



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

In the Matter of:

CYRIL E. MALONE,

Petitioner

HUDOA No. 10-M-CH-AWG60
Claim No. 780710742

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For the Secretary

DECISION AND ORDER

On February 24, 2010, 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 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 (f)(10), on March 3, 2010, this Office stayed referral by HUD of this matter to the U.S. Department of the Treasury for issuance of an administrative wage garnishment order until the issuance of this written decision.

Background

On July 13, 2005, Petitioner executed a Retail Sales Contract Disclosure Statement ("Note") in the amount of \$13,900.00. (Secretary's Statement ("Sec'y Stat."), filed March 19, 2010, ¶ 1, Ex. 1; Ex. 2, Declaration of Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center ("Dillon Decl."), dated March 17, 2010, ¶ 3.) After default by Petitioner, the note was assigned to HUD by First Commercial Bank, under the regulations governing the Title I Insurance Program. (Dillon Decl., ¶ 3.) HUD holds the Note signed by Petitioner. (Sec'y Stat., ¶ 1; Dillon Decl., ¶ 3.)

The Secretary has attempted to collect the amounts due under the Note, but Petitioner remains delinquent. (Sec'y Stat., ¶ 2; Dillon Decl., ¶ 4.) The Secretary has filed a Statement with documentary evidence in support of his position that Petitioner is indebted to the Department in the following amounts:

- (a) \$12,177.34 as the unpaid principal balance as of February 28, 2010;
- (b) \$30.44 as the unpaid interest on the principal balance at 3% per annum through February 28, 2010; and
- (c) interest on said principal balance from March 1, 2010 at 3% per annum until paid.

(Sec'y Stat., ¶ 3; Dillon Decl., ¶ 4.)

A Notice of Intent to Initiate Administrative Wage Garnishment Proceedings, dated January 12, 2010, was sent to Petitioner. (Sec'y Stat., ¶ 5; Dillon Decl., ¶ 5.) In accordance with 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was afforded the opportunity to enter into a written repayment agreement with HUD under mutually agreeable terms. (Dillon Decl., ¶ 6.) As of March 17, 2010, Petitioner has not entered into a written repayment agreement in response to the notice. (*Id.*)

A Wage Garnishment Order, dated February 12, 2010, was issued to Petitioner's employer by the Department of Treasury, Financial Management Service. (Sec'y Stat., ¶ 7; Dillon Decl., ¶ 7, Ex. A.) However, no wages have been garnished as of March 17, 2010. (*Id.*)

As of the same date, Petitioner has not complied with the Secretary's request to provide proof of income. (Sec'y Stat., ¶ 8; Dillon Decl., ¶ 8.) Accordingly, the Secretary submits that a reasonable amount to garnish is \$370.00 per month, which will liquidate the debt in approximately three years as recommended by the Federal Claims Collection Standards, or 15% of Petitioner's disposable income. (*Id.*)

Discussion

Pursuant to 31 C.F.R. § 285.11(f)(8)(ii), Petitioner bears the burden of proving, by a preponderance of the evidence, that no debt exists, that the amount of the debt is incorrect, or that the terms of the repayment schedule are unlawful or would cause financial hardship. Petitioner argues that the alleged debt to HUD is unenforceable and not past due because his divorce from Melissa Diane Malone released him from all obligations under the Note. Petitioner states, "Upon dissolution of marriage to Melissa D. Malone[,] it was declared that all property & debts associated in each part[y's] possetion [sic] where [sic] their own[.] Melissa Malone retained the home and all debts associated." (Petitioner's Request for Hearing ("Pet'r Hr'g Req."), filed February 24, 2010.)

As one of the signatories on the Note, however, Petitioner is jointly and severally liable along with the other signatory for repayment of the alleged debt. "Liability is characterized as joint and several when creditors may sue the parties to an obligation separately or together." *Edgar Joyner, Sr.*, HUDBCA No. 04-A-CH-EE052 (June 15, 2005) (citing *Mary Jane Lyons Hardy*, HUDBCA No. 87-1982-G314 (July 15, 1987)).

Moreover, even if the terms of a court order allocate half of the responsibility for the alleged indebtedness to Petitioner's ex-wife, "Petitioner remains liable to HUD for payment of the Note pursuant to the terms of the Note and existing law." *Terri Kutz*, HUDOA No. 09-M-NY-KK08 (March 20, 2008). The terms of the divorce only determine the rights and liabilities between Petitioner and his ex-wife, they do not bind their creditors. *See Pee Dee State Bank v. Prosser*, 367 S.E.2d 708, 712 (S.C. App. 1988) (overruled in part on other grounds); *Kimberly S. King (Theide)*, HUDBCA No. 89-4587-L74 (April 23, 1990); *see also Cynthia Abernethy*, HUDBCA No. 04-D-NY-AWG39 (March 23, 2005). The Secretary may proceed against any signatory for the full amount of the debt. *Terri Kutz*, HUDOA No. 09-M-NY-KK08 (March 20, 2008.) Although Petitioner may be able to seek indemnification from other signatories on the Note, this does not prevent HUD from seeking payment solely against Petitioner. (*Id.*) Therefore, I find that Petitioner is jointly and severally liable to HUD for the full amount of the alleged debt.

Additionally, Petitioner was specifically ordered by this Court to file documentary evidence to prove that all or part of the alleged debt to HUD in this case is either unenforceable or not past due: first in the Notice of Docketing, Order, and Stay of Referral ("Notice of Docketing"), dated March 3, 2010, and, subsequently, in Orders dated June 30, 2010 and October 26, 2010. The June 30th Order stated that "[f]ailure to comply with this Order shall result in a decision based on the documents in the record of this proceeding." Again, the October 26th Order stated that "[f]ailure to comply with this Order may result in a decision based on the documents in the record of this proceeding."

To date, Petitioner has failed to comply with all of the Orders issued by this Office to provide evidence that would prove that the subject debt is unenforceable or not past due, or to provide evidence to support any claim that repayment of the debt would create a financial hardship for him. 24 C.F.R. § 26.4(c) provides:

If a party refuses or fails to comply with an Order of the hearing office, the hearing officer may enter any appropriate order necessary to the disposition of the hearing including *a determination against a noncomplying party* (emphasis added).

Petitioner's non-compliance with the Orders issued by this Office supports finding against Petitioner pursuant to 24 C.F.R. § 26.4(c).

On the other hand, this Court ordered the Secretary to file the proposed repayment schedule required under 31 C.F.R. § 285.11(3)(2)(ii), as well as documentary evidence proving that Petitioner's alleged debt to HUD is enforceable and past due. (Notice of Docketing.) On March 19, 2010, the Secretary filed the Secretary's Statement, setting forth the documentary evidence in support of the claim against Petitioner for the debt owed to HUD. (Sec'y Stat.) Therefore, in the absence of documentary evidence to refute the Secretary's assertion that Petitioner's alleged debt to HUD is enforceable and past due, this Office finds that Petitioner's claim fails for lack of proof.

ORDER

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 to the extent authorized by law.



H. Alexander Manuel
Administrative Judge

December 3, 2010