UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

March 29, 2016

CBCA 5082-RELO

In the Matter of THOMAS D. MARTIN

Thomas D. Martin, San Diego, CA, Claimant.

Kim A. Darling, Director, Finance Office/Comptroller, National Oceanic and Atmospheric Administration, Department of Commerce, Germantown, MD, appearing for Department of Commerce.

DRUMMOND, Board Judge.

Thomas D. Martin, an employee of the National Oceanic and Atmospheric Administration (NOAA), seeks review of the denial of his claim for reimbursement of $9000 in real estate expenses incurred pursuant to a permanent change of station move. For the reasons explained below, we sustain the agency's decision and deny the claim.

Background

Mr. Martin sold his home in Virginia Beach, Virginia, as a result of a directed reassignment to San Diego, California. In the negotiations for this sale, the buyer requested that Mr. Martin pay $9000 in closing costs. Mr. Martin states that his realtor advised him that it was customary in Virginia Beach for a seller to pay closing costs and prepaid expenses. Mr. Martin also states that he consulted with NOAA's Western Operations Branch relocation office and was advised that he could only be reimbursed for any specific reimbursable expenses outlined in the Federal Travel Regulation (FTR), chapter 302-11. Mr. Martin and the buyer executed a contract for the sale in which Mr. Martin agreed to "pay $9000 towards buyer[']s closing costs." Line 509 of the Department of Housing and Urban Development (HUD) settlement agreement (HUD-1) for the sale showed "seller paid closing

costs" in the amount of $9000, and line 209, which showed amounts paid by or on behalf of the borrower, similarly stated that "seller paid closing costs" in the amount of $9000. The HUD-1 provided no information as to what specific costs were included in the $9000.

Subsequently, Mr. Martin submitted a claim for costs related to the sale of his home, which included $9000 in closing costs that were charged to the buyer. The agency determined that Mr. Martin had not shown that payment of the buyer's closing costs at issue in this case was customary and denied that portion of his claim. Mr. Martin appealed to the agency. In support of his claim, Mr. Martin produce a letter from his title attorney which states the $9000 represents the following on the HUD-1: "Line 803, Adjusted Origination, $6275," "Line 805, Credit Report, $36.12," and "Line 1101, Title Services and Lender's Title Insurance, $2,688.88." All of these expenses are shown as paid from the borrower's funds at settlement.

Mr. Martin also produced two additional letters, one from his title insurance company and one from his realtor. Both letters propound that in the Hampton Roads community, a buyer's closing costs are customarily paid by the seller. The letter from the title insurance company states, *inter alia*, that "it is customary for the seller to pay closing costs" and 3% to 4% of the sales price is the standard in 99% of all transactions in this area." The letter from Mr. Martin's realtor states, *inter alia*, that "in the Hampton Roads market most if not all my buyers' closing costs are paid." Neither letter was supported by any hard data or specific evidence.

On reconsideration of his claim, the agency explained that under FTR 302-11, an employee may be reimbursed for certain residence transaction expenses provided the expenses are "customarily" paid by the seller. The agency was not persuaded by Mr. Martin's documents. The agency noted that these were normal and customary fees for a buyer, and any agreement for Mr. Martin to pay these fees did not amount to reimbursable costs under the FTR 302-11. The agency determined that Mr. Martin had failed to show that payment of those closing costs was customary and denied his claim. Mr. Martin appealed to the Board. Mr. Martin has offered no new evidence or arguments in support of his claim.

Discussion

Mr. Martin contends that as part of the agreement to sell his home, he paid the buyer's closing costs in the amount of $9000, and that he should be reimbursed for those closing costs. Under the FTR, which is applicable in this case, the seller of a residence is entitled to reimbursement for those costs that are "customarily charged to the seller of a residence in the locality of the old official station." 41 CFR 302-11.200 (2015).

This Board has long recognized 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*, GSBCA 13704-RELO, 97-1 BCA ¶ 28,701 (1996)). The claimant must prove by a preponderance of the evidence that a buyer's closing costs are "customarily" paid by the seller in the community where the residence is located. *Charity Hope Marini*, CBCA 4760-RELO, 16-1 BCA ¶ 36,192, at 176,574 (2015). This burden may be met by showing "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." *Id.* at 176,575. On the other hand, "[l]etters 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." *Id.*

Here, Mr. Martin has not met his burden. The assertion in the letter from his title insurance company is not supported by any hard or specific evidence of sales in the community over a period of time. Without reference to a specific and substantial period of time or facts to support the assertion, the Board is not persuaded. In *Brian B. Cooper*, GSBCA 14269-RELO, 98-1 BCA ¶ 29,427, at 146,148 (1997), the General Services Board of Contract Appeals accepted a letter from the claimant's real estate agent explaining the seller's credit for closing costs was the type of credit "paid by sellers in [ninety percent] of residential sales transactions for approximately five years" as evidence of custom. Here, unlike in *Cooper*, the document from the title insurance company did not reference a period of time, let alone a *substantial* period of time, and is therefore insufficient as evidence of custom. *See also Joseph H. Molton*, CBCA 2572-RELO, 12-1 BCA ¶ 34,930, at 171,748 (finding data provided by two realtors, one with only two years of data and one based upon experience from an undefined period, was insufficient to meet claimant's burden of proof).

The assertion the local realtor's letter also does not persuade us that the seller's payment of the buyer's closing costs was customary in Virginia Beach. The assertion is too general and conclusive, and does not suffice to establish the practice is customary.[1]

Accordingly, the agency's determination is sustained.

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[1] Attached to the realtor's statement are several web-links to various blogs, forums, and advice columns on the topic of seller-paid closing costs. The Board does not find these web-links to be the sort of "concrete data" sufficient to support the realtor's assertion.

Decision

The claim is denied.

JEROME M. DRUMMOND
Board Judge