

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

In the Matter of

Kelly Proctor,

Petitioner,

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20-AM-0010-AG-007

780766207-0B

May 27, 2022

DECISION AND ORDER

On or about October 7, 2019, Kelly Proctor, (“Petitioner”) filed a *Request for Hearing* concerning the amount and enforceability of an alleged debt owed to the U.S. Department of Housing and Urban Development (“HUD” or “the Secretary”). The Debt Collection Improvement Act of 1996, as amended (31 U.S.C. § 3720D), authorizes federal agencies to use administrative wage garnishments as a mechanism for the collection of debts owed to the United States government.

The Secretary of HUD has designated the administrative judges of the Office of Hearings and Appeals to adjudicate contested cases where the Secretary seeks to collect debts utilizing administrative wage garnishment proceedings. 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

On or about March 11, 2009, Petitioner entered into a Manufactured Home Retail Installment Contract and Disclosure Statement (“Note”) in the amount of \$37,037.00, which was insured against nonpayment by the Secretary, pursuant to Title I of the National Housing Act, 12 U.S.C. § 1703 (See Exh. A – Note). The note was made payable to Clayton Homes Elizabeth City, and was contemporaneously assigned to Vanderbilt Mortgage and Finance, Inc. (“Vanderbilt”). (See *Secretary’s Statement “Sec’y Stat.”* ¶¶ 2-3; Exh. A, Note, p. 1, 9; Exh C, Declaration of Brian Dillon, Director, HUD Asset Recovery Division (“Dillon Decl.”), ¶ 3).

Under the Note’s terms, Petitioner was to pay the principal amount of the unpaid balance until the Note was paid in full. (See *Sec’y Stat.*; Exh. A, Note, p. 1). The Note cited specific events that could cause the remaining unpaid balance of the debt to become immediately due and payable – one of which was when Petitioner failed to make payment on the Note and entered default. (See *Sec’y Stat.*, ¶ 4; Exh. A, Note, p. 5).

Petitioner, subsequently, failed to make timely payments under the terms of the Note. On or about November 18, 2013, Vanderbilt assigned the Note to HUD as a result of Petitioner’s failure to make payment. (See *Sec’y Stat.*, ¶ 4; Exh. B, Assignment to HUD (“Assignment”)).

HUD has attempted to collect the amount due under the Note and Assignment, but Petitioner remains indebted to HUD. (See *Sec'y Stat.*, ¶ 5; Exh. C, Dillon Decl., ¶ 4).

The Secretary alleges that Petitioner is indebted to HUD in the following amounts:

- a) \$3,414.35 as the unpaid principal balance as of November 5, 2019;
- b) \$0.45 as the unpaid interest on the principal balance at 1.0% per annum through November 5, 2019; and
- c) Interest on said principal balance from November 6, 2019, at 1.0% per annum until paid.

(*Sec'y Stat.*, ¶ 5; Exh. C, Dillon Decl., ¶ 4)

The U.S. Department of Treasury's ("Treasury") records indicate a Wage Garnishment Order was issued to Petitioner's employer on October 17, 2019. (See *Sec'y Stat.*, ¶ 13; Exh. C, Dillon Decl., ¶ 7). The record shows one garnishment payment has been transmitted to HUD from Treasury, which is reflected in the amounts above. (See *Sec'y Stat.*, ¶ 13; Exh. C, Dillon Decl., ¶ 8).

On September 16, 2019, a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings ("Notice") was sent to Petitioner. (See *Sec'y Stat.*, ¶ 6; Exh. C, Dillon Decl., ¶ 5). Under 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was given the opportunity to enter into a written repayment agreement with HUD under mutually agreeable terms. (See *Sec'y Stat.*, ¶ 7; Exh. C, Dillon Decl., ¶ 6). Petitioner has not entered into a written repayment agreement in response to the Notice. *Id.*

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)). Thereafter, Petitioner must show by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. (See 31 C.F.R. § 285.11(f)(8)(ii)). Additionally, Petitioner may present evidence that the terms of the proposed repayment schedule are unlawful, would cause undue hardship to Petitioner, or that the alleged debt is legally unenforceable. *Id.*

As evidence of Petitioner's indebtedness, the Secretary has filed the *Secretary's Statement* (*Sec'y Stat.*) along with the sworn Declaration of Brian Dillon, Director, HUD Asset Recovery Division (Exh. C, Dillon Decl.), and copies of the Note (Exh. A, Note) and the Assignment (Exh. B, Assignment to HUD). Accordingly, the Court finds that the Secretary has met the initial burden of proof.

