



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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March 28, 2008

CBCA 890-RELO

In the Matter of JAMES L. THOMAS

James L. Thomas, Sassafras, KY, Claimant.

Stephen J. Allison, Engineer Trial Attorney, Louisville District, Army Corps of Engineers, Louisville, KY, appearing for Department of the Army.

**POLLACK**, Board Judge.

Mr. James L. Thomas, claimant, was relocated from Florida by the Corps of Engineers (agency). He purchased a home at his new duty station in Happy, Kentucky. He seeks reimbursement for three items that were denied by the agency. Those are:

Underwriting fee, which he describes as a fee required by his lender to determine if the loan could be approved (\$165);

Tax service fee, which he claims is not a tax, but a fee required by his lender to verify property taxes are paid each year (\$80); and

Termite inspection fee, which was incurred because the lender required him to provide a termite inspection to verify that the property was in good condition, so as to secure the mortgage (\$150).

The Board received Mr. Thomas's claim on August 28, 2007. Regarding the underwriting fee and tax fee, he stated that he did not see anywhere in the Joint Travel Regulations (JTR) where those types of fees were not reimbursable. Additionally, in support

of payment, he provided a transmittal, dated May 24, 2007, from his lender. The transmittal stated that the underwriting fee is charged by the lender to examine credit history, employment, appraisal and assets to determine if and how a loan should be approved; and that the tax service fee is a one-time fee charged by the investor to verify that the property taxes are paid each year. The lender then asserted, "Both of these charges are usual and customary in the mortgage loan field and is [sic] required by us." The lender made no comment as to the termite inspection charges.

After docketing the matter, the Board asked the agency for a response. The agency response, dated September 17, 2007, consisted of a summary as to each denial and then nine tabs of backup material. The relevant portions of that backup material are addressed below.

As to the underwriting fee and tax fees, the agency summary cited the Board to two decisions, *Craig A. Czuchna*, GSBCA 15799-RELO, 02-2 BCA ¶ 31,898, and *Daniel T. Mattson*, CBCA 654-RELO, 07-2 BCA ¶ 33,635, each of which the agency contended supported denial.

As to the termite inspection, the agency stated that fees of that nature could only be reimbursed if they were required by a lender or customarily paid by a buyer in the area of the sale. The agency continued that contacts with the Kentucky Board of Realtors revealed that the normal pest inspection fee in the area was \$150, which is paid by the seller. The agency continued that no proof was submitted by the claimant that this fee was required by the lender or customarily paid by the buyer in the area. The agency cited the Board to the GSBCA decision in *Susan J. Jackson*, GSBCA 16516-RELO, 05-1 BCA ¶ 32,912, to support its position on the termite inspection reimbursement.

Pertinent to the claim are several transmittals. The first is a transmittal dated May 23, 2007, from Ms. Debbie Case, agency paralegal specialist, to Mr. Thomas. There she advised him that the underwriting fee and tax service fee were not payable, citing JTR C14002-A.4.b(5). She further advised that according to the Kentucky Association of Realtors (KAR), pest inspections are typically paid by the seller. She continued, "It can be an allowable expense of the buyer, if it can be shown that it was a requirement of the lender." She then asked Mr. Thomas if he wanted to get a statement from the lender.

Mr. Thomas responded by transmittal dated May 24, 2007, stating that he had been told that only VA loans require the seller to pay for the pest inspection and all other loans require the buyer to pay. He asked her to confirm that with her contact at the KAR. In a separate transmittal on the same day, Mr. Thomas contended that he could not find provisions in the JTR denying the tax fee and underwriting fee. He also provided the agency

with an explanation to him from his lender representative, in the form of a transmittal dated May 24 (earlier identified above).

On June 4, 2007, the agency paralegal again communicated with Mr. Thomas. She told him that the KAR web site (kar.com), as well as the Louisville Association of Realtors (www.Louisville Realtors.com) web site, provided that pest inspection is typically paid by the seller of the home. She stated that without proof otherwise, this would not be an allowable expense. She then addressed the denial of the underwriting and tax fees, stating:

JTR C14002-A.4.5 states, “ Except as otherwise provided in par. C14002-A4a, the following items of expense are not reimbursable: . . . (5) no fee, cost, charge or expense determined to be part of the finance charge under the Truth in Lending Act, Title I, PL 9-321[sic], and Regulation Z issued in accordance with PL 90-321 by the Board of Governors of the Federal Reserve System, unless specifically authorized.”

Although no further transmittals were exchanged between the parties, there were two other relevant communications. The first was an undated memorandum of a telephone conversation between the paralegal and Mr. Carl Tackett, who Mr. Thomas identified as the President of the Kentucky Board of Realtors. The second was a conversation between Mr. Tackett and Mr. Thomas that was referenced in Mr. Thomas’s response to the Board of October 29, 2007. While it is not clear on what date the paralegal spoke with Mr. Tackett, it appears that Mr. Tackett telephoned the agency as to the termite matter at Mr. Thomas’s request. The memorandum reported that Mr. Tackett read to the paralegal that section of Mr. Thomas’s sales contract pertaining to the inspection. The section provided, “[B]uyer may obtain and pay for a wood destroying insect infestation inspection. . .” There was nothing further reported and specifically no reported statement by Mr. Tackett saying that the customary practice in the area was for a buyer to pay for termite inspections. As to the communication between Mr. Thomas and Mr. Tackett, Mr. Thomas asserted that he had personally spoken to Mr. Tackett, and that Mr. Tackett had told him that the buyer customarily pays for the pest inspection fee (except with a VA program contract). Mr. Thomas did not provide a date for the conversation nor did he provide a contemporaneous record of the discussion.

