In the Matter of:	:	
CityBank,	:	HUDBCA No. 04-A-SE-EE039
	:	Claim No. 7-207011690A
Petitioner	:	

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For 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, 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 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 or the Internal Revenue Service for offset.

Summary of Facts

On April 3, 2000, Petitioner, as mortgagee, entered into a HUD-insured loan agreement with a borrower for FHA case number 561-7064048 ("Roloff loan"). (Secretary's Statement, attached Declaration of Glenn Goodman, hereinafter "Goodman Decl.," ¶ 5). On October 1, 2000, the borrower-mortgagor defaulted on the loan. (Goodman Decl., ¶ 5). A review of Petitioner's loan on July 16, 2001by HUD's lender monitoring team found "non-compliant lending activities" by Petitioner which exposed HUD to an unacceptable level of risk. (Goodman Decl., ¶ 4). To resolve these findings, CityBank agreed to indemnify HUD for any loss HUD incurred as insurer of this loan. Id. To document this agreement, CityBank executed an indemnification agreement on September 28, 2001. (Goodman Decl., Exh. A).

HUD paid Petitioner's insurance claim for this loan on February 28, 2002, and sold the property on July 10, 2002 for $45,000.00. (Goodman Decl., ¶¶ 5-6; Goodman Decl., Exh. B). 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. (Goodman Decl. ¶ 7). HUD's investment due to the default included: insurance settlements, $84,842.45 (Part A Claim Payment) and $7,190.07 (Part B Claim Payment); taxes, $67.35; maintenance and operation expenses, $1,850.95; and sales expenses, $4,750.45. (Goodman Decl., ¶ 6).

The Secretary alleges that Petitioner is delinquent in paying HUD's claim under the indemnification agreement and that Petitioner is indebted to HUD in the following amounts: $53,701.27 as the unpaid principal balance as of July 30, 2004; $233.36 as the unpaid interest on the principal balance at 1% per annum until paid; and interest on said principal balance from August 1, 2004, at 1% per annum until paid. (Goodman Decl., ¶ 7). By letter dated January 22, 2004, HUD directed Petitioner to indemnify HUD in the amount of $50,095.27, HUD's investment minus the sales price of the property, within thirty (30) days of receipt of that letter. (Goodman Decl., Exh. C).

Discussion

31 U.S.C. §3716 provides Federal agencies with a 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 claims that "as a result of the manner of foreclosure of the deed of trust, lack of notice to CityBank of the foreclosure action, and sale of the property by HUD to a third party without an offer of the property to CityBank…," it does not owe the debt claimed by the Secretary. (Memorandum of CityBank, hereinafter "CityBank Memo," pp. 1-2).

Under the terms of the indemnification agreement, Petitioner agreed to indemnify HUD for "losses, which have been or may be incurred for FHA Case No(s)., 561-7064048 Roloff…if these loans go into default within five years from the date of

endorsement…." (Goodman Decl., Exh. A, ¶ 1). The indemnification agreement provided that:

> 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 AFS 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; <u>any Loss Mitigation partial claims</u>; 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 CB, HUD's loss will be calculated in accordance with paragraph (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.

<u>Id</u>. at ¶ 1(b) and (c). (capitalization and underline in original).

Petitioner contends that it was not notified of the foreclosure of the subject property and, therefore, it does not owe the debt claimed by the Secretary. (CityBank Memo, p. 2). In its Memorandum, Petitioner alleges that "[a]t the time CityBank was advised by HUD of the claimed deficiencies in the underwriting of the Roloff loan, it was not advised of…the fact that the loan was in foreclosure." <u>Id</u>. In support of this argument, Petitioner cites the Revised Code of [the State of] Washington which states: "[t]he beneficiary may give the notices of default, trustee's sale, and foreclosure referred to in RCW 61.24.030(7) and 61.24.040 to any one or more of the guarantors of a commercial loan at the time they are given to the grantor." (CityBank Memo, p. 6, citing RCW 61.24.042).

The cited statute does not appear to support Petitioner's argument. The trustee's sale was conducted by Landsafe Title of Washington on behalf of Countrywide Home Loans, Inc. ("Countrywide") which was at that time the beneficiary under the deed of trust. (CityBank Memo, p. 2). Therefore, if the beneficiary had a duty under the cited statute to give Petitioner notice of default and foreclosure, it apparently would have been the duty of Countrywide who was the beneficiary at the time of the sale. There is no evidence that either Landsale Title of Washington or Countrywide provided Petitioner with such notice. (CityBank Memo, p. 6). Even though Petitioner excuses Countrywide for not giving it notice because "there is no evidence that [Countrywide] was aware of any potential liability of CityBank," Petitioner has failed to prove that HUD, as surety for the Roloff loan, had any legal duty to notify Petitioner of this trustee sale. <u>Id</u>.

