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

In the Matter of:

ROBERT L. AND CAROLE C. LANE,

Petitioners

HUDOA No. 10-M-NY-LL41
Claim Nos. 7-641692870A
7-641692870B

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For the Secretary

DECISION, RULING, AND ORDER

On or about February 1, 2010, Petitioners were notified that, pursuant to 31 U.S.C. §§ 3716 and 3720A, 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.

On February 22, 2010, Petitioners filed a request for a hearing concerning the existence, amount or enforceability of the debt allegedly owed to HUD. The administrative judges of this Office 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. As a result of Petitioners' hearing request, referral of the debt to the U.S. Department of the Treasury for administrative offset was temporarily stayed by this Office on February 23, 2010.

Background

On June 3, 1976, Petitioners executed and delivered to Bank of Independence a property improvement note ("Note") in the amount of $7,486.92, 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 March 10, 2010, ¶ 2; Declaration of Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center ("Dillon Decl."), ¶ 3, Ex. A.) The Secretary is the last holder in due course of the Note, however, the Note cannot be located and is presumed lost. (Sec'y Stat., ¶ 3; Dillon Decl., ¶ 6.) In the Note, Petitioners agreed to make 84 payments of $89.13 each per month beginning on August 15, 1976. (Sec'y Stat., ¶ 4; Dillon Decl., ¶¶ 3, 4, Ex. A.)

On November 21, 1979, Petitioners defaulted on the Note by failing to pay the Note as agreed. (Sec'y Stat., ¶ 5; Dillon Decl., ¶ 5.) On April 8, 1980, pursuant to 24 C.F.R. § 201.54, the Bank of Independence assigned the Note to the United States of America. (Sec'y Stat., ¶ 5; Dillon Decl., ¶ 5.) The Note and assignment were included in the claim packet. (Sec'y Stat., ¶ 5; Dillon Decl., ¶ 5, Exs. A and B.)

The Secretary has made efforts to collect on the Note from Petitioners, but Petitioners remain in default. (Sec'y Stat., ¶ 6; Dillon Decl., ¶ 9.) The Secretary has filed a Statement, with documentary evidence, in support of his position that Petitioners are currently in default on the Note and that Petitioners are indebted to HUD in the following amounts:

(a) $4,605.22 as the unpaid principal balance as of February 28, 2010;
(b) $6,879.90 as the unpaid interest on the principal balance at 7.03% per annum through February 28, 2010; and
(c) interest on the principal balance from March 1, 2010 at 7.03% per annum until paid.

(Sec'y Stat.,¶ 6; Dillon Decl., ¶ 9.)

A Notice of Intent to Collect by Treasury Offset, dated February 1, 2010, was sent to Petitioners. (Sec'y Stat.,¶ 7; Dillon Decl., ¶ 10.)

Discussion

31 U.S.C. §§ 3716 and 3720A authorize federal agencies to collect debts owed to the United States Government by means of administrative offset. The burden of proof is on the alleged debtor to show that the debt claimed by the Secretary is unenforceable or not past due. 24 C.F.R. § 17.152(b). Failure to provide documentary evidence to meet this burden shall result in a dismissal of the debtor's request for review. *Id.*

Petitioners claim that the debt that is the subject of this proceeding is unenforceable because (1) "[n]o Deed of Trust was ever filed in the Jackson County Recorder's Office securing the property improvement loan against Petitioners' home" (Petitioners' Statement that

Petitioner's [sic] Debt Is Legally Not Enforceable and Evidence in Support ("Pet'r Stat."), filed April 5, 2010, ¶ 5); (2) "Petitioners' alleged debt is not legally enforceable by treasury offset because it has been over ten (10) years since HUD was assigned the alleged debt" (Pet'r Stat., ¶ 11); and (3) the evidence provided by HUD fails to prove the existence and terms of the lost Note by clear and convincing evidence. (Petitioners' Response to Supplemental Secretary's Statement that Petitioner's [sic] Debt is Past Due and Legally Enforceable ("Pet'r Response"), filed April 21, 2010, ¶¶ 4, 7).

First, Petitioners claim that the debt that is the subject of this proceeding is unenforceable because no lien was filed on behalf of HUD: "No Deed of Trust was ever filed in the Jackson County Recorder's Office securing the property improvement loan against Petitioners' home." (Pet'r Stat., ¶ 5.) The absence of a recorded lien securing HUD's interest, however, does not prevent collection on the Note itself. The Secretary's right to collect the alleged debt emanates from the terms of the Note, not from the terms of a deed of trust securing the Note. *See Bruce R. Smith*, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). Although the Note was not secured by a lien at the time the Note was assigned to HUD, Petitioners, nevertheless, remain liable for repayment of the Note. *See Luis G. Rios*, HUDOA No. 07-M-NY-HH87 (January 29, 2008); *Michael H. Weed*, HUDOA No. 07-M-NY-HH52 (Nov. 19, 2007).

