

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

In the Matter of:

Robert and Denise Winter,

Petitioners.

HUDOA No.: 17-VH-0060-AO-018

Claim No.: 7-21008894-0B

September 28, 2018

DECISION AND ORDER

This case is before the Office of Hearing and Appeals upon a *Request for Hearing* (“*Hearing Request*”) filed by Petitioners, on February 7, 2017, concerning the existence, amount, or enforceability of a debt allegedly owed HUD. On or about November 28, 2016, Robert and Denise Winter (“Petitioners”) were notified pursuant to 31 U.S.C. §§ 3716 and 3720A, that the Secretary of the U.S. Department of Housing and Urban Development (“HUD” or “Secretary”) intended to seek administrative offset of any federal payments to Petitioners in satisfaction of a debt allegedly owed to HUD. *Secretary’s Statement* (“*Sec’y. Stat.*”), ¶ 10).

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 in 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.

PROCEDURAL HISTORY

Pursuant to 24 C.F.R. §17.81(a), on February 8, 2017, this Court stayed the issuance of an administrative offset of any federal payment due Petitioners until the issuance of this written decision. *Notice of Docketing, Order, and Stay of Referral* (“*Notice of Docketing*”), p. 2. In addition to the evidence submitted with Petitioners’ *Hearing Request*, on March 13, 2017 the Court issued an *Order for Documentary Evidence* to which Petitioners responded on April 4, 2017 and August 26, 2017 with *Petitioners’ Reply to Order for Documentary Evidence* (“*Pet’rs’ Rep.*”) and *Petitioners’ Supplemental Documentary Evidence* (“*Pet’rs’ Supp. Doc.*”). The Secretary responded with his *Secretary’s Statement* and documentary evidence on September 5, 2017.

It should be noted that on June 26, 2017, Petitioner Denise Winter, through counsel, filed a *Motion to Add Robert Winter as Petitioner (Motion)* in the above-captioned matter, but this *Motion* was denied because, when the Motion was filed, Petitioner Robert Winter did not have an administrative offset case posted on the Court's docket to consolidate with the instant case.¹

When Petitioners filed a second *Motion to Consolidate* in response, this time, to the Court's *Order for Clarification*, the *Motion to Consolidate* was granted on July 5, 2018 to consolidate Case No. 17-VH-0136-AO-073 with the instant case. The case is now ripe for review.

FINDINGS OF FACT

On January 27, 2015, Petitioners executed and delivered to the Secretary a *Subordinate Note* ("Note" or "Subordinate Note") in the amount of \$5,557.57, in exchange for HUD advancing funds to Petitioners' FHA insured mortgage lender. *Sec'y. Stat.*, ¶ 4; Ex. B ("Note"), at 1, ¶ 2. The Note described four events that would make the debt immediately due and payable. *Sec'y. Stat.*, ¶ 5; Note, at 1, ¶ 4. One of these events was the payment in full of the primary note and related mortgage. *Id.* On or about March 4, 2016, the insurance on the first mortgage was terminated, as the mortgage was paid in full. *Sec'y. Stat.*, ¶ 6; Ex. A, *Declaration of Brian Dillon*² ("*Dillon Decl.*"), ¶ 4.

HUD states that it has attempted to collect on the Note from Petitioners, but without success. *Sec'y. Stat.*, ¶ 8. Consequently, the Secretary alleges that Petitioners are indebted to HUD in the following amounts:

- a. \$5,557.57 as the unpaid principal balance as of March 30, 2017;
- b. \$27.78 as the unpaid interest on the principal balance at 1% per annum through March 30, 2017;
- c. \$369.90 as the unpaid penalties and administrative costs on the balance through March 30 2017; and
- d. Interest on said principal balance from April 1, 2017, at 1% per annum until paid.

Sec'y. Stat., ¶ 9; Ex. A, *Dillon Decl.*, ¶ 5.

HUD sent a Notice of Intent to Collect by Treasury Offset dated November 28, 2016, to Petitioners. *Sec'y. Stat.*, ¶ 10; Ex. A, *Dillon Decl.*, ¶ 6.

The Secretary respectfully requests that the Court find Petitioner's debt past due and legally enforceable.

DISCUSSION

In this case, Petitioner challenges the legal enforceability of the alleged debt by claiming that: (1) Nationstar Mortgage, LLC, operating as HUD's agent, represented to Petitioner that the subject debt

¹ Counsel for Petitioner Robert Winter later filed a *Request for Hearing* on July 24, 2017 in response to a Notice of Intent to Collect by Treasury Offset issued to Petitioners. Petitioners then responded, as ordered, to the Court's *Notice of Docketing and Order* issued in that case.

