Text as published on gao.gov, https://www.gao.gov/products/b-127483, archived 2026-08-08. GAO published no original file for this decision. Rendered by Comptroller Desk.

B-127483, Apr. 26, 1956

Number: B-127483

Date: 1956-04-26

B-127483, APR. 26, 1956

TO LESTER H. THOMPSON, AUTHORIZED CERTIFYING OFFICER, FEDERAL HOUSING ADMINISTRATION:

REFERENCE IS MADE TO YOUR LETTER OF MARCH 30, 1956, TRANSMITTING BUREAU VOUCHER NO. 5 163809, BUREAU SCHEDULE NO. MC 0608, FOR $2,767.62, IN FAVOR OF THE IRVING TRUST COMPANY, NEW YORK CITY, AND REQUESTING THAT AN ADVANCE DECISION BE RENDERED AS TO THE PROPRIETY OF CERTIFYING THE VOUCHER FOR PAYMENT. THE AMOUNT CLAIMED REPRESENTS THE LOSS SUSTAINED BY HERBERT W. AND ELOISE B. MITCHELL, WHICH THE CLAIMANT PURCHASED THROUGH ITS AGENT, THE FIRST TRUST COMPANY, CHATTANOOGA, TENNESSEE, FROM THE BONDED INSULATION COMPANY.

IT APPEARS THAT THE CLAIMANT IS A HOLDER IN DUE COURSE OF A NEGOTIABLE PROMISSORY NOTE EXECUTED ON JUNE 18, 1954, BY HERBERT W. MITCHELL AND HIS WIFE, ELOISE B. MITCHELL, OF MOULTON, ALABAMA, AND DRAWN TO THE ORDER OF THE BONDED INSULATION COMPANY, ATHENS, ALABAMA. THE PROCEEDS OF THE NOTE WHICH, INCIDENTALLY WAS DISCOUNTED BY THE CLAIMANT'S AGENT--- FIRST TRUST COMPANY--- WERE UTILIZED TO FINANCE THE CONSTRUCTION BY THE PAYEE (BONDED INSULATION COMPANY) OF A CHICKEN HOUSE ON THE PREMISES OF THE MAKERS LOCATED ON ROUTE NO. 1, MOULTON, ALABAMA. IT THUS APPEARS THAT THE SAID CONSTRUCTION PROPERLY FALLS WITHIN THE CATEGORY OF A CLASS (2) (A) FHA LOAN PROJECT, AS DEFINED IN SECTION 201.2 (M), TITLE 24 OF THE CODE OF FEDERAL REGULATIONS. THE RECORD INDICATES THAT THE MAKERS HAVING DEFAULTED ON THEIR NOTE, THE CLAIMANT, THROUGH ITS CHATTANOOGA AGENT, INSTITUTED LEGAL PROCEEDINGS AGAINST THEM IN THE CIRCUIT COURT OF LAWRENCE COUNTY, ALABAMA, FOR THE PRINCIPAL AMOUNT OF THE NOTE, ACCRUED INTEREST THEREON, ATTORNEY'S FEES AND COURT COSTS. AT THE TRIAL ON AUGUST 12-13, 1955, THE JURY WAS UNABLE TO AGREE UPON A VERDICT, A MISTRIAL WAS THEREUPON ORDERED, AND THE COURT DISMISSED THE SUIT, WITHOUT PREJUDICE. THE CASE WAS RESTORED TO DOCKET FOR TRIAL DURING THE SUCCEEDING MARCH (1956) TERM OF COURT. IT IS SUGGESTED IN THE RECORD THAT THE JURY'S FAILURE TO AGREE UPON A VERDICT WAS INFLUENCED PRINCIPALLY BY A FEELING OF SYMPATHY FOR THE DEFENDANT, A DISABLED VETERAN OF WORLD WAR II.

THE PROPRIETY OF REIMBURSING THE CLAIMANT FOR THE AMOUNT OF THE LOSS SUSTAINED ON THIS INSURED LOAN IS QUESTIONED BY YOU ON TWO PRINCIPAL GROUNDS. FIRST, YOU RAISE THE QUESTION OF WHETHER THE DEFAULTED NOTE EXECUTED BY MR. MITCHELL AND HIS WIFE REPRESENTS A "VALID AND ENFORCEABLE" OBLIGATION WITHIN THE CONTEMPLATION OF 24 C.F.R. 201.2, WHICH READS, IN PERTINENT PART:

"SEC. 201.2 ELIGIBLE NOTES--- (A) VALIDITY. THE NOTE SHALL BEAR THE GENUINE SIGNATURE OF THE BORROWER AS MAKER, SHALL BE VALID AND ENFORCEABLE AGAINST THE BORROWER OR BORROWERS AS DEFINED IN SEC. 201.1 (I), AND SHALL BE COMPLETE AND

REGULAR ON ITS FACE. THE SIGNATURES OF ALL PARTIES TO THE NOTE MUST BE GENUINE. * * *"

