



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

In the Matter of:

Randall Dowdy,
Petitioner

HUDOA No. 10-H-NY-AWG13
Claim No. 721000762

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Pro se

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For the Secretary

DECISION AND ORDER

On November 3, 2009, Petitioner requested a hearing concerning a proposed administrative wage garnishment relating to a debt allegedly owed to the U.S. Department of Housing and Urban Development ("HUD"). The Debt Collection Improvement Act of 1996, as amended (31 U.S.C. § 3720D), authorizes federal agencies to use administrative wage garnishment as a mechanism for the collection of debts owed to the United States Government. The Office of Appeals has jurisdiction to determine whether Petitioner's debt is past due and legally enforceable pursuant to 24 C.F.R. § 17.170(b).

The administrative judges of this Office have been designated to determine whether the Secretary may collect the alleged debt by means of administrative wage garnishment if the debt is contested by a debtor. This hearing is conducted in accordance with the procedures set forth at 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.170. The Secretary has the initial burden of proof to show the existence and amount of the debt. 31 C.F.R. § 285.11(f)(8)(i). Petitioner, thereafter, must show by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. 31 C.F.R. § 285.11(f)(8)(ii). In addition, Petitioner may present evidence that the terms of the repayment schedule are unlawful, would cause a financial hardship

to Petitioner, or that collection of the debt may not be pursued due to operation of law. Id. Pursuant to 31 C.F.R. § 285.11(f)(4) and (10), on November 4, 2009, this Office stayed the issuance of a wage withholding order until the issuance of this written decision, unless a wage withholding order had previously been issued against Petitioner.

Background

In or about February 2002, the HUD-insured loan on Petitioner's home was in default, and Petitioner was threatened with foreclosure. (Secretary's Statement ("Sec'y Stat."), filed December 30, 2009 ¶ 2; Declaration of Brian Dillon, Director, Asset Recovery Division, HUD's Financial Operations Center ("Laurent Decl."), ¶ 2-3, dated December 17, 2009.) To prevent the lender from foreclosing, HUD advanced funds to Petitioner's lender to bring the primary note current. (Sec'y Stat., ¶ 3; Dillon Decl., ¶ 4.) In exchange for foreclosure relief, on February 12, 2002, Petitioner executed a subordinate Mortgage and Note in the amount of \$3,437.52 in favor of the Secretary. (Sec'y Stat. ¶ 4, Ex. B.) "On or about May 26, 2006, the FHA insurance on Petitioner's primary note was terminated when the lender notified the Secretary that the Note was paid in full." (Sec'y Stat., ¶ 6.)

The Secretary has filed a Statement in support of his position that Petitioner is currently in default on the Note and is indebted to the Secretary in the following amounts:

- (a) \$3,352.00 as the unpaid principal balance as of November 30, 2009;
- (b) \$268.08 as the unpaid interest on the principal balance at 4% per annum through November 30, 2009; and
- (c) interest on said principal balance from December 1, 2009 at 4% per annum until paid.

(Sec'y Stat., ¶ 7; Dillon Decl., ¶ 6.)

However, Petitioner has not entered into a written repayment agreement pursuant to the October 15, 2009 notice. Therefore, the Secretary proposes a repayment schedule of \$100.00 per month which will liquidate the debt in approximately three years, or 15% of the Petitioner's disposable pay. (Sec'y Stat., ¶ 7; Dillon Decl., ¶ 9.) A Notice of Federal Agency's Intent to Initiate Administrative Wage Garnishment Proceedings dated October 15, 2009 was sent to Petitioner. (Id., ¶ 15; Dillon Decl. ¶ 15.) In accordance with 31 C.F.R. § 285.11 (e)(2)(ii), Petitioner was afforded an opportunity to enter into a written repayment agreement on terms acceptable to the Secretary. Petitioner did not enter into a repayment agreement based on the October 15, 2009 letter.

Discussion

Petitioner challenges the existence of the alleged debt and claims "I had title insurance. The home was sold and the new owners was [sic] issued a title free and clear. This is not a valid det." (Petitioner's Request for Hearing, dated October 21, 2009.) As support, Petitioner

submitted a copy of the Notice of Intent to Initiate Administrative Wage Garnishment Proceedings and a copy of the Full Transaction History. Petitioner has failed, however, to provide the necessary documentation in support of his claim that the debt does not exist.

The Secretary contends, on the other hand, that the alleged debt does exist and is owed in full amount as claimed by the Secretary. Citing Florida Statute § 673.3091, the Secretary is entitled to enforce the terms of the February 12, 2020 Note despite the fact that the Note was lost. More specifically, the Secretary states that Florida Statute § 673.3091, provides that:

1) A person not in possession of an instrument is entitled to enforce the instrument if:

(a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred...

(b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and

(c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

Fla. Stat. § 673.3091(1)(a)-(c) (LEXIS through 2009 Legis. Sess.)

As proof of the terms of the instrument in question, the Secretary states that “[t]he terms of the Note are set forth in the Lost Note Affidavit and Dillon Declaration, and are supported by the Subordinate Mortgage.” (Sec’y Stat., ¶ 13.) The Secretary is unable to produce the Note in the amount of \$3,437.52, because its whereabouts cannot be determined. However, the Note was never transferred or assigned by HUD, nor was it lawfully seized from HUD. (Sec’y Stat., ¶ 8; Dillon Decl. ¶ 5.) Although its whereabouts cannot be determined, there is no question that the Note was executed by Petitioner. (Sec’y Stat. ¶9.) The Secretary contends that the Subordinate Mortgage executed by Petitioner states: “This debt is evidenced by Borrower’s Note dated the same date as this Security Instrument...” (Id., Exh. B.) The Secretary provided copies of the Subordinate Mortgage and Lost Note Affidavit to substantiate his claim. (Id., Attachments.)

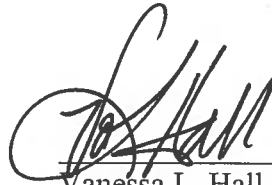
Pursuant to Florida Statute § 673.3091, the Secretary is entitled to enforce the terms of the February 12, 2002 despite the fact that the Note was lost. (Id.) While the Secretary has met his initial burden of proof that the alleged debt exists in the amount claimed, the Petitioner has failed to provide documentary evidence in support of his position, despite being ordered on three occasions to do so. (Notice of Docketing, Order, and Stay of Referral, dated November 4, 2009; Order, dated December 18, 2009; Order to Show Cause, dated, January 14, 2010.) As such, without sufficient documentary evidence to refute Petitioner’s claim that the debt does exist, “this Office is unable to determine whether the alleged debt is non-existent, as required under 31

C.F.R. § 285.11(f)(8)(ii).” Mary Baker, HUDBCA No. 05-D-NY-AWG06 (March 23, 2005). Therefore, I find Petitioner’s claim that the debt does not exists fails for lack of proof.

ORDER

For the reasons set forth above, I find that the debt that is the subject of this proceeding is past due and enforceable 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 wage garnishment is **VACATED**. It is hereby

ORDERED that the Secretary is authorized to seek collection of this outstanding obligation by means of administrative wage garnishment in the amount 15% of Petitioner’s disposable pay.

A handwritten signature in black ink, appearing to read 'V. Hall', is written over a horizontal line.

Vanessa L. Hall
Administrative Judge

May 4, 2010