Office of Appeals
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of:	:	
	:	
Patricia A. Williams,	:	HUDOA No. 08-H-CH-JJ37
	:	Claim No. 7802783770
Petitioner	:	
	:	

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For the Secretary

DECISION AND ORDER

Petitioner was notified that, pursuant to 31 U.S.C. §§ 3716 and 3720A, the Secretary of the U.S. Department of Housing and Urban Development ("HUD") intended to seek administrative offset of any federal payments due to Petitioner in satisfaction of a delinquent and legally enforceable debt allegedly owed to HUD.

Petitioner made a request for a hearing concerning the existence, amount or enforceability of the debt allegedly owed to HUD. The administrative judges of the Office of Appeals have been designated to conduct a hearing to determine whether the debt allegedly owed to HUD is legally enforceable. 24 C.F.R. §§ 17.152 and 17.153. As a result of Petitioner's hearing request, referral of the debt to the U.S. Department of the Treasury for administrative offset was temporarily stayed by this Office on March 21, 2008 until the issuance of a written decision by the administrative judge. 24 C.F.R. § 17.156.

Background

On November 7, 1997, Petitioner executed and delivered to Envoy Capital Corporation an installment note ("Note"), in the amount of $25,000 for a property improvement loan that was insured against nonpayment by the Secretary pursuant to Title I of the National Housing Act, 12 U.S.C. § 1703. (Secretary's Statement ("Sec'y Stat."), filed June 20, 2008, ¶ 2, Ex. A.) Petitioner failed to make payments as agreed in the Note and consequently, Ben Franklin Bank of Illinois (a subsequent holder of the Note) assigned the Note to the United States of America in accordance with 24 C.F.R. § 201.54. (Sec'y Stat., ¶ 3, Ex. B, Ex. C, Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center of HUD ("Dillon Decl."), dated April 4, 2008, ¶ 3.) The Secretary is the holder of the Note on behalf of the United States of America. (*Id.*) Petitioner is currently in default on the Note. (Sec'y Stat., ¶ 4, Ex. C, Dillon Decl., ¶ 4.) The Secretary has made efforts to collect from the Petitioner other than by offset but has been unsuccessful. (*Id.*)

The Secretary has filed a Statement with documentary evidence in support of his position that Petitioner is indebted to the Department in the following amounts:

> (a) 24,412.93 as the unpaid principal balance as of March 30, 2008;
> (b) 10,002.64 as the unpaid interest on the principal balance at 5% per annum through March 30, 2008; and
> (c) interest on the principal balance from April 1, 2008, at 5% per annum until paid.

(*Id.*) On April 23, 2001, a notice of HUD's intent to collect the debt by IRS Tax Refund Offset was sent to Petitioner. (Sec'y Stat., ¶ 6, Ex. C, Dillon Decl., ¶ 5.)

Discussion

The Deficit Reduction Act of 1984, 31 U.S.C. § 3720A, provides Federal agencies with a remedy for the collection of debts owed to the United States Government. Petitioner bears the initial burden of submitting evidence to prove that the debt is not past-due or legally enforceable. 24 C.F.R. § 17.152(b); *Juan Velazquez*, HUDBCA No. 02-C-CH-CC049 (September 25, 2003).

Petitioner contests the existence of the debt as not being owed. Petitioner asserts that HUD does not have the right to pursue collection of this debt because: 1) "[t]he equity in the property at the time of sale exceeded the total secured notes of the [first] and [second] lien holder[s];" 2) the debt "could have been satisfied using the Trustee sale of the property;" and 3) collection is barred by application of Section 343 of the California Code of Civil Procedure. (Petitioner's Hearing Request ("Pet'r Hr'g Req."), filed March 19, 2008.)

First, Petitioner asserts that HUD does not have the right to pursue collection of this debt because "[t]he equity in the property at the time of sale exceeded the total secured notes of the [first] and [second] lien holder[s]." (Pet'r Hr'g Req.) In support of her assertion, Petitioner states that:

> The date of the foreclosure was November 19, 2001. At that time I owed $153,000.00 on the [first] loan and $25,000.00 on the [second] loan (HUD) [for] a total of $178,595.61. The value of the property was $245,000.00 less $178,595.61 with the excess equity of $66,404.39. I did not receive any funds from the sale.

(*Id.*) The Secretary asserts that "[i]n order for Petitioner to be released from liability, the proceeds of a foreclosure sale on Petitioner's property must be sufficient to satisfy...the liens against the property, plus any reasonable expenses associated with the sale." (Sec'y Stat., ¶ 9.) This Office has previously held that "[a]bsent a showing that the proceeds equaled or exceeded this amount, Petitioner remains liable for payment of the debt." *Nicie Anne Smith (Dillehay)*, HUDOA No. 07-O-CH-HH11 (July 28, 2008) (citing *Lula G. Robertson*, HUDBCA No. 88-2939-H457 (April 12, 1988)). While Petitioner asserts that "[t]he value of the property was $245,000.00" with "excess equity of $66,404.39," the "Trustee's Deed Upon Sale" submitted by Petitioner states that "[t]he [a]mount of [t]he [u]npaid [d]ebt was $178,595.61 [and] [t]he [a]mount [p]aid [b]y [t]he [g]rantee [w]as $150,100.00." (Petitioner's Submission ("Pet'r Submission"), filed April 21, 2008, attach. *See also* Sec'y Stat., ¶ 9, Ex. C, Dillon Decl., ¶ 6.) In addition, the Secretary states that "there is no evidence that HUD received proceeds from the sale of the foreclosed real property" and that "no excess proceeds resulted with which to pay HUD's subordinate lien, which was extinguished." (Sec'y Stat, ¶ 9, Ex. C, Dillon Decl., ¶ 6.) Because Petitioner has failed to establish that the proceeds of the foreclosure sale equaled or exceeded the value of the liens against Petitioner's property, Petitioner remains liable for payment of the debt.

