



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 14, 2015

CBCA 4760-RELO

In the Matter of CHARITY HOPE MARINI

Charity Hope Marini, Kailua, HI, Claimant.

James J. Schubert, Associate Counsel, Office of Counsel, Naval Facilities Engineering Command, Pacific, Department of the Navy, Pearl Harbor, HI, appearing for Department of the Navy.

HYATT, Board Judge.

In 2014, the Naval Facilities Engineering Command (Navy), transferred claimant, Charity Hope Marini, from Chesapeake, Virginia, to Pearl Harbor, Hawaii. Incident to her relocation, Ms. Marini sold her home in Chesapeake and submitted a voucher for reimbursement of eligible expenses that she incurred in connection with the sale. The Navy has reimbursed most of Ms. Marini's claimed expenses with the exception of the buyer's closing costs that she paid. The Navy disallowed this item because it was not persuaded that for the seller to pay all or part of the buyer's closing costs in the area where Ms. Marini sold her home was customary. Ms. Marini has requested the Board's review of this decision.

Background

To sell her house, Ms. Marini agreed to pay the amount of \$6500 to be applied toward the buyer's loan origination and attorney fees. In support of her position, Ms. Marini submitted a narrative explaining that her home in Chesapeake was situated in a neighborhood of newly-constructed houses, in which the builder is continuing to sell lots and build similar houses. Her home was the first to be completed and sold in that neighborhood, as well as the first to be marketed for resale. She states that the builders in her development, and in adjacent subdivisions for up to a one-mile radius, consistently subsidize up to \$12,500 of the

buyers' closing costs per home sale. Using this limited market area, Ms. Marini maintains that the regulatory requirement for the practice to be customary has been met.

Ms. Marini's statement is accompanied by a letter from her realtor which states in pertinent part:

In December of 2102 [claimant and her spouse] were the first to purchase a home . . . in the brand new neighborhood called Albemarle River Estates in Chesapeake, Virginia from Summit Construction. Summit has since sold over 25 homes in the neighborhood and plans to build over 200 more in the near future. Due to the sporadically sluggish market in Chesapeake, Virginia the builders/sellers in this market customarily pay . . . up to \$12,500.00 toward the buyer's closing cost[s] at closing. Since it is customary in this market for the seller to pay up to \$12,500 toward buyer's closing costs, the Marinis' home would not have been marketable if the seller had refused to pay buyer closing costs.

...

The real estate firm for which I work is the exclusive listing company for Summit Construction, and as such my firm is comprised of local real estate experts in this market.

The Navy, based on the information provided by Ms. Marini, reasons that the contribution made by claimant to the buyer's closing costs has not been shown to be customary for the local market area. Rather, the Navy concludes that the need to pay a portion of the buyer's closing costs was simply a reflection of local market conditions.

In response to the Navy's position opposing her claim, Ms. Marini submitted additional letters, which are provided by local realtors who work with builders in new construction sales. One letter is from a realtor who works with CKC Homes, which "offers \$7,500 towards buyer's closing costs with the use of preferred lender and title company." Another letter, representing a realtor for Sadler Homes, states that a closing cost incentive of \$7,500 is provided with the use of a preferred lender. Several other statements from realtors working with new construction projects additionally confirm that assistance with buyer closing costs is available if a preferred lender is used. Ms. Marini also submitted a chart produced by the Chesapeake Realtor Assessment of 2013, showing a steady increase overall in the sale of detached single family residences, old and new, in the Chesapeake market to refute the Navy's contention that variations in local market conditions were perhaps the reason for the contribution toward buyer's closing costs.

Discussion

Under the Federal Travel Regulation (FTR) certain expenses associated with the sale of residences incident to an employee's relocation in the interest of the Government are reimbursable "[p]rovided [that they] are customarily charged to the seller of a residence in the locality of the old official station." 41 CFR 302-11.200 (2014). The parallel provision of the Joint Travel Regulations (JTR), C5756-A.1¹ is to the same effect.

The Board has consistently adhered to the standard that "[a]n expense is 'customarily' paid if, by long and unvarying habitual actions, constantly repeated, such payment has acquired the force of a tacit and common consent within a community." *Erwin Weston*, CBCA 1311-RELO, 09-1 BCA ¶ 34,055, at 168,412 (quoting *Christopher L. Chretien*, GSBGA 13704-RELO, 97-1 BCA ¶ 28,701 (1996)); *accord Janet D. Winn*, CBCA 4434-RELO, 15-1 BCA ¶ 35,978, at 175,799-800; *Diedra D. Cordell*, CBCA 3981-RELO, 14-1 BCA ¶ 35,755, at 174,961-62; *Sharon J. Walker*, CBCA 3501-RELO, 14-1 BCA ¶ 35,533, at 174,133-34; *Joseph H. Molton*, CBCA 2572-RELO, 12-1 BCA ¶ 34,930, at 171,747-48. In other words, the term "customarily" refers to what is "usual, normal, habitual, or routine" and reflects "a common tradition or usage, so long established that it has the force or validity of law." In this context, the Board has explained that variations in the strength or weakness of the real estate market in a particular location do not change the definition of "customary." *Anthony J. Kress*, CBCA 877-RELO, 08-2 BCA ¶ 33,903, at 16,777-78.

