



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

In the Matter of:

Kimberly Gift,
Petitioner

HUDOA No. 11-M-NY-AWG87
Claim No. 721006567

Kimberly Gift
4655 Whites Creek Pk.
Whites Creek, TN 37189

Pro se

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DECISION AND ORDER

On April 18, 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 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 April 19, 2011, 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 withholding order had previously been issued against Petitioner. (Notice of Docketing, Order, and Stay of Referral, dated April 19, 2011.)

Background

On December 10, 2005, Petitioner executed and delivered to the Secretary a Subordinate Note in the amount of \$5,313.08 in exchange for foreclosure relief being granted by the Secretary. (Secretary's Statement ("Sec'y Stat.") ¶ 2, filed May 11, 2011; Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center of HUD ("Dillon Decl.") ¶ 4, dated May 5, 2011.) The Subordinate Note cites specific events which make the debt become due and payable. (Sec'y Stat. ¶ 3; Dillon Decl. ¶ 4.) One of those events is the payment in full of the primary note, which was insured against default by the Secretary. (Sec'y Stat. ¶ 3; Dillon Decl. ¶ 4.) On or about December 18, 2009, the FHA insurance on Petitioner's primary note was terminated when the lender informed the Secretary that the note was paid in full. (Sec'y Stat. ¶ 4; Dillon Decl. ¶ 4.)

The Secretary has made efforts to collect this debt from Petitioner, but has been unsuccessful. (Sec'y Stat. ¶ 7; Dillon Decl. ¶ 5.) The Secretary alleges that Petitioner is justly indebted to the Secretary in the following amounts:

- (a) \$2,703.21 as the unpaid principal balance as of April 30, 2011;
- (b) \$2.25 as the unpaid interest on the principal balance at 1% per annum through April 30, 2011; and
- (c) interest on said principal balance from May 1, 2011 at 1% per annum until paid.

(Sec'y Stat. ¶ 7; Dillon Decl. ¶ 5.) Pursuant to 31 C.F.R. § 285.11(e), a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings, dated November 18, 2010, was sent to Petitioner. (Sec'y Stat. ¶ 8; Dillon Decl. ¶ 6.) In accordance with 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was afforded the opportunity to enter into a written repayment agreement under mutually agreeable terms. (Sec'y Stat. ¶ 9; Dillon Decl. ¶ 7.) As of May 5, 2011, Petitioner has not entered into a written repayment agreement in response to the Notice. (Sec'y Stat. ¶ 9; Dillon Decl. ¶ 7.)

The Secretary's proposed repayment schedule is \$107.86 bi-weekly, or 15% of Petitioner's disposable pay. (Sec'y Stat. ¶ 16; Dillon Decl. ¶ 12.)

Discussion

Pursuant to 31 C.F.R. § 285.11(f)(8)(ii), if Petitioner disputes the existence or amount of the debt, Petitioner "must present, by a preponderance of the evidence, that no debt exists or that the amount of the debt is incorrect." In her hearing request, Petitioner objected to the enforceability of the debt, stating that her debt to HUD was paid off on December 16, 2009 when she sold her home and paid \$5,909.00 to The Housing Fund, Inc. ("The Housing Fund") at the

closing. (Pet'r's Hr'g Req.) In support of her argument, Petitioner filed a copy of a release from The Housing Fund, evidencing Petitioner's satisfaction of a debt in the amount of \$5,909.00. (*Id.*)

In response, the Secretary states that "Petitioner's debt to The Housing Fund is separate and distinct from Petitioner's debt to HUD." (Sec'y Stat. ¶ 13.) The Secretary provided a copy of the Subordinate Note in the amount of \$5,313.08, dated December 10, 2005. (Sec'y Stat., Ex. A.) The Secretary states that while Petitioner became indebted to HUD in 2005, Petitioner's indebtedness in the amount of \$5,909.00 to The Housing Fund began on November 12, 2004. (Sec'y Stat. ¶ 13.) As a result, the Secretary states that Petitioner's release from The Housing Fund had no effect on her separate indebtedness to HUD. (Sec'y Stat. ¶¶ 13-15.)

The record supports the Secretary's claim that he is seeking repayment of a "separate and distinct" debt." (Sec'y Stat. ¶ 13.) While Petitioner sufficiently proved that her lender, The Housing Fund, was paid in full, the Housing Fund was merely the lender on Petitioner's *primary mortgage*. HUD was the lender on Petitioner's Subordinate Note. (Sec'y Stat., Ex. A.) Therefore, Petitioner's payment on her primary mortgage to The Housing Fund had no impact on her separate indebtedness to HUD on the Subordinate Note. In fact, the terms of the Subordinate Note indicate that it would become due and payable when the "[b]orrower has paid in full all amounts due under the primary Note and related mortgage." (*Id.*) As a result, when Petitioner paid her primary mortgage in full on December 18, 2009, the Subordinate Note became due and payable.

Further, the Subordinate Note specifically requires Petitioner to direct payments on the Note to "U.S. Department of HUD c/o C&L Service Corporation, 2488 E. 81st Street, Suite 700, Tulsa, OK 74137, or any such other place as Lender may designate in writing by notice to Borrower." (Sec'y Stat., Ex. 1.) Petitioner does not claim that HUD authorized The Housing Fund to accept payments toward the Subordinate Note on its behalf. Therefore, any payments Petitioner remitted to The Housing Fund were applied to the primary mortgage.

For Petitioner to prevail in this instance, HUD would had to have given Petitioner a written release, or other documentary evidence, indicating an intent to release, supported by legally sufficient consideration. *Ann Zamir (Schultz)*, HUDBCA No. 99-A-NY-Y155 (Oct. 4, 1999); *James Ragsdale*, HUDBCA No. 88-3065-H580 (Aug. 3, 1988); *Cecil F. and Lucille Overby*, HUDBCA No. 87-1917-G250 (Dec. 22, 1986); *Jesus E. and Rita de los Santos*, HUDBCA No. 86-1255-F262 (Feb. 26, 1986). In this case, Petitioner has failed to demonstrate that she was released from her loan obligation or that any consideration has been conveyed to HUD. Therefore, absent evidence of a release in writing, I find that Petitioner is bound as a matter of fact and law by the terms of the Subordinate Note and the Secretary's right to proceed against Petitioner to collect this outstanding obligation is unimpaired. *Randy Tyer*, HUDBCA No. 89-4523-L12 (Mar. 15, 1990); *In re Martha Townsend*, HUDBCA No. 87-1695-G32 (Dec. 30, 1986).

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 in 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.



H. Alexander Manuel
Administrative Judge

September 29, 2011