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

In the Matter of: **Ty and Lisa Visco,** Petitioners.	18-AM-0178-AO-055 7-210126020 March 11, 2020

DECISION AND ORDER

On May 9, 2018, Ty and Lisa Visco ("Petitioners") 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").

Congress has authorized federal agencies to use administrative offset as a mechanism for the collection of debts allegedly owed to the United States government. *See* 31 U.S.C. §§ 3716, 3720A. HUD's regulations governing offsets can be found at 24 C.F.R. §§ 17.65-17.79. The Secretary of HUD has 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. *See* 24 C.F.R. § 17.69. This Court is authorized to issue written decisions concerning whether a debt or part of a debt is past due and legally enforceable. *See* 24 C.F.R. § 17.73.

On July 19, 2018, Petitioners, through counsel, filed a *Brief in Support of Ty Visco and Lisa Visco's Opposition to HUD's Application to Collect from the Viscos by Treasury Offset* ("Pet'r Br."), supported by a declaration from Petitioners' counsel, Roberta Anne Burcz ("Burcz Decl."), a declaration from Lisa Visco ("Visco Decl."), and various exhibits. On February 6, 2019, HUD, through counsel, filed a *Secretary's Statement that Petitioner's Debt Is Past Due and Legally Enforceable* ("Sec'y Stat.), supported by exhibits that included a declaration from Brian Dillon, Director of the Asset Recovery Division of HUD's Financial Operations Center ("Dillon Decl."). The record is now closed and this matter is ripe for decision.

BACKGROUND

Petitioners own a home in Point Pleasant, New Jersey that was subjected to a HUD-insured mortgage ("the primary mortgage") in favor of M&T Bank in 2010. (*See* Visco Decl. ¶¶ 1-2; Burcz Decl., Exs. A & B.) In 2015, this primary mortgage was in default, and Petitioners sought financial assistance from HUD to help them avoid foreclosure.[1] (Dillon Decl. ¶ 4; Visco

[1] Petitioners assert that they sought assistance through HUD's Home Affordable Modification Program, or "HAMP." (*See* Visco Decl. ¶ 3.) Under HAMP, which was in effect from 2009 to 2016, HUD paid partial insurance claims of up to 30% of the unpaid principal balance on defaulted HUD-insured loans to incentivize the lender to modify the loan in order to help the borrower avoid foreclosure. *See* 12 U.S.C. § 1715u(b); Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009); U.S. DEP'T HOUS. & URBAN

Decl. ¶ 3.) HUD provided foreclosure relief to Petitioners by advancing funds to M&T Bank in the amount of $97,044.54. (Dillon Decl. ¶ 4; Sec'y Stat., Ex. B; Visco Decl., Ex. B.)

As a result, on April 1, 2015, Petitioners executed a Subordinate Mortgage and a Subordinate Note promising to pay HUD the principal sum of $97,044.54. (Sec'y Stat., Ex. B; Burcz Decl., Ex. C; Visco Decl. ¶¶ 3-5 & Ex. B.) Payment was due on December 1, 2044, but Paragraph 4(A) of the Note cited several specific events that would cause the debt to instead become immediately due and payable. One such event was if Petitioners paid in full all amounts due under their primary note and mortgage. (Sec'y Stat., Ex. B ¶ 4(A)(i); Visco Decl., Ex. B ¶ 4(A)(i).) Another was if the primary note and mortgage were no longer insured by the Secretary. (Sec'y Stat., Ex. B ¶ 4(A)(iii); Visco Decl., Ex. B ¶ 4(A)(iii).)

In 2017, Petitioners applied to M&T Bank to refinance their primary mortgage in order to consolidate some of their debt and replace the primary mortgage with a new loan with more favorable terms. (Pet'r Br. 2; Visco Decl. ¶¶ 6-8 & Ex. C.) Petitioners executed a new note to M&T Bank secured by a new mortgage that closed on September 6, 2017. (Burcz Decl., Ex. D; Visco Decl. ¶ 7.) As a result, the primary mortgage was discharged in full, and the HUD insurance on that mortgage was terminated on September 11, 2017. (Dillon Decl. ¶¶ 4, 7; Visco Decl. ¶ 9 & Ex. F.)

