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

In the Matter of: **Mary Jolivette,** Petitioner.	18-VH-0133-AO-039 721008039 February 25, 2019

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a *Request for Hearing (Hearing Request)* filed on March 12, 2018, by Petitioner Mary Jolivette ("Petitioner") concerning the existence, amount, or enforceability of the payment schedule of the 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 alleged debt is past due and legally enforceable.

PROCEDURAL HISTORY

Pursuant to 24 C.F.R. § 17.81(a), on March 12, 2018, this 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 3, 2018, this Court requested additional probative documentary evidence to corroborate Petitioner's allegations of an improper certification of a signature on the contested documents. On July 13, 2018, Petitioner filed a brief *Statement*, along with additional evidence, alleging forgery and improper certificate acknowledgment by a notary. This case is now ripe for review.

FINDING OF FACTS

This is a debt collection action brought pursuant to Title 31 of the United States Code, section 3720D. The debt resulted from a defaulted loan which was insured against non-payment by the Secretary.

In this case, Michael R. Jolivette and Mary J. Jolivette sought financial assistance from HUD to help them avoid possible foreclosure of their mortgage with their primary lender. Mary

J. Jolivette ("Petitioner"), together with her former spouse, executed an delivered to the Secretary two Subordinate Notes; the first, on February 23, 2006, in the amount of $4,229.24 ("Note 1") and a subsequent Note, on February 25, 2009, in the amount of $6,441.33 ("Note 2" or collectively referred to as the "Notes"). *Secretary's Statement,* (*"Sec'y Stat."*), ¶ 2; Ex. 2, *Declaration of Brian Dillon,* (*"Dillon Decl."*), Director of Asset Recovery Division, HUD Financial Operations Center, ¶ 4).

Under the terms of the Notes, Petitioner was to pay the principal amount of the unpaid balance on the Notes until it was paid in full. *Sec'y Stat.*, Ex. 1, ¶ 2. The Notes cited specific events that could cause the remaining unpaid balance of the debt to become immediately due and payable - one of which was when Petitioner's underlying mortgage to her primary lender was refinanced or otherwise paid in full. *Sec'y. Stat.*, Ex. 1, ¶¶ 4(A)(i) & (iii).

On November 12, 2014, Petitioner's primary lender notified HUD that Petitioner's underlying mortgage with the primary lender had been paid in full. *Sec'y Stat.*, ¶ 5; Ex. 2, ¶ 4. This automatically triggered both the termination of the primary lender's insurance contract with the Federal Housing Administration, as well as the provisions of ¶ 4(A)(i) & (iii) of the Note, requiring Petitioner to pay the full amount owed under the Note to HUD. HUD, thereafter, made its demand upon Petitioner to pay the amounts owed, but Petitioner failed to do so. Thus, the Secretary alleges that Petitioner is indebted to HUD in the following amounts:

a) $6,310.72 as the unpaid principal balance as of July 31, 2018; and

b) interest on said principal balance from August 1, 2018 at 1% per annum until paid.

Sec'y. Stat., ¶ 7; Ex. 2, *Dillion Decl.*, ¶ 5.

On September 14, 2015, a Notice of Intent to Collect by Treasury Offset ("Notice") was mailed to Petitioner's last known address. *Id.* at ¶ 6. 24 C.F.R. § 17.65. The Secretary respectfully requests that the Court find Petitioner's debt past due and legally enforceable.

DISCUSSION

Petitioner maintains that she should not be held responsible for the subject debt because: 1) Petitioner's former spouse forged her name on all of the instruments related to the subject debt; 2) the notary public failed to faithfully discharge the duties and responsibilities of the office because he created an improper certificate of acknowledgment; and, 3) the separation agreement between Petitioner and her ex-spouse assigned the burden to pay the outstanding debt for the primary mortgage to Michael R. Jolivette. As support, Petitioner offered into evidence copies of a Harris County, Constable Precinct 4, *Incident Report* ("incident report") against Michael R. Jolivette for forgery, and a Texas Secretary of State letter ("SOS letter") in which the Texas Secretary determined that the related notary public "did not fully and faithfully discharge the duties and responsibilities required" of the office.

I. Forgery

Petitioner first contends that her signature is forged on the Notes and Deeds of Trust related to the subject debt. Petitioner states that, "The loans show my name and was notarized, but is not

my signature. My ex-husband signed or had someone fordge [*sic*] my name to these loans that I had no knowledge of." *Petitioner's Doc. Evidence, Attached Email dated February 19, 2018.* In support of her claim, Petitioner offered into evidence a copy of an incident report that she filed with the local police department on October 17, 2017. In the incident report, she named her estranged spouse, Michael R. Jolivette, as the suspect, and alleged, she "did not give her husband [*sic*] to put her signature on the documents." She further, alleged that she believed "the notary that signed the documents may be involved in the forgery as well."