Second, Petitioners argue that the debt cannot be collected due to a ten-year statute of limitations: "Petitioners' alleged debt is not legally enforceable by treasury offset because it has been over ten (10) years since HUD was assigned the alleged debt. No claim that has been outstanding for more than ten (10) years may be collected by means of administrative offset. (See 31 U.S.C. 3716(e)(1)) and Jack MacAdoo, HUDBCA No. 03-A-NY-DD021)." (Pet'r Stat., ¶ 11.) Petitioners also cite MacAdoo for the proposition that the statute of limitations begins to run from "the date that the lender assigns the note to the Secretary." (Pet'r Stat., ¶ 12.) Furthermore, Petitioners argue that "[t]he repeal of the 10-year prohibition stated in 31 U.S.C. § 3716 and 31 U.S.C. § 37020A was not retroactive in its effect. Since 10-years had already elapsed prior to the repeal of the 10-year prohibition, any debt due and owing HUD is unenforceable by administrative offset." (Pet'r Response, ¶ 8.)

In response, the Secretary asserts, "While 31 U.S.C. § 3716, which authorizes administrative offset of non-tax federal payments, once prohibited the use of administrative offset to collect federal debts outstanding for more than 10-years, that prohibition was repealed effective June 18, 2008. Consequently, federal debts outstanding at the time of the repeal may be collected via administrative offset of federal payments. 31 U.S.C. § 3716(e)(1) (LEXIS through 3/4/2010)." (Supplemental Secretary's Statement That Petitioners' Debt Is Past Due and Legally Enforceable ("Suppl. Sec'y Stat."), filed April 7, 2010, ¶ 16.)

The Secretary further asserts, "Moreover, although the regulations implementing 31 U.S.C. § 3720A, once prohibited the collection of federal debts outstanding for more than 10-years via tax offset, this prohibition was also repealed effective December 28, 2009. Consequently, HUD may also seek to collect this debt via offset of Petitioners' tax refund. See 31 C.F.R. § 285.2 (LEXIS through 3/11/2010)." (Suppl. Sec'y Stat., ¶ 17.)

The pertinent Federal statute applicable to collection of debts by administrative offset clearly provides that "[a]fter trying to collect a claim from a person under § 3711(a) of this title, the head of an executive . . . agency may collect the claim by administrative offset." 31 U.S.C. § 3716(a) (2008). Furthermore, this statute provides that "[n]otwithstanding any other provision of law, regulation, or administrative limitation, no limitation on the period within which an offset may be initiated or taken pursuant to this section shall be effective." 31 U.S.C. § 3716(e)(1) (2008). This means that there is no time limitation restricting the right of the Government to collect this debt by means of administrative offset. Therefore, irrespective of a thirty-year delay in seeking to enforce collection of this debt, I find that the Secretary is not barred by statute of limitations from collecting the alleged debt by means of administrative offset.

Third, Petitioners claim that "[u]nder Missouri [l]aw, in an action to recover on a lost instrument, evidence of its former existence, execution and loss must be clear and convincing and, the greater the importance of the instrument to the cause of action, the more conclusive should be the evidence. Brunswick Corp. v. Briscoe, 523 S.W.2d 115 (Mo. Ct. App. 1975)." (Pet'r Response, ¶ 3.) Petitioners argue that the evidence provided by HUD, namely the Declaration of Brian Dillon ("the Declaration") and HUD's Letter to Petitioners dated August 27, 1980 ("the HUD Letter"), fails to prove the existence and terms of the lost Note by clear and convincing evidence because the evidence lacks first-hand knowledge of the existence and terms of the lost Note.

Petitioners argue that the Declaration "is lacking as to first-hand knowledge that a Promissory Note was included in the Claim Packet" because "[t]he fact that Mr. Dillon's knowledge of the instrument is limited to his responsibility for reviewing a manual and computerized records pertaining to default loans owned by the Secretary gives him no first-hand knowledge of the existence, terms and subsequent loss of the instrument"; "[t]herefore, the Declaration . . . is merely hearsay." (Pet'r Response, ¶¶ 4-6; Pet'r Stat., ¶ 15.) Petitioners argue that the HUD Letter also "does not establish the existence, terms and subsequent loss [of] the instrument by clear and convincing evidence," but is "merely a representation on behalf of HUD that [HUD] claim[s] to have been assigned the instrument. The [HUD Letter] did not enclose a copy of the instrument and did not recite the terms of the instrument." (Pet'r Response, ¶ 7.)

