



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

In the Matter of:

Oracquiles Gelabert,
Petitioner

HUDOA No. 11-M-NY-AWG31
Claim No. 721005465

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Pro Se

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DECISION AND ORDER

On September 30, 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 are designated to determine whether the Secretary may collect the alleged debt by means of administrative wage garnishment if 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 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 November 24, 2010, this Office stayed the issuance of a wage withholding order until the issuance of this written decision.

Background

On May 23, 2001, Petitioner executed and delivered to the Secretary a Subordinate Mortgage and a Partial Claims Promissory Note ("Subordinate Note" or "Note") in the amount of \$9,186.30 in exchange for foreclosure relief being granted by the Secretary. (Secretary's Statement ("Sec'y Stat."), filed December 15, 2010, ¶ 2; Ex. A, Subordinate Mortgage, dated May 23, 2001.) The Note cites specific events that make the debt become due and payable, one of which is the payment in full of the primary note. (*Id.*, ¶ 3; Ex. A, ¶ 3(A)(I).)

On or about November 2, 2007, the FHA insurance on Petitioner's primary mortgage was terminated when the lender informed the Secretary that the primary mortgage was paid in full. (*Id.*, ¶ 4; Ex. B, Declaration of Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center ("Dillon Decl."), dated December 15, 2010, ¶ 4.) Upon payment in full of the primary note, Petitioner was to make payment at the location identified on the Subordinate Note: "the Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, S.W., Washington, DC 20410 or any such other place as Lender may designate in writing by notice to Borrower." (*Id.*, ¶ 5; Ex. A, ¶ 3(B).)

Petitioner did not make payment on the Note at the place and in the amount specified. (*Id.*, ¶ 6. Dillon Decl., ¶ 5.)

The Secretary has filed a Statement with documentary evidence in support of his position that the debt is past due and immediately enforceable. The Secretary alleges that Petitioner is in default and is indebted to HUD in the following amounts:

- (a) \$9,186.30 as the unpaid principal balance as of November 30, 2010;
- (b) \$267.96 as the unpaid interest on the principal balance at 5% per annum through November 30, 2010; and
- (c) interest on said principal balance from December 1, 2010 at 5% per annum until paid.

(Sec'y Stat., ¶ 7; Dillon Decl., ¶ 5.)

On January 26, 2009, HUD sent Petitioner a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings. (*Id.*, ¶ 8; Dillon Decl., ¶ 6.) Petitioner timely requested a hearing. On September 4, 2009, this Court issued a Decision and Order prohibiting the Secretary from collecting Petitioner's debt via administrative wage garnishment because the Secretary was unable to produce the Subordinate Note establishing the repayment terms of Petitioner's debt, and, therefore, was unable to prove that the debt was past due. (*Id.*, ¶ 9; Motion for Docketing, filed November 12, 2010, Ex. C., *In re Oraquiles Gelabert*, HUDOA No. 09-M-NY-AWG69 ("2009 Decision"), issued September 4, 2009.)

The 2009 Decision stated that the Secretary “shall not be prejudiced from seeking administrative wage garnishment if, in the future ... the Secretary is later able to produce the lost Note.” (2009 Decision, p. 6.)

HUD’s Financial Operations Center has since located the Note. (Sec’y Stat., ¶ 12; Dillon Decl., ¶ 7.) The Secretary notified Petitioner via letter dated May 11, 2010, that the Note had been found, and offered Petitioner 30 days to enter into a repayment agreement, pursuant to 31 C.F.R. § 285.11(e)(2)(ii). (*Id.*, ¶ 13; Dillon Decl., ¶ 7.) Petitioner has not entered into a repayment agreement. (*Id.*)

In a letter dated September 1, 2010, Petitioner was advised of her right to request a hearing. (*Id.*, Dillon Decl., ¶ 8; Dillon Decl., p. 4.) Petitioner requested said hearing via letter dated September 30, 2010. (Motion for Docketing, Ex. A.)

The Secretary has been unable to obtain a copy of Petitioner’s current pay statement, and so proposes a repayment schedule of \$263.00 per month, or 15% of Petitioner’s disposable income. (Sec’y Stat., ¶ 18; Dillon Decl., ¶ 9.)

Discussion

Pursuant to 31 C.F.R. § 285.11(f)(8)(i), the Secretary has the initial burden of proving the existence or amount of the alleged debt. The burden then shifts to the Petitioner to show, by a preponderance of the evidence, that no debt exists or that the amount of the alleged debt is incorrect. 31 C.F.R. § 285.11(f)(8)(ii). Petitioner was afforded the right to file evidence that the terms of the proposed repayment schedule are unlawful or would cause her financial hardship or that the debt is unenforceable by operation of law. (Notice of Docketing, Order, and Stay of Referral, issued November 24, 2010.)

