



Office of Appeals
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of:

Joseph Sotello,

Petitioner

HUDOA No. 10-H-CH-LL75
Claim No. 7-708821540B

Joseph Sotello
4242 Lynd Avenue
Arcadia, CA 91006-5834

Pro se

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For the Secretary

DECISION AND ORDER

Petitioner was notified that, pursuant to 31 U.S.C. §§ 3716 and 3720A, the Secretary of the U.S. Department of Housing and Urban Development ("HUD" or "the Department") intended to seek administrative offset of any federal payments due to Petitioner in satisfaction of a delinquent and legally enforceable debt allegedly owed to HUD.

Petitioner made a request for a hearing concerning the existence, amount or enforceability of the debt allegedly owed to HUD. The administrative judges of the Office of Appeals have been designated to conduct a hearing to determine whether the debt allegedly owed to HUD is legally enforceable. 24 C.F.R. §§ 17.152, 17.153. As a result of Petitioner's hearing request, referral of the debt to the U.S. Department of the Treasury for administrative offset was temporarily stayed by this Office on March 9, 2010 until the issuance of a written decision by the administrative judge. 24 C.F.R. § 17.156.

Background

The Secretary holds a Note and a Deed of Trust, dated June of 1996, that were used to secure the financing of certain repairs to a home the Secretary believes Petitioner previously owned that is identified as 1057 Morada Place, Altadena, California ("the Property"). (Secretary's Statement ("Sec'y Stat."), filed June 29, 2010, ¶ 1, Ex. A; Ex. 1, Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center of HUD ("Dillon Decl."), dated March 17, 2010, ¶¶ 3-4.) Petitioner's signature appears on both the Note and the Deed of Trust, and the Notary Public has attested to the fact that Petitioner presented satisfactory evidence of being the person whose name is subscribed on the Deed of Trust. (Sec'y Stat., ¶ 1, Ex. A; Dillon Decl., ¶ 3.) After default by Petitioner, the Note and the Deed of Trust were assigned to HUD by First Trust of NY, NA, under the regulations governing the Title I Insurance Program. (Dillon Decl., ¶ 3.)

A June 24, 1996 title report ("Title Report") prepared by Southland Title Corporation indicates that Petitioner was the owner of the Property by virtue of a Deed recorded on March 5, 1996. (Sec'y Stat., ¶ 2, Ex. B; Dillon Decl., ¶ 4.) The Title Report further indicates that Petitioner had encumbered the Property with a deed of trust to Long Beach Mortgage Company recorded March 5, 1996, and a deed of trust to Mortgage Plus Incorporated recorded on June 20, 1996. (Sec'y Stat., ¶ 3, Ex. B; Dillon Decl., ¶ 4.)

HUD has attempted to collect on the Note from Petitioner, but Petitioner remains delinquent. (Sec'y Stat., ¶ 13; Dillon Decl., ¶ 6.) The Secretary has filed a Statement with documentary evidence in support of his position that Petitioner is indebted to HUD in the following amounts:

- (a) \$24,965.00 as the unpaid principal balance as of February 28, 2010;
- (b) \$9,529.88 as the unpaid interest on the principal balance at 5.0% per annum through February 28, 2010; and
- (c) interest on said principal balance from March 1, 2010 at 5.0% per annum until paid.

(Sec'y Stat., ¶ 14; Dillon Decl., ¶ 6.) A Notice of Intent to Collect by Treasury Offset ("Notice of Intent") dated January 27, 2010 was sent to Petitioner. (Dillon Decl., ¶ 11.) Treasury Offsets occurred and were posted to Petitioner's debt on March 5, 2001, March 24, 2006, April 21, 2006 and July 21, 2006, with the total amount offset being \$7,822.56. (Sec'y Stat., ¶ 8; Dillon Decl., ¶ 8.) Pursuant to Petitioner's request, HUD forwarded a copy of all records related to this debt on September 16, 2008. (Sec'y Stat., ¶ 9, Ex. F; Dillon Decl., ¶ 9.)

