

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

In the Matter of:

Steven Davis,

Petitioner.

20-VH-0045-AG-024

721015457

September 1, 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 December 11, 2019, by Petitioner Steven Davis (“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”).

JURISDICTION

The Office of Hearings and Appeals has been designated to adjudicate contested cases where the Secretary seeks to collect the subject debt by means of administrative wage garnishment. 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. § 17.81.

PROCEDURAL HISTORY

Pursuant to 31 C.F.R. § 285.11(f)(4), on December 12, 2019, the Court stayed the issuance of a wage garnishment order until the issuance of this written decision. *Notice of Docketing, Order, and Stay of Referral* (“*Notice of Docketing*”) at 2. On February 12, 2020, the Secretary filed his *Statement* (“*Sec’y. Stat.*”), along with documentary evidence in support of his position. Petitioner filed documentary evidence on February 12, 2020, February 18, 2020, and October 20, 2020. (“*Petr.’s Stat.*”) Petitioner subsequently filed additional evidence along with what the Court deemed to be a *Motion to Dismiss* on June 28, 2021. This case is now ripe for review.

FINDINGS OF FACT

This is a debt collection action brought pursuant to Title 31 of the United States Code, section 3720D, as a result of a loan that was insured against non-payment by the Federal Housing Administration (“FHA”). The Debt Collection Improvement Act of 1996 authorizes federal

agencies to use administrative wage garnishment as a mechanism for the collection of debts allegedly owed to the United States government. 31 U.S.C. § 3720D.

In this case, Petitioner executed and delivered to the Secretary a Subordinate Note dated September 13, 2011, in the amount of \$78,170.28. *Sec'y. Stat.*, ¶ 2; *Sec'y. Stat.*, Ex. 1, Subordinate Note, ¶ 2. Subsequently, Petitioner executed and delivered to the Secretary a Promissory Note, dated March 2, 2018, in the amount of \$21,344.10. *Sec'y. Stat.*, ¶ 2; *Sec'y. Stat.*, Ex. 2, Promissory Note, ¶ 2. Herein, the Subordinate Note and the Promissory Note are collectively referred to as the "Notes"; the total sum of the Notes amounts to \$99,514.38. Petitioner executed both Notes in exchange for HUD's advancement of funds to Petitioner's FHA-insured primary mortgage lender to prevent the lender from foreclosing on Petitioner's primary mortgage. *Sec'y. Stat.*, ¶¶ 2-3.

Paragraph 4(A) of each of the respective Notes cites specific events that make the debt become due and payable. One of those events is the payment in full of the primary note, and another is termination of the FHA insurance on the primary note. *Sec'y. Stat.*, ¶ 2; *Sec'y. Stat.*, Ex. 1, Subordinate Note, ¶¶ 4(A)(i) & (iii); *Sec'y. Stat.*, Ex. 2, Promissory Note, ¶¶ 4(A)(i) & (iii). On or about May 31, 2019, the FHA insurance on Petitioner's primary note was terminated when the primary lender notified the Secretary that the primary note was paid in full. *Sec'y. Stat.*, ¶ 5; *Sec'y. Stat.*, Ex. 3, Declaration of Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center ("*Dillon Decl.*"), ¶ 4. Upon payment in full of the primary note, Petitioner was to make payment to HUD on the Note at the "Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, SW, Washington, DC 20410 or any such other place as [HUD] may designate in writing by notice to Borrower." *Notes*, ¶ 4(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.*, ¶ 7; *Dillon Decl.*, ¶ 5. The Secretary has made efforts to collect this debt from Petitioner but has been unsuccessful. Therefore, the Secretary asserts that Petitioner is justly indebted to the Secretary in the following amounts:

- a) \$99,514.38 as the unpaid principal balance as of January 9, 2020;
- b) \$522.27 as the unpaid interest on the principal balance at 1.0% per annum through January 9, 2020;
- c) \$4,975.42 as the unpaid penalties and administrative costs through January 9, 2020; and
- d) interest on said principal balance from January 9, 2020, at 1.0% per annum until paid.

Sec'y. Stat., ¶ 5; *Dillon Decl.*, ¶ 5.

Pursuant to 31 C.F.R. § 285.11(e), a *Notice of Intent to Initiate Administrative Wage Garnishment Proceedings* ("*Notice*") dated November 11, 2019, was mailed to Petitioner at his last known address. *Sec'y. Stat.*, ¶ 6; *Dillon Decl.*, ¶ 6. Treasury's records indicate a *Wage*

Garnishment Withholding Order was issued to Petitioner's employer on December 12, 2019. *Sec'y. Stat.*, ¶ 8; *Dillon Decl.*, ¶¶ 8-9. Petitioner's wages were garnished one time in the amount of \$1,455.87. That payment was transmitted to HUD and is reflected in the amount claimed by HUD above herein. *Sec'y. Stat.*, ¶ 11; *Dillon Decl.*, ¶ 9. HUD has determined that Petitioner's employer erroneously calculated the garnishment and failed to garnish 15% of Petitioner's disposable pay. The proper garnishment amount was \$848.65. *Sec'y. Stat.*, ¶ 6; *Dillon Decl.*, ¶ 10. HUD has processed a refund to Petitioner in the amount of \$607.22, which is the difference between the amount of the garnishment payment and the proper garnishment amount. Id.

