



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

In the Matter of:

Pamela L. Rutowski

Petitioner

HUDOA No. 10-M-NY-AWG27
Claim No. 7-711467570A

Pamela L. Rutowski
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For Petitioner

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For the Secretary

AMENDED DECISION AND ORDER

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 January 8, 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, unless a wage garnishment order had previously been issued against Petitioner.

Background

On November 20, 1995, Petitioner executed and delivered a Home Repair Installment Sale Contract and Consumer Note ("Note") to New Urban Rehab in the amount of \$25,000.00, which was insured against nonpayment by the Secretary, pursuant to Title I of the National Housing Act, 12 U.S.C. § 1703. (Secretary's Statement ("Sec'y Stat."), filed February 24, 2010, ¶ 2, Ex. A.) On the same day, the Note, followed by the Mortgage shortly thereafter, was assigned by New Urban Rehab to Remodelers National Funding Corporation ("Remodelers"). (*Id.* at ¶ 4, Ex. A, Ex. B.) The Note and the Mortgage were subsequently assigned by Remodelers to First Trust of California, National Association as Trustee, for Remodelers Home Improvement Loan Asset-Backed Certificates, Series 1996-1 ("First Trust of California, N.A."). (*Id.* at ¶ 5, Ex. A, Ex. B.) Subsequently, First Trust of California, N.A., by Firstplus Financial, Inc., f/k/a Remodelers National Funding Corp., assigned the Note and Mortgage to Firstplus Financial, Inc. (*Id.* at ¶ 6, Ex. A, Ex. B.)

When Petitioner failed to make payment on the Note as agreed, Firstplus Financial, Inc. assigned the Note and Mortgage to the United States of America in accordance with 24 C.F.R. § 201.54. (*Id.* at ¶ 7, Ex. A, Ex. B.) The Secretary has attempted to collect the amount due under the Note, but Petitioner remains delinquent. (*Id.* at ¶ 8.) 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) \$24,885.35 as the unpaid principal balance as of December 30, 2009;
- (b) \$12,047.38 as the unpaid interest on the principal balance at 5% per annum through December 30, 2009; and
- (c) interest on said principal balance from January 1, 2010 at 5% per annum until paid.

(*Id.*; Declaration of Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center ("Dillon Decl."), dated January 22, 2010, ¶ 4.)

A Notice of Intent to Initiate Administrative Wage Garnishment Proceedings, dated January 4, 2010, was sent to Petitioner. (Sec'y Stat., ¶ 9; 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. (Sec'y Stat., ¶ 18; Dillon Decl., ¶ 6.) As of January 22, 2010, Petitioner has not entered into a written repayment agreement in response to the notice. (Sec'y Stat., ¶ 18; Dillon Decl., ¶ 6.) Petitioner did not provide HUD with her current pay stub. (Sec'y Stat., ¶ 19; Dillon Decl., ¶ 8.) Based on information provided by Petitioner's employer to The Work Number through an Automated

Employment and Income Verification system, Petitioner's bi-weekly gross income is \$1,334.62. (Sec'y Stat., ¶ 20; Dillon Decl., ¶ 8.) After accounting for allowable deductions, the Secretary proposes a bi-weekly repayment schedule of \$140.13, or 15% of Petitioner's disposable pay. (Sec'y Stat., ¶ 20; Dillon Decl., ¶ 8.)

Discussion

Petitioner argues that the alleged debt to HUD is unenforceable because (1) HUD has not credited payments made during the pendency of her Chapter 13 bankruptcy action to her debt balance; (2) payments made to Champion have not been credited by HUD to the debt balance; (3) the Note was assigned from Remodelers, a/k/a Firstplus Financial, Inc., to Challenge Realty fraudulently, and payments allegedly made by Challenge Realty to the federal government as part of a criminal forfeiture action in the Western District of Wisconsin involving Challenge Realty's owner, David Hampton Tedder, included the return of the funds Challenge Realty received from Petitioner in 2005; (4) the title agent hired by Petitioner's lender advised her to pay the subject debt to Challenge Realty when she refinanced her home in 2005; and (5) the Secretary's proposed repayment schedule would result in financial hardship for Petitioner.