Discussion

The Deficit Reduction Act of 1984, 31 U.S.C. § 3720A, provides Federal agencies with a remedy for the collection of debts owed to the United States Government. Petitioner bears the initial burden of submitting evidence to prove that the debt is not past due or legally enforceable. 24 C.F.R. § 17.152(b); *Juan Velazquez*, HUDBCA No. 02-C-CH-CC049 (September 25, 2003).

Petitioner contends that the debt is unenforceable because: 1) he was a victim of identity theft; and (2) his signature was forged.

First, Petitioner claims that the alleged debt is unenforceable against him because he was a victim of identity theft. Petitioner states, "This debt is not mine, and I intend to present evidence that will vindicate me. This is just one of many cases involving [i]dentity theft that I have been trying to correct for many years." (Petitioner's Request for a Hearing ("Pet'r Hr'g Req."), filed March 8, 2010.) Petitioner further states the following:

This Case dates back to 1996, at which time my Identity was used without Authorization or Consent, to not only purchase a house, but also to secure a Home Improvement Loan. During this entire period of time, I have lived at 4242 Lynd Ave., Arcadia, CA 91006. I not only didn't receive the Proceeds Check in question, I certainly never cashed it. . . As a Victim of Identity Theft in this Case, I am not Obligated for any Bills associated with the house in question, Located at 1057 Morada Place, Alta Dena CA. [sic]

(Petitioner's Motion to Dismiss ("Pet'r Mot."), filed July 16, 2010.)

As support, Petitioner filed two "Report Memos" indicating he reported incidents of identity theft with the County of Los Angeles Sheriff's Department on February 10, 2004 and April 12, 2008; credit reports from Experian and Equifax printed on various dates; letters from Experian, Equifax, banks and creditors indicating that Petitioner placed a fraud alert on his credit file maintained by the credit reporting agencies; Petitioner's signed affidavit stating that he is a victim of identity theft; an affidavit from Petitioner's landlord, dated July 11, 2010, stating that Petitioner had been a tenant at 4242 Lynd Ave., Arcadia, CA 91006 since December 1995; and Petitioner's children's school records from 1993 to 1994 and from 2001 to 2003, allegedly submitted to prove Petitioner's residence at 4242 Lynd Ave. (Pet'r Hr'g Req.; Pet'r Evid.; Pet'r Mot., Attach.)

In response, the Secretary contends that "Petitioner's claim of identity theft is not meritorious" because: (1) the Note and the Deed of Trust were signed by Petitioner, and the Deed of Trust was notarized; (2) the Title Report indicates that Petitioner was the owner of the Property in question; and, (3) the alleged identity theft was not timely reported. (Sec'y Stat., ¶ 5.)

With regard to the issue that the Note and the Deed of Trust were allegedly signed by Petitioner, the Secretary states that, "While Petitioner alleges that he is the victim of identity theft and that he never owned this home, his signature appears on both the Note and the Deed of Trust, and the Notary Public has attested to the fact that Petitioner presented satisfactory evidence of being the person whose name is subscribed on the Deed of Trust." (Sec'y Stat., ¶ 1, Ex. A; Dillon Decl., ¶ 3.) The Secretary adds that Petitioner "has not explained away how a Notary Public validated his signature" (Sec'y Stat., p.5.) As support, the Secretary submitted copies of the Note, Deed of Trust, and the Federal Truth in Lending Statement signed by Petitioner in the process of obtaining his HUD insured loan. (Sec'y Stat., ¶ 5, Ex. A and D; Dillon Decl., ¶ 5.)

The Secretary further disputes Petitioner's claim of identity theft by stating that the Title Report signed by Petitioner indicates that Petitioner was the owner of the Property by virtue of a deed recorded in his favor on March 5, 1996. (Sec'y Stat., ¶ 2; Dillon Decl., ¶ 4.) According to the Secretary, prior to obtaining the HUD insured loan, the Title Report also indicates that Petitioner had "encumbered the property commonly known as 1057 Morada Place, Altadena, California with a deed of trust used to secure an indebtedness of \$263,500.00 to Long Beach Mortgage Company... The date of the recording of this security instrument is reported as being recorded on March 5, 1996." (Sec'y Stat., ¶ 3, Ex. B; Dillon Decl., ¶ 4, Ex. 1.) The security instrument used to secure this transaction is shown to have been recorded on June 20, 1996. (Dillon Decl., ¶ 4, Ex. 1.) The Secretary also asserts that "a billing statement from Long Beach Mortgage to Petitioner listing his address as 1057 Morada Place" further supports the Secretary's position that "Petitioner did, in fact, reside at the [P]roperty." (Sec'y Stat., ¶ 5, Ex. C; Dillon Decl., ¶ 5.) As support, the Secretary submitted copies of the Title Report and billing statement from Long Beach Mortgage Company.

