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

In the Matter of: **PATRICIA F. MULLEN,** Petitioner.	15-VH-0036-AO-011 72-100787-1 June 28, 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, Patricia F. Mullen, on February 4, 2015, 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 February 11, 2015, 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. On June 8, 2015, Petitioner filed a *Statement*, along with documentary evidence, in support of her position. *Petitioner's Statement and Documentary Evidence* (Pet'r. Stat.). On July 16, 2015, the Secretary filed a *Secretary's Statement*, which included documentation in support of his position. *Secretary's Statement* (Sec'y. Stat.). 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 February 11, 2012, Petitioner executed and delivered to the Secretary a Subordinate Note ("Note") in the amount of $7,340.22 secured by a HUD-insured mortgage. *Sec'y. Stat.* ¶ 2. Petitioner executed this Note to HUD in exchange for HUD providing foreclosure relief to Petitioner by advancing funds to Petitioner's FHA insured mortgage lender (Bank of America), which was the holder of Petitioner's primary mortgage note ("primary note"). *Sec'y. Stat.* ¶ 3; *Declaration of Brian Dillon*[1] (Dillon Decl.), ¶4. Pursuant the terms of the Note, the Note's amount to be repaid becomes due and payable when the first of the following events occurred (i) borrower had paid in full all amounts due under the primary note and related mortgage, deed of trust of similar security instruments insured by the Secretary; or (ii) the maturity date of the primary note had been accelerated; or (iii) the Note and related mortgage, deed of trust or similar Security Instrument were no longer insured by the Secretary; or (iv) the property was not occupied by the purchaser as his or her principal residence. *Sec'y. Stat.* ¶ 4; Ex. 1, Note.

On or about February 7, 2014, the FHA mortgage insurance on the primary mortgage was terminated, by Bank of America. *Dillon Decl.* ¶ 4. As specified in the Note, this termination caused the Note to become due and payable. *Sec'y. Stat.* ¶ 4; Ex. 1, Note.

On December 22, 2014, a Notice of Intent to Collect by Treasury Offset Program was mailed to Petitioner's then-known address. *Sec'y. Stat.* ¶ 8; *Dillon Decl.* ¶ 6. HUD has attempted to collect the amount due under the Note, but has been unsuccessful. *Dillon Decl.* ¶ 4.

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

(a) $7,340.22 as the unpaid principal balance as of June 30, 2015;
(b) $61.10 as the unpaid interest on the principal balance at 1% per annum through June 30, 2015;
(c) $477.21 as the unpaid penalties and administrative costs as of June 30, 2015; and
(d) interest on said principal balance from July 1, 2015 at 1% per annum until paid.

Sec'y. Stat. ¶ 7, Ex. 2, *Dillon Decl.* ¶ 5.

DISCUSSION

On appeal, Petitioner raises certain issues of concern in support of her position that the subject debt does not exist. Petitioner claims, in her Statement, that: (1) she previously made payments on time until Bank of America allegedly committed fraud against her by convincing her that she no longer needed to make payments; and (2) she misunderstood the requirements expected of her under the terms of the Note because Bank of America failed to explain to her the

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

terms of the Note she signed, particularly regarding how she should make her monthly payments. *Pet'r. Stat.* at 1-3. As support, Petitioner submitted several copies of correspondence between her and the Bank of America dating from 2010 through 2015; Form 1098 IRS Mortgage Interest Statement; a home loan transaction record from Bank of America; and copies of written personal notes and comments from Petitioner on each document presented. *Pet'r. Stat., Attachments.*

The Secretary states, in response, that "Petitioner has raised claims of fraud and/or deceptive business practices that are unsupported by any evidence and do not disprove the validity and enforceability of the Petitioner's debt." *Sec'y. Stat.* ¶ 10; *Dillon Decl.* ¶ 7. As a result, "the Note remains unsatisfied and the debt is enforceable against Petitioner." *Id.* The Secretary maintains further that "Petitioner has not provided any evidence that she did not receive the full benefit of the $7,340.22 paid to her insured lender by HUD on her behalf or that the unpaid principal balance of $7,340.22 and applicable interest, penalties, and costs have been paid in full." *Sec'y. Stat.* ¶ 9; *Dillon Decl.* ¶ 7. Instead, argues the Secretary, "the documentary evidence shows that Petitioner and her husband executed the Note (Exhibit 1), and it subsequently became due upon termination of Petitioner's primary mortgage insurance." *Id.*

The Court examined the record and identified the core issues that form the basis for Petitioner's appeal. Based on the facts set forth on the record, and for the following reasons, the Court finds that Petitioner remains legally obligated to pay the alleged debt in the amount claimed by the Secretary.