² Mr. Dillon is the Director of the Asset Recovery Division of HUD's Financial Operations Center for HUD.

would be paid off with the primary mortgage (*Pet'rs' Reply.*, pp. 3-5.); (2) if the debt exists, Stewart Title Guarantee Company is the appropriate party from which to seek collection (*Petitioner's Supplemental Documentary Evidence* ("Pet'rs' Supp. Doc."), filed May 26, 2017, p. 1.); and, (3) a discrepancy exists between the principal amount due as reflected in the Note and the principal amount claimed by the Secretary. (*Pet'rs' Rep.*, p. 5.)

I. Agency Relationship

Petitioners allege that Nationstar Mortgage, LLC is an agent of HUD and that Nationstar Mortgage, LLC, operating as HUD's agent, represented to Petitioners that the subject debt would be paid off with the primary mortgage. More specifically, Petitioners claim that:

The Winters are not liable on the Subordinate Mortgage and/or Subordinate Note as HUD, through its agent, Nationstar, indicated that the Notes would be collectively paid in full. The Winters entered into a Loan Modification Agreement with Nationstar and a Subordinate Mortgage at the same time. Nationstar drafted and presented all documents to the Winters, including the Subordinate Note and Subordinate Mortgage, at the same time. No HUD representatives ever communicated with the Winters regarding the Subordinate Note and/or Subordinate Mortgage. All communications relating to the Subordinate Note and Subordinate Mortgage were with Nationstar and not HUD. Nationstar always acted on HUD's behalf throughout the loan modification process.

Pet'rs' Rep., pp. 3-5.

According to Petitioners, "In spite [of] Nationstar's representations that the Modification Agreement and Subordinate Mortgage were joint documents with one common payoff and in spite of Nationstar having been paid, HUD is still attempting to collect on its promissory note and mortgage." *Pet'rs' Rep.* at 3. Petitioners concluded that because HUD delegated all tasks associated with drafting and executing documents to Nationstar, "Nationstar had the apparent authority to act for and on behalf of HUD." Petitioners further concluded that, "It was perfectly reasonable, under the circumstances, to rely on the belief that Nationstar could agree to the payoff for HUD." *Pet'rs' Rep.* at p. 5.

As support, Petitioners submitted, along with their *Reply*, documentary evidence including copies of the Survivorship Deed; Open-End Mortgage; Assignment of Mortgage; Loan Modification Agreement; Subordinate Mortgage; Subordinate Note; an email from Land Title to counsel for Petitioners dated March 24, 2017; a written note dated February 17, 2016; the Paid In Full Note for FHA# 412-6776213-703; an undated payoff letter from Nationstar Mortgage LLC; a certificate of release of Nationstar Mortgage # 0605802479; a general warranty deed; and, the Demand Notice for the subject debt.

Citing 24 C.F.R. Part 203, *et seq.*, the Secretary claims, in response, that "It is important to note at the outset that FHA-insured lenders are regulated by HUD and must act in accordance with HUD's program requirements." "While the regulations and Mortgagee Letter require mortgagees to facilitate the borrower's execution of the subordinate note and subordinate mortgage," explains the Secretary, "nowhere in the regulations or guidance does it permit a mortgagee to provide payoff figures

for HUD and/or issue a mortgage satisfaction extinguishing HUD's indebtedness without HUD's express consent." *Sec'y. Stat.*, Ex. C, Mortgagee Letter 2013-19 (May 21, 2013). The Secretary maintains further that, "HUD has its own contractor, Novad Management Consulting, that is responsible for handling payoff requests for single-family HUD-held assets—including partial claim subordinate notes--and this information is readily available on HUD's website." *Sec'y. Stat.*, Ex. D. The Secretary finally contends that "the Note itself explicitly states where payment on the Note should be made when it became due and payable." *Sec'y. Stat.*, Ex. B., Note at ¶ 4(B).

In support of his position, the Secretary submitted, along with his *Statement*, documentary evidence including copies of an affidavit from the Director of HUD's Financial Operation Center; the Subordinate Note signed by Petitioner; Mortgagee Letter 2013-19 (May 31, 2013); and, information on the responsibilities of the Secretary-Held Assets Servicing Contractor.

As a preliminary matter, the Court must first address what defines an agency relationship based on Ohio law. For an agency relationship to exist between HUD and Nationstar Mortgage, certain criteria must be met. First, HUD must exhibit actions that represented Nationstar Mortgage as its agent; and second, Petitioners must have known of these actions and had reason to believe, and did believe in good faith, that Nationstar Mortgage was an agent of HUD. *Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.3d 655, 662–63 (6th Cir. 2005). "[A] court's focus during an inquiry into the existence of apparent authority must be on the acts of the principal and whether those actions manifested a conveyance of authority to the agent." *Id.* at 663.

