

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

In the Matter of:

**Cynthia A. Henderson,**

Petitioner.

17-VH-0092-AO-034

7-210099840B

March 19, 2018

**DECISION AND ORDER**

This proceeding is before the Office of Hearings and Appeals upon a *Hearing Request* filed on May 2, 2017, by Petitioner Cynthia A. Henderson (“Petitioner”) concerning the existence, amount, or enforceability of a 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 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 subject debt is past due and legally enforceable.

**PROCEDURAL HISTORY**

Pursuant to 24 C.F.R. § 17.81(a), on May 3, 2017, the Court stayed the issuance of an administrative offset of any federal payment due to Petitioner until the issuance of this written decision. *Notice of Docketing, Order, and Stay of Referral* (Notice of Docketing) at 2. On July 11, 2017, Petitioner filed her *Statement* along with documentary evidence in support of her position. On August 31, 2017, the Secretary, through Counsel, filed the *Secretary’s Statement*, along with documentary evidence in support of his position. This case is now ripe for review.

**BACKGROUND**

This is a debt collection action brought pursuant to Title 31 of the United States Code, section 3720A, because 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 December 27, 2011, Cynthia A. Henderson ("Petitioner") and Doris Castro executed and delivered to the Secretary a Subordinate Note ("Note"), in the amount of \$36,841.93. The Note secured a Subordinate Mortgage held by the Secretary. *Secretary's Statement*, (*Sec'y. Stat.*), ¶ 2.

As a means of providing foreclosure relief to Petitioner, HUD advanced funds to Petitioner's FHA insured mortgage lender, which was the holder of Petitioner's primary mortgage note ("Primary Note"). In exchange for such funds, Petitioner executed the Note in favor of the Secretary. *Sec'y. Stat.* ¶ 2, Ex. 1, *Declaration of Brian Dillon*<sup>1</sup> ("*Dillon Decl.*"), ¶ 4.

By terms of the Note, the amount to be repaid thereunder becomes due and payable "4(A) On October 1, 2038, or if earlier, when the first of the following events occurs: (i) borrower has paid in full all amounts due under the primary note and related mortgage; or (ii) the maturity date of the primary note has been accelerated; or (iii) the [primary] note and related mortgage, deed of trust or similar security instrument are no longer insured by the Secretary; or (iv) the property is not occupied by the purchaser as his or her principal residence." *Sec'y. Stat.* ¶ 4, Ex. 2, Note.

On or about August 3, 2016 the FHA mortgage insurance on Petitioner's primary mortgage was terminated, as the lender indicated the primary note and mortgage was paid in full. *Sec'y. Stat.* ¶ 4, Ex. 1, *Dillon Decl.*, ¶ 4. HUD has attempted to collect the amounts due under the Note, but Petitioner remains delinquent and indebted to HUD. *Sec'y. Stat.* ¶ 4, Ex. 1, ¶ 5.

Petitioner is justly indebted to the Secretary in the following amounts:

- a. \$36,841.93 as the total unpaid principal balance as of July 30, 2017;
- b. \$153.45 as the unpaid interest on the principal balance at 1% per annum through July 30, 2017;
- c. \$2,253.21 as the unpaid penalties and administrative costs through July 30, 2017; and
- d. interest on said principal balance from July 31, 2017 at 1% per annum until paid.

*Sec'y. Stat.* ¶ 7, Ex. 1, *Dillon Decl.*, ¶ 5.

A Notice of Intent to Collect by Treasury Offset was mailed to Petitioner on or about April 17, 2016. *Sec'y. Stat.* ¶ 4, Ex. 3. The Secretary respectfully requests a finding that the Petitioner's debt is past due and legally enforceable; and, that the stay of referral of this matter to the U.S. Department of Treasury for collection by Treasury Offset be vacated, so that the Secretary may proceed with Administrative Offset against Petitioner.

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<sup>1</sup> Brian Dillon, Director of the Asset Recovery Division of HUD's Financial Operations Center.

## DISCUSSION

Petitioner claims that the subject debt is nonexistent because it was satisfied at closing. While she admits that she co-signed the Note, Petitioner believes she is not responsible for the debt associated with the Note because the funds disbursed were never disbursed to her directly. Petitioner further claims that she, “actually received affirmative assurances that such payoff would resolve *all* liens filed against the property.” (Emphasis added.) *Petitioner’s Statement of Legal Arguments (Pet’r’s Statement)*, ¶ 4. She produced, for review, copies of the primary mortgage agreement; loan modification agreement; subordinate note; subordinate mortgage; payoff statement dated July 6, 2016; and, Release of Mortgage. *Petitioner’s Submittal of Documentary Evidence (Pet’r’s Doc. Evid.)*, Attachments. Petitioner maintains that the copy of the payoff statement was “a payoff letter received from the Secretary’s Agent, BB&T and [sic] represents to be a Payoff Statement for Loan No. 6930593565 and FHA Case No. 0914512381.” *Pet’r’s Doc. Evid.*, ¶ 5.

