

Board of Contract AppealsGeneral Services Administration
Washington, D.C. 20405

February 3, 2005

GSBCA 16519-RELO

In the Matter of MICHAEL BLAZIS

Michael Blazis, Howell, NJ, Claimant.

Randy Keuten, Supervisor, Travel Section, U.S. Department of Veterans Affairs,
Austin, TX, appearing for Department of Veterans Affairs.**BORWICK**, Board Judge.

Claimant, Michael Blazis, an employee of the Department of Veterans Affairs, agency, incident to his permanent change of station transfer, purchased a house in New Jersey. Claimant seeks reimbursement of \$2992 as a loan origination fee. The agency denied claimant reimbursement because it determined that the fee was a loan commitment fee and thus unallowable under the Federal Travel Regulation (FTR). The agency correctly concluded that the charge was a loan commitment fee, not a loan origination fee, and correctly applied the FTR. We therefore deny the claim.

Background

On November 17, 2003, claimant transferred in the interest of the Government from Washington, D.C., to Philadelphia, Pennsylvania. The agency authorized claimant reimbursement of real estate transaction expenses. Claimant sold his house in the suburbs of Washington and, on March 26, 2004, purchased a house in a New Jersey suburb of Philadelphia. Claimant incurred real estate transaction expenses in the purchase of his New Jersey residence, including \$2992 for what is described on the settlement sheet on line 811 as "Commitment fee 1% to Cendant [claimant's mortgage lender]." Line 801 of the settlement sheet for the loan origination fee was blank, since claimant was not charged a loan origination fee.

On or about August 20, 2004, claimant submitted a voucher for reimbursement of the real estate transaction expenses and requested reimbursement of the \$2992 as a "loan origination fee." In support of that position, claimant attached a letter from Cendant Mortgage which stated:

Please accept this letter as confirmation that the State of New Jersey, by law, refers to the origination fee as a commitment fee. [Claimant and spouse] were charged [a] 1 point commitment fee at the time of closing. I understand that per their employer's policy they will only cover an origination point. In this case, the origination point is equivalent to the commitment fee.

On or about September 7, 2004, after an agency audit of the voucher, the agency disallowed the requested reimbursement because it determined the commitment fee was a finance charge as defined by the Truth in Lending Act, 15 U.S.C. § 1605(a) (2000), and Regulation Z of the Federal Reserve System, 12 CFR pt. 226 (2003). The agency determined that, as reimbursement of the commitment fee was not covered by regulatory exception to the finance charge rule, reimbursement of the commitment fee was not allowed under 41 CFR 302-11.202(g) (2003).

Discussion

Under the FTR, any fee, charge, or expense determined to be a finance charge under the Truth in Lending Act or Regulation Z is non-reimbursable unless reimbursement is specifically authorized in 41 CFR 302-11.200. 41 CFR 302-11.202(g). A commitment fee charged by the lender to set aside funds for the borrower or as a "lock-in" fee that a borrower pays to bind the lender to make the mortgage is considered a finance charge under the Truth in Lending Act and Regulation Z. Rodney D. Hartleib, GSBCA 16421-RELO (Nov. 4, 2004) (citing David P. Brockelman, GSBCA 14604-RELO, 98-2 BCA ¶ 29,971). In contrast, a loan origination fee compensates the lender for administrative- type expenses incurred in originating and processing a loan and is reimbursable. 41 CFR 302-11.200(f)(2); Michael L. Rivera, GSBCA 16488-RELO (Nov. 10, 2004); Philip R. Merkel, GSBCA 14668-RELO, 98-2 BCA ¶ 30,094. Charges assessed in lieu of a loan origination fee and that reflect charges that are similar to those assessed in the loan origination fee are also reimbursable. 41 CFR 302-11.200(f)(2).