I. Petitioner was Released from Obligation, Thus No Contract

"In a nutshell," according to Petitioner, "B of Am. [Bank of America] has taken a $120,000.00 up to $268,000.00 all on a FMV – of $112,800.00...and per B of Am. 'Don't send any payments unless we tell you to etc.' ...always sent when they said to." *Pet'r. Stat.* at 2. Based on the foregoing, Petitioner seeks to prove that she previously made payments in a timely fashion until Bank of America convinced her, fraudulently, that she no longer needed to make payments. *Id.* The record shows that Petitioner did in fact discontinue her monthly payments, but the facts do not support Petitioner's contention that Bank of America committed a fraudulent act that led to her decision to discontinue payments. As such Petitioner's allegation is her only proof of record that such an instruction was ever given.

Fraud would require evidence that the fraudulent party, in this case allegedly Bank of America, intended to make an assertion to induce Petitioner into discontinuing her monthly loan payments. RESTATEMENT (SECOND) OF CONTRACTS § 162 (Am. Law Inst. 1981). While the evidence presented by Petitioner shows that a primary loan was later modified as agreed upon between Petitioner and the Bank of America, such evidence does not show that Petitioner was induced into believing she was released from the subject debt owed to HUD. *Pet. Stat.*, Attached Letter from Bank of America dated March 28, 2014; Loan Modification Clarity Commitment, dated January 12, 2015.

Instead the record shows that Petitioner had a clear understanding that the subject debt still existed because of Petitioner's repeated admissions that acknowledged she knew she had to

make payments. *Pet'r Stat.* at 1-3. Petitioner also admitted that she was waiting on some instruction to direct her on when to begin again her loan payments. *Id.* These admissions suggest that Petitioner expected to continue her payments at some point in the future. But, even if the Note no longer existed as Petitioner claims, as a general rule, the existence or non-existence of the original Note is not a requirement for the Court to determine whether the subject debt exists or is owed by the debtor. *See e.g. Newell v. La Font*, 251 S.W. 472, 474 (Mo. App. 1923) (The court held "the question of sufficiency of proof of loss of a note sued upon rests largely with the discretion of the trial court" and that "each case must rest upon its own facts."). In *Newell*, the court established that "where a party is proved to be the owner of the instrument at a given time, the presumption of law is that he so continues to be such owner until the contrary is shown by countervailing proof, or by some stronger countervailing presumption of law." Herein, the countervailing proof presented by the Secretary fully persuaded the Court that Petitioner's debt obligation continued despite Petitioner's claim that she was instructed to do otherwise.

II. Contract Non-Binding Because Lender Failed to Explain the Terms of the Agreement

Petitioner claims that she misunderstood the requirements expected of her under the terms of the Note because Bank of America was negligent in failing to explain to Petitioner the Note she signed. *Pet'r Stat.* at 2. Again, Petitioner provides no evidence that sufficiently supports her argument. The Court reviewed the terms of the Note signed by Petitioner and understood the terms of the agreement to be very concise and sufficiently clear in its wording. In particular, the Court understood the terms of the agreement to specifically state,

> Borrower will pay to Lender any amounts, with interest, which Lender spends under this Paragraph 2. This Security Instrument will protect Lender in case Borrower does not keep this promise to pay those amounts with interest.... *However, Lender and Borrower may agree in writing to terms of payment that are different from those in this paragraph.*

(emphasis added) *Sec'y. Stat.*, Ex. 1.,¶ 2. The evidence presented by Petitioner does not indicate that there was a reasonable alternative, in writing, to the Note that formed the basis for the existence of the subject debt. The Secretary's right to collect the alleged debt in this case emanates from the terms of the Note. *Bruce R. Smith*, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). Here, the record reflects a Note signed by Petitioner that contains unambiguous terms with a binding effect on the parties who signed. Those terms remain intact without evidence to the contrary. As a result, the Court finds this claim lacks merit.

Petitioner has failed to prove to the Court, by a preponderance of the evidence, that she is no longer obligated to pay the debt that is the subject of this proceeding. When Petitioner signed the Note, she agreed to abide by the terms of the Note. No conditions were added to the Note identifying alternate options that may be offered should there be a finding of a misrepresentation of the terms of that agreement. The onus always falls on the parties to read and understand a

contract or agreement before signing it. "[A]bsent fraud, duress, or mutual mistake, one having the capacity to understand a written document who reads and signs it, or without reading it, having it read to him, signs it, is bound by his signature in law." *See Ray v. Eurice*, 93 A.2d 272 at 278 (1952). Therefore, the Court finds that Petitioner is bound by her signature in law and thus bound by the terms of the Note that are enforceable by law.

ORDER

Based on the foregoing, Petitioner remains legally obligated to pay the alleged debt in the amount 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 30 days of the date of the written decision, and shall be granted upon a showing of good cause.