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

In the Matter of:	
JOY SMITH and LULA WILLIAMS,	HUDOA No. 10-H-NY-LL05 Claim No. 7-21006191-0B
Petitioners	

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For the Secretary

DECISION AND ORDER

Petitioners were notified that, pursuant to 31 U.S.C. § 3716, the Secretary of the U.S. Department of Housing and Urban Development ("HUD") intended to seek administrative offset of any Federal payments due to Petitioners in satisfaction of a delinquent and legally enforceable debt allegedly owed to HUD. The alleged debt is an amount that the Secretary claims is due under an indemnification agreement executed by Petitioners.

On November 17, 2009, Petitioners made a timely request for a hearing concerning the existence, amount, or enforceability of the debt allegedly owed to HUD. The Office of Appeals has jurisdiction to determine whether Petitioners' debt is past due and legally enforceable pursuant to 24 C.F.R. § 17.170(b). 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 and 17.153. The Office of Appeals is authorized to conduct hearings to determine whether certain debts allegedly owed to HUD are legally enforceable. (24 C.F.R. § 17.152(c)). As a result of Petitioners' request, this Office temporarily stayed referral of the debt to the U.S Department of Treasury for offset on December 8, 2009. (Notice of Docketing, Order and Stay of Referral ("Notice"), dated December 8, 2009.)

Background

On September 20, 2004, Petitioners executed and delivered to the Secretary a Subordinate Note (the "Subordinate Note") in the amount of $32,221.08, in exchange for foreclosure relief being granted by the Secretary. (Secretary's Statement ("Sec'y Stat."), filed January 22, 2010, ¶ 2, Ex. A.) Paragraph 4 of the Subordinate Note cites specific events which make the debt become due and payable, one of these events being the payment in full of the primary note, which was insured against default by the Secretary. (*Id.* at ¶ 3, Ex. A, ¶ 4(A).)

The Secretary is the holder of the Subordinate Note, which expressly states that payment shall be made to the Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, S.W., Washington, D.C. 20410. (*Id.* at ¶ 5, Ex. A, ¶ 4(B).) On or about August 31, 2008, the FHA mortgage insurance on Petitioners' primary note was terminated when the lender informed the Secretary that the note was paid in full. (*Id.* at ¶ 4, Ex. B, Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center of HUD ("Dillon Decl."), dated January 22, 2010, ¶ 4.) Consequently, pursuant to the terms and conditions of the Subordinate Note, payment is due in full. (*Id.* at ¶ 5.)

HUD has attempted to collect the amounts due under the Subordinate Note, but Petitioners remain delinquent. (*Id.* at ¶¶ 6, 7, Ex. B, Dillon Decl., ¶ 5.) The Secretary has filed a Statement with documentary evidence in support of his position that Petitioners are indebted to the Department in the following amounts:

> (a) $32,221.08 as the unpaid principal balance as of December 31, 2009;
> (b) $402.75 as the unpaid interest on the principal balance at 3% per annum through December 31, 2009; and
> (c) interest on the principal balance from January 1, 2010 at 3% per annum until paid.

(*Id.* at ¶ 7, Ex. B, Dillon Decl., ¶ 5.) A Notice of Intent to Collect by Treasury Offset dated October 26, 2009 was sent to Petitioners. (*Id.* at ¶ 8, Ex. B, Dillon Decl., ¶ 7.)

Discussion

31 U.S.C. § 3716 provides federal agencies with a remedy for collecting debts owed to the United States Government. In this case, HUD seeks debt collection from Petitioners by means of administrative offset of any federal payments due to Petitioners. Petitioners contend that the alleged debt is unenforceable because: (1) Petitioners paid HUD's debt to Countrywide Home Loans ("Countrywide"), and thus the debt is unenforceable under the doctrine of equitable estoppel; and (2) the repayment of the debt would cause financial hardship for Petitioners.

