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B-172965, Jul 16, 1971

Number: B-172965

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CLAIM AGAINST UNITED STATES UNDER TITLE 1 OF NATIONAL HOUSING ACT DECISION THAT PAYMENT TO THE FIRST NATIONAL BANK AND TRUST COMPANY OF FARGO, NORTH DAKOTA UNDER ITS CLAIM FOR REIMBURSEMENT FOR LOSS SUSTAINED ON A LOAN TO ALAN RADERMACHER ACCORDING TO PROVISIONS OF TITLE 1 OF THE NATIONAL HOUSING ACT (12 U.S.C. 1703) IS NOT AUTHORIZED, SINCE THE BANK DID NOT REPORT THE LOAN UNTIL AFTER DEFAULT - WHICH MEANS NO INSURANCE PREMIUM WAS PAID IN ADVANCE TO THE FEDERAL HOUSING ADMINISTRATION AS REQUIRED BY LAW - AND AS THE LOAN MATURED ON THE DATE THE BORROWER'S LEASE EXPIRED - WHICH IS COUNTER TO FHA REGULATIONS AND TITLE 1 WHICH REQUIRE AT LEAST A SIX MONTH PERIOD BETWEEN THE MATURITY DATE AND EXPIRATION DATE OF THE LEASE.

TO MR. R. P. GARRITY:

YOUR LETTER OF MAY 12, 1971, REQUESTS OUR ADVICE AS TO WHETHER YOU MAY PROPERLY CERTIFY FOR PAYMENT A VOUCHER IN FAVOR OF THE FIRST NATIONAL BANK AND TRUST COMPANY (HEREINAFTER REFERRED TO AS THE BANK), FARGO, NORTH DAKOTA, IN THE AMOUNT OF $2,292.74. THE VOUCHER COVERS THE CLAIM OF THE BANK FOR REIMBURSEMENT OF A LOSS SUSTAINED ON A LOAN TO ALAN RADERMACHER AND HIS WIFE, WHICH LOAN HAD BEEN MADE BY THE BANK IN RELIANCE UPON THE PROVISIONS OF TITLE I OF THE NATIONAL HOUSING ACT, AS AMENDED, 12 U.S.C. 1703.

IT APPEARS FROM THE RECORD THAT THE LOAN WAS MADE ON DECEMBER 26, 1967, AND THAT THE LOAN WAS FOR THE CONSTRUCTION OF A BARN ON FARM PROPERTY LEASED BY THE RADERMACHERS (BORROWERS) UNDER A LEASE WHICH WAS TO TERMINATE NOVEMBER 1, 1970. IT FURTHER APPEARS THAT THE DATE OF THE LOAN AND NOTE WAS DECEMBER 26, 1967, AND THAT THE NOTE PROVIDED FOR PAYMENT IN THREE ANNUAL INSTALLMENTS, THE LAST INSTALLMENT BEING PAYABLE NOVEMBER 1, 1970.

THE BANK, BECAUSE OF ITS OWN ERROR, FAILED TO REPORT THE LOAN TO FHA AS REQUIRED BY PERTINENT FHA REGULATIONS (24 CFR 210.10) AND SINCE THE LOAN WAS NEVER REPORTED, THE BANK WAS NOT BILLED FOR AND DID NOT PAY - BEFORE DEFAULT OF THE LOAN - THE INSURANCE PREMIUM TO FHA IN ACCORDANCE WITH 24 CFR 201.13(B). FHA HAD NO KNOWLEDGE OF THE EXISTENCE OF THE LOAN UNTIL THE BANK'S SUBMISSION OF THE INSURANCE CLAIM ON MARCH 4, 1971.

FHA ADVISED THE BANK THAT BY REASON OF ITS FAILURE TO REGISTER THE LOAN FOR INSURANCE AND TO PAY THE REQUISITE PREMIUM CHARGES, IT (FHA) WAS WITHOUT AUTHORITY TO HONOR ITS CLAIM. THE BANK HAS APPEALED THE DENIAL ON THE BASIS THAT:

"'THE ONLY NEGLIGENCE ON OUR PART WAS THROUGH A CLERICAL ERROR IN NOT SUBMITTING

THE PREMIUM TO FHA. THE PREMIUM WAS COLLECTED AND EVIDENCE SHOWS THIS, AND IF IT HAD BEEN SUBMITTED, IT WOULD HAVE BEEN GUARANTEED.

"'WE FEEL OUR INTENT WAS GOOD AND THE LIABILITY OF THE HOUSING ADMINISTRATION IN CONNECTION WITH THE PROGRAM SHOULDN'T BE CHANGED BECAUSE OF AN ERROR OF THIS NATURE. I AM WELL AWARE OF THE PROVISIONS OF SECTION 201.10 AND SECTION 201.13(B) STATING THAT THE INSURANCE CHARGES SHALL BE PAID. THE POINT IS THAT THEY WERE PAID; HOWEVER, WE FAILED TO ADVISE THE HOUSING ADMINISTRATION OF THE SAME.'"

