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

In the Matter of: **Christopher Leska,** Petitioner.	15-VH-0006-AO-001 7807041330A May 11, 2016

DECISION AND ORDER

This case is before the Office of Hearings and Appeals upon a *Request for Hearing* (Hr'g Req.) filed by Petitioner, Christopher R. Leska, on October 17, 2014 concerning the existence, amount, or enforceability of an alleged debt owed to the U.S. Department of Housing and Urban Development ("HUD" or "the Secretary").

Pursuant to 24 C.F.R. § 17.81(a), on October 17, 2014, the Court stayed the issuance of an administrative offset of any federal payment due Petitioner until the issuance of this written decision. *Notice of Docketing, Order, and Stay of Referral* (Notice of Docketing) at 2. The Court granted Petitioner an extension of time on three occasions, but on Petitioner's fourth *Request for Extension of Time*, the request was denied. *Order Denying Motion* dated January 21, 2015. Petitioner filed a *Petitioner's Brief and Documentary Evidence* (Pet'r. Brief) on January 30, 2015. On March 10, 2015, the Secretary filed a *Secretary's Statement*, along with documentary evidence, in support of his position. This case is now ripe for review.

JURISDICTION

The Office of Hearings 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 at 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.

BACKGROUND

This is a debt collection action brought pursuant to Title 31 of the United States Code, section 3720A, as a result of a defaulted loan that was insured against non-payment by the Secretary. The Debt Collection Improvement Act of 1996, as amended (31 U.S.C. 3720A), authorizes federal agencies to use administrative offsets as a mechanism for the collection of debts allegedly owed to the United States government.

On or about November 12, 2003, Petitioner executed and delivered to Domestic Bank, a Promissory Note (Note) in the mount of $25,000.00 secured by a HUD-insured mortgage. *Sec'y. Stat.*, ¶ 2. This mortgage was insured against non-payment by the Secretary pursuant to Title I of the National Housing Act. *Sec'y. Stat.*, ¶ 3, Ex. 3, *Declaration of Brian Dillon*[1] (*"Dillon Decl."*),

[1] Brian Dillon is the Director of the Asset Recovery Division of HUD's financial Operations Center.

¶ 3. "Petitioner failed to make payments as agreed in the Note and the mortgage went into default in or about November 2007." *Id.* As a result of the default, Petitioner's primary mortgagee, ABN AMRO (ABN), foreclosed on Petitioner's home.[2] *Sec'y. Stat.*, Ex. 3, ¶ 8. On July 7, 2008, Domestic Bank assigned its mortgage to HUD pursuant to applicable insurance claim regulations and procedures. *Sec'y. Stat.*, ¶ 4. Ex. 1 at 4.

On September 29, 2008, "a Notice of Intent to Collect by Treasury Offset Program ("TOP") was mailed to Petitioner's then-known address." *Sec'y Stat.* ¶ 7. HUD has attempted to collect the amount due under the Note, but Petitioner remains indebted to HUD. Sec'y. Stat., Ex. 3, *Dillon Decl.* ¶ 4.

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

(a) $22,488.18 as the unpaid principal balance as of January 30, 2015;
(b) $7,893.23 as the unpaid interest on the principal balance at 4% per annum through January 30, 2015;
(c) $3,835.71 as the unpaid penalties and administrative costs as of January 30, 2015; and
(d) interest on said principal balance from February 1, 2015 at 5% per annum until paid.

Sec'y. Stat.. ¶ 6, Ex. 3, *Dillon Decl.* ¶ 4.

DISCUSSION

In Petitioner's Brief, he does not dispute the existence or the amount of the debt. Rather, Petitioner claims the subject debt is unenforceable against him because: (1) the subject debt is precluded by foreclosure; (2) the lenders violated certain federal regulations under 24 C.F.R. § 203 by failing to discuss with Petitioner a repayment plan or loan modification to prevent foreclosure; and, (3) HUD committed willful and unlawful acts by attempting to collect the Domestic Bank debt and, by this attempt, condoned the unlawful acts of ABN and Domestic Bank.