In response, the Secretary argues that, "[p]ursuant to Missouri law, the Secretary is entitled to enforce the terms of the Note, despite the fact that the Note has been lost." (Suppl. Sec'y Stat., ¶¶ 5-6.) Moreover, the Secretary claims that "[t]he terms of the Note and the Secretary's right to enforce the Note are set forth in the Secretary's Statement," as required under Missouri law. (Suppl. Sec'y Stat., ¶¶ 7-8.) The Secretary also argues that first-hand knowledge of the existence of the Note in HUD's file is not necessary, and that the correct burden of proof is preponderance of the evidence: "It is not necessary that Mr. Dillon be the individual who received and handled the actual claim/Note filed by the Bank of Independence. The Secretary need only prove by a preponderance of the evidence that the Note was in HUD's possession at the time the loss occurred." (Suppl. Secy. Stat., ¶¶ 9, 13.) Finally, the Secretary asserts that "Petitioners . . . have twice acknowledged the debt in writing. Once in a repayment agreement dated September 15, 1980, and again on February 14, 2009." (Sec'y Stat., ¶ 9, Dillon Decl., ¶ 8).

Since federal law does not provide the legal standard for determination of the alleged debt, we look to the laws of the state of Missouri, where the Note at issue was signed. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state"); *Boseman v. Connecticut General Life Insurance Co.*, 301 U.S. 196, 202 (1937) ("In every forum a contract is governed by the law with a view to which it was made"); *see also Gay Lee Marriott*, HUDBCA No. 87-2534-H67 (March 22, 1988) (applying Texas law governing disposition of collateral after default on a manufactured home loan held by HUD).

1. The Secretary's Right To Enforce the Note

The fact that the Secretary is unable to produce the Note, in this case, may or may not cause the alleged debt to become unenforceable. Mo. Stat. Ann. § 400.3-309(a) provides that the Secretary is entitled to enforce the Note even if he cannot produce it if:

> (1) the Secretary was in possession of the instrument and entitled to enforce the instrument; (2) the loss of possession was not the result of a transfer by the Secretary or a lawful seizure; and (3) 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.

Mo. Stat. Ann. § 400.3-309(a) (West 2010). In addition, Mo. Stat. Ann. § 400.3-309(b) provides that courts may not enter judgment in favor of the person seeking enforcement of a Note unless it finds that the person required to pay the Note is "adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means." In order to protect Petitioners from claims by other parties attempting to enforce the Note in this case, the Secretary must prove that he is entitled to enforce the Note.

The Secretary claims that he was in possession of the instrument and entitled to enforce the instrument: "The Secretary was in possession of the instrument when loss of possession occurred. The [N]ote and assignment were received by HUD when Bank of Independence submitted [its] claim for insurance benefits." (Sec'y Stat., ¶ 14.); "[b]oth the Title I Claim for Loss Transmittal Letter and the [HUD Letter] advising [Petitioners] that 'the loan has been . . . assigned to [HUD] for collection' are ample evidence that HUD was in possession of the Note at the time that loss occurred." (Suppl. Sec'y Stat., ¶ 14.) Next, the Secretary asserts that the loss of possession was not the result of a transfer by the Secretary or a lawful seizure: "At no time did HUD transfer or assign the note, nor was the note seized from HUD." (Sec'y Stat., ¶ 15.) Finally, the Secretary alleges that he cannot reasonably obtain possession of the instrument because its whereabouts cannot be determined: "Possession of the note cannot reasonably obtained, because its whereabouts is unknown and is presumed lost." (Sec'y Stat., ¶ 16.)

Regardless of whether the correct burden of proof is clear and convincing evidence or preponderance of the evidence, it is of little consequence that the Note is lost if there is other

authoritative documentary evidence that alludes to the fact that the Note existed at one point. In this case, Petitioners offered no evidence to contradict the allusion to the existence of the Note as set forth in the Title I Claim for Loss Transmittal Letter and the HUD Letter that Petitioners received. Petitioners have not filed any documentary evidence, other than general denials, to refute the Secretary's sworn assertions and his documentary evidence.

Moreover, I find no evidence to suggest that, were the Note to be enforced, Petitioners would be subjected to liability by multiple claimants on the Note. Accordingly, I find that the Secretary is entitled to enforce the Note. The evidence filed by the Secretary sufficiently demonstrates that the Secretary is the only holder of the Note. *See* Uniform Commercial Code Comment to Mo. Stat. Ann. § 400.3-309 (there is adequate protection for the person required to pay the instrument if the unendorsed instrument was payable to the person who lost the instrument, because no other person could be a holder of the instrument).

