Alan Belkin
OGM

DECISION

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

FILE: B-187445 DATE: January 27, 1977

MATTER OF: Union National Bank of Austin, Texas

DIGEST:

1. Bank is not entitled to receive reimbursement from SBA for $10,000 loss suffered on loan to small business that was allegedly made on basis of representations from SBA employee that bank loan would be guaranteed. Loan was not guaranteed since it was never approved in writing as required by provision in blanket guaranty agreement between SBA and bank.

2. SBA has no legal liability to bank on basis of estoppel theory since facts presented fail to establish estoppel against Government based on alleged representations by SBA employees that bank loan to small business could be repaid from forthcoming "Business Development Expense" (BDE) payment from SBA to small business. Uncontroverted factual record is insufficient to establish necessary elements of estoppel, especially since documentary evidence indicates that bank official had notice of SBA employees' lack of authority to make representations concerning availability of BDE funds and that reliance on BDE funds was not principal factor in bank's decision to make loan.

The Small Business Administration (SBA) has requested our opinion as to whether it may reimburse the Union National Bank of Austin, Texas, for the $10,000 loss suffered by that institution on a loan extended to Mr. Robert Soto, who was at the time of the loan a small business contractor under section 8(a) of the Small Business Act, 15 U.S.C. § 637 (a)(1970). The Union National Bank has stated that the loan was made to Mr. Soto "based solely on certain representations made by individuals working for the SBA District Office in San Antonio, Texas." On the basis of the submission from SBA, which included affidavits of the various individuals involved and other relevant documents, the facts regarding the instant claim are as follows.

In early 1975, Mr. Robert Soto, the operator of a small machine shop known as Standard Machine Works, was referred to SBA as a potential bidder on a Government contract under the SBA "8(a) program." Under this program SBA enters into procurement contracts with other Federal agencies and then negotiates subcontracts for the performance of the work with eligible small business concerns. Mr. Soto was approved for the program, informed of all the requirements for complying with the 8(a) program, and was aided in the preparation of appropriate documents by SBA personnel. Mr. Robert Tamez, a Business Development Specialist for the SBA Office in San Antonio, worked almost exclusively with Mr. Soto. With the help of Mr. Tamez, Mr. Soto prepared a final cost estimate on a proposed contract to produce hydraulic cylinders for the Air Force in which he offered to produce 642 cylinders at a price of $150.00 each. Following negotiations with the Air Force, handled by Mr. Tamez, SBA entered into a contract with the Air Force for the production of the cylinders for $134 per unit. Mr. Soto agreed to accept the lower contract price of $134 each, based on representations by Mr. Tamez that the difference between his estimate and the contract price—approximately $10,850—would be made up by the use of "Business Development Expense" (BDE) funds to be paid him by SBA and which he would not have to repay. Chapter 6 of SBA's Standard Operating Procedure No. 60-41-2 for the Section 8(a) Program governs the authorization and use of BDE payments. BDE funds are defined as representing the difference between the fair market price, i.e., the negotiated prime contract price, of a section 8(a) contract and the price required by the 8(a) subcontractor to provide the product or service. Id., § 56. The regional directors of SBA are responsible for approval of BDE payments. Id., § 58(c).

While the information submitted to us does not disclose the date of SBA's contract with the Air Force, its subcontract with Mr. Soto was dated October 7, 1975. On October 15, 1975, Mr. James S. Reed, District Director for SBA's San Antonio office, submitted a written request to the Regional Director in Dallas for approval of $10,850 in BDE funds with respect to the Soto contract.

At some point, probably in September of 1975, Mr. Soto informed Mr. Tamez that he needed money to buy machinery and necessary equipment and to pay some debts. Mr. Tamez recommended that Mr. Soto get a loan and commissioned Mr. Eugene Uccellini, a SBA Management Assistant Specialist, to go to a lending institution and obtain a loan for Mr. Soto. Mr. Tamez and Mr. Uccellini met and agreed on two potential banks in Austin, Texas--the Union National Bank and the bank where Mr. Soto normally did his business.