In this case, HUD's actions do not form a reasonable basis for concluding that HUD authorized Nationstar Mortgage to act on its behalf and discharge payoffs of subordinate mortgages, or that HUD conveyed apparent authority for Nationstar Mortgage to operate as its agent. HUD is a regulatory body overseeing FHA-insured lenders and acts in accordance with statutory requirements. *See* 24 C.F.R. § 203, *et seq.* In this case, Petitioner was threatened with foreclosure on January 13, 2015 and HUD advanced funds to Petitioner's lender to prevent foreclosure in accordance with 24 C.F.R. § 203.371(b). One of the conditions for this payment or advancement of funds is the execution of a Subordinate Mortgage which the lender, by regulation, must facilitate. *See* 24 C.F.R. § 203.371(c).³

Petitioners state that "HUD's only communications to Petitioner were the Subordinate Note and Subordinate Mortgage." *Pet'rs' Reply* at 1. But, neither document identifies Nationstar Mortgage as an agent for HUD. Instead the Subordinate Note, in receipt by Petitioners, provide in unambiguous terms where payments on the Note should be submitted: "**Office of 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." (emphasis in original); *Pet'rs' Reply*, Ex. 10; *Sec'y. Stat.*, ¶ 7. Further, the Secretary indicates that "HUD has its own contractor, Novad Management Consulting, that is responsible for handling payoff requests for single-family HUD-held assets – including partial claim subordinate notes – and this information is readily available on HUD's website. *Sec'y. Stat.*, ¶ 17, Ex. D, Secretary-Held Assets Servicing Contractor online at https://www.hud.gov/program_offices/housing/sfh/nsc/fmaddr.

³ 24 C.F.R. § 203.371 (c) -- Partial claim. (c) Repayment of the subordinate lien. The mortgagor must execute a mortgage in favor of HUD with terms and conditions acceptable to HUD for the amount of the partial claim under §203.414(a). HUD may require the mortgagee to be responsible for servicing the subordinate mortgage on behalf of HUD.

The evidence presented by Petitioners was insufficient and did not convince the Court that Nationstar had apparent authority to act as HUD's agent. Without evidence to refute the evidence presented by the Secretary, Petitioners fall short of meeting their burden of proof in support of their position. As a result, the Court finds that HUD's actions do not reflect with certainty that HUD intended to appoint Nationstar as its agent and further finds that Petitioners did not possess a good faith belief that Nationstar Mortgage operated as HUD's agent.

II. Title Company's Liability

Next, Petitioners assert that Stewart Title Guarantee Company ("Title Company") should be responsible for the subject debt. *Pet'rs' Supp. Doc. Evid.* at 1. As support, Petitioners submitted a copy of a *Commitment for Title Insurance* ("*Commitment*") from the Title Company. *Pet'rs' Supp. Doc. Evid.*, Ex. 15. According to Petitioners, this document identifies "Crosscountry Mortgage, Inc. and/or The Secretary of Housing and Urban Development of Washington, D.C., their successors and/or assigns, as their interests may appear" as an insured party. *Id.* Petitioners contend that the *Commitment* serves as proof that the Title Company is the proper party for HUD to pursue collection of the subject debt.⁴

The Court acknowledges that certain parties have been identified in the *Commitment* as insured, but Part II of the *Commitment* also contains a list of exceptions to such coverage – "unless the same are disposed of to the satisfaction of the [title insurance] Company." *Pet'rs' Supp. Doc. Evid.*, Ex. 15, p. 2. One of those exceptions is the Subordinate Mortgage associated with the debt in this case and signed by Petitioners in the amount of \$5,557.57. *Id.* at ¶ 21. As a result, the Title Company has effectively disclaimed any liability for the subject debt owed to HUD by Petitioners.

The Secretary's right to collect the subject debt emanates from the terms of the Note, not from the terms of payoff statements from the primary lender or a *Commitment* from the Title Company. *See, in general, Cydnie A. Taylor*, HUDOHA No. 14-AM-0063-AO-005 (October 22, 2014); *Bruce R. Smith*, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). The *Commitment* and undated payoff letter from Nationstar Mortgage fail to prove Petitioners' allegation – that they have been released from the debt because the Title Company is liable. In fact, Petitioners introduced into evidence proof that they were well aware that only one loan had been paid in full. A letter dated February 17, 2016 from Nationstar Customer Service states therein "Both mtgs will [be] cancelled when [t]he loan is paid off. Mr. Winter [sic] only making one Loan pymt. The payoff as we received it is consistent with the amount Mr. Winter says is." (emphasis added). *Pet'rs' Supp. Doc. Evid.*, Ex. 9. So, only one loan payment was made to Nationstar Mortgage for full payment of the primary mortgage, and that payment was irrefutably proven by the Petitioners themselves. *See Pet'rs' Supp. Doc. Evid.*, Ex. 9, 10, and 11; *Hearing Request*, Attached undated payoff letter from Nationstar Mortgage; and Attached letter from Nationstar Mortgage with Certificate of Release for Primary Mortgage.

