

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

In the Matter of:

Cale Garrison,

Petitioner.

No. 20-AM-0006-AG-006

7721010007

July 14, 2021

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a *Request for Hearing* (“*Hearing Request*”) filed on or about October 16, 2019, by Cale Garrison (“Petitioner”) concerning the existence, amount, or enforceability of the payment schedule of the 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 wage garnishments as a mechanism for the collection of debts owed to the United States government. *See* 31 U.S.C. § 3720D.

The Secretary of HUD has designated the administrative judges of this Office of Hearings and Appeals to adjudicate contested cases where the Secretary seeks to collect debts via administrative wage garnishment. This hearing is conducted in accordance with procedures set forth at 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.81(b).

BACKGROUND

In or around September of 2015, the HUD-insured primary mortgage on Petitioner’s home was in default. On September 29, 2015, Petitioner sought foreclosure relief from HUD to help him avoid foreclosure on his home by the primary lender (“Wells Fargo”). To prevent the primary lender from foreclosing, HUD advanced funds to Petitioner’s lender to bring the primary note current. (*See* Secretary’s Statement (“Sec’y Stat.”), ¶ 3; Exh. A, Declaration of Brian Dillon (“Dillon Decl.”); Exh. B, Note). In exchange for foreclosure relief, on September 29, 2015, Petitioner executed a Subordinate Note (“Note”) in the amount of \$33,192.36 in favor of the Secretary. (*See* Sec’y Stat., ¶ 4; Exh. B, Note).

Paragraph 3(A) of the Note cites specific events that make the debt become due and payable. One of those events is the payment in full of the primary note. (*See* Sec’y. Stat., ¶ 5; Exh. B, Note, ¶ 3(A)(i)). On or about August 8, 2016, the primary lender notified the Secretary that the primary note was paid in full. (*See* Sec’y Stat., ¶ 6; Dillon Decl., ¶ 4). Upon payment in full of the primary note, Petitioner was to make payment to HUD on the Note at the “U.S.

Department of HUD, c/o Novad Management Consulting, Shepard's Mall, 2401 NW 23rd St, Suite 1A1, Oklahoma City, OK 73107 ... or any such other place as [HUD] may designate in writing." (See Sec'y. Stat., ¶ 7; Exh. B, Note, ¶ 3(B)).

Petitioner failed to make payment on the Note at the place and in the amount specified above. Consequently, the Secretary alleges that Petitioner's debt to HUD is delinquent. (See Sec'y Stat., ¶ 8; Dillon Decl., ¶ 5). The Secretary has made efforts to collect this debt by mailing a *Notice of Intent to Initiate Administrative Wage Garnishment Proceedings* ("Notice") to Petitioner on September 19, 2019. (See Sec'y Stat., ¶¶ 9-10; Dillon Decl., ¶¶ 5-6). However, to HUD's knowledge, Petitioner still has not repaid the loan. Therefore, the Secretary asserts that Petitioner is justly indebted to the Secretary in the following amounts:

- a) \$29,812.88 as the unpaid principal balance as of September 30, 2019;
- b) \$397.28 as the unpaid interest on the principal balance at 1% per annum until paid;
- c) \$3,957.33 as the unpaid penalties and administrative costs as of September 30, 2019; and
- d) interest on said principal balance from October 1, 2019 at 1% per annum until paid.

(See Sec'y Stat., ¶ 8; Exh. A, ¶ 2).

DISCUSSION

The Secretary bears the initial burden of proof to show the existence and amount of the alleged debt. See 31 C.F.R. § 285.11(f)(8)(i). Petitioner, thereafter, must show by a preponderance of the evidence that no debt exists or the amount of the debt is incorrect. See *id.* § 285.11(f)(8)(ii). Additionally, Petitioner may present evidence that the terms of any proposed repayment schedule are unlawful, or that the alleged debt is legally unenforceable. See *id.*

As evidence of the Petitioner's indebtedness, the Secretary has filed the Secretary's Statement (Sec'y Stat.) along with the sworn declaration of Brian Dillon, Director, Asset Recovery Division (Exh. A, Dillon Decl.); and a copy of the Note. Accordingly, the Court finds that the Secretary has met his initial burden of proof.

Petitioner maintains he should not be held responsible for the subject debt because it (1) should have been paid off when he paid off the primary note with Wells Fargo; and (2) would impose a financial burden on Petitioner. Petitioner introduced, as support for his position, the affidavits of Thomas Hotard, Esq., who served as closing attorney when Petitioner sold his home in August 2016, and Mr. Hotard's assistant, April West; the September 21, 2012 Security Deed for the home; the August 19, 2013 Corporate Assignment of the Security Deed in favor of the primary lender; the October 20, 2015 Subordinate Security Deed in favor of HUD; the August 8, 2016 Payoff Letter for the primary note; an August 9, 2016 Warranty Deed; and an August 29, 2016 Cancellation of Deed to Secure Debt. (Petr's. Stat., Exhs. A-H).