First, Petitioner disputes the amount of the debt claimed by asserting that HUD has not credited payments made during the pendency of her Chapter 13 bankruptcy action to her debt balance. Petitioner states, "Petitioner[] filed a Chapter 13 bankruptcy on July 8, 1998[:] [p]art of the plan included payments for HUD." (Petitioner's Letter ("Pet'r Ltr."), filed March 3, 2010.) Having enclosed "three of the Trustee reports . . . regarding payments to HUD" in her Letter, Petitioner argues that "[i]t does not appear from the information received from HUD that the Petitioner[] [was] credited with that amount." (*Id.*, Ex. 2.)

The Secretary responds, "In the absence of a release from HUD discharging Petitioner from her obligation to repay the debt, Petitioner remains justly indebted to the Secretary in the amount set forth above. *See In re Juanita Mason*, HUDOA No. 08-H-NY-AWG70, at p. 3 (December 8, 2008) ("[F]or Petitioner not to be held liable for the debt, there must be either a release in writing from the lender . . . or valuable consideration accepted by the lender from Petitioner . . .") (citations omitted)." (Sec'y Stat., ¶ 17.)

The Secretary further asserts, "All payments received by HUD during the pendency of Petitioner[s] 1998 bankruptcy action were credited to [her] account. According to the Standing Trustee's Final Report, attached as Exhibit 2 as Petitioner's March 3, 2010 letter, \$2,540.89 was disbursed to HUD during the pendency of Petitioner[s] bankruptcy action. The Audit Reconstruction Report maintained by HUD's Financial Operations Center reveals that between March 18, 1999 and November 19, 2001, HUD received and credited payments totaling \$2,540.89 to Petitioner[s] account. This is the exact amount disbursed to HUD by the Standing Trustee on Petitioner[s] behalf." (Secretary's Statement ("Sec'y Apr. Stat."),¹ filed April 20, 2010, ¶¶ 11-13; Declaration of Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center ("Dillon Apr. Decl."), dated April 15, 2010, ¶ 6, Ex. B.)

¹ While the Secretary's Statement is for HUDOA No. 10-M-NY-LL72, the federal offset case concerns the same debt and Claim No. 7-711467570A as that of the instant action.

Petitioner has filed no documentary evidence to support her assertion that the payments made during the pendency of Petitioner's bankruptcy action has not been credited toward her debt. "Assertions without evidence are insufficient to show that the debt claimed by the Secretary is not past due or enforceable." *Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996). Therefore, Petitioner's assertion that the amount of the debt is incorrect must fail for want of proof. Petitioner has not submitted any documentary evidence that successfully refutes the Secretary's claim that HUD credited payments made as a result of Petitioner's bankruptcy action toward her account.

Second, Petitioner also disputes the amount of the debt claimed by asserting that payments made to Champion, "as servicer for HUD," until Petitioner refinanced her loan in 2005, have not been credited by HUD to the debt balance. (Pet'r Ltr.) In response, the Secretary argues that first, "Champion has never been a loan servicer for HUD." (Sec'y Apr. Stat., ¶ 15; Dillon Apr. Decl., ¶ 7.) Second, the Secretary argues that perhaps "Petitioner[] intended to argue that [she was] making payments to 'Countrywide' rather than Champion, since Countrywide was [her] mortgagee at the time [she] refinanced in 2005." (Sec'y Apr. Stat., ¶ 15, Ex. D.)

Again, Petitioner has filed no documentary evidence to support her assertion that she made payments to Champion, or that the alleged payments to Champion should be credited toward her debt balance. Champion is not a loan servicer for HUD. Petitioner has not provided any evidence that Petitioner made any payments to the original lender or any valid assignee, including HUD, that have not already been accounted for in the debt balance claimed by the Secretary. "Assertions without evidence are insufficient to show that the debt claimed by the Secretary is not past due or enforceable." *Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996). Therefore, Petitioner's assertion that the amount of the debt is incorrect must fail for want of proof.