The parties are in substantial agreement regarding the following facts. Mr. Uccellini was provided with two documents to take to whichever of the two banks was selected. The documents were a copy of the contract signed by SBA and Mr. Soto and identical letters dated October 20, 1975, addressed from Mr. Tamez to each bank reading in pertinent part as follows:

> "The Small Business Administration anticipates placing approximately $10,000.00 in your bank for business development use by Standard Machine Works, an Austin firm owned and operated by Mr. Robert Soto. A special account will be required for which all withdrawals are to be approved or co-signed by the San Antonio SBA District Director or his designee.
>
> "Request you provide the account number that will apply so that the cognizant accounting office may properly direct the funds. Thank you for your assistance in this matter."

Mr. Uccellini chose to deal with the Union National Bank (Bank) on the basis of his prior experience with the Bank and the fact that it was minority owned. He arrived by himself at the Bank before 8 a.m. probably on Tuesday, October 21, 1975. The Bank had no prior experience with or knowledge of Mr. Soto. Mr. Uccellini explained the 8(a) program and the use of BDE funds to Mr. Gilbert Martinez, vice president and cashier and then to Mr. Daniel Wimmer, the then executive vice president (now president) of the Bank. Mr. Wimmer acted as loan officer for the Bank in this matter. Following the initial discussion between Mr. Uccellini and Mr. Wimmer, in which Mr. Uccellini told Mr. Wimmer that to the best of his knowledge the BDE funds were definitely forthcoming and could be applied to pay the Bank loan, a call was placed from the Bank to Mr. Tamez in the SBA Office in San Antonio, at the request of Mr. Wimmer for clarification.

At this point there is some factual dispute as to precisely what was said by the different individuals involved. Mr. Wimmer says in his affidavit that Mr. Tamez told him that the $10,000 loan would be guaranteed under the Bank's blanket loan guarantee agreement with SBA, and that the BDE funds were definitely forthcoming and could be used to repay the loan. Mr. Uccellini's statement is basically consistent in this regard with Mr. Wimmer's affidavit. However, Mr. Tamez maintains that, although he told Mr. Wimmer that technically portions of the BDE funds could be used to make loan repayments provided these portions were eligible BDE expenditures and were approved by SBA, he further stated

that such use was not intended because Mr. Soto needed $20,000 for initial capitalization on the contract. Also Mr. Tamez says that no representations were made that the loan would be guaranteed by SBA. Instead, Mr. Tamez says that he told Mr. Wimmer that an assignment of the proceeds of the contract would be available to the Bank as a normal business transaction.

Thereafter on Friday, October 24, 1975, Mr. Tamez arrived at the Bank with Mr. Soto. On that day Mr. Soto assigned his rights to the proceeds under the contract to the Bank and signed a note for $10,000. At the same time, the Bank made the loan to Mr. Soto and signed an agreement to establish a special bank account into which all payments by SBA to Mr. Soto under the 8(a) contract would be paid. Furthermore Mr. Tamez states in his affidavit that at this time he provided Mr. Wimmer with a copy of an October 15, 1975 letter from the SBA San Antonio District Director to the SBA Regional Director in Dallas requesting the Regional Director to approve the payment of BDE to Mr. Soto. Mr. Tamez states that this letter was given to Mr. Wimmer "for the purpose of identifying the types of BDE expenditures that would be considered for approval and to further emphasize the control SBA would have over the use of BDE funds* * *." Mr. Wimmer does not deny that he received a copy of this letter. Rather, he states in his affidavit that Mr. Tamez "showed Affiant some documents, [and] that Affiant cannot recall what these documents were other than that they related to the Soto loans [sic]* * *."