SECTION 2 OF THE NATIONAL HOUSING ACT, AS AMENDED, 12 U.S.C. 1703, PROVIDES, IN PERTINENT PART, AS FOLLOWS:

"(2) THE SECRETARY IS AUTHORIZED AND EMPOWERED *** TO INSURE BANKS, *** AGAINST LOSSES *** AS A RESULT OF LOANS *** FOR THE PURPOSE OF (I) FINANCING *** THE BUILDING OF NEW STRUCTURES, UPON *** REAL PROPERTY *** BY THE OWNERS THEREOF OR BY LESSEES OF SUCH REAL PROPERTY UNDER A LEASE EXPIRING NOT LESS THAN SIX MONTHS AFTER THE MATURITY OF THE LOAN OR ADVANCE OF CREDIT *** .

"(F) THE SECRETARY SHALL FIX A PREMIUM CHARGE FOR THE INSURANCE HEREAFTER GRANTED UNDER THIS SECTION, BUT IN THE CASE OF ANY OBLIGATION REPRESENTING ANY LOAN, ADVANCE OF CREDIT, OR PURCHASE, SUCH PREMIUM CHARGE SHALL NOT EXCEED AN AMOUNT EQUIVALENT TO 1 PER CENTUM PER ANNUM OF THE NET PROCEEDS OF SUCH LOAN, ADVANCE OF CREDIT, OR PURCHASE, FOR THE TERM OF SUCH OBLIGATION, AND SUCH PREMIUM CHARGE SHALL BE PAYABLE IN ADVANCE BY THE FINANCIAL INSTITUTION AND SHALL BE PAID AT SUCH TIME AND IN SUCH MANNER AS MAY BE PRESCRIBED BY THE SECRETARY."

SINCE THE TERMINATION DATE OF THE LEASE AND THE MATURITY DATE OF THE LOAN WERE THE SAME DATE, I.E., NOVEMBER 1, 1970, IT IS OBVIOUS THAT THE LEASE WAS NOT ONE "EXPIRING NOT LESS THAN SIX MONTHS AFTER THE MATURITY OF THE LOAN OR ADVANCE OF CREDIT" AS PROVIDED BY 12 U.S.C. 1703(A). THUS, THE LOAN IN QUESTION WOULD NOT HAVE BEEN ELIGIBLE FOR FHA INSURANCE, EVEN IF PROPERLY REPORTED AND THE PREMIUM CHARGE PAID THEREON, SINCE IT WAS NOT IN COMPLIANCE WITH 12 U.S.C. 1703(A).

FURTHER, PAYMENT OF THE PREMIUM IN ADVANCE BY THE LENDER TO FHA IN COMPLIANCE WITH 12 U.S.C. 1703(F) AND THE IMPLEMENTING FHA REGULATIONS IS NECESSARY IN ORDER FOR A LOAN TO BE ELIGIBLE FOR INSURANCE, AT LEAST WHEN NONPAYMENT OF THE PREMIUM IS SOLELY THE FAULT OF THE FINANCIAL INSTITUTION. WHILE IN THE PRESENT CASE THE BANK COLLECTED THE PREMIUM CHARGE FROM THE BORROWER, THE BANK DID NOT REPORT THE LOAN TO FHA FOR INSURANCE, OR PAY FHA THE REQUIRED PREMIUM CHARGE. AS INDICATED ABOVE, THE FIRST KNOWLEDGE FHA HAD OF THE EXISTENCE OF THE LOAN IN QUESTION WAS A LETTER DATED JANUARY 14, 1971, FROM THE BANK MAKING AN INSURANCE CLAIM BECAUSE OF THE BORROWERS DEFAULT ON THE LOAN. THUS, FHA HAD NO KNOWLEDGE OF THE EXISTENCE OF THE LOAN UNTIL MORE THAN THREE YEARS AFTER THE LOAN WAS MADE AND NOT UNTIL AFTER IT WAS IN DEFAULT. SINCE THE BANK DID NOT PAY THE PREMIUM CHARGE ON THE LOAN IN ADVANCE AS REQUIRED BY 12 U.S.C. 1703(F) AND THE IMPLEMENTING REGULATIONS, THE REQUIREMENTS OF 12 U.S.C. 1703(F) ALSO WERE NOT MET.

ALTHOUGH 12 U.S.C. 1703(E) AUTHORIZES THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT TO WAIVE COMPLIANCE WITH REGULATIONS PRESCRIBED BY HIM, NEITHER THAT SECTION NOR ANY OTHER PART OF THE ACT VESTS ANY AUTHORITY IN THE SECRETARY TO WAIVE COMPLIANCE WITH A STATUTORY PROVISION OR LIMITATION. THEREFORE, SINCE THE LOAN INVOLVED HERE DID NOT COMPLY WITH THE ABOVE-QUOTED STATUTORY PROVISIONS

PERTAINING TO (1) LOANS TO LESSEES AND (2) PAYMENT OF PREMIUM CHARGES, THE SECRETARY'S WAIVER AUTHORITY WOULD NOT APPLY. ACCORDINGLY, THE VOUCHER INVOLVED, WHICH IS RETURNED HEREWITH TOGETHER WITH YOUR CLAIM FILE, MAY NOT BE CERTIFIED FOR PAYMENT.