The Secretary asserts that, after the HUD insurance on the primary mortgage was terminated, thereby triggering the acceleration clause of Paragraph 4(A) of the Subordinate Note, he attempted to collect on the Note, but Petitioners remained delinquent. (Dillon Decl. ¶ 5.) Accordingly, on March 19, 2018, HUD mailed a Notice of Intent to Collect by Treasury Offset to Petitioners pursuant to 24 C.F.R. § 17.65, initiating the instant proceeding. (Dillon Decl. ¶ 6; Hr'g Req.) The Secretary now alleges that Petitioners are indebted to HUD in the following amounts:

a) $97,034.54[2] as the unpaid principal balance on the Subordinate Note as of December 31, 2018;
b) $889.13 as the unpaid interest on the principal balance at 1% per annum through December 31, 2018;
c) $35.33 as the unpaid administrative costs as of December 31, 2018; and
d) Interest on said principal balance from January 1, 2019, at 1%, per annum until paid.

(*See* Dillon Decl. ¶ 5).

DISCUSSION

The Debt Collection Act of 1982 empowered federal agencies to administratively offset federal payments owed to debtors as a remedy for the collection of debts owed to the United States government. *See* Pub. L. No. 97-365, § 10, 96 Stat. 1749, 1754-55 (1982) (now codified in provisions including 31 U.S.C. §§ 3716 and 3720A). Before attempting to collect a claim by administrative offset, an agency must provide a debtor with an opportunity to present evidence

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DEV., *FHA-Home Affordable Modification Program (FHA-HAMP)*, https://www.hud.gov/hudprograms/fhahamp (last visited March 2, 2020).

[2] The Subordinate Note lists a principal balance of $97,044.54, but the Notice of Intent to Collect by Treasury Offset states that the total principal due is $97,034.54. The reason for the ten-dollar discrepancy is unclear.

regarding the debt and to obtain a review within the agency of the agency's debt collection decision. *See* 31 U.S.C. § 3716(a)(1), (3); *id.* § 3720A(b)(2)-(3). HUD has chosen to provide a right of review before this Court, which must determine, by a preponderance of the evidence, whether there is a debt that is past due and legally enforceable. *See* 24 C.F.R. §§ 17.69, 17.73.

In this case, the preponderance of the evidence establishes that Petitioners owe HUD a debt and that the debt is past due and legally enforceable. Petitioners' signature on the Subordinate Note executed on April 1, 2015, constitutes a legally binding promise to pay and creates a valid obligation for them to repay HUD the principal sum of $97,044.54. This obligation emanates from the terms of the Note itself. *In re Halley*, No. 09-H-CH-AWG12, 2010 HUD Appeals LEXIS 5, at *18 (HUDOA Apr. 30, 2010) (citing *Bruce R. Smith*, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007)). Under Paragraph 4(A) of the Subordinate Note, Petitioners promise to repay HUD on the earlier of December 1, 2044, or when the primary note and related mortgage are paid in full or are no longer insured by the Secretary. (Sec'y Stat., Ex. B ¶ 4(A)(i), (iii).) Petitioners refinanced their primary mortgage in 2017. As a result, as of September 11, 2017, the primary note and related mortgage were discharged in full and the HUD insurance thereon was terminated. (Dillon Decl. ¶¶ 4, 7; Visco Decl. ¶ 9 & Ex. F.) These events triggered Petitioners' obligation to repay HUD under Paragraph 4(A) of the Subordinate Note.

To prove that this obligation has been satisfied, Petitioners would need to produce a written release from HUD or evidence of valuable consideration accepted by HUD indicating an intent to release Petitioners from their obligation. *See In re Herrera*, No. 12-M-CH-AWG27, 2012 HUD Appeals LEXIS 4, at *5 (HUDOA July 13, 2012). However, Petitioners have produced no such evidence. Instead, Petitioners argue that equitable principles preclude HUD from deeming them to have defaulted on the Subordinate Note.