DISCUSSION

In response to the *Secretary's Statement*, Petitioner does not dispute he owes the subject debt to HUD. *Petr.'s Stat.*, Amendment, ¶ 2. Petitioner disputes, in general, the enforceability of the debt alleged by the Secretary because: (1) "To financial punish [sic] Steven Davis due to the decisions of a multimillion-dollar title insurance company is an injustice"; and (2) imposition of the proposed wage garnishment would create a financial hardship.

I. Decisions of a Title Insurance Company Do Not Invalidate the Subject Debt

Petitioner claims he would not have to "face wage garnishment... if some one [sic] at HUD and the Treasury Department had reviewed North American Title Insurance's transaction file." *Petr.'s Stat.*, ¶¶ 4-5. Petitioner states, "The closing of Steven Davis' sale transaction on March 13, 2019 is a complete failure to follow the Good Funds Law,^[2] lenders instructions, and common closing practices prior to recording by North American Title Insurance Company." *Petr.'s Stat.*, ¶ 15. Petitioner further states:

North American Title Company was no [sic] in position to record the resales transaction involving Steven Davis' residential property. The title company was short of funds and could not fulfill the conditions of escrow and lender's instruction prior to recording. North American Title Insurance Company has not a single scrap of paper signed, initialed or otherwise from Steven Davis agreeing to close short. Nor is there a signed indemnity by Steven Davis stating he would hold North American Title Insurance Company harmless in agreeing to close short of funds.

Petr.'s Stat., ¶ 20.

As support, Petitioner introduced into evidence copies of his January 22, 2019 Escrow Instructions to Pay Commission; January 22, 2019 Escrow Electronic/Digital Documentation Agreement and Acknowledgement; March 13, 2019 Seller's Settlement; January 4, 2019 North American Title Insurance Company's Preliminary Title Report; and January 22, 2019 Natural Hazard Disclosure Statement.

After a careful examination of the documentary evidence introduced by Petitioner, the Court has determined that the evidence fails to prove that the subject debt is unenforceable because

² Cal. Ins. Code § 12413.1.

of the action taken by North American Title Insurance Company. The Secretary's right to collect the alleged debt in this case emanates from the terms of the Notes, not from the representations made by a mortgage company or title company. Bruce R. Smith, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). More specifically, any action or inaction by North American Title Insurance Company is unrelated to the enforceability of the subject debt owed to HUD.

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 Notes, or produce "valuable consideration accepted by the lender" that indicates HUD's intent to release. Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (Dec. 22, 1986). Petitioner has failed to produce either in this case.

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." *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 Notes. Although he sold the underlying property, there is no evidence that any of the funds from the sale were paid to HUD to satisfy the Notes. Because Petitioner does not dispute the existence of the subject debt to HUD and agreed in the Notes to repay the subject debt, the onus falls on Petitioner, not on the primary lender or North American Title Insurance Company, to ensure that the subject debt was satisfied. Hence, the Court finds that the Petitioner's claim fails for lack of proof and, as a result, the subject debt remains valid, past due, and enforceable.

II. Petitioner Has Failed to Establish Financial Hardship

Next, Petitioner claims, "it is just a matter of time before the garnishment of Steven Davis [sic] wages makes the Davis family homeless for a second time within a year," and that he "cannot afford legal representation against a multimillion-dollar insurance corporation or a billion-dollar government agency." *Petr. 's Stat.*, ¶¶ 30 & 32.

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 garnishment that will be allowed. *See Raymond Kovalski*, HUDBCA No. 87-1681-G18 (December 8, 1986); 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's disposable income for purposes of administrative wage garnishment is defined as that part of Petitioner's compensation that remains after the deduction of health insurance premiums and any amounts required by law to be withheld. *See* 31 C.F.R. § 285.11(c). Such deductions include social security taxes and withholding taxes, but not amounts withheld pursuant to court order. *Id.*

In this case, Petitioner provided copies of his biweekly pay statement for the pay periods ending December 21, 2019 and January 4, 2020. Petitioner receives approximately \$10,866.61 for his monthly gross income, before deductions required by law that, here, total \$2,238.64 (Federal Withhold Tax \$716.26; Social Security Tax \$530.69; Medicare Tax \$152.83; California

Withholding Tax \$429.67; Employer-Employee Tax, \$72.91; Local Med Plan \$275.51; Dental Plan \$42.92; and Vision Plan \$18.46). Thus, after deductions, Petitioner's approximate monthly net disposable pay is \$8,627.97.

