



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

In the Matter of:

Willie R. Shumpert,
Petitioner

HUDOA No. 11-H-CH-AWG67
Claim No. 780591092-OA

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Pro se

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For the Secretary

DECISION AND ORDER

On March 22, 2011, 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 Office of Appeals has jurisdiction to determine whether Petitioner's debt is past due and legally enforceable pursuant to 24 C.F.R. § 17.170(b).

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. 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 an undue 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), on March 29, 2011, this Office stayed the issuance of a wage withholding order until the issuance of this written decision, unless a wage

withholding order had previously been issued against Petitioner. (Notice of Docketing, Order, and Stay of Referral, dated March 29, 2011.)

Background

Petitioner executed and delivered an Installment Note dated May 2, 2000, payable to the order of TMS Mortgage, Inc., dba The Money Store, in the amount of \$12,602.58, for a home improvement loan that 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 28, 2011, ¶ 2, Ex. A.) HomEq Servicing Corporation, successor by merger to TMS Mortgage, Inc., assigned the Note and Mortgage to Wells Fargo Bank Minnesota, National Association, as trustee under the Pooling and Servicing Agreement, dated as of February 28, 2001. (Sec'y Stat., ¶ 3, Ex. A2.) After default by Petitioner, the Note was assigned to HUD by Wells Fargo Bank Minnesota, National Association. (Sec'y Stat., ¶ 4; Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center within HUD ("Dillon Decl."), dated April 8, 2011, ¶ 3.)

HUD has attempted to collect on the Note from Petitioner, but Petitioner remains in default. Petitioner is indebted to HUD on the Note in the following amounts:

- (a) \$11,207.48 as the unpaid principal balance as of March 31, 2011;
- (b) \$1,176.84 as the unpaid interest on the principal balance at 2.0% per annum through March 31, 2011;
- (c) 2,969.41 as penalties and administrative costs through March 31, 2011; and
- (d) interest on said principal balance from April 1, 2011 at 2.0% per annum until paid.

(Sec'y. Stat., ¶ 6; Dillon Decl., ¶ 4.)

A Notice of Intent to Initiate Administrative Wage Garnishment Proceedings, dated January 26, 2011, was sent to Petitioner. (Sec'y. Stat., ¶ 7; 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. As of April 8, 2011, Petitioner has not entered into a written repayment agreement in response to the January 26, 2011 Notice. (Sec'y. Stat., ¶ 8; Dillon Decl., ¶ 6.)

Based on a review of Petitioner's bi-weekly pay statement, the Secretary, after accounting for allowable deductions, proposes a bi-weekly repayment schedule of 15% of Petitioner's disposable pay, or \$229.76. (Sec'y Stat. ¶ 9; Dillon Decl., ¶ 8.)

Discussion

Pursuant to 31 C.F.R. §285.11 (f)(8)(ii), if Petitioner disputes the existence or amount of the debt the Petitioner "must present, by a preponderance of the evidence, that no debt exists or that the amount of the debt is incorrect." Petitioner objects to the proposed administrative wage garnishment on two grounds: (1) the debt was discharged in Petitioner's Chapter 13 bankruptcy, and (2) the administrative wage garnishment would result in financial hardship to Petitioner. (Petitioner's Hearing Request (Hr'g Req.), filed March 22, 2011.)

First, Petitioner objects to the enforceability of the debt by stating that he “filed a Chapter 13 a while back [and] thought [his] lender was paid in full.” (AWG Hr’g Req.) Petitioner has failed to submit any documentary evidence that substantiates that the filing of the Chapter 13 bankruptcy released Petitioner from the enforceability of the alleged debt.

In response, the Secretary states:

In a Chapter 13 bankruptcy, the debtor may propose a plan that attempts to modify the rights of a secured creditor under § 1322(b)(2), or the debtor may propose a plan to cure any defaults and maintain payments pursuant to the original agreement between the parties in accordance with § 1322(b)(5) of the Code.

(Sec’y Stat., ¶ 16.)

11 U.S.C. § 1322(b)(5) provides for the “curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due[.]” The Secretary asserts that “when a default on a mortgage is cured under § 1322(b)(5), the full amount of the creditor’s claim i[s] not paid during the Chapter 13 case” since the “last payment is due after the date on which final payment under the plan is due.” (Sec’y Stat., ¶¶ 17-18.) The Secretary explains that this allows the debtor to “reserve[] the benefit of a longer payment schedule which extends beyond the due date of the last payment under the plan, and the creditor is protected by the exception to discharge for long term debts on which defaults are cured.” (*Id.*) The Secretary maintains that “the Petitioner’s liability on the remaining debt has not been discharged and is enforceable by the Secretary.” (*Id.* ¶ 19.)

As support, the Secretary provided a copy of the Trustee’s Final Report and Account that reflects Petitioner’s payment of \$1,627 towards the outstanding balance owed to HUD. (Sec’y Stat., ¶ 14, Ex. F.) Additionally, the Secretary provided a copy of the modified bankruptcy plan, which was discharged on April 11, 2008. (*Id.*, Exs. D, G.) The modified bankruptcy plan states that the debtor was to make monthly payments toward his mortgage arrears to HomeEq Servicing Corp., a predecessor in interest to HUD. (*Id.*, Exs. D, E.) The Secretary also submitted a copy of the Note in which it states that Petitioner:

[W]ill make monthly payments every month until [he] has paid all of the principal and interest and any other fees or charges . . . that [he] may owe under this Note. If, on May 08, 2020 any sum still remains unpaid, [he] will pay what [he] owe[s] on that date.