In response, the Secretary claims that Petitioner has failed to meet her burden of proof regarding the existence, amount, and validity of the subject debt. According to the Secretary, although Petitioner submitted, as proof of full payment, a copy of a Branch Banking and Trust Company (“BB&T”) Payoff Statement dated July 6, 2016, such documentation provided “no indication that the debt owed to HUD pursuant to the Note was included in the Payoff Statement or elsewhere....” The Secretary filed, for the Court’s review, copies of the Subordinate Note executed between HUD and Petitioner, and the Payoff Statement from BB&T Mortgage dated July 6, 2016. This evidence, maintains the Secretary, fails to show “that any funds available at Petitioner’s property sale closing were paid out to HUD” or that “the debt owed to HUD has been paid.” *Sec’y. Stat.* ¶ 9. Citing *Dillon’s Declaration* as support, the Secretary concludes that there was “no indication that Petitioner’s debt to HUD was paid as a result of this sales transaction. The \$133,605.36 paid to BB&T Mortgage at the time of closing did not include the Partial Claim Debt owed to HUD.” *Sec’y. Stat.* ¶ 4, Ex. 1, *Dillon Decl.*, ¶ 11.

After reviewing the record of evidence, the Court finds the Secretary’s position credible and persuasive. First, regarding satisfaction of the debt, Petitioner’s reliance on the BB&T Payoff Statement and the loan modification as proof of full payment of the subject debt is misplaced. While BB&T’s Payoff Statement may represent that the Statement is for “Loan No. 6930593565 and FHA Case No. 0914512381,” the face of the Payoff Statement does not reflect satisfaction of the debt amount associated with the Subordinate Note in this case. BB&T and Petitioner alone are the parties to the primary mortgage and the loan modification agreements to which Petitioner refers; but, the parties to the Subordinate Note are instead, Petitioner and the Secretary of U.S. Housing and Urban Development. Thus, the terms of the former contracts cannot dictate the obligations of the parties to the Note.

The Secretary’s right to collect the subject debt in this case emanates from the terms of the Note. Bruce R. Smith, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). For Petitioner not to be held liable for the subject debt, she must submit evidence of either (1) a written release

from HUD showing that Petitioner is no longer liable for the debt; or (2) evidence of valid or valuable consideration paid to HUD to release her from her obligation. Franklin Harper, HUDBCA No. 01-D-CH-AWG41 (March 23, 2005) (citing Jo Dean Wilson, HUDBCA No. 03A-CH-AWG09 (January 30, 2003)); William Holland, HUDBCA No. 00-A-NY-AA83 (October 12, 2000); Ann Zamir (Schultz), HUDBCA No. 99-A-NY-Y155 (October 4, 1999); Valerie L. Karpanai, HUDBCA No. 87-2518-H51 (January 27, 1988); Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (December 22, 1986); and Jesus E. and Rita de los Santos, HUDBCA No. 86-1255-F262 (February 28, 1986). Petitioner's submission of a Payoff Statement related to a primary mortgage or the loan modification is unrelated to the subject debt associated with the Note and fails as proof that the subject debt has been satisfied, particularly when HUD was not a party to that contract.

Paragraph 4(A)(i) of the Subordinate Note, referenced earlier, provides that "On October 01, 2038 or, if earlier, when the first of the following events occurs (i) *Borrower has paid in full all amounts due under the primary Note and related mortgage, deed of trust or similar Security Instruments insured by the Secretary....* (Emphasis added) *Pet'r's Doc. Evid.*, Attachment 3. When Petitioner paid in full the primary mortgage, the amount of the subject debt immediately became due based on the agreement between Petitioner and HUD. The loan modification agreement adjusted the terms of the primary mortgage agreement. However, the purpose of the Subordinate Note, in its function as a Security Instrument, is to protect HUD from losses which might result if the Borrower defaults under the Note. In this case, such default has occurred and the record lacks evidence of either a written release, or of consideration exchanged, that would otherwise prove Petitioner is no longer obligated to pay the subject debt. The Court therefore finds that Petitioner has failed to meet her burden of proof, and further finds that Petitioner's claim fails for lack of proof.

Next, Petitioner claims although she co-signed the Note, no funds were disbursed to her. As a result, she maintains that without a disbursement of funds to her, consideration was not given to otherwise hold Petitioner liable for the subject debt. This argument lacks merit. Again, 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). Petitioner, along with her mother, co-signed the Note and so, the terms of the Note are binding on both parties as co-signers. This Court has consistently held that co-signers of a loan are jointly and severally liable to the obligation, and as a result, "a creditor may sue the parties to such obligation separately or together." Mary Jane Lyons Hardy, HUDBCA No. 87-1982-G314, at 3 (July 15, 1987).

Further, Paragraph 7 of the Note states, "If more than one person signs this Note, *each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed.*" (Emphasis added). In the Note, it states that the "Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note." Consistent with case law precedent, and the terms of the

Note, “the Secretary may proceed against any co-signer for the full amount of the debt” because, again, each co-signer is jointly and severally liable for the obligation. Hedieh Rezai, HUDBCA No. 04A-NY-EE016 (May 10, 2004). *Pet’r’s Doc. Evid.*, Attachment 3.

The Note in this case does not recognize the disbursement of funds as a factor for determining the payment obligations of the parties to the Note. This means that Petitioner and Petitioner’s mother, as co-signors of this Note, are considered jointly and severally liable for the payment of the subject debt unless evidence of a written release from HUD, or proof of consideration, can be provided by Petitioner. In the absence of such evidence, as the case is herein, the Court must find that Petitioner remains contractually obligated to pay the debt so claimed by the Secretary.

### **ORDER**

Based on the foregoing, Petitioner must by obligation pay the subject 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.

**SO ORDERED.**

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Vanessa L. Hall  
Administrative Judge

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**SO ORDERED.**



Vanessa L. Hall  
Administrative Judge

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**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 only upon a showing of good cause.