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B-164118, Aug. 14, 1968

Number: B-164118

Date: 1968-08-14

B-164118, AUG. 14, 1968

TO MR. LESTER H. THOMPSON:

THIS IS IN RESPONSE TO YOUR REQUEST OF APRIL 22, 1968, FOR OUR OPINION WHETHER, IN THE SITUATION RELATED BELOW, YOU MAY PROPERLY CERTIFY FOR PAYMENT A FORWARDED VOUCHER FOR THE SUM OF $701.56 IN FAVOR OF THE STOCK YARDS NATIONAL BANK, SOUTH ST. PAUL, MINNESOTA.

THE VOUCHER COVERS THE CLAIMS OF THE STOCK YARDS NATIONAL BANK FOR REIMBURSEMENT OF LOSSES SUSTAINED ON TWO NOTES OF JOSEPH H. AND JEAN M. HILL WHICH HAD BEEN INSURED PURSUANT TO TITLE I OF THE NATIONAL HOUSING ACT, AS AMENDED (12 U.S.C. 1701 ET SEQ.). THE QUESTION OF THE BANK'S ENTITLEMENT TO REIMBURSEMENT OF ITS LOSSES ON THE INSURED NOTES ARISES BECAUSE OF THE APPARENT EXTENSION OF THE MATURITY OF THE NOTES BEYOND THE STATUTORY MAXIMUM TERM OF FIVE YEARS AND THIRTY-TWO DAYS FOR INSURABLE LOANS. SECTION 2 (B) OF THE NATIONAL HOUSING ACT, AS AMENDED (12 U.S.C. 1703 (B) ); 24 CFR 201.2 (D) (2) (I).

THE FIRST NOTE, WHICH IS THE SUBJECT OF CLAIM NO. 6-242003, WAS EXECUTED BY JOSEPH AND JEAN HILL ON NOVEMBER 1, 1962. IT WAS FOR THE SUM OF $453.60, INCLUDING FINANCING CHARGES, AND PROVIDED FOR THE PAYMENT OF THE AMOUNT DUE IN 60 SUCCESSIVE MONTHLY INSTALLMENTS OF $7.56 EACH ON THE FIRST DAY OF EACH MONTH BEGINNING WITH THE MONTH OF JANUARY 1963. WHILE NOT BEARING A SPECIFIC MATURITY DATE, THE NOTE WOULD HAVE MATURED UNDER ITS PAYMENT PROVISIONS ON DECEMBER 1, 1967, WHEN THE LAST PAYMENT WAS DUE, OR FIVE YEARS AND THIRTY DAYS FROM THE DATE OF THE NOTE.

THE SECOND NOTE, WHICH IS THE SUBJECT OF CLAIM NO. 6-242004, WAS EXECUTED BY JOSEPH AND JEAN HILL ON OCTOBER 25, 1963. IT WAS FOR THE SUM OF $2,119.80, INCLUDING FINANCING CHARGES, AND PROVIDED FOR THE PAYMENT OF THE AMOUNT DUE IN 60 SUCCESSIVE MONTHLY INSTALLMENTS OF $35.33 EACH ON THE 25TH DAY OF EACH MONTH BEGINNING WITH THE MONTH OF NOVEMBER 1963. THIS NOTE ALSO DID NOT BEAR A SPECIFIC MATURITY DATE, BUT BY ITS PAYMENT PROVISIONS THE NOTE WOULD HAVE MATURED ON OCTOBER 25, 1968, OR FIVE YEARS FROM THE DATE OF THE NOTE.

ON SEPTEMBER 21, 1966, BOTH NOTES WERE IN ARREARS AND THE LENDER, THE STOCK YARDS NATIONAL BANK, AND THE BORROWER JOSEPH HILL ENTERED INTO WRITTEN AGREEMENTS AMENDING EACH OF THE NOTES. THE AGREEMENT WITH REFERENCE TO THE FIRST NOTE PROVIDED THAT THE BALANCE OF $120.96 REMAINING UNPAID THEREON SHALL BE PAID IN 16 MONTHLY INSTALLMENTS OF $7.56 EACH, PAYABLE THE FIRST DAY OF EACH MONTH BEGINNING OCTOBER 1, 1966. THE AGREEMENT WITH REFERENCE TO THE SECOND NOTE PROVIDED THAT THE BALANCE OF $989.24 REMAINING UNPAID THEREON SHALL BE PAID IN 28 MONTHLY INSTALLMENTS OF $35.33 EACH, PAYABLE THE 25TH DAY OF EACH MONTH

BEGINNING OCTOBER 1966. IN CONNECTION WITH THE AGREEMENTS THE STOCK YARDS NATIONAL BANK COLLECTED EXTENSIONS FEES OF $1.20 AND $9.89 RESPECTIVELY.

