UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of: **Brenda C. Archer** Petitioner.	19-AM-0097-AO-035 7-210131870A March 7, 2023

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a request for hearing filed by Brenda C. Archer ("Petitioner") concerning the existence, amount, or enforceability of a debt allegedly owed to the U.S. Department of Housing and Urban Development ("HUD" or "the Secretary").

The Debt Collection Improvement Act of 1996 authorizes federal agencies to use administrative offset as a mechanism for the collection of debts owed to the United States government. *See* 31 U.S.C. §§ 3716, 3720A. The HUD Office of Hearing and Appeals has jurisdiction to determine whether Petitioner's debt is past due and legally enforceable pursuant to 24 C.F.R. §§ 17.61 *et. seq*. The administrative judges of this Court, in accordance with the procedures set forth in 24 C.F.R. §§ 17.69 and 17.73, have been designated to conduct a hearing to determine, by a preponderance of the evidence, whether the alleged debt is past due and legally enforceable. The Secretary bears the initial burden of proof to show the existence and amount of the alleged debt. Pursuant to 24 C.F.R. § 17.69(b)-(c). Thereafter, Petitioner must show by a preponderance of the evidence that all or part of the alleged debt is either not past due or not legally enforceable.

PROCEDURAL BACKGROUND

On or about April 8, 2019, Petitioner filed the *Request for Hearing* in this case. Pursuant to 24 C.F.R. § 17.77, this Court initially stayed the issuance of an administrative offset order until the issuance of this written decision. (*See Notice of Docketing, Order and Stay of Referral,* dated April 8, 2019 ("*Notice of Docketing*") at 2. On or about April 3rd and 4th, 2019, Petitioner filed HUD's Notice of Intent to Collect by Treasury Offset with attached copies of the Subordinate Note at issue in this case; and separately, Petitioner's correspondence with her primary lender, Bank of America, dated November 9, 2018, (pertaining to her application for a FHA-Hamp program loan that Petitioner alleges is related to this case). On or about October 15, 2019, Petitioner filed the *Petitioner's Restatement of the Petition* ("*Pet. Restat.*"). On or about January 22, 2020, the Secretary filed *the Secretary's Statement that Petitioner's Debt Is Past Due and Legally Enforceable* ("*Sec'y. Stat*."), along with documentary evidence in support of the Secretary's position. On or about February 18, 2020, Petitioner filed her *Response to Secretary's Statement* ("*Pet. Resp-1*"). On June 8, 2020, Petitioner filed her *Addendum to Petitoner's Response to Secretary's Statement* ("*Pet. Resp-2*").

On or about June 18, 2021, Petitioner filed a *Motion to Dismiss* this case for failure to state a claim upon which relief can be granted. The Secretary filed *the Secretary's Statement in Opposition to Petitioner's Motion to Dismiss* ("*Sec. Oppos.")* on July 27, 2021. On April 8, 2022, this Court denied *Petitioner's Motion to Dismiss*, (*Ruling Denying Petitioner's Motion to Dismiss,* finding that "the Department has set forth a *prima facie* basis for its claim against Petitioner.")) On or about March 23, 2022, Counsel for Petitioner filed correspondence with the Court stating that Petitioner did not receive a copy of the *April 8, 2022 Ruling Denying Petitioner's Motion to Dismiss.* Nevertheless, that *Ruling* was duly issued, and sent to Petitioner. *See* 24 C.F.R. §17.152(c). This *Decision and Order* follows.

DISCUSSION

The Secretary maintains that Petitioner is indebted to the Department under the terms of a Loan Modification Agreement, Subordinate Note and Mortgage, dated February 29, 2012 ("the Note"). The Note contains Petitioner's notarized signature. *See Sec'y Stat,* ¶¶ 4, 7; Exhibit A – Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center of the U.S. Department of Housing and Urban Development; Exhibit B – the Note. The Department states that the proceeds of the Note in the amount of $23,695.57 were used to advance funds to provide foreclosure relief to Brenda Archer, the Petitioner in this case, to prevent her home from going into foreclosure proceedings when she fell behind on the loan payments with her primary lender, Bank of America. *Id,* ¶ 4.

