



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

In the Matter of:

JOHN AND PAMELA L. RUTOWSKI ,

Petitioners

HUDOA No. 10-M-NY-LL72
Claim No. 7-711467570A

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For the Secretary

AMENDED DECISION 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 March 3, 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 March 5, 2010.

Background

On November 20, 1995, Petitioners 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 April 20, 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 Petitioners 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 amounts due under the Note, but Petitioners remain delinquent. (*Id.* at ¶ 8.) 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) \$24,885.35 as the unpaid principal balance as of December 30, 2009;
- (b) \$12,358.45 as the unpaid interest on the principal balance at 5% per annum through March 31, 2010; and
- (c) interest on said principal balance from April 1, 2010 at 5% per annum until paid.

(*Id.*; Declaration of Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center ("Dillon Decl."), dated April 15, 2010, ¶ 4.)

A Notice of Intent to Initiate Administrative Wage Garnishment Proceedings, dated February 1, 2010, was sent to Petitioners. (Sec'y Stat., ¶ 9; Dillon Decl., ¶ 5.)

Discussion

Petitioners argue that the alleged debt to HUD is unenforceable because (1) HUD has not credited payments made during the pendency of their Chapter 13 bankruptcy action to their 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, 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 Petitioners in 2005; (4) the title agent hired by Petitioners' lender advised them to pay the subject debt to Challenge Realty when they refinanced their home in 2005; (5) the

Secretary's proposed repayment schedule would result in financial hardship for Petitioners; and (6) the case at bar is time barred by 24 C.F.R. § 17.160.

First, Petitioners dispute the amount of the debt claimed by asserting that HUD has not credited payments made during the pendency of their Chapter 13 bankruptcy action to their debt balance. Petitioners state, "Petitioners filed a Chapter 13 bankruptcy on July 8, 1998[;] [p]art of the plan included payments for HUD." (Petitioners' Letter ("Pet'r Ltr."),¹ filed March 3, 2010.) Having enclosed "three of the Trustee reports . . . regarding payments to HUD" in their Letter, Petitioners argue that "[i]t does not appear from the information received from HUD that the Petitioners were credited with that amount." (*Id.*, Ex. 2.)

In response, the Secretary asserts, "All payments received by HUD during the pendency of Petitioners' 1998 bankruptcy action were credited to their account. According to the Standing Trustee's Final Report, attached as Exhibit 2 as Petitioners' March 3, 2010 letter, \$2,540.89 was disbursed to HUD during the pendency of Petitioners' 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 Petitioners' account. This is the exact amount disbursed to HUD by the Standing Trustee on Petitioners' behalf." (Sec'y Stat., ¶¶ 11-13; Dillon Decl., ¶ 6, Ex. B.)

Petitioners have filed no documentary evidence to support their assertion that the payments made during the pendency of Petitioners' bankruptcy action has not been credited toward their 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, Petitioners' assertion that the amount of the debt is incorrect must fail for want of proof. Petitioners have not submitted any documentary evidence that successfully refutes the Secretary's claim that HUD credited payments made as a result of Petitioners' bankruptcy action toward their account.

Second, Petitioners also dispute the amount of the debt claimed by asserting that payments made to Champion, "as servicer for HUD," until Petitioners refinanced their 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 Stat., ¶ 15; Dillon Decl., ¶ 7.) Second, the Secretary argues that perhaps "Petitioners intended to argue that they were making payments to 'Countrywide' rather than Champion, since Countrywide was their mortgagee at the time they refinanced in 2005." (Sec'y Stat., ¶ 15, Ex. D.)

Again, Petitioners have filed no documentary evidence to support their assertion that they made payments to Champion, or that the alleged payments to Champion should be credited toward their debt balance. Champion is not a loan servicer for HUD. Petitioners have not provided any evidence that Petitioners made any payments to the original lender or any valid

¹ The Petitioners' letter is for both HUDOA No. 10-M-NY-AWG27 and the federal offset case at bar. Both cases concern the same debt and Claim No. 7-711467570A. In the letter, Petitioners state, "While the caption [for the letter] is solely In the Matter of Pamela L. Rutowski, Mr. Rutowski was served with a Notice of Intent to Collect by Treasury Offset, a copy of which is attached. Therefore this submission will cover both of those Notices." (Pet'r Ltr.)

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, Petitioners' assertion that the amount of the debt is incorrect must fail for want of proof.