It is claimant's burden to establish by a preponderance of evidence that it is customary in the Chesapeake, Virginia area for the seller of a residence to assume some or all of the buyer's closing costs. *See, e.g., Walker; Molton; Bryan Trout*, CBCA 2138-RELO, 11-1 BCA ¶ 34,727, at 170,991-92. The evidentiary showing expected for the seller to recover costs of this nature has been aptly summarized as follows:

Sellers who pay a closing cost which might be thought to be generally the responsibility of the buyer have met their burden in a variety of ways. The fact that state law makes payment of a particular cost an obligation of the seller is clear proof of customary practice. Showing that a preprinted settlement form calls for the seller to pay a specific cost is also persuasive. Letters from a real estate broker and the local board of realtors confirming that in the

¹ This citation is to the JTR in effect when Ms. Marini was transferred. We note that under the most recent issuance of the JTR, combining rules for both military members and civilian employees of the Department of Defense, effective December 1, 2014, the same provision is renumbered as section 5914-c.1.6.

relevant area, a particular cost is invariably paid by the seller for the buyer, have been found convincing. We have additionally accepted, as proof of customary practice, extensive sales data on similarly-priced properties in the community in question showing that over a period of years, ninety-three percent of sellers contributed to purchasers' closing costs. Similarly, a real estate agent's statement that the type of cost paid by the seller for the buyer had been paid by sellers in ninety percent of residential sales transactions in the community for the past five years has been acceptable proof of local custom.

On the other hand, a bald assertion that many sellers in the community, during the relevant time, paid buyers' closing costs does not establish that the payment of these costs was "customary," as we comprehend the meaning of that term. Even if a practice is common, that is not enough to raise it to the status of being customary. The payment may simply have been a means of lowering the total cost to the buyer in order to make the purchase more attractive, an expense that the FTR makes non-reimbursable. . . . The term "customary" must be applied strictly, for the statute on which the regulatory phrase is based makes agencies responsible for paying transferred employees' closing costs only where those costs "are required to be paid."

Monika J. Dey, GSBICA 15662-RELO, 02-1 BCA ¶ 31,744, at 156,827-28 (2001) (citations omitted).

In general, claimants who have succeeded in meeting this burden have provided statements from multiple sources, including realtors, attorneys and lenders, who are familiar with the locality, confirming that a particular cost is invariably assumed by the seller for the buyer, based on data showing that over the years a commanding percentage of sellers have paid such costs. Other sources of insight into the customary allocation of costs could include the local office of the Department of Housing and Urban Development or a local association of realtors. Finally, specific evidence of the number and percentage of sales in the same community, over a substantial period of time, that involved seller contributions to buyer's closing costs, could also be probative of whether a custom has evolved. Letters from realtors asserting only that many, or even most, sellers contribute to buyers' closing costs, unaccompanied by concrete data, do not generally suffice to establish that a practice is customary.

Here, Ms. Marini's argument is supported primarily by a letter from her own realtor stating an opinion that it is customary for builders and sellers in the "sluggish" Chesapeake market area to offer to pay some or all of a buyer's closing costs to induce a sale. We note

in this regard that “[g]eneral statements as to customary practice, particularly by real estate firms that have participated in the real estate transaction involved, are not as persuasive as sales data from independent real estate firms.” *Bryan Trout*, CBCA 2138-RELO, 11-1 BCA ¶ 34,727, at 170,991 (quoting *Deborah A. Bentley*, GSBICA 16752-RELO, 06-1 BCA ¶ 33,197, at 164,568). The supplemental letters provided by Ms. Marini are from realtors who deal in new construction and aver that in sales of new homes builders typically pay about \$10,000 to \$12,500 in closing costs for buyers who use their preferred lender. Ms. Marini’s own observations are also limited primarily to the narrow subdivision where the developer that built her house continues to build new homes. No specific data or evidence from independent realtors is offered so as to enable the Navy to make an informed assessment, relative to the overall inventory of new and existing homes in the larger Chesapeake, Virginia market, of the degree to which sellers actually defray some or all of the buyer’s closing costs without regard to the lender used. The chart depicting sales of new and existing homes in the area similarly provides no insight into whether the payment made by Ms. Marini is customary or not.

In short, we cannot conclude that claimant has met her burden to show that it is customary in this local area for the seller to assume a share of the buyer's closing costs. The evidence establishes only that there are a substantial number of new single family residences being built in the area and that it is a common practice for the seller to shoulder a portion of the buyer’s closing costs, particularly in subdivisions where sales of existing residences compete with new houses on the market. Nothing in Ms. Marini’s submissions to the agency or to the Board establishes that within the Chesapeake, Virginia market as a whole, sellers are “customarily” – as that term is used in the FTR and in our case law – expected to defray buyer’s closing costs.

Decision

The claim is denied.

CATHERINE B. HYATT
Board Judge