

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

In the Matter of:

Winifred W. Carter,

Petitioner.

18-VH-0067-AO-019

721011568-0A

June 26, 2019

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a *Request for Hearing* (“*Hearing Request*”) filed on December 1, 2017, by Petitioner Winifred W. Carter (“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”). 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.

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.

PROCEDURAL HISTORY

Pursuant to 24 C.F.R. § 17.81(a), on December 4, 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 March 26, 2018, Petitioner filed her *Statement* and additional documentary evidence in support of her position. On June 7, 2018, the Secretary filed an *Amended Secretary’s Statement (Sec’y. Stat.)* along with documentary evidence, in support of his position. This case is now ripe for review.

FINDINGS OF FACT

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.

Petitioner executed and delivered to the Secretary a Subordinate Note ("Note"), dated April 13, 2013, in the amount of \$18,930.31. *Sec'y. Stat.* ¶ 2, Ex. 2. The Note secured a Subordinate Mortgage held by the Secretary. *Sec'y. Stat.* ¶ 2, Ex. 1, *Declaration of Kathleen M. Porter*¹ ("*Porter Decl.*"), ¶ 4. 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"). *Sec'y. Stat.* ¶ 3, *Porter Decl.*, ¶ 4. In exchange for such funds, Petitioner executed the Note in favor of the Secretary. *Sec'y. Stat.* ¶ 3, *Porter Decl.*, ¶ 4.

By terms of the Note, the amount to be repaid thereunder becomes due and payable on April 1, 2043,² "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, or (ii) The maturity date of the primary Note has been accelerated, or (iii) The 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, at ¶ 4.

On or about May 9, 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.* ¶ 5, *Porter Decl.*, ¶ 4. HUD has attempted to collect the amounts due under the Note, but Petitioner remains delinquent and indebted to HUD. *Sec'y. Stat.*, ¶ 6, *Porter Decl.*, ¶ 5.

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

- a. \$18,930.31 as the total unpaid principal balance as of April 30, 2018;
- b. \$126.16 as the unpaid interest on the principal balance at 1% per annum through April 30, 2018;
- c. \$1,174.93 as the unpaid penalties and administrative costs through April 30, 2018; and
- d. interest on said principal balance from May 1, 2018 at 1% per annum until paid.

¹ Kathleen M. Porter was Director of Asset Recovery Division for the U.S. Housing and Urban Development.

² It should be noted, for the record, that while the *Secretary's Statement* indicates the due and payable date as January 1, 2029, the language in the Note reflects April 1, 2043. The Court recognizes that the corrected date does not directly impact the outcome of this case, but acknowledgment of the changed date is merely to ensure that the record is accurate.

Sec'y. Stat. ¶ 7, Porter Decl., ¶ 5.

A Notice of Intent to Collect by Treasury Offset was mailed to Petitioner on October 16, 2017. *Sec'y. Stat. ¶ 8.*

DISCUSSION

Petitioner claims that the subject debt does not exist because it was discharged through bankruptcy. More specifically, Petitioner states that during her bankruptcy proceeding the court “discharged this debt as of 5/16/15.” *Petitioner’s Documentary Evidence, Attached Letter dated November 18, 2017.* As support, Petitioner offers into evidence copies of select documents from her bankruptcy proceeding before the US Bankruptcy Court for the District of Colorado; documents from Land Title Insurance Corporation (“Land Title”); and, a letter from Default/Bankruptcy Specialist Angelica Sanchez. *Petitioner’s Documentary Evidence, Attachments.*

As a preliminary matter, it is important to address the timeline of events that took place during the bankruptcy proceeding and thereafter to better understand the basis for this Court’s decision. The Bankruptcy Trustee’s Final Report and Account indicates that Petitioner filed for bankruptcy on April 9, 2012 followed by confirmation of the reorganization plan on July 27, 2012. In the interim, in 2013, Petitioner executed and delivered to HUD a Subordinate Note, dated April 13, 2013, in the amount of \$18,930.31.

Petitioner’s bankruptcy plan was then modified by order of the Bankruptcy Court on May 9, 2013 and later completed on March 17, 2015. On May 6, 2015, the Bankruptcy Court then issued an Order of Discharge pursuant to section 1328(a), of Title 11 of the U.S. Bankruptcy Code. The Secretary filed, as required, a secured proof of claim on the Subordinate Note as one of Petitioner’s secured creditors on that same day, May 6, 2015. The proof of claim submitted by the Secretary secured HUD’s position on Petitioner’s Schedule of Creditors to *likely* be paid under Petitioner’s reorganization plan with the Bankruptcy Court. (Emphasis added.) Such payment never occurred according to the record of evidence.