Petitioner first claims that collection of the subject debt is precluded by foreclosure. Based on the record and Petitioner's own admission, foreclosure was inevitable under the circumstances presented. Petitioner "was employed in the mortgage loan industry, and his entire income was derived from earned commissions." *Petitioner's Letter to Brian Dillon* (Pet'r. Dillon Letter) dated September 17, 2014 at 1. Petitioner "started having financial problems due to the staggering downturn experienced by the mortgage industry" and, as a result, the downturn "permanently reduced Petitioner's income." Id. at 3. While Petitioner argues that his financial circumstances resulted in his inability to maintain regular payments on the primary mortgage and ultimately to avoid foreclosure, Petitioner has failed to produce any evidence to prove that he has been released from his legal obligation to pay the subject debt based upon foreclosure.

[2] On February 4, 2003, Petitioner obtained a HUD insured loan on his property from ABN AMRO, Domestic Bank's primary loan servicer. ABN AMRO filed a foreclosure complaint against Petitioner on March 27, 2007. On March 6, 2008, ABN AMRO obtained a foreclosure judgment against Petitioner. *Petitioner's Brief* at 1, 2.

In his response, the Secretary argues that Petitioner's claim that the subject debt is unenforceable due to foreclosure "is not supported by the law and does not affect the existence or enforceability of the debt Petitioner owes to HUD. *Sec'y. Stat.* ¶ 9. The Secretary states:

> Subsequent to the primary lender's foreclosure of Petitioner's home (the secured loan collateral), the secured second mortgage under the Note, was assigned to HUD by Domestic Bank. Petitioner has not provided any evidence that the remaining unpaid principal balance, applicable interest, penalties and cost have been paid. *Id.*

As support, the Secretary produced copies of the Note, Assignment of the Loan to Domestic Bank, Request for Notice of Default and Foreclosure under Superior Mortgages or Deeds of Trust, and Notice to Borrower of HUD's Role in Title I Loan (Notice of Default), all of which were signed, without objection, by Petitioner.

Upon reviewing the record, the Court is unconvinced that Petitioner's position, without evidence, is valid. In the Note signed by Petitioner, Petitioner agreed to "perform all of Borrower's obligations under any mortgage, deed of trust or *other security agreements with a lien which has priority over this Mortgage*, including covenants to make payments when due." (Emphasis added) *Sec'y. Stat.*, Ex. 2, ¶ 4.

As a matter of law, the repossession of Petitioner's home as collateral does not relieve Petitioner of his obligation to pay the remaining balance on the loan. *Marie O. Gaylor*, HUDBCA No. 03-D-NY-AWG04 (Feb. 7, 2003); *Theresa Russell*, HUDBCA No. 87-2776-H301 (Mar. 24, 1988). Petitioner agreed that "Upon payment of all sums secured by this Mortgage, Lender shall discharge this Mortgage without charge to Borrower." *Sec'y. Stat.*, Ex. 2, ¶ 20. Here, Petitioner became legally responsible for the debt when he signed the Note but there is no evidence in the record that Petitioner has paid all sums secured by the Mortgage in this case. In order for Petitioner not to be held responsible for the debt, there must be either a release in writing from the lender that specifically discharges Petitioner's obligation, or some valuable consideration accepted by the lender from Petitioner that would indicate intent to release. *Jo Dean Wilson*, HUDBCA No. 03-A-CH-AWG09 (Jan. 30, 2003); *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. 28, 1986). Petitioner falls short in both regards because he has failed to produce evidence of a written release or evidence of valuable consideration that indicates the intent to release.

This Court has addressed this issue and previously held "if, according to state law, satisfaction of a senior deed of trust through a foreclosure sale does not prevent a junior trust holder from enforcing a junior trust deed on the same real property, that junior trust holder may collect the debt by initiating collection efforts based on the obligations in the loan note." *John Bilotta*, HUDBCA No. 99-A-CH-Y258 (Dec. 29, 1999) citing *Kimberly S. (King) Thede*, HUDBCA No. 89-4587-L74 (Apr. 23, 1990) *citing Alan Juel*, HUDBCA No. 87-2065-G396 (Jan. 28, 1986). In Ohio, the governing state law herein, it is well settled that the rights of lienholders who are not made parties to the foreclosure remain unaffected, the same as if no judicial sale had been made. *Stewart v. Johnson*, 30 Ohio St. 24 (Ohio 1876); See also *Cranberry Financial, L.L.C. v. S & V Partnership et al; Schindley et al.*, 186 Ohio App. 3d 275 (Ohio Ct. App. 2010) (holding that mortgagors were not released from their obligation under a

mortgage contract). Consequently, the Note signed by Petitioner in this case entitles the Secretary to separately enforce the debt against Petitioner under the assigned Note as agreed.

