In the Matter of:	:	
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Homestead Funding Corporation	:	HUDBCA No. 04-A-NY-EE044
(re Kornegay),	:	Claim No. 720701544
	:	
Petitioner	:	
	:	

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DECISION AND ORDER

Petitioner was notified by Due Process Notice that, pursuant to 31 U.S.C. §§ 3716 and 3720, that 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 for offset.

Background

On September 11, 1996, Homestead Funding Corporation ("Homestead"), as mortgagee, entered into a HUD-insured loan agreement with a borrower. (Secretary's Statement, hereinafter "Secy. Stat.," Exh. C, Declaration of Stephanie Brewer, hereinafter "Brewer Decl.," ¶ 5). On or about April 1, 1998, the borrower-mortgagor defaulted on the loan. (Secy. Stat., ¶ 3). 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 May 24, 1999. (Brewer Decl., ¶ 4; Brewer Decl., Exh. A). That agreement, in general, required Petitioner to reimburse HUD for any loss it incurred with respect to the sale of the subject property following foreclosure. (Brewer Decl., Exh. A).

The subject property which secured the mortgage loan was conveyed to HUD in February 2000 following foreclosure. (Secy. Stat., Exh. E). HUD paid an insurance claim for this loan on February 19, 2000. (Brewer Decl., ¶ 5). The property was appraised in April 2000 at a value of $16,000.00. (Secy. Stat., Exh. E). However, after the property had remained on the real estate market for approximately one year without being sold, HUD opted to sell the property to the City of Albany, New York, for $1.00 on April 18, 2001. (Brewer Decl. ¶ 5; Homestead's Statement That Debt Is Not Due And Is Not Legally Enforceable, hereinafter "Pet. Stat.," ¶ 4; Secy. Stat., Exh. E). Petitioner was subsequently given a credit of $7,999.00, one half the appraised value of the property, against the actual aggregate loss sustained by HUD and Petitioner's debt to HUD was reduced by that amount. (Secy. Stat., Exh. D, p. 2).

Since proceeds from the sale of the property clearly 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 an indemnification agreement. (Brewer Decl. ¶ 7). HUD's investment due to the default included: insurance settlements, $29,622.58 (Part A Claim Payment) and $8,528.17 (Part B Claim Payment); maintenance and operation expenses, $1,256.68; and sales expenses, $669.16. (Brewer Decl., ¶ 6). Petitioner failed to make payments as agreed to in the indemnification agreement and is indebted to HUD for the following amounts: $33,180.10 as the unpaid principal balance as of July 30, 2004; $82.95 as the unpaid interest on the principal balance 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).

The Indemnification Agreement

The pertinent provisions of the indemnification agreement signed by HUD and Petitioner state:

1. HFC agrees to indemnify HUD for losses which

have been or may be incurred…where these loans go into default within five years from the date of endorsement.

(b) 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 HFC and indemnification will be made to HUD for its investment. HUD's investment includes, but is 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. In the event HUD does not convey the property to HFC, HUD's loss will be calculated in accordance with paragraph (c).

(c) 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 as defined in paragraph (b), minus the sales price of the property.

(Secy. Stat., Exh. A; Pet. Stat., Exh. A).

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 and a Supplemental Statement with documentary evidence in support of his position that Petitioner is indebted to HUD in a specific amount. Petitioner argues that HUD violated the indemnification agreement by not insisting that Petitioner accept title to the subject property and reimburse HUD for the insurance claim paid out by HUD before selling the property to a third party, thereby depriving Petitioner of the opportunity to mitigate the loss from the sale of the property.

Petitioner submits that "HUD had a duty under [provision 1(b) of the indemnification agreement] to make due demand that Homestead accept title to the subject premises and pay HUD for the amount of its investment," and that "[o]nly if Homestead failed to accept the tender of title and pay the insurance claim paid out by HUD on this loan, should a sale to a third party occur under the terms of the Indemnification Agreement." (Pet. Stat., ¶ 6; Pet. Stat., unmarked exhibit, Declaration of Richard C. Miller, Jr., General Corporate Counsel for Petitioner, hereinafter "Miller Decl.," ¶ 6). Petitioner further claims that:

> [HUD's] failure to make due demand of Homestead as provided in paragraph 1(b) of the Agreement bars recovery under said Agreement, as the acts and/or omissions on the part of HUD regarding the sale of this property to a third-party prevented Homestead from exercising rights it had pursuant to the Indemnification Agreement which would have permitted it to mitigate or avoid a loss.

(Pet. Stat., ¶ 8).

Petitioner's contention that the indemnification agreement bars HUD's recovery due to certain acts or omissions by HUD is misplaced. The agreement contains no explicit provisions that required HUD to offer the property to Petitioner, to convey the property to Petitioner, or to provide Petitioner with an opportunity to pay its debt to HUD before selling the property to a third party. 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 found that, "HUD had no obligation under the indemnification agreement to offer Petitioner…the opportunity to repurchase the loan. An indemnification agreement gives 'HUD the right to decide whether to sell the property to a third party or convey to the Petitioner.'" Crest Mortgage Company, HUDBCA No. 04-K-CH-EE021 (November 3, 2004), citing First Millennium Mortgage Corp.