On or shortly after October 24, 1975, the Bank signed a Notice of Assignment of Proceeds of the contract. In a discussion after the signing of the note in the SBA Office in San Antonio, Mr. Tamez informed Mr. Uccellini that the BDE funds could not be used to pay the note, although the Bank was apparently not so advised at that time. No documents evidencing any intent to guarantee the loan were ever sent to the Bank. No fee was ever paid by the Bank for the purpose of guaranteeing the loan. A Blanket Guaranty Agreement covering all guaranteed loans made by the Bank had been entered into between SBA and the Bank in 1974. At some point after the signing of the note and before the middle of January 1976, the SBA in San Antonio and Mr. Soto were informed that the BDE funds would not be forthcoming. Early in January of 1976, Mr. Soto informed Mr. Tamez that he no longer intended to participate in the contract due to insufficient funds. Work had not yet commenced at that time on the contract. On or about February 9, 1976, Mr. Soto filed a petition in bankruptcy in the United States District Court for the Western District of Texas. The debts have not yet been forgiven and the SBA has not filed a proof of claim. The bank has filed an objection to discharge on the note due to improper use of the funds loaned.

It is SBA's view that the Bank did not run a credit check on Mr. Soto and made the loan to him based solely on oral representations made by Mr. Ucciellini and Mr. Tamez. In this regard SBA's submission states that:

> "Mr. Winmer believed that SBA would prepare all necessary documents to make this loan a very safe arrangement in light of the $10,000 BDE funds to be placed in his bank by the SBA which could be applied to the note, the SBA guarantee, and the fact that the contract payments would be forthcoming which could be used to pay on the note."

The SBA submission cites two prior decisions of our Office in relation to this matter. In B-178250, August 6, 1973, we held that SBA could not pay the claim of a bank for its loss on a loan made by it to a small businessman who had also received a direct economic opportunity loan from SBA. The bank alleged that an SBA employee had agreed to make the bank a co-payee on the SBA loan check to the borrower, but the employee denied this allegation. We concluded that SBA lacked authority to assume the borrower's obligation to the bank in these circumstances. (See also, B-164162, September 20, 1968.) In 54 Comp. Gen. 219 (1974), we held, inter alia, that SBA could reimburse a bank for its loss on a loan to a small businessman-borrower who had also been approved for a direct SBA loan. In that case, an SBA Deputy Regional Director had requested the bank to make its loan and had stated that the bank's loan could be repaid from the proceeds of the forthcoming SBA direct loan. We observed, id. at 230-31:

> "* * * Although it is true that the letter from the Deputy Regional Director of SBA's Philadelphia Regional Office did not specifically state in precise terms that the bank's $50,000 advance disbursement would be guaranteed, the letter did clearly and unambiguously provide for reimbursement of the bank by SBA when the full loan was actually disbursed by that agency. We believe that such a written commitment did in fact constitute SBA's guaranty of any advances made in reasonable and justifiable reliance thereon. The fact that the full SBA loan has not and cannot be disbursed to the borrower because of his disappearance is irrelevant to our determination of whether SBA has a legal duty to Girard Trust Bank.
>
> "* * * In the present case it is clear that a properly authorized SBA official did assure Girard Trust Bank in writing that SBA's check would be drawn to the bank and

> the money the bank had advanced could be withdrawn therefrom. In our view SBA's obligation to insure the bank's repayment is not terminated merely because the check was, in fact, never issued.
>
> "In view of the preceding analysis, especially consideration of SBA's contractual commitment to Girard Trust Bank, the fact, mentioned in SBA's submission to us, that SBA will have to rely upon the assignment of the bank's interim note if the bank is reimbursed rather than the more comprehensive SBA note form is irrelevant in determining SBA's liability. Accordingly, we conclude that SBA is legally required to reimburse Girard Trust Bank for its $50,000 interim loan."

Apparently SBA believes that the instant case is analogous to our decision at 54 Comp. Gen. 219 which allowed recovery. While the SBA submission in this case does not attempt to specifically resolve the factual inconsistencies, discussed previously, surrounding the Union National Bank loan to Mr. Soto, it does recommend that the Bank be paid $10,000. Noting that SBA's published regulations do not indicate "which individuals in SBA have authority to represent that BDE funds will be forthcoming, which individuals in SBA have control over those funds, and for what purposes they can be used," the submission concludes:

> "In light of the fact that the bank was not on notice regarding which individuals [in] SBA had authority to make the representations made, it justifiably relied upon the representations made to it that the BDE funds were forthcoming and that they could be used to repay the loan."