In the absence of sufficient evidence, Petitioner's argument that the subject debt is precluded by foreclosure is without merit. The Court therefore finds that Petitioner remains legally obligated to pay the subject debt due to lack of proof that the requirements for a valid release have been established by means of foreclosure.

Next, Petitioner claims that the lender, more specifically the loan service provider, ABN, violated certain federal regulations under 24 C.F.R. § 203 by failing to extend to Petitioner a repayment plan or loan modification to prevent foreclosure. *Petitioner's Brief* at 2. Title 24 of the Code of Federal Regulation, Part 203, provides that the lender takes all reasonable and prudent measures to induce the borrower to bring the loan account current, and agree to a modification agreement or repayment plan for bringing the loan current by a later date.

According to Petitioner, on March 21, 2007, his primary mortgage servicer, ABN, had discussed with him a loan modification and was told to expect a loan modification package. *Affidavit of Christopher Leska* (*Pet'r. Affidavit*) at 3. Petitioner admits that on May 1, 2007, he was sent a Forbearance Agreement (Agreement)[3], the terms of which required Petitioner to make an immediate payment of $1,800.00 and thereafter pay a monthly installment of $1,166.85 for a period of 24 months. *Id.* at 5. But, Petitioner claims he only signed it because he "believed he had no choice at the time." After signing the Agreement, Petitioner sent it back to ABN with the immediate payment that was due in the amount of $1800.00. *Id.* Petitioner states that he started making monthly payments on the primary mortgage from June 15, 2007 until September, 2007, at which point he defaulted. *Pet'r. Brief* at 2. ABN pursued a foreclosure action against Petitioner and, on March 6, 2008, obtained a foreclosure judgment against Petitioner and sold the property on January 13, 2009. *Id.*

Consistent with the provisions of the Note, the Notice of Default, and the governing regulations, ABN proceeded accordingly and then notified Domestic Bank, the Title I [HUD] lien holder, of its foreclosure action against Petitioner. It is here where the Petitioner claims that Domestic Bank's primary loan servicer, ABN, violated certain HUD regulations set forth under "24 C.F.R. Part 203, the HUD Handbook § 4330.01, REV-5, and the Mortgagees Letters prepared by HUD" by failing to comply with the Loss Mitigation Program and contacting Petitioner to attempt to arrange a repayment plan or loan modification to avoid foreclosure. *Pet'r. Brief* at 3.

In response to this allegation, the Secretary contends that "24 C.F.R. [Part] 203, like other Parts of Subchapter B [Mortgage and Loan Insurance Programs under National Housing Act], contains provisions in relation to the administration of HUD's mortgage insurance programs *for lenders*." (Emphasis added) *Sec'y. Stat.* at ¶ 11. "Only HUD and its insured lenders are parties to such programs and contracts. Mortgagors like the Petitioner do not have standing under contracts of HUD mortgage insurance for enforcement purposes." *Id.*

[3] A forbearance agreement is an agreement in which the mortgagor is granted forbearance relief if the following criteria set forth in HUD Handbook § 4330.1 REV-5, Chapter 8 – HUD-APPROVED RELIEF PROVISIONS, section 8-1 is met: A.) It is reasonable to believe that the mortgagor can and will resume the mortgage payments; B.) the forbearance plan is made up of reasonable monthly payments that the mortgagor has the ability to pay; and, C.) compliance with the forbearance plan will bring the mortgage completely current and paid in full.