The Secretary avers that the Department has met all requirements for seeking Treasury Offset in this case, and that Petitioner is indebted to the Department in the following amounts:

(a) $23,695.57 as the unpaid principal balance as of December 30, 2019;
(b) $394.80 as the unpaid interest on the principal balance at 1% per annum through December 30, 2019;
(c) $3,113.72 as the unpaid penalties and administrative costs as of December 30, 2019; and
(d) interest on said principal balance from January 1, 2020 at 1% per annum until paid.

Id, ¶ 5. The Secretary further provides that she has provided proper regulatory notice to Petitioner of the Notice of Intent to Collect by Treasury Offset in this case. *Id,* ¶ 6. The Secretary further certifies that the Department paid the complete sum of $23,695.57 on April 23, 2012 for the related partial claim due and owing under the applicable FHA insurance provisions. *Id,* ¶ 7. The Secretary has therefore met its initial burden to prove that Petitioner is indebted to the Department in the amounts claimed by the Secretary.

For Petitioner's part, she does not deny that she received the benefit of the proceeds of the loan. She also does not claim that she has repaid her loan to HUD. Instead, she claims that the Note is not legally enforceable against her on three principal grounds:

1. that the Department acted 'arbitrarily, capriciously, abused its discretion, or otherwise has not acted in accordance with law when it accessed interest, fees, costs, collection fees and other[sic] to a lien pursuant to the FHA-HAMP Program";

2. that "the lien" that her primary lender, Bank of America, filed against Petitioner in the state of Florida was defective in that she was not given proper notice at the time the lien was filed, and on the grounds that HUD was not a party to her FHA-HAMP loan agreement with Bank of America; and
3. that the alleged actions or failures of Bank of America are somehow attributable to HUD.

Id, Pet. Restat., at 1 – 3.

Petitioner has filed numerous documents in support of her allegations that Bank of America ("BofA") improperly filed a lien against her property in Miami-Dade County in Florida in or around June 6, 2012. *Id,* Exhibit 2. Petitioner claims that she was not properly notified of the placement of the lien, and that Bank of America officials failed to respond to her requests for information concerning the FHA-HAMP loan. Although Petitioner makes numerous factual allegations alleging improper handling of her FHA-HAMP loan with BofA, Petitioner fails to provide any appreciable proof that BofA was acting on behalf of HUD, or that HUD has any legal liability for actions that may or may not have been taken by BofA.

The Secretary has addressed each of Petitioner's allegations and arguments in detail. The Secretary correctly observes that Petitioner does not dispute that she signed these documents, and that she received the benefit of the funds that HUD paid to her lender to prevent the lender from foreclosing on her home. *Sec'y. Stat.* ¶ 21. The Secretary argues that

> "Petitioner attempts to deflect attention away from the obvious by making arguments that amount to nothing more than red herrings for the sake of avoiding liability. Petitioner, for example, cites no statute, regulation or case law that makes the Subordinate Note and Mortgage she signed unenforceable."

¶ ¶ 5, 6. Moreover, the Secretary neither BofA nor Petitioner's mortgage servicer, Carrington Mortgage Servicers are agents of HUD, under the law. The documentary evidence provided by both parties does not establish that HUD "held itself out" as a principal on whose behalf BofA or Carrington Mortgage Servicers were authorized to act. The Secretary points out that:

> "It should be noted that FHA-insured lenders are regulated by HUD and must act in accordance with HUD's program requirements. *See* 24 C.F.R. Part 203, *et seq*. When a borrower goes into default on an FHA insured mortgage, HUD permits the lender to submit a Partial Payment of Claim to prevent foreclosure provided all conditions are met. See 24 C.F.R. § 203.371(b)… One of those conditions is the execution of a subordinate note and subordinate mortgage by the borrower in favor of HUD, which the lender must facilitate. Id. at § 203.371(c). While HUD regulations require the mortgagee to facilitate the borrower's execution of the subordinate note and subordinate mortgage, unless HUD explicitly requests that a lender service the indebtedness, no FHA-insured lender has blanket authority to service HUD-held debt and/or issue a mortgage satisfaction extinguishing HUD's indebtedness without HUD's express consent."