After examining Petitioner's documentary evidence, the Court finds that Petitioner has failed to meet his burden of proof that the debt herein is fully satisfied and thus unenforceable. In or around August 2016, Petitioner was incorrectly informed by Wells Fargo via Mr. Hotard that payment of the primary note held by Wells Fargo also discharged all his obligations under

the Note in favor of HUD. (*See* Petr’s Stat., 2; Exh. A, ¶¶ 2-3; Exh. B, ¶ 2; *see also* Sec’y. Stat., ¶ 12). However, the Secretary’s right to collect the alleged debt in this case emanates from the terms of the Note, not from the representations made by the primary lender or the closing attorney. Although Petitioner’s Security Deed in favor of Wells Fargo and Subordinate Security Deed in favor of HUD have the same FHA case numbers (*see* Petr’s Stat., Exh. A, ¶ 3), they secure two different loans. Petitioner’s affiants, Mr. Hotard and Ms. West, assert that when Petitioner sold his home, Wells Fargo assured them Petitioner’s payoff amount covered both security deeds, but there is no evidence that any funds from the sale of the home were paid to HUD. Petitioner’s payment of \$116,628.52 paid in full only the primary note, not the Note in favor of HUD. (*See* Petr’s Stat., 2; Exh. A, ¶ 3; Exh. B, ¶ 2; Exh. F, ¶ 1).

The Note signed by Petitioner when he was threatened with foreclosure clearly states under the heading “Borrower’s Promise to Pay” that “[i]n return for a loan received from Lender, Borrower promises to pay the principal sum of ... \$33,192.36...” (*See* Note, ¶ 2) (emphasis added). “Lender” is defined under the heading “Parties” as “the Secretary of Housing and Urban Development.” (*See* Sec’y. Stat., ¶ 14; Exh. B, Note, ¶ 1-2 (emphasis added)).

For Petitioner not to be held liable for the full amount of the debt, Petitioner must produce either a release in writing explicitly relieving Petitioner’s obligation under the terms of the Note, or proof of “valuable consideration accepted by the lender” that indicates HUD’s intent to release. *See Cecil F. and Lucille Overby*, HUDBCA No. 87-1917-G250 (Dec. 22, 1986). Petitioner has failed to produce either in this case. Furthermore, there is no evidence to suggest the Note was paid off when Petitioner sold his home. Thus, the evidence submitted by Petitioner merely demonstrates that Petitioner paid off the primary note, not the subject Note, and was provided erroneous information upon which Petitioner relied as binding.

This Court has consistently maintained that “assertions without evidence are insufficient to show that the debt claimed by the Secretary is not past due and legally enforceable.” *See Sara Hedden*, HUDOA No. 09-H-NY-AWG95 (July 8, 2009), *quoting Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996). In this case, Petitioner failed to introduce into evidence proof of a written release, directly from HUD, that effectively discharged Petitioner from the debt associated with the Note. Because Petitioner agreed in the Note to pay the subject debt, the onus falls on Petitioner, not on Wells Fargo or Thomas Hotard, Esq., to ensure that the subject debt is satisfied. Hence, the Court finds that the Petitioner’s claim fails for lack of proof and, as a result, the subject debt remains past due and enforceable.

Petitioner also suggests that repayment of this debt would impose a financial hardship on him. While financial hardship does not invalidate a debt or release a debtor from the obligation to pay, financial hardship factors are relevant in determining the amount of administrative wage garnishment that will be allowed. *See Raymond Kovalski*, HUDBCA No. 87-1681-G18 (December 8, 1986); *see also* 31 C.F.R. § 285.11(f)(2), (k)(3).

In this case, the Secretary seeks to collect the debt by garnishing 15% of Petitioner’s disposable pay from each of his paychecks, which is the maximum deduction allowed by law. *See* 31 U.S.C. § 3720D(b)(1). Petitioner was specifically ordered to file documentary evidence in support of any claim that this proposed garnishment schedule would cause financial hardship.

Petitioner failed to do so. Accordingly, the Court finds Petitioner did not meet his burden to prove that repayment of the debt, in the manner proposed by the Secretary, would cause a financial hardship.

Finally, Petitioner states he would “agree to repaying only the principal amount owed over a period of not fewer than 240 payments at an interest rate below 4%.” (*See* Petr.’s Stat., 3). To the extent he is expressing interest in negotiating a settlement, this Court’s jurisdiction is limited to a “determination of whether the debt is enforceable and past due” and whether Petitioner has established financial hardship. *See Edgar Joyner Sr.*, HUDBCA No. 04-A-CHEE052 (June 15, 2005). As such, the Court is not authorized to “extend, recommend or accept any payment plan or settlement offer on behalf of the Department.” *Id.* If Petitioner wishes to discuss a payment plan, Petitioner may address the matter with Michael DeMarco, the Director of the HUD Financial Operations Center, at 1-800-669-5152, extension 2859, or may write to the HUD Financial Operations Center at 50 Corporate Circle, Albany, NY 12203-5121. Petitioner is also entitled to seek reassessment of this financial hardship determination in the future if Petitioner experiences materially changed financial circumstances. *See* 31 C.F.R. § 285.11(k).

ORDER

For the reasons set forth above, 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 15% of Petitioner’s disposable pay for each pay period.

SO ORDERED,



H. Alexander Manuel
Administrative Judge

Review of determination by hearing officers. A motion for reconsideration of this Court’s written decision, specifically stating the grounds relied upon, may be filed with the undersigned Judge of this Court within 20 days of the date of the written decision, and shall be granted only upon a showing of good cause.