2. The Terms of the Note

Mo. Stat. Ann. § 400.3-309(b) provides that "[a] person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument." Petitioners argue that the evidence presented by the Secretary, namely the Declaration and the HUD Letter, fails to prove the terms of the lost instrument: "The Declaration . . . fails to prove the terms of the lost instrument by clear and convincing evidence" because "[t]he fact that Mr. Dillon's knowledge of the instrument is limited to his responsibility for reviewing a manual and computerized records pertaining to default loans owned by the Secretary gives him no first-hand knowledge of the . . . terms . . . of the instrument." (Pet'r Response, ¶¶ 4, 6.); the HUD Letter "is not clear and convincing evidence of the instrument['s] . . . terms . . ., but merely a representation on behalf of HUD that [it] claim[s] to have been assigned the instrument. The [HUD] Letter . . . did not enclose a copy of the instrument and did not recite the terms of the instrument." (Pet'r Response, ¶ 7.)

The Secretary acknowledges that pursuant to Mo. Stat. Ann. § 400.3-309(b), he "must . . . prove the terms of the instrument and [his] right to enforce the instrument." (Suppl. Sec'y Stat., ¶ 7.) The Secretary argues that, as required under the statute, he has set forth the terms of the Note and his right to enforce the Note in the Secretary's Statement, the Declaration and the Title I Claim for Loss. (Suppl. Sec'y Stat., ¶ 8; Sec'y Stat., ¶¶ 17-18.)

While Petitioners have failed to show that Missouri law requires that documentary evidence in the Secretary's support must show first-hand knowledge of the terms of the Note, this Court agrees with Petitioners that the Declaration of Brian Dillon is hearsay as to this case. Nowhere does Mr. Dillon acknowledge having actual knowledge of the terms of the Note. The Secretary relies on the Declaration of Mr. Dillon, who does not have first-hand knowledge but has only documentation alluding to the Note. The terms of the Note, therefore, have not been established.

While the Title I Claim for Loss identifies the Note by its type, loan number, face amount, interest rate charged, etc., I agree that the documents, in and of themselves, and together with the Declaration do not provide definitive proof of the terms of the Note. This Office

generally requires a copy of the mortgage, promissory note or other loan documents to prove the existence of the terms of the underlying note. In the absence of such evidence, I find that the Secretary has not sufficiently proven the terms of the Note.

3. Enforcement of the Note

The Secretary has failed to prove the terms of the Note. However, in this case, the Secretary has sufficiently shown that Petitioners, themselves, acknowledged the existence of the underlying debt, in writing, on two separate occasions: "Petitioners . . . have twice acknowledged the debt in writing. Once in a repayment agreement dated September 15, 1980, and again on February 14, 2009." (Sec'y Stat., ¶ 9, Dillon Decl., ¶ 8).

Both Petitioners signed the repayment agreement dated September 15, 1980 stating, "Regarding the debt which I now owe the United States Government, the following payment plan is submitted for your approval," wherein Petitioners proposed to make regular payments of $25.00 starting September 15, 1980. (Dillon Decl., Ex. C.) Again, on February 14, 2009, both Petitioners signed the Settlement Offer Form, wherein both acknowledged their debt to HUD, identified by HUD Claim number, and offered a lump sum payment of $150.00. The Settlement Offer Form states, "[W]e[,] Robert L and Carole C. Lane[,] acknowledge . . . our . . . debt to the United States Department of Housing & Urban Development. This debt is identified by the HUD claim number above." (Dillon Decl., Ex. D.) The Settlement Offer Form has the correct HUD Claim Number handwritten above that line. (Dillon Decl., Ex. D.)

In conclusion, although the Secretary has failed to prove the terms of the lost Note, he has established that he is entitled to enforce the Note by showing that Petitioners have acknowledged the debt at issue. Upon due consideration, I find that Petitioners have not met their burden to show that the debt claimed by the Secretary is unenforceable and not past due, and that this matter must be dismissed pursuant to 24 C.F.R. §17.152(b). Thus, I find that the alleged debt to HUD in this case is past due, and therefore legally enforceable at this time.

ORDER

For the reasons set forth above, 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 seek collection of this outstanding obligation by means of administrative offset of any federal payments due to Petitioners to the extent authorized by law.

H. Alexander Manuel
Administrative Judge

July 16, 2010