We do not agree with SBA's conclusion that the Bank is entitled to reimbursement for the $10,000 loss it suffered on this loan. Basically there are two theories under which it might be argued that such a recovery from SBA is justified in this case; i.e., that the loan in question actually constituted a guaranteed loan pursuant to 15 U.S.C. § 636(a) (1970), or, alternatively, that SBA is liable to the Bank on the basis of equitable estoppel.

With respect to the possibility of a formal SBA guarantee, as stated in SBA's submission and recognized by Mr. Wimmer in his affidavit, a Blanket Guarantee Agreement was in effect between SBA and the Bank at the time the instant loan was made to Mr. Soto. Paragraphs 1 and 2 of the Blanket Agreement provides as follows:

"1. Application for guaranty. This agreement shall cover only loans duly approved hereafter for guaranty by Lender and SBA subject to SBA's Rules and Regulations. Any loan approved by Lender contingent upon SBA's guaranty under this agreement shall be referred to SBA for authorization upon the separate applications of Lender and the loan applicant.

"2. Approval of Guaranty. SBA shall either authorize the guaranty or decline it, by written notice to the Lender. Any change in the terms or conditions stated in the loan authorization shall be subject to prior written approval by SBA. An approved loan will not be covered by this agreement until Lender shall have paid the guaranty fee for said loan as provided in paragraph 5 of this agreement."

In 54 Comp. Gen. 219, supra, we relied on the provision in paragraph 2 when we said the following:

"Since we cannot conclude as a matter of law that either the relevant regulatory or contractual provisions were sufficient to put the bank on notice that the issuance of a formal loan authorization was an absolute requirement for an effective and binding loan approval, or were even intended to have such a legal effect, we are inclined to the view that the written approval by an SBA official possessing actual legal authority both to make sure approvals and to issue loan authorizations does, in fact, constitute official approval of the guaranteed loan in question."

Thus, having concluded that the written approval by an authorized official was legally sufficient to establish the existence of an SBA guarantee even though a formal loan authorization was not issued, we implicitly recognized the significance of the requirement set forth in paragraph 2 of the Guarantee Agreement that the approval of a guarantee must, at a minimum, be in writing in order to be valid. Accordingly, even if we accept Mr. Wimmer's statement at face value, although it is not supported and is, in fact, contradicted by Mr. Tamez, it is clear that the loan in question could not have been guaranteed by SBA since no written approval or other document evidencing any intent to guarantee the loan was ever sent to the Bank and, in any event, Mr. Tamez who allegedly told Mr. Wimmer that the loan would be guaranteed was not authorized to approve guarantees.

With respect to the estoppel argument, judicial decisions, as well as decisions of our Office and other authorities, recognize that the doctrine of equitable estoppel may be applied against the Federal Government, but only in certain limited circumstances. See, e.g., Ernest Industries, Inc. v. United States, 485 F.2d 652 (Ct. Cl., 1973); United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir., 1970); 55 Comp. Gen. 911, 931 (1976); 53 Comp. Gen. 302, 5[illegible] (1974); see generally, 2 Davis, Administrative Law Treatise, §§ 17.01-17.04 (1958 & 1970 Supp.); Annot., 27 A.L.R.Fed. 702 (1976). The essential elements of estoppel in a case involving the United States have been stated as follows:

> "In order to constitute an equitable estoppel there must exist a false representation or concealment of material facts, it must have been made with knowledge, actual or constructive, of the facts, the party to whom it was made must have been without knowledge or the means of knowledge of the real facts, it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice." United States v. Shaw, 137 F. Supp. 24, 28 (D.N.D. 1955); and see United States v. Georgia Pacific Company, supra., at 96."