Even if it was determined that the Title Company was negligent by failing to pay in full the subject debt, a third party's negligence does not normally relieve Petitioners of liability for the debt. *See Brvan McClees*, HUDOA No. 17-AM-0037-AO-010 (February 14, 2018). The Note signed by Petitioners on January 27, 2015 states:

⁴ Petitioners did not offer in the record the legal basis for their position that an agreement they were neither party to nor beneficiary of renders collection of the debt from Petitioners unenforceable.

7. BORROWER'S PROMISE TO PAY

In return for a loan received from Lender, Borrower [herein Petitioners] promises to pay the principal sum of FIVE THOUSAND FIVE HUNDRED FIFTY-SEVEN AND 57/100 Dollars (U.S. \$ 5,557.57), to the order of Lender.

Sec'y. Stat., Ex. B, Note, p. 1, ¶ 2.

The Note was executed by HUD and Petitioners and serves as a binding agreement between them alone. The onus falls on Petitioners, not on the Title Company or Mortgage Company, to ensure that the subject debt is paid in full. Petitioners voluntarily signed the Note and agreed to pay "all of the amounts owed under this Note." *Id.* This obligation has not shifted to the Title Company.

The fundamental issue here is simple – a debt is owed by Petitioners, and their failure to satisfy that debt fails to comply with the terms of the Note which is a valid and binding contract between Petitioners and HUD. Based on the evidence presented, Petitioners have failed to meet their burden of proof to prove otherwise. Therefore, the Court finds that Petitioners' allegation lacks merit and, as a result, Petitioners responsibility for the subject debt remains intact.

III. Discrepancy on the Amount Owed

Finally, Petitioners allege that HUD is attempting to collect more than the amount stated in the Note. *See Pet'rs' Reply* at 3, Ex. 14. Petitioners received a letter, dated February 13, 2017, from the Department of the Treasury alleging that Petitioners owed HUD \$7,610.87. *Pet'rs' Rep.*, Ex. 14.) The Secretary concedes that the principal owed by Petitioners is \$5,557.57, as so claimed by Petitioners. *Sec'y. Stat.*, ¶ 9; Ex. A, *Dillon Decl.*, ¶ 5. But, interest and penalties continued to accrue from the date the Subordinate Note became due and payable.

Under 31 U.S.C. § 3717⁵, and 31 C.F.R. 901.9⁶, HUD can charge interest and penalties toward debts owed. *Sec'y. Stat.*, Ex. A, *Dillon Decl.*, ¶ 8. After the primary mortgage was paid in full, the Note immediately became due and payable. The principal amount has since accrued additional interest and penalties for which Petitioners are also responsible. So, the amount of \$7610.87 includes the additional interest and penalties on the principal amount of \$5,557.57 as required by law. Accordingly, the Court finds that Petitioners are obligated to pay not only the principal amount so claimed by the Secretary, but also the additional interests and penalties accrued herein.

⁵ 31 U.S.C. § 3717 (a)(1) The head of an executive, judicial, or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point.

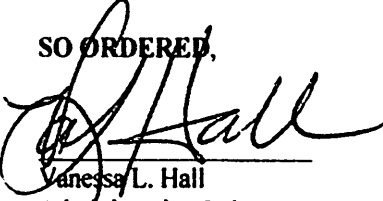
⁶ 31 C.F.R. 901.9 (a) Except as provided in paragraphs (g), (h), and (i) of this section, *agencies shall charge interest, penalties, and administrative costs on debts owed to the United States pursuant to 31 U.S.C. 3717.* An agency shall mail or hand-deliver a written notice to the debtor, at the debtor's most recent address available to the agency, explaining the agency's requirements concerning these charges except where these requirements are included in a contractual or repayment agreement. These

ORDER

Based on the foregoing, 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 debt by means of administrative offset of any federal payment due Petitioners.

SO ORDERED,



Vanessa L. Hall
Administrative Judge

Review of determination by hearing officers. A motion for reconsideration of the 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 only upon a showing of good cause.