD's actions in disposing of the property in the manner it chose was not in the public interest.

III

Petitioner submits that it should not be held responsible for fees stemming from "independent acts of third-parties who vandalized or otherwise burglarized the mortgaged premises…subsequent to the execution of the indemnification agreement and prior to the sale of the property by HUD." (Miller Statement, ¶¶ 9-10).

Robert Sowinski, Manager of the Construction Loan Department of Homestead Funding Corporation, states on behalf of Petitioner:

> 3. I am familiar with FHA Case No. 3712393435, which is a FHA 203K mortgage loan with Tonya McQueen as the borrower. I have had the opportunity to review the file and have a personal recollection of inspecting the property towards the point in time when this construction was almost completed.
> 4. [When] I last inspected this property, it had all of the improvements and fixtures required under the plans and specifications filed by the borrower and relied upon by Homestead in connection with this mortgage loan; ….
> 5. Subsequently, I have had an opportunity to review a report and pictures taken of the building sometime on or about July 25, 2000, which reveals that certain of the fixtures and improvements which had previously been installed by the borrower or someone on behalf of the borrower and which were present at the time I had inspected the property were not in fact still present in the structure.
> 6. …these cabinets, fixtures and improvements did exist at one time and were subsequently removed, as the borrower painted

around these fixtures, cabinets and improvements, revealing the outline of the shape of the fixtures, cabinets and improvements.

7. It is apparent to me that subsequent to the completion of this building and Homestead's inspection of it, that someone gained access to the premises and removed these items, which would have the effect of diminishing the value, and prevent it from being eligible to retain the certificate of occupancy issued by the building department of the City of Albany; ….
8. I cannot explain how or when the change in the condition of the premises occurred. However, I do know, through a review of the file, that this property was foreclosed upon. ….

* * * *

9. The absence of these fixture[sic], cabinets and improvements would have a significant affect on the marketability of the subject premises, as any future buyer would have to replace these items at some considerable cost.

(Pet. Ltr., Attachment, Statement of Robert Sowinski, hereinafter, "Sowinski Statement," ¶¶ 3-9).

Sowinski claims to have first personally inspected the property "when this construction was almost completed," and later to have reviewed a report and pictures taken of the building in July 2000. (Sowinski Statement, ¶¶ 3-5). It does not appear in his statement on what date Sowinski personally inspected the property. Since Sowinski did not personally inspect the property following completion of construction, he has drawn certain conclusions based on pictures and representations made in a report conducted by someone else. While copies of certain pictures have been submitted into the record, Petitioner has not submitted to the Board a copy of the report Sowinski discusses. (See Sowinski Statement, Exh A). However, Sowinski admits that he "cannot explain how or when the change in the condition of the premises occurred." Consequently, Sowinski's declarations, even if accepted as true, fail to show that the property was in HUD's possession when the alleged vandalism took place. (Sowinski Statement ¶ 8).

While Petitioner may not be liable for damages to the property due to vandalism which may have occurred while the property was not in its possession, Petitioner has submitted into the record neither credible proof of HUD's liability for such damage nor documentary evidence establishing the amount of the property loss sustained which would justify reducing Petitioner's debt in a specific amount due to alleged intervening third party acts.

IV

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).

It would appear that Petitioner now desires to exercise rights under the agreement which were not included when the agreement was executed by Petitioner. The Board has no authority to create new contractual rights at the request of a party obligated under terms of a legally enforceable agreement. 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.

Petitioner asserts that because the indemnification agreement "was prepared by HUD, [and is] customarily used by HUD, [it] should therefore be construed against [HUD] in accordance with common contract interpretation principles…[which] would require that the instrument be construed strictly against the drafter, and any ambiguity would be construed against it. (Miller Statement ¶ 6). While the agreement certainly could have been better drafted, the Board finds no ambiguity in the pertinent language of the agreement relating to the issues presented. Even if the agreement "was prepared by HUD and is customarily used by HUD" as Petitioner contends, the Board finds that the agreement is valid and enforceable because there has been no showing: (1) that Petitioner executed the agreement under fraud, duress, or mutual mistake; (2) that Petitioner should be released from its obligation to comply with the terms of an agreement voluntarily executed; or (3) that there are circumstances which would justify a rescission or nullification of the agreement as a matter of law.

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.

Conclusion

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. Petitioner has not cited any legal authority to support its proposition that the debt is not valid, has not shown that HUD is obligated to give Petitioner any form of credit against any alleged loss sustained, and has failed to prove that Petitioner's debt to HUD should be reduced by any amount due to alleged intervening acts of unidentified third parties.

Order

Upon due consideration of the entire record of this proceeding, the Board finds that the claim which is the subject of this proceeding is legally enforceable against Petitioner in the corrected amount now 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

April 13, 2005