The Secretary has filed a statement, supported by documentary evidence, in support of his position that Petitioner is indebted to the Department in the claimed amounts. Petitioner challenges the existence of this debt and contends that she never received the actual funds from the HUD loan. (Motion for Docketing, Ex. A, Petitioner’s Hr’g Req. Letter). However, the Secretary has provided documentary evidence in the form of the sworn declaration of Brian Dillion that HUD had indeed advanced the agreed-upon funding to the FHA-insured lender to bring the Petitioner’s mortgage current. (Dillon Decl., ¶ 4.)

On November 24, 2010, this Office ordered Petitioner to file, within 45 days, “documentary evidence to prove that all or part of the alleged debt is either unenforceable or not past due. (Notice, p. 2). Petitioner subsequently filed a letter making additional assertions and requesting additional time to secure legal counsel. (Petitioner’s Letter (“Pet’r’s February 1 Letter”), filed February 1, 2011). This Court granted the request and ordered Petitioner to file documentary evidence on or before April 8, 2011. (Ruling and Order (“February Order”), issued February 11, 2011). Petitioner failed to respond to this Order.

On June 23, 2011, this Court ordered Petitioner to file documentary evidence on or before July 12, 2011. (Order (“June Order”), issued June 23, 2011). The June Order also stated that: “Failure to comply with this Order may result in sanctions being imposed by the Court ...

including judgment being entered on behalf of the opposing party, or a decision based on the documents in the record of this proceeding.” (*Id.*) (emphasis in original). Again, Petitioner failed to respond. Therefore, I find that there is no evidence to support Petitioner’s contention that HUD did not fund the loan that is the subject of this case.

Petitioner’s February 1 Letter also asserted that “we cannot afford to have our wages garnished as we would not be able to continue to pay our bills or put food on the table.” (Pet’r’s February 1 Letter.) In the Notice of Docketing issued to Petitioner, this Office explained that, “[t]o prove financial hardship, Petitioner’s documentary evidence should not be limited to a mere list of expenses, but instead must include proof of payment of household expenses.” (emphases in original) (Notice of Docketing at 2.) The Notice of Docketing also required Petitioner to file copies of Petitioner’s pay statements for the past 12 months. (*Id.*) Petitioner did not file any such documentary evidence in response to the Notice of Docketing.

Both the February Order and the June Order instructed Petitioner that she may file documentary evidence proving that repayment would result in financial hardship, but that the proof must “consist of proof of actual payment” of household expenses, including receipts, bank statements, and copies of checks for payment of rent, food, or transportation. (See June Order, February Order.) Petitioner has not provided any documentation evidencing a financial hardship. I therefore find that Petitioner’s assertion of potential financial hardship is unsupported by the record.

Finally, Petitioner contends that she refinanced the mortgage on her home into a reverse mortgage and, under Florida law, a home encumbered by a lien cannot be the subject of a reverse mortgage. (Pet’r’s February 1 Letter.) Petitioner thus offers the existence of her reverse mortgage as evidence that there was no lien on the home at the time of the refinance.

Petitioner does not, however, identify the Florida law upon which she relies, and does not introduce any evidence proving that she has a reverse mortgage or, if she does, that the reverse mortgage occurred after the date on which a lien would have been recorded. I therefore find no evidence in the record to support Petitioner’s assertion that Florida law invalidates this loan.

This Office has held that “[a]ssertions without evidence are not sufficient to show that the debt claimed by the Secretary is not past-due or enforceable.” *Darrell Van Kirk*, HUDBCA No. 03-A-CH-AWG03 (January 27, 2003) (citing *Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996)). In this case, Petitioner has provided no evidence to refute the Secretary’s claim that the debt is legally due and enforceable, despite being ordered on three occasions to come forward with such evidence. Petitioner’s claim that the alleged debt does not exist must therefore fail for lack of proof.

ORDER

Upon consideration of the arguments, allegations, and documentary evidence set forth above, I find that the alleged debt is past due and legally enforceable against Petitioner in the amount claimed by the Secretary.

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 in the amount of \$263.00 per month or 15% of Petitioner's disposable pay, whichever is lesser.

ORDERED this 8th day of September, 2011.



H. Alexander Manuel
Administrative Judge

September 8, 2011