Id, ¶ ¶ 7 – 11. Nowhere in the HUD regulations does the language create an express or implied relationship of agency and principal between HUD and individual lenders. The Secretary also demonstrates, as a matter of law, that Petitioner cannot establish an agency relationship under these facts.

> "Under Florida law in order to prove the existence of an actual agency relationship, Petitioners must prove that HUD and Bank of America and/or Carrington agreed that these entities would act as HUD's agent in business transactions with third parties such as Petitioners. *Atlanta & St. Andrews Bay Ry. Co. v. Chilean Nitrate Sales Corp*., 277 F. Supp. 242, 245 (N.D. Fla. 1967), *rev'd on other grounds*, 415 F.2d 393 (5th Cir. 1967) (An agency relationship requires the consent of both parties, and absent evidence of consent from both parties, there is no actual agency relationship).

Id, ¶ 14. The Court agrees with the Secretary's analysis. *See Federal Ins. Co. v. Western Waterproofing Co. of America*, 500 So.2d 162, 165 (Fla.1st DCA 1986).

With respect to Petitioner's unsupported claims that the Department is not entitled to seek recovery for interest, penalties, and other fees on just debts owed the U.S. Government, the Secretary has also spelled out its authority, indeed requirement, to collect such debts.

> "The Debt Collection Improvement Act of 1996 requires HUD to refer delinquent debts to the U.S. Department of the Treasury ("Treasury") for collection. 31 U.S.C. § 3711(g). Once HUD sends a debt to Treasury, Treasury is authorized to charge HUD a fee for its collection efforts. 31 U.S.C. § 3711(g)(6). Those fees are passed on to the debtor. HUD is also required to charge the debtor interest, administrative costs, and penalties. 31 U.S.C. § 3717(a)&(e)(1)-(2). Fees and administrative costs (which includes the fee charged by Treasury) total 30% of any amount collected by Treasury. Payments made by the debtor are first applied to fees, then interest, and then principal. 31 C.F.R. § 901.9(f)."

Sec'y. Stat., ¶ 22.

This Court has consistently held that "[a]ssertions without evidence are not sufficient to show that the debt claimed by the Secretary is not past due or enforceable." In *re Joan Hattan*, HUDOA No. 11-M-NY-LL23 (June 29, 2011) at 3 citing *BonnieWalker*, HUDBCA No. 95-G-NY-7300 (July 3, 1996). Consequently, Petitioner's allegations must fail for lack of proof.

I find that the Secretary has not acted arbitrarily or capriciously in the circumstances surrounding the creation or handling of the Note in this case. I also find no action by any Department official that could constitute abuse of discretion in connection with the handling of the Note. The Court finds that Petitioner is indebted to the Department in the amounts claimed by the Secretary, and that the Government is entitled to enforce the full amount of its insurance claims sought in this case.

ORDER

Accordingly, it is

ORDERED that the Secretary is authorized to seek collection of this outstanding obligation by means of administrative offset in the amounts claimed by the Secretary. It is

FURTHER ORDERED that the *Stay of Referral* of this matter to the U.S. Department of the Treasury for administrative offset, imposed on April 8, 2019, is hereby **VACATED**.

SO ORDERED,

H. ALEXANDER MANUEL
Administrative Judge

APPEAL NOTICE: You have the right to move for reconsideration of this case before the HUD Office of Hearings and Appeals within 20 days of the date of this ruling or decision; or, thereafter, to reopen this case. Ordinarily, such motions will not be granted absent a demonstration by the movant that there is substantial new evidence to be presented that could not have been presented previously. An appeal may also be taken of this decision to the appropriate United States District Court. For wage garnishments cases, See 24 C.F.R. § 17.81, 31 C.F.R. § 285.119f), and 5 U.S.C. 701, *et seq*. For administrative offset cases, See 24 C.F.R. § 17.73(a), and 5 U.S.C. § 701, *et seq*