(*Id.*, Ex. A.)

11 U.S.C. § 1328(a)(1) and 11 U.S.C. 1322(b)(5) state that a debt is not discharged on a secured claim on which the last payment is due after the date of the final payment under the bankruptcy plan. In this case, the last payment on the Note is due on May 8, 2020, which is after

the April 11, 2008 date of the bankruptcy discharge. (Sec'y Stat., Exs. A, G.) Therefore, Petitioner's debt to HUD was not discharged after April 11, 2008, when the trustee paid \$1,627.00 to HUD. Pursuant to the modified bankruptcy plan, Petitioner was still required to make monthly payments on the alleged debt owed to HUD until the final due date of May 8, 2020. (*Id.*, Ex. D.) Moreover, Petitioner's discharge specifically lists debts that are *not* discharged, including "[d]ebts provided for under section 1322(b)(5) of the Bankruptcy Code and on which the last payment is due after the date on which the final payment under the plan was due." (*Id.*, Ex. G.)

To date, Petitioner has not provided, in this case, any documentary evidence that would prove that HUD issued a written release or final discharge to Petitioner or that the \$1,627.00 paid to HUD represented a settlement amount. Without sufficient evidence to substantiate a written release due to discharge by bankruptcy, I must find that the alleged debt remains due and owing by Petitioner because the debt was not ordered discharged by bankruptcy.

Second, Petitioner claims that the administrative wage garnishment would result in financial hardship. Specifically, Petitioner states that, "[m]y bills is [sic] too much for the garnishment at this point in my life." (Pet'r's Hr'g Req.) In support of his financial hardship claim, Petitioner provided copies of proofs of payment for his monthly expenses. (Petitioner's Documentary Evidence ("Pet'r's Evid."), filed April 12, 2011, Attachments.) Petitioner failed to provide this Office with a pay statement, so this Office had to rely upon the copy of Petitioner's pay statement that was submitted as an exhibit with the Secretary's Statement. (See Sec'y Stat., Ex. B.) Petitioner's bi-weekly pay statement for the pay period of February 20, 2011 to March 5, 2011 indicates that Petitioner's bi-weekly gross pay is \$2,141.60, or \$4,382.20 monthly. (Dillon Decl., Ex. B.) 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. . . . includ[ing] amounts for deductions such as social security taxes and withholding taxes." 31 C.F.R. § 285.11(c). After subtracting allowable deductions for federal tax, \$489.44; Medicare, \$60.02; state tax, \$182.36; health insurance, \$149.56; and retirement, \$338.38, Petitioner is left with a monthly disposable income of \$3,063.44.

The documentary evidence submitted by Petitioner for his essential monthly household expenses are: water, \$22.34; automobile loan payment, \$256.44; Nationwide Insurance, \$182.99; and telephone, \$51.50. Petitioner also alleged other additional expenses for: mortgage, \$341.00; gas, \$100.00; clothes, \$100.00; and, food, \$100.00, but he failed to file proofs of payment to support these additional expenses. (Pet'r's Evid.) However, this Office has maintained that credit may be given for certain essential monthly living expenses, such as expenses for food, shelter, or utilities, in instances where the listed monthly expenses provide reasonable and necessary living expenses, even though proofs of payment have not been provided. *David Herring*, HUDOA No. 07-H-NY-AWG53, at 4-5 (July 28, 2008); *Elva and Gilbert Loera*, HUDBCA No. 03-A-CH-AWG28, at 4 (July 30, 2004).

So similarly, in this case, this Office will consider allowances to pay for reasonable and necessary living expenses, such as food, clothing, gas, and a mortgage. Therefore, this Office also will credit the amounts alleged for monthly living expenses for: mortgage, \$341.00; and gas, clothes, and food, at \$100.00 each per month.

Certain other expenses will not be credited towards Petitioner's household expenses because Petitioner has not submitted sufficient documentary evidence to establish that these household expenses are essential on a monthly basis: furniture, \$74.54; cellular phone, \$127.11; ADT Security Services, \$90.50; and cancelled automobile insurance, \$117.48. Petitioner also will not receive credit for two medical bills, the first bill for Ingalls Hospital in the amount of \$1,148, with a settlement offer for \$918.40; and, the second bill for a doctor's bill in the amount of \$156.00. Since the record does not reflect that these medical bills are recurring monthly expenses, but instead show that they are one-time only expenses, these medical bills will not be credited towards Petitioner's essential monthly living expenses. Thus, based upon the evidence provided by Petitioner, Petitioner's essential monthly household expenses total \$1154.27.

Petitioner's disposable income of \$3,063.44 exceeds his monthly living expenses of \$1154.27 by \$1909.17. A 15% garnishment rate of Petitioner's current monthly disposable income would result in a garnishment amount of \$459.52 per month and would leave Petitioner with a positive balance of \$1,449.65. As a result, Petitioner has not met his burden of establishing, by a preponderance of the evidence, that the Secretary's proposed repayment schedule creates a financial hardship for him. Therefore, Petitioner remains legally obligated to pay the debt that is the subject of this proceeding.

ORDER

For the reasons set forth above, I find that the debt which is the subject of this proceeding is legally enforceable against Petitioner in the amount claimed by the Secretary.

The Order imposing stay of referral of this matter to the U.S. Department of Treasury for administrative wage garnishment is **VACATED**. It is hereby

ORDERED that the Secretary is authorized to refer this matter to the U.S. Department of the Treasury for administrative wage garnishment in the amount of 15% of Petitioner's disposable income.



Vanessa L. Hall
Administrative Judge

August 18, 2011