Third, Petitioners argue that the Note was assigned from Remodelers National Funding Corporation, a/k/a Firstplus Financial Inc., to Challenge Realty fraudulently, and that Petitioners' 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. Petitioners state, "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.) Petitioners further state, "The [judicial order against Mr. Tedder] references allegations that \$1.8 million was paid to the government. Petitioners refinanced by Mortgage dated March 8, 2005, before the payments were allegedly made by Challenge Realty to the government. Therefore it is Petitioners' 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 Petitioners' argument that they are 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 Petitioners 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, Petitioners have produced no evidence to support their position that their debt to HUD was paid as a result of the assets forfeited by Challenge Realty in the action against Mr. Tedder. (*Id.*)

Fourth, Petitioners argue that when they refinanced their mortgage in 2005, they were advised by their 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 them from their obligation to repay HUD. Petitioners state, "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[s]." (Pet'r Ltr.)

The Secretary responds that Challenge Realty, Inc. was not the rightful holder of the Note and Mortgage. (Sec'y Stat., ¶ 18.) The Secretary states:

The Release [of Mortgage], 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 Mortgage 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 Petitioners have failed to provide any evidence that the underlying Note was ever assigned to Challenge Realty.

(Dillon Decl., ¶ 9, Ex. E.)

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

Fifth, Petitioners assert that the Secretary's proposed repayment schedule would result in financial hardship for Petitioners: "Attempting to collect this debt would create an unbearable hardship on Petitioners. Petitioners are already behind on bills, have to pay their mortgage given their financial background, have to eat, have to drive to doctors appointments and pay for medication, etc." (Pet'r Ltr.) Unfortunately, evidence of financial hardship, no matter how compelling, cannot be taken into consideration in determining whether the debt is past-due and enforceable in administrative offset cases such as this. *Thelma Smith*, HUDBCA No. 00-A-NY-AA8 (June 19, 2000) (citing *Della Coleman*, HUDBCA No. 99-C-SE-Y73 (Feb. 23, 2000)). 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 (Dec. 8, 1986). Furthermore, this Office is not authorized to extend, recommend, or accept any payment plan or settlement offer on behalf of the Department. Should Petitioners wish to initiate, continue, or renew discussion regarding settlement terms, Petitioners may wish to discuss this matter with counsel for the Secretary in this proceeding, or to file a HUD Title I Financial Statement (HUD Form 56142) with Lester J. West, Director, HUD Albany Financial Operations Center, 52 Corporate

Circle, Albany, NY 12203-5121. Mr. West's telephone number is 1-800-669-5152, extension 4206.

Lastly, Petitioners argue that the debt cannot be collected due to a ten-year statute of limitations: "[I]t is [P]etitioners' position that this debt is unenforceable as the Statute of Limitations has passed. The Assignment of Mortgage was dated February 18, 1998, the time when the Secretary's right to collect the debt first accrued. The initiation of the offset was early 2010, which falls outside the 10 year window." (Petitioners' Letter ("Pet'r May Ltr."), filed May 19, 2010.) Petitioners rely on 24 C.F.R. §17.160 for the proposition that "[t]he Secretary may not initiate offset of Federal payments due to collect a debt for which authority to collect arises under 31 U.S.C. [§] 3716 more than 10 years after the Secretary's right to collect the debt first accrued." (*Id.*)

The governing statute in 31 U.S.C. § 3716 (e)(1), however, was amended in 2008 to eliminate the ten-year limitation.² The regulation cited by Petitioners, 24 C.F.R. §17.160, implementing the statute, is therefore superseded by the amended statute under 31 U.S.C. § 3716 (e)(1). As a result, no statute of limitations applies in this case.

Specifically, 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 twelve-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.

In conclusion, Petitioners have failed to file sufficient documentary evidence to support their argument that the debt that is the subject of this proceeding is not past due or is unenforceable, and have therefore failed to meet their burden of proof as set forth in 24 C.F.R. § 17.152. In the absence of sufficient documentary evidence filed by Petitioners, I find the debt that is the subject of this proceeding to be legally enforceable against Petitioners in the amount claimed by the Secretary.

ORDER

The Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative offset is VACATED. For the reasons stated above, it is hereby

² On May 22, 2008, 31 U.S.C. § 3716 (e)(1) was amended in Public Law No. 110-234, § 14219 to now state: "Elimination of statute of limitations applicable to collection of debt by administrative offset."

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



H. Alexander Manuel
Administrative Judge

August 11, 2010