Additionally, with regards to Petitioner's claim of identity theft, the Secretary argues that "no appeal related to identity theft was raised at that time and the matter was referred to the Department of the Treasury on December 14, 1998. (Sec'y Stat., ¶ 7; Dillon Decl., ¶ 7, Ex. 1.) The original Notice of Intent was mailed to Petitioner on October 6, 1998. (Sec'y Stat. ¶ 6, Ex. E, Attached DCMS Case History). Furthermore, "Treasury Offsets occurred on March 5, 2001, March 24, 2006, April 21, 2006 and July 21, 2006, with the total amount offset being \$7,822.45, however[,] Petitioner did not raise the issue of identity theft until September of 2008." (Sec'y Stat., ¶ 8; Dillon Decl., ¶ 8.) "Despite these offsets, Petitioner did not contact HUD and allege identity theft with regards to this debt until September 2008. " (Dillon Decl., ¶ 8.) further claims that:

On September 16, 2008, Debt Servicing Representative Scott Strock provided Petitioner with a copy of HUD's records related to this debt. Petitioner responded via email on October 15, 2008 referencing a settlement agreement. Mr. Strock responded to Petitioner via email on October 16, 2008 indicating that HUD would continue to pursue collections of the debt as Petitioner had provided no evidence to support his allegation of identity theft.

(Sec'y Stat., ¶ 8.)

The Secretary finally states:

Petitioner has not explained why he waited for two years to file an identity theft report after taking out a primary mortgage in February of 1996 and a Title I Home Improvement Loan secured by the very same property four months later. If Petitioner was truly the victim of identity theft and never lived in the subject property, it seems logical that the primary mortgage that secured the purchase money financing in the amount of \$263,000.00 would

have been foreclosed upon and any issues related to identity theft would have been resolved in the foreclosure action.

(Sec'y Stat., p.5.)

As support, the Secretary submitted copies of: 1) the letter, dated September 16, 2008, that was mailed to Petitioner in response to his request for copies of documents related to the subject claim; 2) the e-mail from Petitioner, dated October 15, 2008, to the Debt Servicing Representative of HUD's Financial Operations Center regarding the subject of settlement; and, 3) the e-mail response to Petitioner from the Debt Servicing Representative of HUD's Financial Operations Center, dated October 16, 2008. The Secretary also provided a copy of a letter dated January 29, 2009 to Petitioner in which Petitioner was instructed by the Director of HUD's Asset Recovery Division on what to submit to the Director in order to prove Petitioner's claims of identity theft as well as forgery.

Upon a careful examination of the record, this Office is not fully persuaded that the alleged debt is unenforceable against Petitioner based on Petitioner's claim of identity theft. Petitioner has not established, by a preponderance of the evidence, that he was a victim of identity theft at the time that he signed the loan documents related to the debt that is the subject of this proceeding. After reviewing further the documentary evidence submitted by Petitioner, the record shows that Petitioner produced a handwritten letter signed by Cheng Ling Hsu that states "Joe Soletto [sic] has been our tenant at 4242 Lynd Ave. Arcadia CA 91006 since December 1995." (Petitioner's Brief in Response to Secretary's Statement (Pet'r's Brief), filed July 16, 2010, Attach.) This letter, alone, does not constitute proof that Petitioner was a victim of identity theft with regard to the alleged debt in this case. At a minimum, the letter might prove that Petitioner resided at a location different from the property that is the subject of the alleged debt, but, beyond location of Petitioner's residence it offers no additional proof that Petitioner is released from his legal obligation to pay the alleged debt because his residential address now differs from Petitioner's residential address at the time he signed the Note related to the alleged debt. The school records of Petitioner's children submitted by Petitioner in order to prove that his residence was 4242 Lynd Avenue, from 1993-1994 and from 2001 to 2003, are also insufficient to prove that Petitioner was a victim of identity theft at the time that he signed the loan documents related to the alleged debt.