SUBSEQUENTLY, AFTER FURTHER PAYMENTS HAD BEEN MADE REDUCING THE AMOUNT OUTSTANDING ON EACH OF THE NOTES, JOSEPH AND JEAN HILL WERE ADJUDICATED BANKRUPT AND THE STOCK YARDS NATIONAL BANK FILED CLAIMS WITH THE FEDERAL HOUSING ADMINISTRATION UNDER ITS CONTRACT OF INSURANCE. THE CLAIMS WERE ADMINISTRATIVELY REJECTED AS THE AGREEMENTS AMENDING THE NOTES APPEARED TO EXTEND THE FIRST NOTE, INVOLVED IN CLAIM NO. 6 242003, TO A TERM OF 5 YEARS AND 62 DAYS AND EXTENDED THE SECOND NOTE, INVOLVED IN CLAIM NO. 6- 242004, TO A TERM OF 5 YEARS AND 92 DAYS, WHICH TERMS WERE IN VIOLATION OF SECTION 2 (B) OF THE NATIONAL HOUSING ACT, AS AMENDED (12 U.S.C. 1703 (B)

FOLLOWING REJECTION OF ITS CLAIMS THE STOCK YARDS NATIONAL BANK REQUESTED RECONSIDERATION ALLEGING, AS WE UNDERSTAND ITS CONTENTION, THAT THE AGREEMENTS OF SEPTEMBER 21, 1966, WERE INTENDED TO MERELY DEFER SEVERAL PAYMENTS ON EACH NOTE WITHOUT EXTENDING THE FINAL MATURITY DATES OF THE NOTES. IN A LETTER OF DECEMBER 15, 1967, THE BANK STATED: "WHEN THE HILL'S APPROACHED US FOR THE EXTENSION OF THE PAYMENTS OF THE TWO LOANS MENTIONED ABOVE, THEY ASSURED US THAT THEIR FINANCIAL PROBLEMS WERE TEMPORARY AND THEY FELT THAT THE DELINQUENT PAYMENTS COULD BE MADE UP BEFORE THE MATURITY DATES OF THE NOTES.' THE BANK ALSO SUBMITTED AN AFFIDAVIT DATED DECEMBER 14, 1967, OF JOSEPH AND JEAN HILL "THAT THE INSTALLMENTS WERE EXTENDED ON A TEMPORARY BASIS ONLY AND THAT IT WAS THEIR INTENTION THAT THE INSTALLMENT BE MADE UP BEFORE THE FINAL MATURITY DATE OF THE AFOREMENTIONED NOTES.'

THE BANK IN EFFECT SEEKS TO REFORM THE EXTENSION AGREEMENTS OF SEPTEMBER 21, 1966. THAT IT MAY INTRODUCE PAROL EVIDENCE FOR THAT PURPOSE NEED NOT BE QUESTIONED. PROFESSOR CORBIN IN HIS TREATISE ON CONTRACTS STATES THAT THE "PAROL EVIDENCE RULE," WHICH GENERALLY INHIBITS THE USE OF PAROL EVIDENCE TO MODIFY A WRITTEN AGREEMENT, HAS NEVER BEEN ASSERTED TO EXCLUDE EVIDENCE OF MISTAKE; BUT GOES ON TO POINT OUT THAT WHAT CONSTITUTES A MISTAKE JUSTIFYING RECISSION OR REFORMATION IS FREQUENTLY NOT AN EASY MATTER. CORBIN ON CONTRACTS, SECTION 573.

ANOTHER ASPECT OF THE PROBLEM OF REFORMATION IS THE MATTER OF PROOF. "THOUGH THE PAROL EVIDENCE RULE DOES NOT PRECLUDE ORAL EVIDENCE TO ESTABLISH A POWER OF AVOIDANCE FOR MISTAKE, THE FACT THAT THE PARTIES HAVE AGREED ON A WRITTEN INTEGRATION OF THEIR INTENDED TRANSACTION MAKES CLEARER PROOF OF THE NECESSARY FACTS REQUISITE THAN THE MERE PREPONDERANCE OF EVIDENCE, WHICH IS ALL THAT IS GENERALLY REQUIRED TO ESTABLISH A RIGHT OF ACTION OR A DEFENSE.' RESTATEMENT OF THE LAW OF CONTRACTS, SECTION 511, COMMENT A. AND IN PHILIPPINE SUGAR ESTATES DEVELOPMENT COMPANY, LTD., V GOVERNMENT OF THE PHILIPPINE ISLANDS, 247 U.S. (1918) 385, REFERRED TO IN THE SUBMISSION, THE COURT STATED: "THE BURDEN OF PROOF RESTING UPON THE APPELLANT CANNOT BE SATISFIED BY MERE PREPONDERANCE OF THE EVIDENCE. IS SETTLED THAT RELIEF BY WAY OF REFORMATION WILL NOT BE GRANTED, UNLESS THE PROOF OF MUTUAL MISTAKE BE -OF THE CLEAREST AND MOST SATISFACTORY HARACTER.-"