Petitioners first argue that they are not in default because, under the equitable principles of replacement and modification of loans, the refinanced mortgage recorded by M&T Bank in 2017 should hold priority over the Subordinate Note and mortgage recorded by HUD in 2015. (Pet'r Br. 4-5.) Petitioners acknowledge that New Jersey is a race-notice jurisdiction, meaning that the first lender to record its lien (in this case, HUD) is customarily accorded priority. (Pet'r Br. 4.) However, in *Sovereign Bank v. Gillis*, the New Jersey Superior Court accorded priority to a refinanced mortgage even though an intervening lien had been recorded earlier, reasoning that the refinanced mortgage should be treated as a "replacement and modification" of the primary mortgage (which had been recorded before the intervening lien) because the mortgagee was the same and the terms of the refinanced mortgage did not materially prejudice the intervening lienor. 432 N.J. Super. 36 (App. Div. 2013). Petitioners argue that this rationale is compelling and dictates the same determination of priority in this case, as Petitioners' primary mortgage was discharged and replaced by a refinanced loan from the same mortgagee—M&T Bank—and the terms of the refinanced mortgage do not materially prejudice HUD. (Pet'r Br. 5.)

HUD counters that this debt collection proceeding has nothing to do with lien priority. (Sec'y Stat. ¶ 14.) The Court agrees. The Subordinate Note constitutes Petitioners' promise to pay HUD. Although this promise is secured by a mortgage lien, the priority of the underlying lien does not affect the terms of the Note. The Note spells out the conditions under which Petitioners are obligated to repay HUD. These conditions remain the same and bind Petitioners regardless of whether the underlying mortgage is in first lien position, or even whether the lien is valid and properly recorded. *Cf. In re Simpson et al.*, No. 12-M-NY-PP18, 2012 HUD Appeals

LEXIS 16, at *7 (HUDOA Apr. 19, 2012) (explaining that liability on note was not conditioned upon proper recording of underlying mortgage, which was merely collateral to borrower's promise to repay). The lien secures the debt, but even if the lien were unenforceable, the Subordinate Note itself would still give rise to an enforceable (albeit unsecured) debt. *See In re Williams*, No. 08-H-CH-JJ37, 2008 HUD Appeals LEXIS 10, at *7 (HUDOA Nov. 14, 2008) (finding that, even after mortgage lien securing note was extinguished, Secretary could attempt to collect the debt, now unsecured, based on the obligations in the note itself).

Moreover, the facts of the *Sovereign Bank* case differ significantly from the facts of the instant case. In *Sovereign Bank*, the borrower had defaulted on both the refinanced mortgage and the intervening loan. 432 N.J. Super. at 41. Thus, the issue of priority arose because the lenders had filed competing foreclosure actions, and the New Jersey Superior Court needed to determine which creditor had a superior claim to the underlying collateral. *See id.* at 41-42. By contrast, this case does not involve a dispute between HUD and M&T Bank over the underlying property, which is still in Petitioners' possession. This Court need not decide whether HUD's claim to the property would hold priority over M&T Bank's, as HUD is not relying on priority or the property lien to enforce the debt. Instead, the question is simply whether HUD is entitled to payment under the terms of the Subordinate Note, which it is.

Petitioners insist that finding them to be in default on the Subordinate Note would unjustly enrich HUD by giving it the benefit of priority. (Pet'r Br. 6-7.) Citing *U.S. Bank National Association v. Hylton*, 403 N.J. Super. 630, 643 (Ch. Div. 2008), Petitioners assert that a mortgagee who receives the benefit of holding a first priority lien after another party pays off a prior mortgage is, as a matter of law, unjustly enriched. (Pet'r Br. 6.)