Petitioner does not cite any legal authority or language in the indemnification agreement to support a finding that HUD, and not Countrywide, was required to provide

it with such notice of default or foreclosure of the loan. Rather, Petitioner contends that HUD "had an obligation as a matter of fundamental fairness and equity, to have advised CityBank of the default and pending foreclosure of the deed of trust during the negotiations regarding the indemnity agreement, assuming HUD knew of the pending foreclosure." (CityBank Memo, p. 7). Petitioner has not set forth any legal authority for the proposition that HUD's rights under the indemnification agreement were conditioned upon an obligation to disclose to Petitioner HUD's knowledge of any adverse financial conditions relating to this defaulted note or the property which secured it.

Notwithstanding the fact that Petitioner has failed to show that HUD was required to provide Petitioner with notice of default and/or foreclosure on the loan, the Secretary has presented documentary evidence to support its allegation that HUD did, in fact, advise CityBank of the default and pending foreclosure of the subject loan. This notification was given before the on-site review by the lender monitoring team. The Department's Response to the Memorandum of CityBank states the following:

> On June 13, 2001, six months prior to execution of the Indemnity Agreement and five months prior to the trustee's sale, CityBank was informed by HUD via facsimile transmission that the loan was not only in default but that the foreclosure process has already started.
>
> CityBank had access to additional, continuing information regarding the loan and foreclosure status over the internet through HUD's Neighborhood Watch feature at any time it desired to check.

(Department's Response To Memorandum Of CityBank, hereinafter "Dept. Resp. to CityBank Memo," ¶¶ 7-8 citing Supplemental Declaration of Glenn Goodman filed October 1, 2004, hereinafter "Supp. Goodman Decl.," Exh. A). In any event, the Board does not find that HUD violated any contractual, regulatory, or statuatory provision, the violation of which would discharge Petitioner from fulfilling its obligations under the indemnification agreement.

Contrary to what is alleged in the Memorandum of CityBank filed on August 30, 2004, Petitioner, in the Supplemental Memorandum of CityBank, admits that it received notice of the trustee's foreclosure sale of the subject property. (Supplemental Memorandum of CityBank, hereinafter "Supp. CityBank Memo," ¶ 1). However, Petitioner claims that the notice it received did "not provide CityBank with the type of specific notice that it would have been entitled to as to the specifics of the foreclosure sale." Id. Again, Petitioner has failed to cite any legal authority or language in the indemnification agreement that placed a duty on HUD to provide Petitioner with notices of default and foreclosure. In the absence of a showing that Petitioner had a legal right to

receive from HUD a notice of default or foreclosure prior to HUD's sale of the property to another party, Petitioner's claim fails for lack of proof.

Petitioner alleges that Countrywide, even though it was not required to do so by law, bid the entire amount of the debt owed to it at the trustee's sale "with no consideration as to the value of the property and the amount of any claimed loss it may [have made] against HUD." (CityBank Memo, p. 7). Petitioner claims that Countrywide did not know the reasonable value of the property because "[t]here is no evidence that an appraisal or any other evaluation of the property was obtained prior to the trustee's sale to determine a reasonable sale price." Id. Petitioner cites a provision of the Revised Code of Washington to support its proposition that Countrywide was not required to bid the entire amount of the debt. The statute states:

> Trustee's sale, who may bid - - if beneficiary is purchaser - - if purchaser is not beneficiary
>
> (1) The trustee may not bid at the trustee's sale. Any other person, including the beneficiary, may bid at the trustee's sale.
> (2) The trustee shall, at the request of the beneficiary, credit toward the beneficiary's bid all or any part of the monetary obligations secured by the deed of trust. If the beneficiary is the purchaser, any amount bid by the beneficiary in excess of the amount so credited shall be paid to the trustee in the form of cash, certified check, cashier's check, money order, or funds received by verified electronic transfer, or any combination thereof. If the purchaser is not the beneficiary, the entire bid shall be paid to the trustee in the form of cash, certified check, cashier's check, money order, or funds received by verified electronic transfer, or any combination thereof. (emphasis in original).

(CityBank Memo, p. 7 citing RCW, 61.24.070).