Pursuant to 31 C.F.R. § 285.11(f)(8)(ii), the burden of proof is on the Petitioner to show, by a preponderance of the evidence, that no debt exists or that the amount of the debt is incorrect, or to prove that the collection of the debt may not be pursued due to operation of law. In a forgery case, like the claim at hand, this Court must determine whether the evidence submitted by Petitioner is sufficient to meet Petitioner's burden of proof that her signatures are forged or unauthorized. "If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity (in this case the Secretary), but the signature is presumed to be authentic and authorized..." Uniform Commercial Code (UCC) § 3-308(a). [1] Relying on the guidance provided from the UCC, it is evident that the Secretary is not required to prove that the signature on the Notes are valid until other evidence has been introduced to support a finding that the signature in question is unauthorized or is a forgery. Official comment 1 to UCC § 3-308. If sufficient evidence is offered as support for finding forgery, "the burden of proof for establishing the authenticity of the signature by a preponderance of the evidence shifts to the plaintiff," who herein is the Secretary. See Justito Poblete, HUDBCA No. 98-A-SE-W302 (April 30, 2010).

"Administrative judges are not handwriting experts, and thus, must depend on the scientific testimony of experts in order to find that forgery has occurred." In the Matter of Lawrence Syrovatka, HUDOA No. 07-A-CH-HH10 (November 18, 2008). In this case, Petitioner has not offered any expert testimony based on a handwriting analysis of the signatures in question to compare to the Notes contained in *Exhibit 1* of Petitioner's Statement. Petitioner has offered only a reassertion of her claims made earlier in emails to HUD officials, that later were reduced to the form of a police complaint. To date, other evidence such as criminal charges filed, pending litigation, admission or finding of guilt are still missing from the record.

Had the Court determined that Petitioner's signature was forged, Petitioner's retention of benefits upon execution of the Notes acted as a retroactive adoption of the alleged unauthorized signature. "Ratification is a retroactive adoption of the unauthorized signature by the person whose name is signed and may be found from conduct as well as from express statements. For example, it [ratification] may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature." Official comment 3 to UCC § 3-403. Under Texas Law, "Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer (Subsection (a)) discover and report the customer's unauthorized signature on, or any alteration on the item, is precluded from asserting against the bank the unauthorized signature or alteration." Tex. Bus. & Com. Code § 4.406(f).

---

[1] Both Texas Courts and the Secretary of State use the UCC as a guideline when deciding issues related to fraudulent documents, contracts and liens. https://www.sos.state.tx.us/ucc/index.shtml

In the instant case, HUD notified Petitioner of the debt in September 2015. In 2015, Petitioner should have reported the unauthorized signatures on the Notes at that time. The record does not indicate that Petitioner so reported. Instead, the record shows that Petitioner reported the alleged forgery in October 2017, nearly two years after the initial discovery of the alleged forgery and after the statute of limitations had run. The relevance of the existence of Petitioner's signature on the Notes, at this point, and whether such signatures were forged is insignificant. Because Petitioner received the benefit of the proceeds from the loans upon execution of the Notes, her receipt of the loan proceeds constituted ratification of the alleged unauthorized signature. See Tex. Bus. & Com. Code § 4.406.

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). The Court is unable to decide whether the signature on the Notes is forged based on the limited evidence presented by Petitioner. As a result, the Court must find that Petitioner's claim of forgery fails for lack of sufficient proof.

II. Improper Certificate Acknowledgment

Petitioner next purports that the Note at issue was void as a result of alleged fraud by the notary. In an, Petitioner states, "I have proven I did not sign your Loan by supplying the letter form [*sic*] the Secretary of State (SOS) stating the Notary did not do her job and verify the person signing your loan was ME." *Pet'r's. Doc., Attached Email dated June 20, 2018.* Indeed, the SOS letter shows a finding that the notary public "did not fully and faithfully discharge the duties and responsibilities required" by the commission. The complaint was closed after the notary completed the educational requirements noted in the reprimand. However, there is no indication in the SOS letter that identifies the specifics of Petitioner's claim with the Secretary of State's office, or a resolution of the same. The office also did not decide whether the documents addressed in Petitioner's complaint were valid.

Texas Law is settled that, "a certificate of acknowledgment is prima facie evidence that the grantor appeared before the notary and executed the deed in question for the purposes and consideration therein expressed." Bell v. Sharif-Munir-Davidson Dev. Corp., 738 S.W.2d 326, 330 (Tex. App. – Dallas 1987, *writ denied*). The burden of proof is on the party who denies the genuineness of the acknowledgment and document, herein Petitioner. Clear and unmistakable proof that either the party did not appear before the notary or that the notary practiced some *fraud* (emphasis added) or imposition upon the party is necessary to overcome the validity of a certificate of acknowledgment. *Bell*, 738 S.W.2d at 330; see also Stout v. Oliveria, 153 S.W.2d 590, 596 (Tex. Civ. App. – El Paso 1941, writ ref'd w.o.m.), and Morris v. Wells Fargo Bank, *N.A.*, 334 S.W.3d 838, Tex. App. (2011)). In this case, Petitioner has not provided clear or unmistakable proof that she did not appear before the notary or that a fraud was committed by the notary public (i.e. testimony contained in the notary's sworn statement, or other similar affidavit), but such sworn statement has not been entered into the record for the Court's review.