The question in this case is whether the \$2992 charge was an unallowable loan commitment fee, as was stated in the settlement sheet, or, as maintained by claimant and suggested by Cendant, the equivalent of the allowable loan origination fee. We are not bound by the characterization of the charge by the mortgage lender; we must look to the substance of the transaction and the charge. See Kenneth DeFazio, B-191038 (Nov. 28, 1978). In this case the substance of the transaction is defined by New Jersey law.

New Jersey law limits the type of fees mortgage lenders may charge. Statute provides:

a. Notwithstanding the provisions of any other law, a person licensed as a mortgage banker or correspondent mortgage banker, incidental to the origination, processing and closing of a mortgage loan transaction, shall have the right to charge only the following fees: (1) credit report fee; (2) appraisal fee; (3) application fee; (4) commitment fee; (5) warehouse fee; (6) fees necessary to reimburse the mortgage banker for charges imposed by third parties; and (7) discount points.

b. Notwithstanding the provisions of any other law, a person licensed as a mortgage broker, incidental to the brokering of a first mortgage loan

transaction, shall have the right to charge only the following fees: (1) application fee; and (2) discount points.

c. No person licensed as a mortgage banker, correspondent mortgage banker or mortgage broker may charge any fee either not expressly authorized by this section or authorized by the commissioner by regulation.

N.J. Stat. Ann. § 17:11C-23 (West, WESTLAW through 2004). The intent of the statute is to limit the fees licensed lenders may charge incidental to the origination, processing and closing of a mortgage loan transaction. Gulkowsky v. Equity One Inc., 821 A.2d 485, 513 (N.J. Super. 2003), rev'd on other grounds, 848 A.2d 747 (N.J. 2004).

In implementing the statute, the New Jersey Department of Banking defines a commitment fee as follows:

Commitment fee: Defined as a fee, exclusive of third-party fees, imposed by a lender as consideration for binding the lender to make a loan in accordance with the terms and conditions of its commitment and payable on or after acceptance of the commitment, except a lock-in fee charged pursuant to (a)5 below. The amount of any commitment fee shall be reasonably related to its purpose and may be based upon a percentage of the principal amount of the loan or the amount financed.

N.J. Admin. Code tit. 3 § 1-16.2(a)(4) (WESTLAW through 2004). The New Jersey Department of Banking allows mortgage lenders to charge third party fees that a lender incurs on behalf of the borrower. Those fees are separately listed at N.J. Admin. Code tit. 3 § 1-16.2(a)(7)(i)-(ix), but are not defined as part of an origination fee. Moreover, the Department of Banking will only approve third party fees that benefit the borrower and represent a cost not associated with the lender's overhead. Consequently, the "the Department will not approve fees for document preparation, processing, underwriting, file updates, lender reviews, copying, funding, and miscellaneous." Id. § 1-16.2(a)(7)(xv).

Clearly, in New Jersey the commitment fee is not merely a loan origination fee by another name. Under New Jersey law, the commitment fee is imposed on the borrower as consideration for binding the lender to make a loan, exactly the type of fee that is considered a finance charge incident to an extension of credit under the Truth in Lending Act and Regulation Z. Indeed, the New Jersey Administrative Code suggests that the loan origination fee that compensates a lender for its overhead administrative-type expenses is not permitted in New Jersey.

Although Cendant's charge for the loan commitment fee may, in New Jersey, generate for Cendant equivalent revenue to its charges for the loan origination fee in other states, the substance of the two fees differs considerably. Indeed, under New Jersey law, if Cendant had even desired to call the loan commitment fee a "loan origination fee," it would have had to "document to the Department that the fee fits the definition and description of a permissible fee" listed in the New Jersey Administrative Code. N.J. Admin. Code tit. 3 § 1-16.2(b).

Claimant has not demonstrated that the loan commitment fee was charged in lieu of the loan origination fee or that the loan commitment fee reflected charges that were similar

to those assessed by the loan origination fee and thus reimbursable under 41 CFR 302-11.200(f)(2).

Since claimant has not demonstrated that the \$2992 commitment fee he incurred in the purchase of his house is allowable, his claim must be denied.

ANTHONY S. BORWICK
Board Judge