In the present case, to make out an estoppel against the Government it must be demonstrated, at a minimum, that the Bank made the loan to Mr. Soto on the basis of its reasonable reliance on representations by SBA personnel that the BDE funds were definitely forthcoming and could be used by the Bank to repay the loan. Much of what is stated in this regard in the affidavits of the different individuals concerning the oral representations made is inconsistent. When such a conflict exists, we must look to any relevant written documents, as well as those portions of the statements of the different individuals involved that are consistent.

The actual documents that are relevant to this matter, including the letter dated October 20, 1975, from Mr. Tamez to the Bank, the letter from SBA's District Director dated October 15, 1975, to the Regional Office requesting BDE approval, a copy of which was provided to the Bank, and the notice of assignment dated October 22, 1975, signed by Mr. Wimmer, are clearly insufficient to establish an estoppel against the Government. In fact, of these three documents, only the October 20 letter lends any support to the estoppel argument, and all that letter indicates, giving it the most favorable interpretation

possible, is that SBA had approved the payment of BDE to Mr. Soto. However, this letter does not suggest, explicitly or implicitly, that the BDE money would be made available to the Bank to assure repayment of Mr. Soto's loan. In the absence of satisfactory proof that such representations concerning the availability of BDE funds as a source of security for the loan were actually made, the Bank would clearly not have been justified in making the loan on the assumption that the BDE funds could be used by the Bank to repay the loan. Although the affidavits of Mr. Uccellini and Mr. Wimmer do state that oral representations were made by Mr. Uccellini, Mr. Tamez, or both, that the BDE funds would be forthcoming and could be used to repay the loan, Mr. Tamez specifically states that he told the Bank's representative that it was not intended that BDE funds be issued to repay the loan since Mr. Soto needed $20,000 for initial capitalization on the contract. In light of such differences, we do not believe that it has been demonstrated that whatever oral representations were made reasonably led the Bank to believe that any BDE funds which might be forthcoming could be used to repay the loan. Moreover, the other documents involved do not support the estoppel argument.

However, even assuming that all representations attributed to the SBA employees were in fact made, and were relied upon by the Bank, the estoppel argument must fail due to the Bank's lack of due diligence. The October 15 letter requesting the Regional Director's approval of BDE, which was provided to Mr. Wimmer by Mr. Tamez on October 24, 1975, (and may have been provided to Mr. Wimmer several days earlier by Mr. Uccellini), states in the very first sentence that "Regional approval of BDE in the amount of $10,850.00 is requested to support the 8(a) development of Standard Machine Works/Robert Soto."

The October 15 letter does not, of course, establish that approval could not have been granted by the time the loan was made nine days later. However, it does clearly establish that the SBA employees with whom Mr. Wimmer was dealing had no authority to commit BDE funds and, consequently, that he could not rely on any representations made by them concerning the availability of the BDE funds. At this point, due diligence would, in turn, have required further inquiries as to the actual status of the BDE approval request. In sum, at the time Mr. Wimmer made the loan, he had reason to question the facts as allegedly represented by Messrs. Uccellini and Tamez, and he had the means of ascertaining the true facts.

In this regard, 28 Am. Jur. 2d, Estoppel and Waiver, § 76 states the following at pages 710-712:

> "The conduct of the party claiming estoppel must be considered no less than the conduct of the party sought to be estopped. As a general rule, it is essential to the existence of an equitable estoppel * * * that the representation, whether consisting of words, acts, or omissions of the party against whom the estoppel is asserted, shall have been believed by the party claiming the benefit thereof, and that he shall have relied thereon and been influenced and misled thereby. He must have acted upon the declarations or conduct of the person sought to be estopped, and not on his own knowledge or judgment. Only reasonably justified reliance will create an estoppel, and reliance is not justified where knowledge to the contrary obtains."