The Note is a signed, unconditional promise or order to pay a fixed amount of money, with interest, thus a negotiable instrument. See Tex. Bus. & Com. Code § 3.104. The Secretary is the Note's *holder in due course* since the Note did not bear apparent evidence of forgery or alteration nor was it otherwise irregular or incomplete as to call into question its authenticity at the time it

was delivered. See Tex. Bus. & Com. Code § 3.302(a)(1) & (2). Because the Secretary accepted the Note from Petitioner for value, in good faith, and without notice that any party had a defense or claim in recoupment on the Note, the Secretary is a holder in due course who has the legal right under Texas law to enforce a party's obligation to pay the instrument. See Tex. Bus. & Com. Code §§ 3.305(b) and 3.406(a). While forgery or alteration are considered defenses against the right to enforce the obligation of a party to pay an instrument under Tex. Bus. & Com. Code § 3.305(a), the record does not reflect that the Secretary was put on notice of any defense or claims in recoupment when the Note was originally assigned.

Petitioner has failed to show that the Note is, *per se*, unenforceable against her as a matter of law. Accordingly, the Court finds that this claim also fails for lack of proof and as such Petitioner remains obligated to pay the debt so claimed by the Secretary.

III. Joint and Several Liability

Finally, Petitioner claims that her estranged spouse, and not Petitioner, is responsible for the debt because arrears on the property in question were allocated to Michael R. Jolivette in a separation agreement. Petitioner states:

> [M]y EX-husband forged my signature on two loans for Hud which I had not [sic] knowledge. *At the time my ex Michael Jolivette did the last loan* (emphasis added), we were going thur [sic] a divorce. I was awarded the house in exchange he was supposed to pay the mortgage up to current and I had to pay him half the value of the house from my 401k... when we went to court he (Michael R. Jolivette – added for clarity) supplied paperwork showing the mortgage current, and I not knowing at that time he had forged my name to your loans to pay the mortgage payments to current. (emphasis in original) *Petitioner's Doc. Evid.*

Petitioner's allegation is merely an allegation unsupported by evidence of forgery, or a written release from liability. Presumably, Petitioner and her ex-spouse were making decisions together in the years preceding their separation or divorce. This means that the first Note was executed with Petitioner's acknowledgment with her then spouse. Notably absent in the record are copies of a separation agreement or divorce decree that may have reflected their agreement regarding the division of property.

However, even if such documentation existed, this Court has previously held that co-signers of a Note are jointly and severally liable to the obligation to pay the Note, 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). As a result, the Secretary may proceed against any co-signer for the full amount of the debt" since each co-signer is jointly and severally responsible for the debt under the parameters of the Note. Hedieh Rezai, HUDBCA No. 04-A-NY-EE016 (May 10, 2004).

The Secretary's right to collect the debt alleged in this case emanates from the Note's terms. *Bruce R. Smith*, HUDBCA No. 07-ACH-AWG11 (June 22, 2007). When Petitioner and her husband signed the Notes on February 23, 2006, and February 25, 2009, they both agreed to terms contained in the documents, "If more than one person signs this Note, *each of us is fully and*

personally obligated to pay the full amount owed (emphasis added) and to keep all of the promises made in this Note." *Sec'y. Stat.*, Ex. 1, ¶ 7.

For Petitioner to not be held responsible 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. 03-A-CH-AWG09 (January 30, 2003)). Petitioner has not produced any evidence demonstrating a written release from her obligation to pay the alleged debt or evidence of valuable consideration paid to HUD in satisfaction of the debt. Petitioner claims that arrears payment on her home's mortgage was part of a divorce arrangement to which the Secretary is not a party.

As a recourse, Petitioner may seek to enforce, in state or local court, the divorce decree that was allegedly granted against her ex-husband so that Petitioner may recover from her ex-spouse monies paid to HUD by her to satisfy the legal debt obligation in this case. *See* Michael York, HUDBCA No. 09-H-CH-AWG36 (June 26, 2009) at 3. Therefore, the Court finds, without proof of a written release, Petitioner remains legally obligated to pay the subject debt as a co-signer on the Notes.

ORDER

Based on the foregoing, the debt that is the subject of this proceeding exists, is past due, and is enforceable in the amount so claimed by the Secretary.

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 hereby

ORDERED that the Secretary is authorized to seek collection of this outstanding obligation by means of administrative offset at 15% of Petitioner's disposable income.

SO ORDERED.

Vanessa L. Hall
Administrative Judge