Petitioner has produced sufficient evidence for the Court to determine whether the Secretary's proposed garnishment amount would cause financial hardship. Petitioner's essential monthly expenses include rent, \$2,395; electric, \$79.93; gas, \$79.34; water and sewage, \$102.26; garbage pickup fee, \$41.14; rental insurance, \$73; two car payments, \$1,172.62; car insurance, \$350; union fees, \$81.27; cellphone payments, \$602.90; food, \$600; and clothing, \$150. Petitioner also listed as monthly essential household expenses: car fuel and tolls, \$730; internet, cable, and phone bundle, \$320.99; and Petitioner's Thrift Loan Plan #1, \$195.8, and Thrift Loan Plan #2, \$159.04.

Petitioner has provided no documentary evidence to support the spending of \$730 per month on car gas and tolls. The Court has previously ruled that credit may be given for certain essential living expenses based on Petitioner's estimates when the "financial information submitted by Petitioner ... [was found to be] generally credible..." See In re Elva and Gilbert Loera, HUDBCA No. 03-A-CH-AWG28 (July 30, 2004); see also Muriel Redd, HUDOA No. 08-H-CH-AWG19 (December 12, 2008). In the case at bar, however, Petitioner's claimed costs for car gasoline and tolls are not generally consistent with price and consumption patterns, and thus will not be given full credit. Compare Carolyn A. Reed, HUDOA No. 12-M-CH-AWG05 (January 10, 2012). In the case at bar, "this Court will only give partial credit for Petitioner's ... gas expenses, because although such expenses are generally deemed to be essential household expenses, the expenses submitted by Petitioner are excessive." See Gary Cannady, HUDOA No. 08-M-CH-AWG26 (June 12, 2009). Accordingly, Petitioner will be given credit for \$200 for gas per car, for a total credit of \$400 for gas per month. *E.g., id.*, HUDOA No. 08-M-CH-AWG26.

Petitioner has provided documentary evidence establishing he spends \$320.99 per month for his internet, cable, and phone bundle. While the Court recognizes that internet is an essential household expense in this day and age, it maintains that cable is not. See *id.*, HUDOA No. 08-M-CH-AWG26 (where television and cellular phone service expenses were not credited); Charles R. Chumley, HUDOA No. 09-M-CH-AWG09 (April 6, 2009) ("Satellite television ... are [sic] not essential living expenses."); see also Michelle Edwards, HUDOA No. 12-M-CH-AWG23 (April 12, 2012); Carolyn A. Reed, HUDOA No. 12-M-CH-AWG05 (January 10, 2012). Likewise, home phone service is not an essential household expense when Petitioner already pays \$602.90 per month for cellphone plans for five phone lines (himself, his wife, and three dependent children). Accordingly, Petitioner will be given credit for \$100 per month for internet, which is the price for his current internet services as a subcomponent of his service bundle.

Petitioner has provided no documentary evidence describing Thrift Loan Plans #1 and #2 or evidencing that they constitute essential living expenses. This Court has consistently maintained that a "Petitioner will only be given credit for *essential* household expenses." See Cannady, HUDOA No. 08-M-CH-AWG26 (emphasis added). In other words, "[w]ithout an evidentiary showing that these debts were incurred for the purchase of necessities, credit will not be given to Petitioner for those obligations." See Donna Kind, HUDOA No. 12-M-CH-AWG29 (June 7, 2012); compare Danny J. and Ronda K. Huckba, HUDBCA No. 03-C-CH-AWG02 (where

Petitioners' three outstanding loans for financing their house were included in essential living expenses calculations). Accordingly, the Court excludes Thrift Loan Plans #1 and #2 from its calculation of Petitioner's essential household expenses.

Petitioner's monthly essential household expenses total \$6,189.13. Petitioner's monthly disposable income of \$8,627.97, less his total monthly essential household expenses of \$6,189.13, yields a positive balance of \$2,438.23 per month to cover non-essential monthly expenses. At a 15% garnishment rate, Petitioner's monthly garnishment payment would be \$1,294.10 (\$647.05 bi-weekly garnishment), which would leave Petitioner with a positive balance of \$1,144.13 at the end of the month to cover non-essential household expenses.

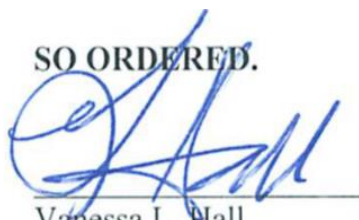
Pursuant to 31 C.F.R. § 285.11(e)(8)(ii), this Court has the discretion to modify the Secretary's proposed repayment schedule if there is a *bona fide* showing of financial hardship based on the record. However, Petitioner has not successfully persuaded the Court that imposition of the proposed wage garnishment at the rate of 15% would in fact create a financial hardship for Petitioner.

As a final point, on June 28, 2021, Petitioner filed what the Court deemed to be a *Motion to Dismiss* in which Petitioner once again raised issues already addressed by the Court in this *Decision and Order*. As a result, Petitioner's *Motion to Dismiss* is hereby **DENIED** as moot.

ORDER

Based on the foregoing, 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 collection of this outstanding obligation by means of administrative wage garnishment an amount equal to 15% of Petitioner's monthly disposable income.

SO ORDERED.

Vanessa L. Hall
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.