First, Petitioners argue that the claimed debt is unenforceable due to equitable estoppel because their title agent was advised by HUD and their primary mortgagee, Countrywide that HUD's Subordinate Note did not have to be paid off so long as Countrywide was paid. In particular, Petitioners state that when they sold their property in August 2008, their mortgage lender, Countrywide, was paid off in full at the time of closing. (Petitioners' Request for Hearing ("Pet'r Hr'g Req."), filed November 17, 2009; Petitioners' Response to the Secretary's Statement (Pet'r Response"), filed February 16, 2010, ¶ 2, Ex. A.) "However, at the closing," Petitioners assert, "the title agent, NMR Realty Abstract Services, Ltd.[,] was not sure whether HUD had to be paid any funds, as the FHA mortgage that was recorded was unclear. Accordingly, . . . twice the sum of the debt owed to HUD was held in escrow, pending the title agent's inquiry into how, or whether to satisfy the subject debt." (*Id.* at ¶ 3, Ex. B.) Petitioners assert that the title agent "was informed that HUD did not need to be paid off and that as long as Countrywide was paid off, HUD's mortgage should be cleared as well." (Pet'r Hr'g Req.)

As support, Petitioners submitted a letter from the title agent along with documents related to the sale of the property as well as a payoff from Countrywide. (*Id.*, Attach.; Pet'r Response, Attach.) Petitioners were advised:

> "In response to your question concerning the mortgage to the Secretary of Housing & Urban Development, dated September 20, 2004 and recorded on March 7, 2005 as CFRN 200500134248, we made an exhaustive enquiry into this loan with both Countrywide Home Loans as well as the [D]epartment of Housing & Urban Development. We were informed by both that this mortgage was a loan to Countrywide that was rolled into the original loan to Countrywide which was the subject of foreclosure. Please find attached hereto a letter received from Countrywide's foreclosing attorney wherein they acknowledge that the loan to Countrywide was paid. I am further attaching the title policy issues to the new owner of the property wherein we have insured free and clear title to said property." (Pet'r Hr'g Req., Attach; Pet'r Response, ¶ 4, Ex. C.)

Relying on the substance of the title agent's letter, Petitioners argue that they relied upon the verification given by the title agent, and detrimentally relied upon the position of HUD with respect to this debt, and as a result, the escrow was accordingly issued to [P]etitioners. (Id.) "For this reason, HUD is therefore equitably estopped from seeking offset." (Pet'r Response, ¶ 6.)

Petitioners further states: "[e]quitable estoppel arises when someone by his acts, representations or admissions, or by his silence when he ought to speak out, either intentionally or through culpable negligence induces another to believe certain facts to exist and such other person rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." See Bavush [sic] v. Workman's Compensation Appeal Board[,] 111 Pa. Commw. 617, 867 A.2d 853 (1986); see also Lincoln Logs Ltd. v. Lincoln Pre-Cut Homes, 971 F.2d 732, 734 (Fed. Cir. 1992) (emphasis added)." (*Id.* at ¶ 7.)

As such, Petitioners believe that because the Secretary fails to deny their claim that "HUD representatives ultimately advised the title agent that the debt to the Secretary would be satisfied if [P]etitioners paid off its lender," the Secretary has by failing to deny has in fact acknowledged the claim in his Statement. Petitioners then cite Douge v. Commissioner, 899 F.2d 164 (2d Cir. 1990), citing Tax Court Rule 37(c), in which the court, according to Petitioners, has held that "[i]n civil practice, claims not specifically denied are deemed admitted." (*Id.* at ¶ 8.) Petitioners assert that, based on Douge, "the Secretary should not be permitted to enforce this claimed debt against [P]etitioners because of equitable estoppel." (*Id.*)