Third, Petitioner argues that the Note was assigned from Remodelers National Funding Corporation, a/k/a Firstplus Financial Inc., to Challenge Realty fraudulently, and that Petitioner's debt to HUD was paid as a result of payments Challenge Realty made to the federal government in a criminal forfeiture action involving Challenge Realty's owner, David Hampton Tedder. Petitioner states, "Challenge Realty was started/owned by David Hampton Tedder. Mr. Tedder is a disbarred attorney from Florida who was convicted of, among other things, fraud, out of Federal Court in Wisconsin which resulted in a prison sentence of about three years." (Pet'r Ltr.) Petitioner further states, "The [judicial order against Mr. Tedder] references allegations that \$1.8 million was paid to the government. Petitioner refinanced by Mortgage dated March 8, 2005, before the payments were allegedly made by Challenge Realty to the government. Therefore it is Petitioner' position HUD was paid off from that money." (*Id.*)

The Secretary acknowledges that "David Hampton Tedder was convicted in U.S. District Court for the Western District of Wisconsin for conspiring to defraud the United States by assisting a waging enterprise to conceal [his] identity and income from the United States, and for money laundering." (Sec'y Apr. Stat., ¶ 26; Dillon Apr. Decl., ¶ 8, Ex. C, Ex. D.) The Secretary further asserts that "Mr. Tedder apparently used Challenge Realty to launder funds on behalf of his co-conspirators[,] and [c]onsequently, the federal government was authorized to seize \$1,174,062 in assets from Challenge Realty, [which was] 'traceable to laundered money derived

from the conspiracy.” (Sec’y Apr. Stat., ¶ 26; Dillon Apr. Decl., ¶ 8, Ex. C, Ex. D.) The Secretary, however, asserts that Petitioner’s argument that she is not liable for the subject debt to HUD because the payments made by Challenge Realty to the federal government as part of the criminal forfeiture action included the repayment of funds fraudulently received by Challenge Realty from Petitioner in 2005 is unfounded. (Sec’y Apr. Stat., ¶ 25.)

This Office agrees with the Secretary’s argument that the government’s action against Mr. Tedder leading to the forfeiture of his assets is not relevant in the case at bar involving the subject debt. (*Id.* at ¶ 27.) Moreover, as the Secretary argues, Petitioner has produced no evidence to support her position that her debt to HUD was paid as a result of the assets forfeited by Challenge Realty in the action against Mr. Tedder. (*Id.*)

Fourth, Petitioner argues that when she refinanced her mortgage in 2005, she was advised by her title agent to pay the subject debt to Challenge Realty, Inc., and that a Release of Mortgage issued and recorded by Challenge Realty, Inc. releases her from her obligation to repay HUD. Petitioner states, “In regard to the refinance of 2005, attached as Exhibit 4 are the HUD-1 settlement statement and final title policy from that refinance. It appears the payoff went to Challenge Realty given the HUD-1 and Exhibit 5, a filed Release of Mortgage for this mortgage from Challenge Realty. This office has asserted a claim with Landamerica on behalf of the Petitioner.” (Pet’r Ltr.)

The Secretary responds that Challenge Realty, Inc. was not the rightful holder of the Note and Mortgage. (Sec’y Apr. Stat., ¶ 11.) The Secretary states:

Petitioner and her attorney have submitted a March 10, 2005[] Release of Mortgage in support of their contention that the debt which is the subject of this proceeding is not legally enforceable. The Release, executed by Challenge Realty Inc. and recorded in the Middlesex County Clerk’s Office on March 15, 2005, indicates that Challenge Realty Inc. was assigned the Mortgage by virtue of an assignment dated January 26, 1996, and recorded in book #00857, page #246 at the Middlesex County Clerk’s Office. However, a search of the Middlesex County Clerk’s records indicates that the assignment to Challenge Realty Inc., recorded in book# 00857, page #246 and executed by Firstplus Financial, Inc. is dated March 1, 2000, and was not recorded until December 10, 2001. Based on the dates of these two documents, neither the Assignment to Challenge Realty Inc. or the Release of [M]ortgage issued by Challenge Realty Inc. are valid, as both the underlying Note and Mortgage related to this debt had been assigned to HUD in 1998. The original recorded Mortgage from New Urban Rehab and the related chain of assignments to HUD are properly recorded in the Middlesex County Clerk’s Office and Petitioner has failed to provide any evidence that the underlying Note was ever assigned to Challenge Realty Inc.

(Dillon Decl., ¶ 7, Ex. A.)

