DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-183515 DATE: SEP 16 1975

MATTER OF: Title I Housing Act Claim

DIGEST: Bank's claims for loss on refinanced note for term in excess of maximum maturity allowable under title I of National Housing Act and implementing regulations which was resubmitted for payment on basis of original note marked "paid by renewal" with legend "stamped in error," cannot be certified for payment since new note executed within contemplation of refinancing proviso of National Housing Act and regulations necessarily operates as discharge of original note.

This decision to Mr. B. C. Tyner, an authorized certifying officer of the Department of Housing and Urban Development (HUD), is in response to his letter dated March 24, 1975, requesting advice as to whether a voucher enclosed therewith payable to Farmers and Merchants Bank, Spokane, Washington, in the amount of $1,260.71 may be certified for payment. The voucher covers a claim on a Federal Housing Administration (FHA) loan made by the bank upon the borrowers' "FHA Title I Note," which loan was insured pursuant to title I of the National Housing Act, as amended, 12 U.S.C. §§ 1701 et seq.

Mr. Tyner's explanation of the pertinent facts and circumstances giving rise to his question is set forth below.

The note in question was made pursuant to a credit application submitted to the bank on March 3, 1972. The proceeds of the loan were disbursed to the borrowers on March 8, 1972, and on March 8, 1972, the borrowers executed a note in the amount of $1,865.04 representing an amount financed of $1,600, and a finance charge of $265.04, with an annual percentage rate of 10.25 percent. The borrowers subsequently encountered difficulties and the obligation of March 8, 1972, was refinanced by another note on October 26, 1972, for a term of 110 months.

At the time of the foregoing transactions, section 2(b) of the National Housing Act, as amended, 12 U.S.C. § 1703(b) (1970) provided in pertinent part as follows:

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> "No insurance shall be granted under this section to any such financial institution with respect to any obligation representing any such loan * * * (2) if such obligation has a maturity in excess of three years and thirty-two days, except that the Secretary may increase such maximum limitation to seven years and thirty-two days if he determines such increase to be in the public interest * * * Provided further, that any obligation with respect to which insurance is granted under this section on or after July 1, 1939, may be refinanced and extended in accordance with such terms and conditions as the Secretary may prescribe, but in no event for an additional amount or term in excess of the maximum provided for in this subsection."

FHA had increased the maximum maturity to 7 years and 32 days as authorized. See 24 C.F.R. § 201.2(d)(2)(i) (January 1, 1972). Then current FHA regulations--24 C.F.R. § 201.9(b) (January 1, 1972)--provided that a "Class 1(a) loan" (which includes the instant loan)--

> "may be refinanced for an additional period not in excess of 7 years and 32 days from the date of the refinancing, provided that the term of the new note does not extend beyond 12 years from the date of the original note."

The bank had originally submitted its claim on the basis of the second (October 26, 1972) note. However, HUD denied this claim on the ground that the 110-month maturity period under the note exceeded the maximum duration (7 years and 32 days from the date of refinancing) permitted by its regulations. The bank then resubmitted the claim and asked that it be considered on the basis of the original (March 8, 1972) note, which was marked "paid by renewal" with the legend "stamped in error" also entered on the note. HUD again denied the claim, advising that "the original note has been stamped 'paid by renewal' and it is the opinion of our Title I Counsel that the claim made on a cancelled note should not be certified for payment." At the request of the bank, the matter was submitted for our decision. In his submission to us, the HUD certifying officer refers to UNIFORM COMMERCIAL CODE § 3-605, which states in part that the holder of an instrument may discharge any party "in any manner apparent on the face of the instrument or the indorsement, as by intentionally cancelling the instrument * * *."

Whether an original note is discharged, and therefore extinguished, by cancellation and/or execution of a renewal note is

ordinarily a factual question dependent upon ascertaining the intent of the parties. See generally 11 Am. Jur. 2d, Bills & Notes, §§ 905-906, 915-916. In the instant case, there is ample support for HUD's conclusion that the original March 8, 1972 note was in fact discharged. As indicated above, this note had been stamped "paid by renewal," although it was also later marked "stamped in error." While there is no explanation in the record before us as to the timing and circumstances of the later marking, the fact that a new note was executed and that the bank's initial claim was apparently based entirely on the new note strongly suggests that the original note was considered a nullity, at least prior to HUD's initial disallowance.

However, aside from the lack of adequate factual support for the viability of the original note, we believe that the instant claim based thereon must be rejected as a matter of law. With reference to the refinancing proviso in section 2(b) of the National Housing Act, supra, our Office has consistently held that an insured lending institution may extend the time for paying a note beyond the maximum initial maturity period fixed by the statute only if it refinances the loan, that is, if a new note is executed. B-131963, July 17, 1957; B-148816, May 21, 1962; B-149800, September 28, 1962; cf. 51 Comp. Gen. 222, 224 (1971). This approach is also reflected in the FHA regulations here applicable, which provide for refinancing only by execution of a new note. See 24 C.F.R. § 201.9(a) (January 1, 1972):

> "General requirements. New obligations to liquidate loans previously reported for insurance pursuant to title I of the Act * * * will be covered by insurance if the new obligations meet the requirements of all applicable regulations in this part and the special provisions of this section."

Thus it is our opinion that a new note executed within the contemplation of the refinancing proviso of section 2(b) and implementing regulations must necessarily be considered to discharge the original note, thereby precluding the payment of a claim based on it.

In view of the foregoing, the voucher, which is returned herewith, together with the claim file, may not be certified for payment.

R.F. KELLER

(Deputy) Comptroller General
of the United States