Finally, as part of the Board’s analysis, the Board went to the web sites that had been cited in the correspondence. The Board found no information on the Louisville site to support a conclusion either way as to whether the seller or buyer customarily secures the termite inspection. However, the KAR site clearly provides that the practice is for the seller to secure the inspection.

### Discussion

This Board and its predecessor on relocation cases, the General Services Board of Contract Appeals (GSBCA), have uniformly held that reimbursement of underwriting fees and tax service fees as part of purchase of a residence are not allowable. As this Board recently stated in *Daniel T. Mattson, supra*:

Underwriting fees have been held to be charges paid incident to and as a prerequisite to the extension of credit, and are thus not reimbursable.

07-2 BCA ¶ 33,635, at 166,582.

In its decision in *Mattson*, this Board cited *Shane Douthitt*, GSBCA 16819-RELO, 06-1 BCA ¶ 33,262, as authority. In *Douthitt*, the GSBCA had similarly held that an underwriting fee is considered to be part of the finance charge and therefore not reimbursable, citing *Willo D. Lockett*, GSBCA 16391-RELO, 04-2 BCA ¶ 32,722. *See also Czuchna; Virginia Wensley Koch*, GSBCA 16277-RELO, 04-1 BCA ¶ 32,625.

The GSBCA had also uniformly found that tax service fees were not reimbursable, identifying such charges being as part of the finance charge. As explained in *Czuchna*:

Tax service fees are generally charged by a lender to monitor tax assessments on mortgaged property. Underwriting fees are generally charged by a lender to cover the cost of having a loan underwritten. These fees are not usually denominated as finance charges on real estate transaction settlement sheets. Nevertheless, they are paid by the consumer and imposed by the creditor as incident to the extension of a mortgage loan (a form of credit). Consequently, they are “finance charges,” as that term is defined in the Truth in Lending Act and Regulation Z. Reimbursement of these fees is not specifically authorized in the FTR. The fees are therefore not reimbursable by the transferring Government agency. All of the Board decisions cited above [referring to citations in the decision] enunciate this holding.

02-2 BCA ¶ 31,898, at 157,594.

Fees such as underwriting and tax service fees have been distinguished from other fees associated with transfer of a residence, such as real estate brokerage fees, document preparation fees, and other similar transaction costs not associated with the extension of the credit. These latter fees are reimbursable. *Andreas Frank*, CBCA 557-RELO, 07-1 BCA ¶ 33,531, at 166,115; *Daniel T. Mattson*. The disputed fees in this case, however, are not

payable, because those types of fees have been ruled to be finance fees associated with the extension of credit.

The final item claimed by Mr. Thomas is the termite inspection costs. Under JTR C14002-A.4.a(11), a pest inspection fee would be reimbursable if it is (1) customarily paid by the purchaser, (2) is either required by law or as a precondition to financing, and (3) does not exceed the amount customarily paid in the locality. In *Susan J. Jackson, supra*, the GSBCA concluded that the agency was correct in denying a home inspection fee, citing JTR C14002-A.4.a(11). More specifically, the board reiterated that expenses in connection with property inspection (a category which includes pest inspection) can only be reimbursed where the expenses meet all three of the tests. Failure to meet any one of the tests makes payment unallowable.

Mr. Thomas is not entitled to reimbursement for termite inspection fees. As noted above, Mr. Thomas must meet all three criteria to secure reimbursement. In this case, we find that he has failed to meet the first condition, establishing that the fee is one customarily paid by the purchaser.

The nature of our handling relocation claims does not call for an extensive factual development to the level of taking testimony to resolve conflicting points of fact. We do not hold a hearing. We do allow and ask the parties to file support for their respective positions and consider that in making our decisions. In this case both Mr. Thomas and the agency provided additional support. Mr. Thomas, however, is the claimant, and it is he who bears the burden of proving that the customary practice in the Louisville area is to have the buyer pay for the termite inspection. What he has provided us as authority, we find to be at best inconclusive. We have no letter from Mr. Tackett, only Mr. Thomas's description of a reported conversation. We have a memorandum of the agency's representative's conversation with the same individual, Mr. Tackett, which indicates that Mr. Tackett took no specific position on what was customary and what was not, when speaking with the agency. We view that silence on what was customary to suggest that the matter of what is customary is not as absolute as reported by Mr. Thomas. We would have expected that if Mr. Tackett considered purchaser payment of termite inspection fees as a customary practice in Kentucky, he would have said so to the paralegal. Such a statement was not reflected in her memorandum. Finally, and particularly significant, the agency has cited us to the KAR web site, which provides that the inspection is the seller's responsibility. Based on the evidence presented to us, we do not find that claimant has established the needed requisite element for reimbursement, which is that the fee is one customarily paid by the buyer in this locale. Having failed to meet this element, we need go no further.

Decision

We deny the claim.

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HOWARD A. POLLACK  
Board Judge