But the *U.S. Bank* case, like the *Sovereign Bank* case, is not on point here because it arose from a foreclosure complaint. *See* 403 N.J. Super. at 633. Thus, the issue confronting the New Jersey Superior Court was, again, which of two creditors was entitled to priority when both sought to enforce a lien on the same collateral. By contrast, in the instant case, neither HUD nor M&T Bank has received the benefit of holding a first priority lien, because such a benefit accrues only after the lender enforces the lien by foreclosing on the collateral. In this case, Petitioners have avoided foreclosure because HUD gave them an interest-free loan to help them retain possession of their home. HUD will not be unjustly enriched by now requiring Petitioners to repay the loan in accordance with the terms of the Subordinate Note they signed, which provided that payment would be due immediately if the primary mortgage were discharged and the HUD insurance thereon terminated.

Petitioners' arguments imply that it is inequitable to consider their primary mortgage to have been discharged when it was simply replaced by a refinanced mortgage from the same lender. Petitioners point out that they are not sophisticated buyers and were not represented by an attorney during their refinance in 2017. (Hr'g Req.; Pet'r Br. 1.) They assert that they did not realize the refinance would cause HUD to claim the entire amount on the Subordinate Note was due immediately, and if they had, they would not have gone through with it. (Hr'g Req.; Visco Decl. ¶ 11) The refinance represented an attempt to consolidate their debt, Petitioners explain, and it is "hard to fathom" why the company handling the title search did not notice HUD's subordinate mortgage and bring it to Petitioners' attention so that the debt could be included in the consolidation and refinance. (Hr'g Req.; Visco Decl. ¶ 8.)

Although Petitioners' predicament invokes sympathy, the plain language of the Subordinate Note, a contract signed by Petitioners for valuable consideration, makes clear that payment is due upon discharge of the primary mortgage and termination of the HUD insurance thereon. If the Court were to make an exception for refinances, this would prejudice HUD, because Petitioners could then avoid repaying their debt and continue holding HUD's money interest-free simply by repeatedly refinancing the primary mortgage with the same lender. Accordingly, Petitioners' arguments are rejected, and the Court finds that they owe a valid and legally enforceable debt to HUD pursuant to the Subordinate Note.

Petitioners contend that HUD has denied their request for a repayment plan and that repayment of the debt in full would present a financial hardship for them. (Pet'r Br. 3; Visco Decl. ¶ 11.) Unfortunately, in determining whether a debt is legally enforceable, this Court may not consider evidence of financial hardship. *In re Simpson*, No. 12-M-NY-PP18, 2012 HUD Appeals LEXIS 16, at *9 (HUDOA Apr. 19, 2012); *In re Rezai*, No. 04-A-NY-EE016, 2004 HUD Appeals LEXIS 83, at *7 (HUDBCA May 10, 2004). Further, this Court is not authorized to extend, recommend, or accept any settlement offer on behalf of HUD or to establish a repayment schedule. *In re Herrera*, *supra*, 2012 HUD Appeals LEXIS 4, at *7. However, if Petitioners wish to discuss a payment plan, Petitioners may contact Michael DeMarco, Director of the HUD Financial Operations Center, at 1-800-669-5152, extension 2859, or may write to the HUD Financial Operations Center at 50 Corporate Circle, Albany, NY 12203-5121.

ORDER

For the reasons set forth above, I find the debt that is the subject of this proceeding to be legally enforceable against Petitioners in the amount claimed by the Secretary. It is hereby

ORDERED that the Court's May 15, 2018 order staying the 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 Petitioners.

SO ORDERED,

H. ALEXANDER MANUEL
Administrative Judge

APPEAL NOTICE: You have the right to move for reconsideration of this case before the HUD Office of Hearings and Appeals within 20 days of the date of this ruling or decision, or, thereafter, to reopen this case. Ordinarily, such motions will not be granted absent a showing of new evidence that could not have been previously presented. You may also appeal this decision to the appropriate United States District Court. *See* 24 C.F.R. § 17.73(a); 5 U.S.C. §§ 701, *et seq.*