Petitioner submits that, "[a]ssuming the value of the property was less than the balance owed on the loan, Countrywide … essentially prevented any competitive bidding on the property that could have minimized the amount of its loss." (CityBank Memo, p. 7). In its memorandum, Petitioner sets forth its speculations regarding why Countrywide chose to bid the entire amount of the debt instead of a portion of it. However, Petitioner's suppositions regarding why Countrywide chose to bid the entire amount of the debt are irrelevant to the disposition of this case. What is relevant is that Petitioner has failed to show that Countrywide was legally restricted from bidding the entire amount of the debt. Id.

Petitioner contends that the Code of Federal Regulations, specifically, 24 CFR §203.356, imposes a duty upon a lender to give notice to HUD of foreclosure or pending

foreclosure. Petitioner claims that "there is no evidence in this case that notice of the trustee's sale was given to HUD by Countrywide prior to the conducting of the trustee's sale on November 30, 2000." Id at p. 8. According to Petitioner, this lack of notice would have entitled HUD to deny paying insurance benefits to Countrywide, and that, due to HUD's decision to pay the insurance benefits despite the lack of notice from Countrywide, "it can only be assumed that HUD didn't care whether it paid the claim or not since it intended [to] recover any loss against CityBank." Id. Petitioner claims that if not for the lack of notice of default and commencement of the foreclosure sale by Countrywide, "under the Code of Federal Regulations [, HUD] could have obtained an appraisal of the property and determined an appropriate bid price at the sale." Id. at 9 Petitioner cites 24 C.F.R. §203.368, which is titled "Claims without conveyance procedure," in support of its proposition that the bid price set for the subject property at the foreclosure sell was not based on the estimated value of the property. Id. at 9-11

In response to Petitioner's assertions, the Secretary has submitted documentary evidence which shows that " Countrywide informed HUD of the trustee sale through the Department's Single Family Default Monitoring System (SFDMS), the manner prescribed by the Secretary." (Supp. Goodman Decl., ¶ 4; Supp. Goodman Decl., Exh. E, Exh. F, Exh. G). The Secretary has also submitted documentary evidence that shows, in accordance with 12 U.S.C. §1710 and 24 C.F.R. §203.366, "Countrywide Home Loans had to obtain clear and marketable title to the property [in order] to obtain HUD insurance benefits [and] Countrywide Home Loans obtained clear and marketable title by bidding the full amount of the debt." (Supp. Goodman Decl., ¶ 5; Supp. Goodman Decl., Exh. F referencing 12 U.S.C. §1710 and 24 C.F.R. §203.366).

In addition, the Secretary has submitted documentary evidence to support its contention that Countrywide set its bid price for the subject property based on the estimated value of the property. The Supplemental Declaration of Glenn Goodman states:

> 24 CFR 203.368, which includes setting a bid price based on the estimated value of the property, is titled 'Claims without conveyance procedure.' File evidence shows that Countrywide Home Loans did not file a claim without conveyance. Countrywide Home Loans filed a claim with conveyance.
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> Before resale by HUD, the property appraised for $45,000.00…. The sales price for the property was $45,000.00. The purchaser's net bid was $22,500.00 through the Teacher Next Door Program…. HUD reduced its indemnified loss by $45,000.00 giving CityBank credit for the full sales price.

(Supp. Goodman Decl., ¶¶ 6-7; Supp. Goodman Decl., Exh. E, Neighborhood Watch screen prints). I find no impropriety in the course of these transactions. In any event, the

cited Departmental regulations, which set forth procedures designed to protect the public interest, have neither been shown to have been violated by HUD nor to have provided Petitioner with a right of action against HUD to redress Petitioner's current grievances.

Petitioner argues that:

> [E]ven though CityBank was not notified of the trustee's sale prior to the sale, CityBank's ability to potentially reduce the damages could still have been protected if HUD had offered to convey the property to CityBank in return for reimbursement of the loan amount and costs. If such an offer was made[,] then HUD could have been made whole and CityBank could have controlled the ultimate disposition of the property to minimize its losses. Instead HUD chose to sell the property at a discount through the Teacher Next Door Program without any Notice to CityBank.

(CityBank Memo, p. 11).

Petitioner has failed to cite any legal authority or language in the indemnification agreement 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 prior to HUD's sale of 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 or sell property to a particular party). 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. Petitioner's argument that HUD should have "offered to convey the property to CityBank" is unsupported by any law cited by Petitioner.

The Board's reasoning in Homestead Funding Corporation, HUDBCA No. 04-A-NY-EE043 (2005) is similarly applicable in this case:

> 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 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 additional credit against any alleged loss sustained, and has failed to set forth a legal basis which would substantiate a reduction of Petitioner's debt to HUD due to alleged improper actions of HUD or a third party.

ORDER

Upon consideration of the entire record of this proceeding, 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.

_____
David T. Anderson
Administrative Judge

June 21, 2005