The elements of estoppel, from the viewpoint of the party asserting it, are further explained, id., § 80, pages 720-722, as follows:

> "Generally speaking, so far as the party claiming an estoppel is concerned, one of the essential elements of the estoppel is that such party shall have lacked knowledge and the means of knowledge of the truth as to the facts in question. * * *
>
> "One who claims the benefit of an estoppel on the ground that he has been misled by the representations of another must not have been misled through his own want of reasonable care and circumspection. A lack of diligence by the party claiming an estoppel is generally fatal. If the party conducts himself with careless indifference to means of information reasonably at hand, or ignores highly suspicious circumstances, he may not invoke the doctrine of estoppel. Good faith is generally regarded as requiring the exercise of reasonable diligence to learn the truth, and accordingly, estoppel is denied where the party claiming it was put on inquiry as to the truth and had available means for ascertaining it, at least where actual fraud has not been practiced on the party claiming the estoppel. * * *"

Accordingly, we believe that since Mr. Wimmer was on notice that Mr. Uccellini and Mr. Tamez lacked authority to make the representations attributed to them concerning BDE funds, his failure to inquire further demonstrated lack of due diligence. In this regard, we should point out that we do not question that whatever representations were in fact made to or perceived by Mr. Wimmer, he honestly believed that the BDE funds were forthcoming and simply failed to examine the documents given to him. However, the basic test, for purposes of estoppel, is not what Mr. Wimmer actually believed, but whether his belief was reasonably justified under the circumstances and was consistent with the exercise of due diligence on his part. For the reasons stated above, this test cannot be met here.

The notice of assignment, dated two days before the loan was made, and signed by Mr. Wimmer further undermines the estoppel argument. This document is significant in light of the requirement that a party asserting estoppel must establish both reasonable reliance on representations made by the party to be estopped as well as injury resulting from such reliance. See, with respect to the latter element, 28 Am. Jur. 2d, Estoppel and Waiver, §§ 77-78. As stated above, we conclude that the first element of reasonable reliance is absent here. We also question whether the second element is satisfied. Obviously the Union National Bank suffered injury as a result of the Soto loan, but it is uncertain, at best, from the record before us that its injury stemmed from reliance upon representations concerning the BDE funds, which is the only possible basis for estoppel here.

The record indicates that there were three factors before the Bank at the time of the loan, any one of which could have provided a basis for its decision to make the loan—the anticipated availability of BDE funds, a possible SBA guarantee of the loan, and the assignment to the Bank of the proceeds from Mr. Soto's 8(a) subcontract with SBA. With respect to the latter two factors, the contract proceeds were in fact assigned to the Bank. However, it is clear as stated above that there was no SBA guarantee of the loan. (The Bank cannot claim an estoppel based on oral representations that the loan would be guaranteed since the blanket loan guaranty agreement with SBA put it on notice as to the requirement that guarantee approvals be in writing.) The question therefore arises as to whether the record is sufficient to establish that the loan was made on the basis of the anticipated BDE funds rather than the other factors.

While this point is not specifically addressed in the SBA submission or in the record presented to us, Mr. Wimmer does state in his affidavit:

> "* * * Affiant felt adequately protected in advancing the $10,000.00 to Mr. Soto, a man with whom the bank had never dealt, due to the SBA guarantee [sic] loan and the availability of BDE funds as a source for repayment * * * Affiant does not recall any discussion or representation that the bank was to obtain an assignment of the proceeds from the contract * * *."

Thus Mr. Wimmer appears to concede that his understanding that the loan would be guaranteed by SBA was at least as significant to his decision as was the availability of BDE funds for repayment of the loan. Moreover, in light of the notice of assignment signed by Mr. Wimmer, we cannot accept that portion of Mr. Wimmer's statement which, in effect, completely discounts the assignment of the contract proceeds as a factor in his decision. In view of these circumstances, we conclude that the record does not fairly establish that representations concerning the BDE funds caused the loan to be made and, hence, the Bank's injury.

To summarize, it is our opinion, based on our analysis of the full record presented, that SBA is not legally liable for the Bank's loss on the $10,000 loan to Mr. Soto. Accordingly, SBA appropriations are not available to reimburse the Bank for this loss. B-178850, August 6, 1973; B-164162, September 20, 1968, supra.

Deputy Comptroller General
of the United States