The Secretary explains that, contrary to Petitioner's assertion that the governing regulations for mortgage servicing and loss mitigation for the Title I loans are govern by 24 C.F.R. Part 203 and HUD Handbook 4330.01, the HUD regulations that actually govern "the 'Title I Property Improvement and Manufactured Home Loans' relevant to this case are self-contained at 24 C.F.R. Part 201." Id. at ¶ 7. "Upon default the lender is obligated to contact the borrower to discuss the reason for default, seek its cure, and document these efforts." *Sec'y Stat.*, Ex. 3, *Dillon Decl.* ¶ 9. "If the default is not cured, the lender is required to provide the borrower with written notice that the loan is in default and that the loan maturity is to be accelerated." *Id.*

In compliance with 24 C.F.R. Part 201.50, the Secretary further explains that "the Title I claim file submitted to HUD by the Title I lender, Domestic Bank, includes a 'Title I Claim for Loss Form HUD-637' which indicates that Petitioner defaulted on the loan in November 2007." *Sec'y. Stat.*, Ex. 3, *Dillon Decl.*, ¶ 9, Ex. C. In addition, "the claim file also contains the lender's collection notes which document multiple attempts by the lender to contact Petitioner via telephone between November 2007 and April 2008. *Sec'y. Stat.*, Ex. 3, *Dillon Decl.*, ¶ 9, Ex. D. According to the Secretary, "the Title I claim file contains a copy of a 'Final Notice of Default' that was mailed to Petitioner via Certified Mail at 2928 Chatsworth Way, Reynoldsville,Ohio 43068," Petitioner's last known address of record.

The Court reviewed the regulations presented by both parties and has determined, based upon the facts of this case, that Title 24 of the Code of Federal Regulations, Part 201, and not 24 C.F.R. Part 203, should govern in this case. First, these set of facts involves a Title I loan that is clearly intended to be governed by 24 C.F.R. Part 201. It is also undisputed that, in compliance with 24 C.F.R. Part 201, the Lender attempted on numerous occasions, without success, to contact Petitioner in an effort to arrange a repayment plan to cure the default. Both parties admit that these efforts were made. *Pet'r. Dillon Ltr.* at 2; *Sec'y. Stat., Ex. 3, Dillon Decl.* ¶ 10. Petitioner signed the Agreement that by its nature should have achieved what the Petitioner was expecting, to arrange a repayment plan to cure his default. *Pet'r. Brief* at 2; *Sec'y Stat., Ex. 3, Dillon Decl.* ¶10, 11. These attempts were documented by the Lender. *Sec'y Stat., Ex. 3, Dillon Decl.* ¶10. Petitioner entered into the Agreement but later defaulted. *Id.*

Moreover, after defaulting on the Agreement arranged by ABN, Petitioner admits that "Between February and July 2008 Domestic Bank continued its collection efforts, and ABN AMRO proceeded with its foreclosure action in Franklin County Court." *Pet'r. Dillon Ltr.* at 2. Petitioner also admits to being contacted by Domestic Bank when he stated "No documentary evidence was provided by Domestic showing why Mr. Leska was not eligible for a loan modification *other than a record of telephone calls to Mr. Leska's phone and several calls to Mr. Leska's mother, demanding payment on his mortgage.*" (Emphasis added) *Pet'r. Hr'g. Req.* at 4. Petitioner further states, "with respect to the Domestic Bank mortgage, '*other than one letter to Mr. Leska in January, 2008, which directed Mr. Leska to contact lender's collection department,*' Domestic Bank made no effort whatsoever to consider and follow the Loss Mitigation Program. (Emphasis added) *Pet'r. Hr'g. Req.* at 7. Is it possible that the repayment plan or loan modification sought by Petitioner would have been arranged had Petitioner simply responded to one of the numerous phone calls or other means of contact that, based upon the evidence, were extended to Petitioner?

While Petitioner, in his *Brief*, repeatedly alleges that Domestic Bank and ABN have failed to comply with governing regulations, the evidence in the record more sufficiently

supports Petitioner's failure to respond to repeated attempts made by Domestic Bank to contact Petitioner. Even more persuasive is Petitioner's own admission to failing to respond to such repeated efforts. *Pet'r. Dillon Ltr.* at 2. Based on the record, the provisions of 24 C.F.R. Part 201.50 were met. Upon default, Petitioner was contacted on numerous occasions, over a six-month period (November 2007 through April 2008), to discuss Petitioner's delinquency in an attempt to cure the default but to no avail.

