DOCUMENT RESUME

C1927 - [A1232208]

[Reimbursement of Legal Fees Incurred in Protecting Bank's Interest in Loan Guaranteed by the Small Business Administration]. B-187950. April 26, 1977. 4 pp.

Decision re: Fidelity National Bank of Albuquerque; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Accounting and Financial Reporting (2800).
Contact: Office of the General Counsel: General Government Matters.
Budget Function: General Government: Central Fiscal Operations (803).
Organization Concerned: Small Business Administration.
Authority: B-176039 (1972). United States v. California, 332 U.S. 19, 39-40 (1947). Sholtwell v. United States, 163 F. Supp. 907,915 (E.D. Wash. 1958). United States v. Georgia Pacific Company, 421 F. 2d 92 (9th Cir. 1970). Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1917). United States v. Shaw, 137 F. Supp. 24, 28-29 (D. N.D. 1956).

Wilson I. Cooper, Authorized Certifying Officer, SBA, requested a decision as to whether the SBA may reimburse the bank for attorney's fees incurred in litigation to liquidate an SBA-guaranteed loan made by the bank. Since SBA neither contracted for nor benefited from the attorney's services, there was no authority for reimbursement. (RRS)

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DECISION

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

Grammer
GGM

FILE: B-187950 DATE: April 26, 1977

MATTER OF: Fidelity National Bank of Albuquerque

DIGEST: Bank may not recover from Small Business Administration (SBA) cost of legal fees incurred by Bank's private attorney in protecting Bank's 10 percent interest in SBA-guaranteed loan. Since SBA neither contracted for nor benefited from private attorney's services, there is no authority for reimbursement on contract or quasi-contract basis, and since no misrepresentation occurred, there is no authority for reimbursement on estoppel basis.

Mr. William I. Cooper, an authorized certifying officer of the Small Business Administration (SBA), requests an advance decision on whether the SBA may reimburse the Fidelity National Bank of Albuquerque, New Mexico, for attorney's fees incurred in the representation of the Bank's interest in litigation brought to liquidate an SBA-guaranteed loan made by the Bank.

The facts as contained in documents enclosed with the submission are as follows. The SBA and the Bank engaged a private attorney to protect their collateral in the loan in question for the period before the United States Attorney entered into the case to litigate. Apparently the attorney's fees for this period have been paid and are not in issue.

Upon receiving the Motion for Substitution of the United States Attorney, the private attorney notified the United States Attorney by letter dated July 10, 1973, as follows:

> "* * * Since you have moved to substitute, we see no reason for us to continue to incur costs against our client, Fidelity National Bank, and absen[t] some indication from you to the contrary, we will not appear, nor will we pursue this matter further, turning it over to you entirely by this letter."

The United States Attorney's response to this letter, dated July 27, 1973, appears to have given rise to the misunderstanding

that resulted in the Bank's legal fees now in dispute. The United States Attorney answered:

> "Various parties have objected to the United States' substitution for Fidelity National Bank unless I can assure them that the United States can answer various interrogatories concerning matters which appear to be solely within the knowledge of Fidelity National Bank. Since I cannot give the other parties that assurance, and since Fidelity National Bank apparently retains a 10% interest in this matter, I have concluded that the United States cannot properly seek to substitute for Fidelity. Therefore I shall be relegated to intervening in the now consolidated cases. I am enclosing a copy of my motion and complaint for intervention."

The SBA's District Director indicates that such a letter from the United States Attorney is "uncommon[:] * * * both in our experience and the Bank's experience on previous loans, such a letter has never been sent." The SBA's Regional Counsel explains that:

> "The message [the] * * * U.S. Attorney * * * intended to convey was that he could not represent the bank in several suits initiated against them by certain principals of * * * [the debtor company]."

Whatever the intent of the United States Attorney's letter, the Bank interpreted it to mean that its 10 percent interest in the recovery would not be represented unless the private lawyer were retained. Thus, although the services of the private attorney may in fact have been unnecessary, the Bank incurred $3,574.14 in legal fees. The Bank now demands that the United States contribute $3,216.73, representing the Government's 90 percent interest in the loan, toward these private attorney's fees.

It is clear from the record that the interests of the United States were adequately represented by the United States Attorney throughout the litigation. The Bank, acting upon its own initiative, retained the private lawyer solely to protect its own interests. Thus, it appears that the Government neither contracted for nor

benefited from the private attorney's services during the litigation. Accordingly, SBA has no legal authority to pay the Bank's legal fees in this case.

Although the loan guaranty agreement provides that the holder (here, the SBA) has the responsibility of loan servicing and that reasonable expenses of making, servicing, and liquidating a guaranteed loan that are not recoverable from the borrower "shall be shared ratably by Lender and SBA in accordance with their respective interests," this does not authorize Government payment of expenses incurred unilaterally by the Bank. The SBA fulfilled its obligations under the contract by retaining the United States Attorney to liquidate the loan. Moreover, because the SBA neither accepted nor benefited from the services of the lawyer for the Bank, no recovery of the private attorney's fees can be made on a quasi-contract or quantum meruit basis. See, e.g. B-176039, July 13, 1972.

It is the opinion of the SBA's Regional Counsel, apparently on the theory of equitable estoppel against the Government, that the Bank should be reimbursed. He states in a memorandum to the SBA Regional Director, dated June 20, 1975--

> "All in all, the confusion was a misunderstanding on the part of the bank which may reasonably be concluded to have arisen because of actions or inactions on the part of SBA or its agent, which equity would demand that we redress. As a result, the equitable thing would be to bear our share of the burden which would be 90% of the cost incurred."

The courts have traditionally been reluctant to apply the doctrine of estoppel against the Federal Government or one of its agencies, and have generally held that the Government is not subject to the same rules of estoppel as are private parties. See United States v. California, 332 U.S. 19, 39-40 (1947); Shotwell v. United States, 163 F. Supp. 907, 915 (E.D. Wash. 1958); but see United States v. Georgia Pacific Company 421 F. 2d 92 (9th Cir. 1970). This attitude on the part of the courts is based largely on the rationale, set forth in Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917) that:

> "* * * the United States is neither bound nor estopped by acts of its officers or

> agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit * * *."

Furthermore, the facts in the record do not support an estoppel argument in this case. Estoppel has been defined as follows:

> "To constitute an equitable estoppel there must exist a false representation or concealment of facts made with knowledge, actual or constructive, and the party to whom it was made must have been without knowledge or means of knowledge of the real facts. * * *" United States v. Shaw, 137 F. Supp. 24, 28-29 (D. N.D. 1956).

While the United States Attorney's letter and the SBA's handling of the matter may have contributed to the misunderstanding that resulted in this claim, it is evident that no misrepresentation took place. The Bank realized from the outset that it was retaining a private attorney to protect only its own interests at no benefit to the SBA. That determination to retain counsel was a matter of judgment to be decided by the Bank and its lawyer alone. Additionally, there was never any indication from Government officials that the United States would reimburse the Bank for the Bank's legal fees.

In light of the above, there is no authority for reimbursement of the Fidelity National Bank's legal fees. Accordingly, the voucher may not be certified for payment.

R. F. Keller

Deputy Comptroller General
of the United States