On the other hand, the Secretary contends that "neither the Subordinate Note nor HUD authorized Countrywide to receive payments on HUD's behalf, and Petitioners have produced no evidence to show that HUD directed them to make payment to Countrywide." (Sec'y Stat., ¶ 10, Ex. A, ¶ 4(B), Ex. B, Dillon Decl., ¶ 9.) "The Subordinate Note states, 'Payment shall be made at the Office of Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, SW, Washington, DC 20410, or any such other place as Lender may designate in writing by notice to Borrower.' HUD did not designate Countrywide to receive the payment on behalf of HUD." (Sec'y Stat., ¶ 10, Ex. A, ¶ 4(B), Ex. B, Dillon Decl., ¶ 9.) "More importantly," the Secretary further asserts, "Petitioners have produced no evidence to show that they actually paid HUD's debt to Countrywide, and HUD has received no payments from Countrywide on Petitioners' behalf. Although Petitioners have produced a 'Payoff Demand Statement' prepared by Countrywide, the statement is silent as to Petitioners' debt to HUD, and only shows the amounts Petitioners were required to pay to satisfy Countrywide's mortgage." (Sec'y Stat., ¶ 11-12, Ex. B, Dillon Decl., ¶ 10.)

Additionally, with regards to Petitioners' claim of equitable estoppel, the Secretary further contends that "[t]he title agent's claim that it was advised by both HUD and Countrywide that HUD's debt was 'rolled into the original loan' is unsubstantiated." (Sec'y Stat., ¶ 14.) The Secretary maintains that "Information allegedly received verbally that HUD's debt was satisfied by paying off Countrywide, should appease no one, no less a title agent, and is no substitute for a written release from the person or entity to who[m]

the individual is indebted." (*Id.* at ¶ 15.) The Secretary concludes that "This Court has repeatedly held that assertions without evidence are insufficient to establish that the debt due to the Secretary is not enforceable or past due." In re Kenneth Winzer, HUDOA 10-H-CH-AWG46, citing In re Bonnie Walker, HUDBCA No. 95-G-NY-T300 (July 3, 1996)." (*Id.* at ¶ 16.)

Generally, the doctrine of equitable estoppel is a judicial remedy by which a party is precluded from asserting a claim or defense because of improper action, regardless of its objective validity. It is applied against those persons or entities whose words or conduct induce a reasonable good faith reliance by others, who then change their position for the worse. See In re Village Properties, HUDBCA NO. 85-962-C6 (March 17, 1987); See also 3 J. Pomeroy, Equity Jurisprudence, § 804, at 189; Thompson, Equitable Estoppel of the Government, 79 Colum.C.Rev. 551, 557 (1979).

In order to sustain a claim of equitable estoppel, Appellant must establish that: (1) the Government had knowledge of the facts alleged by Appellant, including what was authorized by the contract; (2) the governmental actions were intended or could be expected to induce reliance by Appellant, (3) Appellant was ignorant of some or all of the information available to the Government, and (4) Appellant's relied upon the actions or misrepresentations of the Government in such a manner as to change its position to its detriment. City of Alexandria v. U.S., 3 Cl.Ct. 667, 2 FPD ¶ 45 (1983).

Upon reviewing the evidence presented by Petitioners, I find that Petitioners have failed to establish that the Secretary should be equitably estopped from asserting his right to the payment of the debt. Petitoners primarily rely upon Bayush, Lincoln Logs, and Douge as support for their position. In the Bayush case, Petitioners claim that "the two essential elements of equitable estoppel are an inducement and a justifiable reliance on the inducement." Bayush, 111 Pa. Cmwlth. at 625. Furthermore, according to Bayush "[t]he party asserting the estoppel bears the burden of proving it by clear and convincing evidence." *Id.* In the present case, Petitioners have failed to show that they have met the criteria as set forth in Bayush. There is no indication from the evidence presented that shows any inducement of Petitioners by HUD or any justifiable reliance on an alleged inducement by HUD that would have led Petitioners to believe HUD has released its right to payment of the debt.