A Final Notice of Default (Notice) was sent by certified mail and signed by Petitioner at Petitioner's last known address at 2928 Chatsworth Way, Reynoldsville, Ohio 43068, a Notice Petitioner now claims he never received. *Pet'r. Dillon Ltr.* at 2. What is most puzzling to the Court is Petitioner's claim, on the one hand, that he never received the Notice, yet his acknowledgement, on the other hand, of the content of the Notice he claims he never received. He states that the Notice was "not signed by anyone," that the Notice stated "Mr. Leska defaulted on his loan," and that "the letter [Notice] instructed him [Petitioner] to contact the bank's collection department." *Pet'r. Dillon Ltr.* at 2; *Pet'r. Brief* at 3. This noted discrepancy is relevant to the Court because Petitioner's claim of non-receipt of the Notice seems inconsistent with Petitioner later acknowledgment of receipt of the Notice. Ironically, this Notice is the same Notice Petitioner admits instructed him to contact the bank's collection department to discuss a cure for default — conduct that Petitioner now claims the lender failed to do that allegedly violated certain loss mitigation regulations. *Sec'y. Stat.*, Ex. D.

It is well-established that the sending of commercially reasonable notice by the lender, and not evidence of receipt of notice, is determinative of the issue of legally sufficient notice. See 24 C.F.R. § 17.65. In Ohio, there is no requirement that the debtor must actually receive notice, only that the lender sends it. Ohio Rules of Civil Procedure, Rule 5 (B)(2)(c).[4] In this case, the lender sent a Final Notice of Default via certified mail that was accepted and signed by Petitioner. If Petitioner's address changes, the onus falls on Petitioner to notify the Government of the change of address. See *Appeal of: UPCAR Contractors, Inc.*, HUDBCA No.81-561-C3 (April 21, 1982) (in which the administrative judge similarly held that it is the obligation of a party to notify the Board of any change of address so that it can be served with notices and pleadings or to make other appropriate arrangement for expeditious receipt of mail. Failure to do so is at the risk of the party failing to make such arrangements).

As a final point, even if the requirements of 24 C.F.R. 201.50 (a) are not met, the Secretary is correct in noting that this Court has addressed a similar issue in a previous decision, *In re Dan Leedom*, HUDBCA No. 90-4637-L119 (Jan. 8, 1990). In *Dan Leedom*, the Petitioner challenged the enforceability of the debt based on the requirements contained in 24 C.F.R. § 201.50. The administrative judge held that a "[p]etitioner cannot avail himself of the requirements contained in 24 C.F.R. § 201.50 to defeat the enforceability of the debt [in order] to keep the Secretary from seeking to collect an otherwise valid debt which he has been assigned, and on which he has paid an insurance claim..." *Id.* Consistent with *Dan Leedom*, Petitioner likewise cannot claim in this case that the subject debt is unenforceable on the same grounds.

[4] Ohio Rules of Civil Procedure, Rule 5 (B)(2)(c) provides: A document is served under this rule by: (c) mailing it to the person's last known address by United States mail, in which event service is complete upon mailing.

Based on the foregoing, Petitioner's contention that ABN, the loan service provider, violated certain federal regulations under 24 C.F.R. § 203 by failing to discuss with Petitioner a repayment plan or loan modification to prevent foreclosure, lacks credibility and also lacks a valid legal basis sufficient to warrant further consideration. 24 C.F.R. Part 203 simply does not apply to Title I loans such as the one in this case. As such, Petitioner remains obligated to pay the subject debt in the amount claimed by the Secretary.

Finally, Petitioner claims HUD committed willful and unlawful acts by attempting to collect the Domestic Bank debt and, by so doing, condoned the unlawful acts of ABN and Domestic Bank. This Court is only authorized to determine the past due status and legal enforceability of debts sought to be recovered by the Secretary. See 31 U.S.C. § 3720A (b)(2)(3); 24 C.F.R. §§ 17.61-17.77. The alleged bad acts of insured lenders, as so claimed by Petitioner, are beyond the scope of this Court's jurisdiction and thus will not be addressed.

ORDER

Based on the foregoing, Petitioner remains legally obligated to pay the alleged debt in the amount so claimed by the Secretary.

The Order imposing the stay of referral of this matter to the U.S. Department of Treasury for administrative offset is **VACATED**. It is hereby

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

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 upon a showing of good cause.