UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

May 28, 2013

CBCA 3049-RELO

In the Matter of BRADLEY K. FOSSEY

Bradley K. Fossey, St. Cloud, MN, Claimant.

Maj. Lyndsey M. Olson, Office of the Staff Judge, Department of the Army, St. Paul, MN, appearing for Department of the Army.

McCANN, Board Judge.

Claimant seeks reimbursement of $8000 in real estate costs that he paid to the buyer to entice the buyer to purchase his house.

Background

Claimant, Bradley K. Fossey, a civilian employee of the Minnesota Army National Guard, was transferred under permanent change of station orders in March 2009 from St. Paul, Minnesota, to St. Cloud, Minnesota. Unfortunately, claimant was unable to sell his house until June of 2012, over three years later. Prior to the selling of his house, claimant commuted the 150 miles between his home and his new duty station - a time consuming and expensive endeavor. Claimant agreed to pay $8000 of the buyer's closing costs in order to entice the buyer into buying his house. He contends that, had he not paid this $8000, the buyer would not have purchased his house and would have likely purchased a different house. We have no reason to question the veracity of claimant's assertion. In fact, there is no disagreement between the parties that the reason claimant paid the seller $8000 was to close the deal on the sale of the house.

Claimant contends that he is entitled to reimbursement of this $8000 under the applicable regulations. He contends that, at the time, many sellers in the locality were paying some or all of the buyer's closing costs. Accordingly, he avers that the $8000 in buyer's closing costs that he paid is "customarily paid by the seller" and reimbursable within the meaning of Joint Travel Regulation (JTR) C5756-A.4.

The Army, on the other hand, contends that the $8000 is not reimbursable because the reason that claimant paid the amount was due to market conditions, i.e., a down market (where prices have fallen). The Army posits that JTR 5756-A.5. entitled "Losses Due to Prices or Market Conditions," covers this situation, and asserts that the $8000 that claimant paid is exactly the kind of non-reimbursable loss envisioned by the regulation.

Under the JTR, sellers are entitled to reimbursement for miscellaneous real estate expenses "(if customarily paid by a seller of a residence at the old PDS) . . . to the extent they do not exceed specifically stated limitations, or . . . amounts customarily paid in the residence locality. . . ." JTR C5756-A.4. The JTR also provides that losses due to prices or market conditions may not be reimbursed when caused by "[f]ailure to sell a residence at the old PDS at the price asked, or at its current appraised value, or at its original cost . . . [or] [a]ny similar causes." JTR C5756-A.5.

Discussion

When a buyer purchases a house from a seller he pays the agreed-upon price of the house plus the buyer's closing costs. The cost of the house to the buyer is the sale price plus the buyer's closing costs. The seller, on the other hand, receives the agreed-upon price of the house, minus the seller's closing costs. The HUD-1, which is signed at closing, reflects the specifics of this transaction. It sets forth specifically what costs the buyer and the seller are responsible for in the transaction.

In this transaction, on page one of the HUD-1, line 301, the "Gross Amount due from Borrower is shown. This is the amount that the borrower needs to produce in order to purchase the house. This amount consists of four items: the mortgage loan, earnest money, cash, and $8000 in "Seller Paid Closing Costs."

On page two of the HUD-1 there are two columns located on the right side of the page. The left column is headed "Paid From Borrower's Funds at Settlement"; the right column is headed "Paid From Seller's Funds at Settlement." The total settlement charges to the buyer appears on line 1400, entitled "Total Settlement Charges." The items set forth above line 1400 are the closing costs the borrower must pay. These costs do not change with market conditions. They vary with each loan, but they are always the responsibility of the buyer, not the seller.

The $8000 labeled "Seller Paid Closing Costs" is not shown on page two of the HUD-1, and claimant has not identified any of the costs on page two as being covered by the $8000. Thus, we do not know what part of the $8000 claimant is contending is "customarily paid" in the locality. Hence, this $8000 in seller paid closing costs is not the kind of closing cost that the buyer is ordinarily responsible to pay in the locality. Accordingly, it is not reimbursable under JTR C5756-A.4.

In addition, the $8000 labeled "Seller Paid Closing Costs" is an amount agreed to by the parties that reimburses the buyer for some of his costs, and thereby reduces the buyer's overall cost of purchasing the house. It is a reduction in the overall price. This $8000 reduction in price was necessitated by market conditions which had depressed the price of claimant's house. Just as claimant contends, had he not paid the $8000, the purchaser would have gone elsewhere and claimant would not have sold his house. Thus, the $8000 reduction constitutes a "Loss Due to Prices or Market Conditions," prohibited from reimbursement by JTR C5756-A.5. Since the $8000 payment constituted a loss, it is not a payment of any of the buyer's closing costs, contrary to its label. The buyer still had to pay all of his closing costs.

Decision

The claim is denied.

R. ANTHONY McCANN
Board Judge