This Office has ruled that in order to be discharged from her obligation to repay the alleged debt, Petitioner must have been issued a release, in writing, from HUD. *In re Juanita Mason*, HUDOA No. 08-H-NY-AWG70 (December 8, 2008). Petitioner has not filed any such

release in this case and has failed to provide sufficient evidence to show that the alleged debt to HUD in this case has been repaid. In the absence of a release from HUD discharging Petitioner from her obligation to repay the debt, this Office finds that Petitioner remains indebted to HUD.

Lastly, Petitioner asserts that the Secretary's proposed repayment schedule would result in financial hardship for Petitioner: "Attempting to collect this debt would create an unbearable hardship on [Petitioner]. [Petitioner is] already behind on bills, [has] to pay [her] mortgage given [her] financial background, [has] to eat, [has] to drive to doctors appointments and pay for medication, etc." (Pet'r Ltr.) In support of her financial hardship claim, Petitioner submitted copies of her bi-weekly pay statements, bills, and statements from Petitioner's credit account accounts and checking account. (*Id.*)

Petitioner provided this Office with a copy of her bi-weekly pay statements for the pay periods from May 31, 2009 to June 13, 2009; October 4, 2009 to October 17, 2009; and December 27, 2009 to January 9, 2010. The most recent pay statement - from December 27, 2009 to January 9, 2010 - reflects that Petitioner's gross pay totaled \$2,669.24 monthly. (Pet'r Ltr.) The Secretary is authorized to garnish "up to 15% of the debtor's disposable pay," which is determined "after the deduction of health insurance premiums and any amounts required by law to be withheld...[including] amounts for deductions such as social security taxes and withholding taxes...." 31 C.F.R. §§ 285.11(c) and (i)(2)(i)(A). After subtracting allowable deductions for federal and state taxes and health insurance, Petitioner is left with a disposable income of \$1,992.34 per month. (Pet'r Ltr.)

Petitioner also submitted bills and records of payment for essential monthly household expenses which included garbage, \$32.33; water, \$65; student loan \$79.84; sewer, \$34.75; credit card payments, \$150; mortgage, \$2,247; and power, \$250. These essential household expenses total \$ 2,858.92.

Petitioner also provided documentary evidence of cable television and Internet, \$120; cellular phone, \$150; groceries, \$800; children's lunch, \$230; automobile fuel, \$500; doctor, \$75; and dentist, \$50. Petitioner's monthly cellular phone, groceries, automobile fuel, and medical expenses are excessive. Therefore, this Office will reduce the amounts for the expenses to \$100, \$300, \$200, and \$50 respectively. With this reduction, Petitioner's essential household expenses total \$3,508.92. The cable television and Internet and children's lunch expenses, however, will not be credited towards Petitioner's essential monthly expenses because Petitioner has not submitted sufficient documentary evidence to establish either a recent record of payment or the amount of ongoing expenses, or that the expenses are essential living expenses.

Petitioner's monthly essential living expenses of \$3,508.92 exceed her disposable pay of \$1,992.34 by \$1516.58. A 15% garnishment rate of Petitioner's current monthly disposable income would result in a garnishment amount of \$298.85 per month and would leave Petitioner with a negative balance of (-\$1,815.43). Because Petitioner's essential monthly expenses exceed her monthly disposable income, even with a lower garnishment rate, her balance will always result in a negative balance.

Pursuant to 31 C.F.R. § 285.11(k)(3), this Office has the authority to order garnishment at a lesser rate based upon the record before it, particularly in cases where financial hardship is found. Upon due consideration, this Office finds that the Petitioner has submitted sufficient documentary evidence to substantiate her claim that the administrative wage garnishment of her disposable income, in the amount sought by the Secretary, would cause a financial hardship. To impose an administrative wage garnishment against the Petitioner, at any rate, would be ineffective and unproductive at this time.

While the Secretary has successfully established that the debt that is the subject of this proceeding is legally enforceable against Petitioner in the amount claimed by the Secretary, a garnishment amount at any percentage of Petitioner's disposable income would constitute a financial hardship sufficient enough to forego collection at this time.

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. For the reasons stated above, it is hereby

ORDERED that the Secretary is NOT 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

August 6, 2010