THE REFERRED-TO SECTION 201.1 (I), TITLE 24, CODE OF FEDERAL REGULATIONS, DEFINES A "BORROWER" AS ONE WHO APPLIES FOR AND RECEIVES A LOAN IN RELIANCE UPON THE PROVISIONS OF THE NATIONAL HOUSING ACT, 48 STAT. 1246, AND WHOSE INTEREST IN THE PROPERTY TO BE IMPROVED IS EITHER A (1) FEE TITLE, (2) A LIFE ESTATE, (3) AN EQUITABLE INTEREST UNDER AN INSTRUMENT OF TRUST OR CONTRACT, OR (4) A LEASE HAVING A FIXED TERM EXPIRING NOT LESS THAN SIX CALENDAR MONTHS AFTER THE MATURITY OF THE LOAN, IT APPEARS THAT THE BORROWER, MR. MITCHELL, IS THE OWNER OF THE PREMISES UPON WHICH THE STRUCTURE HERE INVOLVED WAS ERECTED. FURTHER, THE RECORD SHOWS THAT THE SIGNATURES OF THE BORROWERS OF MAKERS OF THE NOTE ARE GENUINE, AND THAT THE INSTRUMENT WAS GIVEN FOR VALUABLE CONSIDERATION IN THE FORM OF A STRUCTURE WHICH WAS CONSTRUCTED AND SATISFACTORILY COMPLETED BY THE PAYEE PURSUANT TO A VALID CONTRACT DULY ENTERED INTO BETWEEN THE LATTER AND THE SAID BORROWERS. FURTHERMORE, THERE IS NO SERIOUS QUESTION CONCERNING THE ADEQUACY OR COMPLETENESS OF THE WORK PERFORMED BY THE BONDED INSULATION COMPANY, PAYEE OF THE NOTE, NOR IS THERE ANYTHING IN THE CREDIT RECORDS OF THE BORROWERS WHICH WOULD INDICATE A CONDITION OF INSOLVENCY OF FINANCIAL INCAPACITY TO SUCCESSFULLY CARRY OUT THEIR PART OF THE AGREEMENT. FACT, THE CREDIT APPLICATION AND INVESTIGATION COMPLETED IN CONNECTION WITH THIS LOAN CLEARLY INDICATES A SUBSTANTIAL COMPLIANCE BY THE INSURED, AND CLAIMANT HEREIN, WITH THE REQUIREMENTS OF SECTIONS 201.5 (A) AND (B), TITLE 24, CODE OF FEDERAL REGULATIONS.

THUS, THE SOLE REMAINING ISSUE BEARING ON THE MATTER OF ENFORCEABILITY OF THE OBLIGATION OF THE NOTE WOULD APPEAR TO INVOLVE THE LEGAL EFFECT THEREON OF THE MISTRIAL WHICH RESULTED FROM THE JUDICIAL PROCEEDINGS WHICH WERE INSTITUTED AGAINST THE BORROWERS. IN ITS STRICT LEGAL SENSE, THE TERM "MISTRIAL" USUALLY IS APPLIED TO A CASE IN WHICH A JURY IS DISCHARGED WITHOUT A VERDICT, FISKE V. HENARIE, 32 F. 425, 427; THAT IS TO SAY, A MISTRIAL, IN ITS LEGAL SENSE, IS, IN FACT, NO TRIAL AT ALL, BAIRD V. CHICAGO, I.R. AND P.R. CO. 16 N.W. 207; STATE V. YOUNG, 212 N.W. 857, 858. CERTAINLY, IT CANNOT BE SAID THAT THE LITIGATION IN THIS CASE RESULTED IN A JUDICIAL DETERMINATION THAT THE DEFENDANTS WERE NOT LIABLE. THE CONCLUSION, THEREFORE, IS REQUIRED THAT THE MISTRIAL IN THE SUIT HAS NO MATERIAL BEARING UPON THE LEGALITY OR ENFORCEABILITY OF THE OBLIGATION IN QUESTION.

YOUR SECOND INQUIRY CONCERNS THE FACT THAT THE LOAN ON THIS NOTE WAS MADE BY THE CLAIMANT'S AGENT AT A TIME WHEN THE DEALER'S NAME APPEARED ON AN FHA "PRECAUTIONARY MEASURES LIST" BECAUSE OF EVIDENCE OF ALLEGED "IMPROPER OPERATION.' THERE IS NOTHING IN THE AVAILABLE RECORDS BEARING ON THE INSTANT TRANSACTION DEEMED SUFFICIENT TO RAISE ANY SERIOUS QUESTION CONCERNING THE INTEGRITY OF THE DEALER, NOR IS THERE ANYTHING THEREIN WHICH MIGHT TEND TO THROW ANY SUSPICION ON HIS MOTIVES OR DOUBT CONCERNING HIS CAPACITY TO SATISFACTORILY COMPLETE A STRUCTURE OF THE KIND CONTRACTED FOR BY THE BORROWERS HEREIN. TO THE CONTRARY, THE RECORDS SHOW THAT THE INSTANT NOTE, WHEN DISCOUNTED, WAS ACCOMPANIED BY AN "FHA TITLE I COMPLETION CERTIFICATE," DULY EXECUTED BY THE BORROWERS, CERTIFYING AS TO THE SATISFACTORY COMPLETION OF THE WORK CONTRACTED FOR BY THEM.

IN VIEW THEREOF, PAYMENT ON THE INSTANT VOUCHER NEED NOT BE OBJECTED TO BY YOU ON THE GROUND THAT THE NOTE DOES NOT REPRESENT A "VALID AND ENFORCEABLE" OBLIGATION, NOR NEED THE CLAIM BE FURTHER QUESTIONED UNDER THE "DEALER INVESTIGATION AND APPROVAL" PROVISIONS OF 24 C.F.R. 201.8 (A) AND (B).