Petitioner claims that the alleged debt is not enforceable against her on the grounds that the Separation and Property Settlement Agreement entered by the Court in her divorce proceeding stated that her husband was to bear responsibility for the alleged debt in this case. (See *Petitioner's Request for Hearing*; Petitioner's Separation and Property Settlement

Agreement p. 5, ¶ 13(A)). Apart from this allegation, Petitioner does not provide any documentary evidence that the alleged debt is not past due or that it is unenforceable.

In response to *Petitioner's Request for Hearing*, the Secretary produced the *Secretary's Statement*, which argues that the terms of Petitioner's settlement agreement with her former husband are not binding on HUD because HUD was not a party to the proceeding. (See *Sec'y Stat.*, ¶ 9). The Secretary further contends that Petitioner and her former husband, as co-signers on the Note, are jointly and severally liable for the repayment of the entire debt, and that HUD has not released Petitioner from liability for the debt. (See *Sec'y Stat.*, ¶ 10). To assist Petitioner, the Secretary points out that, under the guidance of counsel and separate from this proceeding, Petitioner may wish to pursue an indemnification action in the local courts against her former husband to enforce the settlement agreement. (See *Sec'y Stat.*, ¶ 11).

Petitioner has not provided any evidence that she relied upon statements made by HUD that her debt was satisfied and/or that the terms of her settlement agreement with her former husband were binding on HUD in this case. Petitioner's mere assertions that her former husband is solely responsible for the debt are insufficient evidence to establish that HUD may not enforce the Note against her. (See *Jo Dean Wilson*, HUDBCA No. 03-A-CH-AWG09 (January 30, 2003)). Moreover, Petitioner has not proven that she has repaid the Note in full.

The Petitioner also has not provided evidence of any release from HUD of her obligation to repay the Note. (See *Sec'y Stat.*, ¶ 10). For the debt to be extinguished, HUD must provide a written release that specifically discharges the debtor's obligation, for valuable consideration accepted by the lender from the debtor, which would indicate intent to release. (See *Franklin Harper*, HUDBCA No. 04-D-CH-AWG41 (March 23, 2005)). (See *Jo Dean Wilson*, HUDBCA No. 03-A-CH-AWG09 (January 30, 2003)). (See *Cecil F. & Lucille Overby*, HUDBCA No. 87-1917-G250 (December 22, 1986)). (See *Jesus E. & Rita de los Santos*, HUDBCA No. 86-1255-F262) (February 28, 1986)). Petitioner has provided no evidence that she received a release from HUD, and HUD asserts that it never issued or authorized the issuance of any instrument or document to cancel, satisfy or release HUD's note. (See *Sec'y Stat.*, ¶ 10).

The idea that the Petitioner is not responsible for the debt when HUD has not released her is, as the Secretary suggests, unreasonable, unjust, and entirely without merit. (See *Sec'y Stat.*, ¶ 12). Petitioner provides no legal authority or language in the Note that suggests that HUD is bound by her divorce settlement agreement. (See *Petitioner's Request for Hearing*). HUD, as a third-party creditor, is not bound by a settlement, divorce decree, or other debt transfer agreement between parties when HUD is not a party to the instrument or arrangement. (See *Jo Dean Wilson*, HUDBCA No. 03-A-CH-AWG09 (January 30, 2003) (citing *Wendy Kath*, HUDBCA No. 89-4518-L8, at 2)). This Court finds that, because HUD did not agree to this transfer of its debt obligation between Petitioner and her former husband, HUD's interest is unaffected and Petitioner remains indebted to HUD, notwithstanding her divorce settlement.

Petitioner has failed to submit any documentary evidence to prove that she is not indebted to the Department. I therefore find that Petitioner is indebted to HUD in the amounts claimed by the Secretary.

DETERMINING REPAYMENT

Petitioner has failed to come forward with sufficient financial information to establish that repayment of this debt would create undue financial hardship. After review of Petitioner's financial documentation, the Court determines that the proposed garnishment would not create undue hardship for the Petitioner. Therefore, the Secretary is entitled to enforce the debt in the amount of \$43.91 biweekly.

ORDER

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

ORDERED that the Order imposing the *Stay of Referral* of this matter to the U.S. Department of the Treasury for administrative wage garnishment is **VACATED**. The Secretary is authorized to seek administrative wage garnishment in the amount of \$43.91 biweekly, or such other amount as determined by the Secretary, not to exceed 15% of Petitioner's disposable income per month.

SO ORDERED,



H. Alexander Manuel
Administrative Judge