In addition, Petitioner's submission of copies of credit reports from Experian, Equifax, banks, and creditors indicated that Petitioner placed a fraud alert on his credit file does not constitute proof that he was a victim of identity theft and not actually the person who signed to loan documentation related to the debt that is the subject of this proceeding. According to 15 U.S.C.A. § 1681c-1(a)(1):

(a) One-call fraud alerts

(1) Initial alerts

Upon the direct request of a consumer, or an individual acting on behalf of or as a personal representative of a consumer, who asserts in good faith a suspicion that the consumer has been or is about to become a victim of fraud or related crime, including identity theft, a consumer reporting agency described in section 1681a(p) of this title that maintains a file on the consumer and has received appropriate proof of the identity of the requester shall--

- (A) include a fraud alert in the file of that consumer, and also provide that alert along with any credit score generated in using that file, for a period of not less than 90 days, beginning on the date of such request, unless the consumer or such representative requests that such fraud alert be removed before the end of such period, and the agency has received appropriate proof of the identity of the requester for such purpose;....

(Emphasis added.)

Under § 1681c-1(a)(1), Petitioner's request to include a fraud alert in his file is a direct request of Petitioner based upon Petitioner's suspicion as the consumer that he has been, or is about to become, a victim of fraud or identity, but such suspicion does not constitute proof, by a preponderance of the evidence, that identity theft actually exists.

The Secretary, on the other hand, presented copies of the Note, the Deed of Trust and the Truth in Lending Statement, all of which were signed by Petitioner. The Deed of Trust was properly notarized to show that Petitioner actually signed the documents in the process of obtaining the subject debt. In California, the notarized signature of Petitioner on the Deed of Trust gave rise to the presumption that the signature was authentic. *See* Cal. Evid. Code § 1451¹. *See also Butler v. Encyclopedia Britannica, Inc.*, 41 F.3d 285, 294-95 ("A notary public's certificate of acknowledgment, regular on its face, carries a strong presumption of validity."). As a result, the Deed of Trust that Petitioner signed, and that was attested to by a Notary Public, is presumed to be valid and, thus, Petitioner remains legally bound by the terms and conditions of the Deed of Trust. The Title Report and the billing statement also show that Petitioner was the owner of the property at 1057 Morada Place and the original mortgagor with respect to that property.

As a final point, Petitioner had an opportunity to report the alleged identity theft with respect to the subject debt from the date that the Note was allegedly signed by another person on June 5, 1996, until the date the original Notice of Intent was mailed to Petitioner on October 6, 1998. (See Sec'y Stat., Ex. A and Ex. E.) The record also shows that four Treasury Offsets occurred on March 5, 2001, March 24, 2006, April 21, 2006 and July 21, 2006, but there is no evidence in the record that Petitioner objected to these offsets collected on those dates, or raised the issue of identity theft with HUD until September, 2008. (Sec'y Stat., ¶ 8; Dillon Decl., ¶ 8.) The record further shows that Petitioner did not file a police report with the local police until February 10, 2004, and again on April 12, 2008. (*Id.*) But, even the Petitioner's "Report Memos" with the County of Los Angeles Sheriff's Department did not establish, as a result of an extensive investigation, a nexus between Petitioner's alleged incident of identity theft to the debt that is the subject of this proceeding. Therefore, without evidence from Petitioner that sufficiently rebuts or refutes the evidence submitted by Secretary, Petitioner's claim of identity theft fails for lack of sufficient and credible evidence.

¹ Cal. Evid. Code § 1451 provides: A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with Section 1180) of Chapter 4, Title 4, Part 4, Division 2 of the Civil Code.