THE WRITTEN EXTENSION AGREEMENTS UNDER CONSIDERATION WERE EXECUTED ON FORMS FURNISHED BY THE BANK BEARING THE HEADING "RETAIL RENEWAL OR EXTENSION AGREEMENT.' IN ITS LETTER OF JANUARY 29, 1968, THE BANK STATES IT USES "THE TYPE OF EXTENSION AGREEMENT INVOLVED FOR EXTENDING PAYMENTS ON ALL THE TYPE OF LOANS THAT WE HANDLE," AND INVITES ATTENTION TO THE SECTION ENTITLED "SCHEDULE OF PAYMENTS," WHICH WAS NOT FILLED IN. IT GOES ON TO STATE THAT "AS A PURELY MECHANICAL ERROR, WE DID NOT COMPLETE THE EXTENSION AGREEMENTS IN THEIR ENTIRETY

SHOWING THAT THE PAYMENTS WERE TO BE MADE UP BEFORE THE FINAL MATURITY DATE.'

HOWEVER, THE EXTENSION AGREEMENTS EXECUTED BY AN OFFICER OF THE BANK AND MR. HILL, PROVIDING THAT THE BALANCE DUE ON EACH OF THE NOTES SHALL BE PAID IN SO MANY MONTHLY INSTALLMENTS OF A STIPULATED AMOUNT ON A GIVEN DAY OF EACH MONTH BEGINNING WITH A DESIGNATED MONTH, ARE A CLEAR AND UNAMBIGUOUS MODIFICATION OF THE NOTES WHICH THEY ARE INTENDED TO AMEND, AND AS AMENDMENTS THEY APPEAR TO BE COMPLETE WITH RESPECT TO THE TIME AND AMOUNT OF EACH PAYMENT. THE STATEMENT THAT AS A PURELY MECHANICAL ERROR THE EXTENSION AGREEMENTS WERE NOT COMPLETED IN THEIR ENTIRETY IS NOT UNDERSTOOD, AS THE SECTION "SCHEDULE OF PAYMENTS," APPARENTLY REFERRED TO, IS AN ALTERNATE BLANK IN THE FORM FOR THE SCHEDULING OF PAYMENTS ON OTHER THAN A REGULAR BASIS AS WAS IN FACT PROVIDED FOR IN THIS CASE.

THE RECORD DOES NOT PRESENT CLEAR AND SATISFACTORY PROOF THAT A MISTAKE WAS MADE IN THE EXECUTION OF THE EXTENSION AGREEMENTS, ALTHOUGH THE BANK ON ITS PART MAY HAVE BEEN GUILTY OF AN OVERSIGHT, TO WARRANT THE CONCLUSION THAT THE WRITTEN AGREEMENTS ARE NOT THE ACTUAL AGREEMENTS OF THE PARTIES. THAT THE HILLS MAY HAVE INTENDED, IN REQUESTING THE EXTENSIONS, TO MAKE UP THE DELAYED PAYMENTS AND PAY OFF THEIR INDEBTEDNESS TO THE BANK WITHIN THE ORIGINAL MATURITY DATES, DID NOT PRECLUDE THEIR ACCEPTANCE OF THE TERMS OF THE WRITTEN EXTENSION AGREEMENTS, AND IT DOES NOT APPEAR THAT ANY ACCELERATED PAYMENTS WERE MADE BY THEM BETWEEN THE TIME OF THE AGREEMENTS AND THEIR GOING INTO BANKRUPTCY.

WE ARE OF THE VIEW THAT A RIGHT TO REFORMATION OF THE EXTENSION AGREEMENTS OF SEPTEMBER 21, 1966, HAS NOT BEEN ESTABLISHED AND THAT THE TERMS THEREOF ARE CONTROLLING. SEE HOGAN V CHURCH OF ST. ANNE OF LE SUEUR, 53 N.W.2D 449. CONSEQUENTLY, YOU ARE ADVISED THAT THE VOUCHER, RETURNED HEREWITH TOGETHER WITH YOUR CLAIM FILES, MAY NOT BE CERTIFIED FOR PAYMENT.