The language of section 1(b) of the indemnification agreement does not require HUD to demand that Homestead 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 not contest "conveyance of the property" by HUD to any party. Moreover, 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 . . .," emphasizes HUD's right to sell the property to any "third party."

Petitioner's assertion that it had rights under the indemnification agreement that would have permitted it to mitigate or avoid a loss is not supported by any language in the agreement or by any applicable law cited by Petitioner. Petitioner contends that, in accordance with section 1(b) of the indemnification agreement:

> Only if Homestead failed to accept the tender of title and pay the insurance claim paid out by HUD on this loan, should a sale to a third

> party occur under the terms of the Indemnification Agreement…. In this case HUD did not make a demand that Homestead accept title to the subject premises 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 Homestead of the fact that it held title or was intending to do anything with the property. Instead, HUD sold the property to the city of Albany for the sum of one Dollar ($1.00) sometime on or about April, 2001, after apparently acquiring the property in February of 2000. Thereafter, HUD did not notify Homestead that a claim relative to this loan was pending until on or about April 2, 2004, almost three years later.

(Miller Decl., ¶¶ 6 and 7).

Again, Petitioner's interpretation of section 1(b) of the indemnification agreement is flawed. There simply is no language in the agreement that requires HUD, before selling the property to a third party, to "make due demand that Homestead accept title to the subject premises," or to "notify Homestead of the fact that [HUD] held title or was intending to do anything with the property." (Pet. Stat., ¶ 6; Miller Decl., ¶ 7). Petitioner has failed to show that HUD's sale of the property under the terms of the indemnification agreement was improper, and the Secretary's claim under the agreement for losses sustained by HUD is not valid.

The subject property was appraised following default at a value of $16,000.00, but was a year later sold to the City of Albany, New York for $1.00. (Secy. Stat., Exh. E). HUD informed Petitioner that "[i]n cases such as this where the property is sold to a local governing entity or non-profit agency for $1.00, HUD attempts to mitigate the burden upon the indemnifying lender by crediting ½ [sic] of the property's 'as is' appraised value to the existing debt balance." Id. Petitioner was subsequently given a credit of $7,999.00, one half the appraised value of the property, against the actual aggregate loss sustained by HUD and Petitioner's debt to HUD was reduced by that amount. (Secy. Stat., Exh. D, p. 2).

Although HUD credited Petitioner with $7,999.00 against the amount due, Petitioner claims that it is still being asked to pay more than it legally should owe. (Miller Decl., ¶ 12). Petitioner argues that due to the acts and/or omissions of HUD regarding the handling of this matter and the provisions of the indemnification agreement:

> [Petitioner] either should have no obligation at all…or in the alternative…should get a credit against the loss for the full amount of the HUD appraised value of the subject property…thereby

> reducing the amount of the loss Homestead incurs to only that amount which exceeds the reasonable market value of the property as determined by HUD.

(Miller Decl., ¶ 13).

This argument is a specious one. The actual "market value" of the property at the time the property was conveyed is speculative and is made more uncertain because the property remained on the market unsold for approximately one year. Petitioner has not shown that, under the circumstances of this case, the $7,999 credited to the outstanding balance due HUD from Petitioner did not reasonably reflect the value to HUD of this property or that this sum was not a commercially reasonable value for the property when it was conveyed by HUD.

Petitioner then suggests that the indemnification agreement itself was ambiguous in that the "Agreement is not clear as to an exact procedure to be followed…." (Miller Decl., ¶ 9). However, the Board finds no ambiguity in the pertinent language of the agreement relating to this issue. Even if the agreement "was prepared by HUD and is customarily used by HUD" as Petitioner contends, there has been no showing that Petitioner executed the agreement under duress or that there are circumstances which would justify a rescission or nullification of the agreement. (Miller Decl., ¶ 9). It would appear that Petitioner now desires rights under the agreement which were not included when the agreement was executed by Petitioner. The Board is not authorized to create new contractual rights at the request of a party obligated under terms of a legally enforceable indemnification 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 intergrated 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 intergrated 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).

Conclusion

I find no impropriety in HUD's conduct under the circumstances of this case and conclude 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, notwithstanding any loss or hardship which Petitioner asserts occurred as a result of the conveyance of the property by HUD. Petitioner has cited neither legal authority to support its proposition that HUD is obligated to give Petitioner more of a credit against the loss than HUD already has, nor language in the indemnification agreement which would require HUD to reduce Petitioner's debt by an amount certain because the market value of the property at the time it was sold may have been greater than the sum credited to the outstanding balance due HUD from Petitioner.

ORDER

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

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.

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David T. Anderson
Administrative Judge

February 1, 2005