Second, Petitioner contends that the debt is unenforceable because his signature was forged on the Note. Petitioner states that he “did not sign the [d]ocuments, and the signature purporting to be [Petitioner’s] signature on the documents is a forgery.” (Petitioner’s Documentary Evidence (“Pet’r Evid.”), filed June 22, 2010.) As support, Petitioner submitted a signed Affidavit, in which he states that he “did not sign the [d]ocuments, and the signature purporting to be [Petitioner’s] signature on the documents is a forgery.” (Pet’r Evid.)

In response, the Secretary asserts that “Petitioner[] bear[s] the initial burden of submitting evidence to prove that the debt is not past-due or legally enforceable,” but “has not met his burden of proof with respect to demonstrating that his signature was forged[,] or presented any other credible argument with respect to the debt not being past due and legally enforceable.” (Sec’y Stat., pp.4-5.) The Secretary further states, “[I]n addition to not submitting an expert handwriting analysis, Petitioner has not filed any documentary evidence that suggests that his signature on the Note acknowledging indebtedness to HUD has been forged. . . . He has not explained away how a Notary Public validated his signature” (*Id.* at p.5.) The Secretary states, “Despite an invitation by the Secretary to do so, Petitioner has not explained how his name came to be listed as owner of record and the original mortgagor with respect to the [P]roperty that is the subject of this appeal,” and that Petitioner has not “explained what corrections were made to remove his name from ownership of the [P]roperty” (Sec’y Stat., p.5.)

On August 19, 2010, Petitioner was specifically ordered to submit:

- copies of any police report or other proof that Petitioner reported the alleged forgery involved in this case to law enforcement authorities or to the lender;
- expert analysis and written opinion of Petitioner’s handwriting and the disputed signature on the loan agreement;
- copies of any complaint or civil actions filed in a court by Petitioner involving the alleged forgery of his name on the HUD note that is the subject of this proceeding;
- a copy of the entire promissory note allegedly signed by Petitioner.

Other than the Petitioner’s affidavit alleging forgery, Petitioner failed to provide this Office with the necessary documentation that proves Petitioner’s signature on the Note was forged. Petitioner’s affidavit, alone, does not sufficiently prove Petitioner’s allegation of forgery.

This Court has previously addressed the standard for ascertaining the authenticity of an alleged forgery in *Justito Poblete*, a case in which the Petitioner raised forgery as a defense against the enforceability of the debt. *Justito Poblete*, HUDBCA No. 98-A-SE-W302 (April 30, 2001). In *Justito*, the administrative judge stated: “This Board [Court] must ascertain if Petitioner’s signature is authentic on the . . . Note to the extent that Petitioner is legally bound by his apparent signature.” *Justito* at 2. “This Board [Court] must reach its finding by examining the evidence in the record of this proceeding and determining if Petitioner can establish, by a preponderance of the credible evidence, his proposition that he did not execute the . . . Note at issue.” *Id.* The Petitioner in *Justito* provided documentary evidence in support of forgery, but the evidence was insufficient for a determination of forgery due to the lack of “documentation of an expert analysis comparing Petitioner’s signature on the note with the submitted specimens.”

Id. at 6. Administrative judges are not handwriting experts, and thus, must depend on the scientific testimony of experts in order to find that a forgery has occurred.

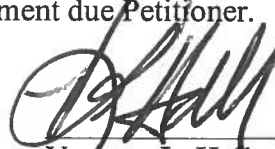
Without an expert analysis comparing Petitioner's signature on the Note with other specimens, a conclusive decision in Petitioner's favor cannot be made due to lack of evidence. Consistent with *Justito*, this Court finds that Petitioner has failed to rebut the presumption of authenticity of his signature on the Note, and also has failed to produce evidence to establish that his signature on the Note was forged.

ORDER

For the reasons set forth above, I find that Petitioner has failed to submit the documentary evidence necessary to establish that all or part of the debt is either unenforceable or not past due based upon Petitioner's claims of identity theft or forgery. I further find that the debt is enforceable against Petitioner in the amount claimed by the Secretary.

The Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative offset is **VACATED**. It is hereby

ORDERED that the Secretary is authorized to refer this matter to the U.S. Department of the Treasury for administrative offset of any payment due Petitioner.



Vanessa L. Hall
Administrative Judge

April 8, 2011