The title agent's statement that "this mortgage was a loan to Countrywide that was rolled into the original loan to Countrywide which was the subject of foreclosure" does not, alone, show that the payoff of the debt to Countrywide means a payoff of the HUD debt under the Subordinate Note. Furthermore, the title agent is not considered an authorized agent of HUD. HUD never authorized the title agent to act or speak on behalf of HUD as its agent. Additionally, neither the Subordinate Note nor HUD authorized Countrywide to receive payments from Petitioners on HUD's behalf. Thus, Petitioners have failed to meet their burden of proof by showing by clear and convincing evidence that their alleged reliance on the title agent's statement has been induced by HUD or is justifiable.

Likewise, the Lincoln Logs case to which Petitioners refer requires the elements of equitable estoppel to include: "(1) misleading conduct, which may include not only statements and action but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted." Lincoln Logs Ltd., 971 F.2d 732, 734. Again, Petitioners have failed to show that the title agent's statement has led Petitioners to reasonably infer that HUD's right to enforce the debt will not be asserted against Petitioners.

Finally, Petitioners contend that the Secretary's failure to specifically deny Petitioners' claim of equitable estoppel, is deemed an admission in accordance with Douge. However, this case is distinguished from the case at hand because the case at bar does not involve constructive admissions under Tax Court Rule 90(c) (failure to respond to request for admissions), or Rule 37(c) (items not denied in reply to the Commissioner of the Internal Revenue Service's answer deemed admitted). Douge, 899 F.2d at 168.

Finally, inasmuch as Petitioners have failed to provide documentary evidence to substantiate their position that the alleged debt was paid off or that the Secretary is equitably estopped from enforcing the debt, their allegation disputing the alleged debt must fail for lack of proof. Elizabeth Aragon, HUDBCA No. 97-C-SE-W231 (October 28, 1997) (citing Nona Mae Hines, HUDBCA No. 87-1907-G240 (February 4, 1987)). Therefore, I find Petitioners' claim that the alleged debt was paid off fails for lack of proof.

Second, Petitioners contend that the debt due to HUD is unenforceable because repayment of the debt would cause Petitioners financial hardship. Petitioner states:

> In any event, [P]etitioners are rightfully entitled, and should, in fact and law, be exempted from administrative offset of their only means of support, namely Social Security Disability benefits (hereinafter "SSD") pursuant to Title 13 U.S.C. 3716(c)(3)(B), as 'offset would tend to interfere substantially with or defeat the purposes of the payment certifying agency's program.' Moreover, in this regard, offset would amount to severe financial hardship to [P]etitioners.

(Pet'r. Response.)

This Office acknowledges Petitioner's financial circumstances, but the law provides "unfortunately, in administrative offset cases evidence of financial hardship, no matter how compelling, cannot be taken into consideration in determining whether the debt is past-due and enforceable." *Edgar Joyner, Sr.*, HUDBCA No. 04-A-CH-EE052 (June 15, 2005); *Anna Filiziana*, HUDBCA No. 95-A-NY-T11 (May 21, 1996); *Charles Lomax*, HUDBCA No. 87-2357-G679 (February 3, 1987). Financial adversity does not invalidate a debt or release a debtor from a legal obligation to repay it. *Raymond Kovalski*, HUDBCA No. 87-1681-G18 (December 8, 1986). Furthermore, no regulation or statute currently exist that permits financial hardship to be considered as a basis for determining whether a debt is past-due and enforceable in cases involving debt collection by means of administrative offset. Thus, consistent with case law precedent and statutory

limitations, I find that financial hardship cannot be considered as a defense in this case as the debt owed by Petitioner is sought to be collected by means of administrative offset.

ORDER

For the reasons set forth above, I find that the debt which is the subject of this proceeding is legally enforceable against Petitioners 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**.

The Secretary is hereby authorized to refer this matter to the U.S. Department of the Treasury for administrative offset of any federal payment due Petitioners. It is hereby

ORDERED that the Secretary is authorized to seek collection of this outstanding obligation by means of administrative offset to the extent authorized by law.

Vanessa L. Hall
Administrative Judge

July 29, 2010