

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

In the Matter of:

Jose Velazquez and Maria Velazquez,

Petitioner.

17-AM-0093-AO-035

7210110016-0A

December 14, 2018

DECISION AND ORDER

On April 26, 2017, Jose and Maria Velazquez, (“Petitioner”) filed a Request for Hearing concerning the amount and enforceability of a debt allegedly 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. § 3720A), authorizes federal agencies to use administrative offset as a mechanism for the collection of debts allegedly owed to the United States government. The regulation governing offsets can be found at 24 C.F.R. §§ 17.65-17.79 *et seq.*

The Secretary of HUD designated the administrative judges of the Office of Hearings and Appeals to adjudicate contested cases where the Secretary seeks to collect debts using administrative offset. This Court is authorized to issue written decisions concerning whether a debt or part of a debt is past due and legally enforceable. 24 C.F.R. § 17.73.

BACKGROUND

On March 24, 2014, Petitioners sought financial assistance from HUD to help them avoid possible foreclosure on their mortgage with their primary lender, Wells Fargo Home Mortgage (“Wells Fargo” or “primary lender”). HUD loaned Petitioners the sum of \$24,084.59 to help them avoid defaulting on their mortgage with Wells Fargo. (*See* Secretary’s Statement, (“Sec’y Stat.”), ¶ 2, Ex. 1; Ex. 2, Declaration of Brian Dillon, (“Dillon Decl.”) Director, Asset Recovery Division, HUD Financial Operations Center, ¶ 4.). Petitioners executed and duly delivered a subordinate note (“Note”), evidencing this loan to HUD. (*See* Sec’y Stat., Ex. 1, the Note, dated March 24, 2014). Under the Note’s terms, Petitioners were to pay the principal amount of the unpaid balance on the Note until it was paid in full. (*See* Sec’y Stat., Ex. 1, ¶2). 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 Petitioners’ underlying mortgage to their primary lender was refinanced or otherwise paid in full. (*See* Sec’y Stat., Ex. 1, ¶¶ 4(A)(i) & (iii)).

On August 10, 2016, Wells Fargo notified HUD that Petitioners paid their first mortgage in full. This information automatically triggered both the termination of Wells Fargo’s insurance

contract with the Federal Housing Administration, as well as the provisions of ¶ 4(A)(i) & (iii) of the Note, requiring Petitioners to pay the full amount owed under the Note to HUD. HUD, thereafter, made its demand upon Petitioners to pay the amounts owed, but Petitioners failed to do so. (See Secretary's Supplemental Statement, (Sec'y Supp. Stat.), dated December 6, 2017, Ex. 2). Thus, the Secretary alleges that Petitioners are indebted to HUD in the following amounts:

- a) \$24,084.59 as the unpaid principal balance as of May 31, 2017;
- b) \$60.18 as the unpaid interest on the principal balance at 1% per annum through May 31, 2017;
- c) interest on said principal balance from June 1, 2017, at 1%, per annum until paid.

(See Dillon Decl., dated April 19, 2017, ¶ 5).

On April 17, 2017, HUD mailed a Notice of Intent to Collect by Treasury Offset ("Notice") to Petitioners. 24 C.F.R. 17.65. (See Sec'y Stat., ¶ 6; Dillon Decl., ¶ 6).

DISCUSSION

The Deficit Reduction Act of 1984, 31 U.S.C. § 3720A provides federal agencies with administrative offset of federal payments as a remedy for the collection of debts owed to the United States government. The Secretary bears the initial burden of proof to show the existence and amount of the alleged debt. 31 C.F.R. § 285.11(f)(8)(i). Under 24 C.F.R. § 17.69 (b) - (c), Petitioners must show by a preponderance of the evidence that all or part of the alleged debt is either not past due or not legally enforceable.

As evidence of the Petitioners' indebtedness, the Secretary has filed the *Secretary's Statement*, and the sworn declaration by Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center; copies of the Note, and accompanying notices and documents. (See Sec'y Stat. with Ex. 1; Ex. 2; Ex. 2-A; Dillon Decl.; and Sec'y Supp. Stat. with Ex. 1; Ex. 2; Ex. 3). On the Note's first page, Petitioners' name and address, and states, "This loan is payable in full at maturity or if the conditions outlined in section 4 below occur. You must repay the entire principal balance of the loan." (Sec'y Stat., Ex. 1, ¶ 1). The Note, Exhibit 1 ¶ 6, identifies the parties, presenting Petitioners as the "Borrower" and the Secretary as the "Lender." At paragraph four, the Manner of Payment identifies four triggers requiring the loan's full payment. (Sec'y Stat., Ex. 1, ¶ 1 and ¶ 4). The Note, Exhibit 1's final page shows the Petitioners' signatures and accession to the Note's terms. (Sec'y Stat., Ex. 1, p. 2.). Accordingly, the Court finds that the Secretary has met his initial burden of proof.

At issue, Petitioners believed that the Note was a loan modification through their primary lender, Wells Fargo. (Petitioners' April Letter, (Pet'r. Apr. Ltr.), ¶ 4, dated April 26, 2017.) Moreover, Petitioners assumed that the Note to HUD was paid following their home's sale on August 10, 2016, because Wells Fargo had not informed them that the Note was due in the Loan Payment Confirmation Letter or at any point during the sale. (Petitioners' May Letter, (Pet'r. May. Ltr.), dated May 31, 2017.) Further, Petitioners used Citywide Title Corp. ("Citywide") to research and certify a clear title. Petitioners assert that because of their reliance on Citywide

providing clear title the responsibility for payment should shift from them to Citywide. (*See* Pet'r. Apr. Ltr. ¶ 3). Petitioner asserts that they would not be able to afford to pay both the mortgage on their new home and the \$24,084.59 that is owed to HUD. In support of these claims, Petitioner filed two correspondences listed above; the Notice of Intent to Collect; ALTA Settlement Statement; Closing Disclosure and Certification, Payoff Letter Indemnification Agreement, and Title Insurance Commitment, File No.714299; and Better Business Bureau Complaint, ID # 12119929.