However, it was not until May 6, 2016 that Petitioner sold the property associated with the subject debt. *See Petitioner’s Documentary Evidence, Attached Land Title Records.* Three days later, on May 9, 2016, the FHA mortgage insurance on Petitioner’s primary mortgage was terminated because, by the terms of the Note, full payment had been made by Petitioner on the primary note and mortgage. This event, the full payment of the primary mortgage on May 9, 2016, then triggered the timeline for the Note associated with the subject debt to become due and payable. The due and payable date, May 9, 2016, also occurred after the bankruptcy plan was completed on May 16, 2015, the date admitted by Petitioner as the date of completion for the bankruptcy plan.

Upon further review of the record there is sufficient documentation that HUD, as a secured debtor, was listed among the Scheduled Creditors to specifically be owed \$18,930.31. What is not in the record is sufficient evidence to show that the HUD debt was discharged or paid in full.

However, in the Court's assessment of this case, it would not be expected that the subject debt would have been paid because the due and payable date of May 9, 2016 did not occur until after the bankruptcy plan was completed. Section 1328(a) provides that "the court shall grant the debtor a discharge of all debts provided for by the plan . . . , except any debt – (1) provided for under section 1322(b)(5)[.]" In § 1322(b)(5),³ Congress explicitly excepts from any § 1328(a) discharges secured debts, payments on which extend beyond the life of the plan. In re Kurtz, 502 B.R. 238, 243 (Bkrtcy.D.Colo. 2013); see also In re Hoyt-Kieckhaben, 546 B.R. 868, 873–74 (Bkrtcy.D.Colo. 2016) ("Payments made after the [bankruptcy] case is no longer pending are required by the terms of the long-term debt itself, which, pursuant to § 1328(a), is not discharged."). In this case, the bankruptcy court did not, as Petitioner argued, discharge the secured debt to HUD on "May 16, 2015." Petitioner was granted a discharge of debt under 11 U.S.C. § 1328(a) but the record of evidence fails to show that the subject debt was discharged or paid in full. Because Petitioner's expected payment of the subject debt extended beyond the life of the bankruptcy plan in this proceeding, it remains, to date, due and payable.

Petitioner also offered into evidence documentation from Land Title and from Default/Bankruptcy Specialist Angelica Sanchez.⁴ Again, the documentations offered do not provide any language to convince the Court that the subject debt no longer exists by way of bankruptcy or by means of a written release directly from HUD to Petitioner. This Court has consistently maintained that a Petitioner can only avoid liability for said debt to HUD by presenting either a release in writing from the former lender explicitly relieving Petitioner's obligation, or "valuable consideration accepted by the lender" indicating intent to release. Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (Dec. 22, 1986). The evidence presented by Petitioner herein has failed to demonstrate, by preponderance of the evidence, that the subject debt was paid off, or even discharged for that matter. It is well established that "assertions without evidence are insufficient to show that the debt claimed by the Secretary is not past due and legally enforceable." Sara Hedden, HUDOA No. 09-H-NY-AWG95 (July 8, 2009), quoting Bonnie Walker, HUDBCA No. 95-G-NY-T300 (July 3, 1996). Therefore, consistent with case law precedent, the Court finds that Petitioner remains contractually obligated to pay the debt so claimed by the Secretary due to lack of sufficient proof.

ORDER

Based on the foregoing, Petitioners remain legally obligated to pay the alleged debt in the amount so claimed by the Secretary.

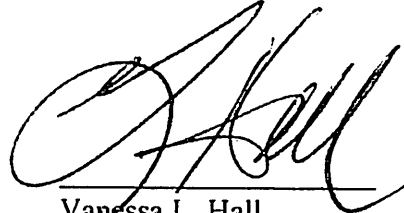
The *Order* imposing the stay of referral of this matter on December 4, 2017 to the U.S. Department of Treasury for administrative offset is VACATED. It is hereby

³ Section 1322(b)(5) states that a bankruptcy plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due[.]" (*emphasis added*).

⁴ Sanchez's signature block in the email that Petitioner attached suggests that Sanchez is a specialist for NOVAD Management Consulting, not a HUD Representative as Petitioner asserted.

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.

A handwritten signature in black ink, appearing to read 'V. Hall', written over a horizontal line.

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 only upon a showing of good cause.