The Court takes Petitioner's first two claims at once; both the belief that the Note was a loan modification through Wells Fargo and Petitioners relying on their primary lender to inform them that the Note became due are flawed arguments. The Court has stated time and again that the obligation to repay the debt derives from the Note's terms, which Petitioners signed. *Dimitris and Andrea Baldwin*, HUDOA No. 12-AMCH-AO47 (April 8, 2013). The Notes first paragraph identifies the "Lender" as "the Secretary of Housing and Urban Development and its successors and assigns," and states that Petitioner is to pay "to the order of Lender." (*See* Sec'y Stat., Ex. 1, ¶ 1). The Notes fourth paragraph identifies the manner of payment. Under this provision, the debt becomes due once all amounts under the primary note are paid in full. (*Id.* at ¶ 4(A)(i)). Payment was to be made at HUD's office in Washington, D.C., "or any such other place as Lender may designate in writing by notice to Borrower." (*Id.* at ¶4(B)). The Note's terms thus provide express instructions as to how, when, where, and to whom payment was required to be made. *Id.* The Note does not name Wells Fargo as a lender, assignee, or loan servicer. Therefore, Petitioners should have known that they were required to pay the debt to HUD as proscribed in the Note.

Petitioners' claim that they were, mistakenly, under the impression that Wells Fargo repaid HUD as part of their primary mortgage payoff is insufficient evidence to establish that HUD's Note is not past due or unenforceable against them. *Nancy Brignoni*, HUDOA No. 10-H-NY-AWG11 (April 26, 2011). Petitioners evidence does not show any line item that reflects the Note's payment. Additionally, they have not provided any assent from HUD that shows the lender released them from any repayment obligation under the Note. For Petitioners, not to be held liable for the subject debt, she must submit evidence of either (1) a written release from HUD showing that Petitioners are no longer liable for the debt; or (2) evidence of valid or valuable consideration paid to HUD to release them from their legal obligation. *Franklin Harper*, HUDBCA No. 01-D-CH-AWG41 (March 23, 2005). Here Petitioners received none of the releasing conditions from HUD. Further, in their letter (Pet'r. Apr. Ltr., ¶ 4), they state that they now understand that they own on the Note.

Petitioners assert that Citywide may hold some or all liability because it did not inform Petitioners of HUD's Note and they had relied on Citywide for title insurance. First, Petitioners must know that within their evidentiary documents the Note is annotated and acknowledged by Citywide's agent. Based on the Petitioners' evidence found in *Title Insurance Commitment, Schedule B, section C – Special Exceptions at ¶ 4* (emphasis added), they knew or should have known that there was an outstanding Note due to HUD. Further, the Court has consistently ruled, "A third party's error or negligence does not relieve Petitioners of liability for the debt... Petitioners' obligation to pay the debt derives from the Note's terms." *Stephond West*, HUDOA No. 17-AM-0026-AG-006 (March 14, 2018), citing *Bryan McClees*, HUDOA No. 17-AM-0037-

AO-010 (February 14, 2018) and *Cydney A. Taylor*, HUDOA No. 14-AM-0063-AO-005 (October 22, 2014).

Petitioner emphasizes that they would not be able to afford paying both the mortgage on their new home and the \$24,084.59 debt that is owed to HUD. Unfortunately, in determining whether a debt is legally enforceable, evidence of financial hardship, no matter how compelling, cannot be taken into consideration. *Randolph and Barbara Pitkin*, HUDBCA No. 99-C-NY-Y181 (June 14, 2000), citing *Anna Filiziana*, HUDBCA No. 95-A-NYT11 (May 21, 1996). Moreover, financial adversity does not release a debtor from a legal obligation to pay a loan, nor does it invalidate the debt. *Thomas R. Herrin*, HUDBCA No. 88-2848-H372 (December 9, 1987), citing *Raymond Kovalski*, HUDBCA 87-1681-G18 (December 8, 1986).

If Petitioners seek to negotiate a repayment schedule with the Department, they should be aware that this Court only has the authority to make a “determination of whether the debt is enforceable and past due.” (See *Edgar Joyner Sr.*, HUDBCA No. 04-A-CH-EE052 (June 15, 2005)). This Court does not have the authority to establish “a debtor’s repayment amount or a schedule of payments.” *Id.* As such, while Petitioners may wish to negotiate repayment terms with the Department, this Court is not authorized to “extend, recommend or accept any payment plan or settlement offer on behalf of the Department.” *Id.* If Petitioners wish to discuss a payment plan, Petitioners may discuss the matter with Michael DeMarco, the Director of the HUD Financial Operations Center, at 1-800-669-5152, extension 2859 or write to HUD Financial Operation Center, 50 Corporate Circle, Albany, NY 12203-5121.

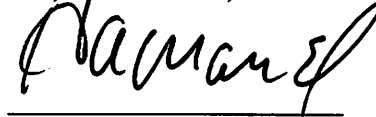
ORDER

For the reasons set forth above, I find the debt that is subject of this proceeding to be legally enforceable against Petitioners 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 offset is **VACATED**. It is

FURTHER ORDERED that the Secretary is authorized to refer this matter to the U.S. Department of the Treasury for administrative offset of any federal payment due to Petitioner.

SO, ORDERED,



H. Alexander Manuel
Administrative Judge