Second, Petitioner asserts that HUD does not have the right to pursue collection of this debt because the debt "could have been satisfied using the Trustee sale of the property." (Pet'r Hr'g Req.) Petitioner asserts that "HUD...had the same rights to foreclosure" that the first lien holder possessed and that "HUD forfeited their right on the secured deed of trust to acquire the $25,000.00 due [HUD]..." by not collecting the debt at the time of the foreclosure sale. (*Id.*) In support of her assertions, Petitioner states: "Please refer to Legal reference: California Codes of Civil Procedure, Code: 726, Codes 580[a] – [d] and Code 343." (*Id.*) Petitioner, however, did not cite to any specific provision that supported her assertions.

The Secretary, in response, states that "[t]he Secretary's right to collect emanates from the terms of the [N]ote, in which Petitioner agreed to be liable for the debt." (Sec'y Stat., ¶ 10 (citing *Bruce R. Smith*, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007).) The Secretary also provided documentary evidence that the Note was for a property improvement loan, which "was a separate instrument and was a trust junior to that [of the] foreclosing first priority lien holder." (Sec'y Stat., ¶¶ 2, 9, Ex. A.) This Office has

previously held that "[i]f satisfaction of a senior deed of trust prevents a junior trust holder from enforcing a junior trust deed on the same real property, the junior trust holder may collect the debt, now unsecured, by initiating collection efforts based on the obligations in the loan note." *Mitchell and Rosalva Fraijo*, HUDBCA No. 99-C-CH-Y200 at 3 (March 20, 2000); *John Bilotta*, HUDBCA No. 99-A-CH-Y258 (December 29, 1999) (citing *Kimberly S. (King) Thede*, HUDBCA No. 89-4587-L74 (April 23, 1990)). Therefore, this Office finds that the Secretary is entitled to separately enforce the debt against Petitioner under the assigned Note.

By referring to Section 726 of the California Code of Civil Procedure, Petitioner then questions the enforceability of the debt based on the belief that this administrative offset is in violation of California's "one form of action" rule. The "one form of action" rule under Section 726 of the California Code of Civil Procedure "protect[s] the debtor against [a] multiplicity of suits and compel[s] competitive bidding to test the value of all security for the debt." *Mitchell and Rosalva Fraijo* at 2 (citing *United Cal. Bank v. Tijerina*, 25 Cal. App. 3d 963, 968 (1972)). Pursuant to Section 580d of the California Code of Civil Procedure, as referenced by Petitioner, "deficiency judgments are unavailable after a trustee's sale of property under a deed of trust." *John Bilotta* at 2 (citing CAL. CIV. PROC. CODE § 580d (1999)). "However, the 'one form of action' rule of Section 726 does not apply to a sold-out junior lienor." *Id.* (citing *Roseleaf Corp. v. Chierighino*, 59 Cal. 2d 35, 39 (1963)). In *Mitchell and Rosalva Fraijo*, this Office stated that "[j]unior trust deed holders, like HUD, who become unsecured, are not precluded by the 'one form of action' rule from pursuing a separate action on their note unless the note constitutes a 'purchase money' note." *Mitchell and Rosalva Fraijo* at 2 (citing *Robert P. Long*, HUDBCA No. 97-C-SE-W64 (October 15, 1997)).

In challenging the enforceability of this debt, Petitioner refers to Section 580b of the California Code of Civil Procedure, which applies specifically to purchase money mortgages, and states:

> No deficiency judgment shall lie in any event after a sale of real property...under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property...to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser.

CAL. CIV. PROC. CODE § 580b (2008). "Where the vendor secures a deed of trust or mortgage to secure the purchase price of real property, such a transaction is deemed a purchase money note." *Mitchell and Rosalva Fraijo* at 2 (citing *James T. Palm v. John R. Schilling*, 199 Cal. App. 3d 63 (1988); CAL. CIV. PROC. CODE § 580b (2008)). Here, the Secretary has provided documentary evidence that "the home improvement loan was not to secure payment of the balance of the purchase price of the real property, but was rather to secure improvements made to the home." (Sec'y Stat., ¶ 11(a).) In *Mitchell and Rosalva Fraijo*, "the home improvement loan was not secured towards the purchase of Petitioners' home, but rather to undertake improvements made to the home." *Mitchell*

and Rosalva Fraijo at 2. Similarly here, the Note was not secured towards the purchase of Petitioner's home and thus, the home improvement Note does not constitute a purchase money note under California law. Since Petitioner's Note is not a purchase money note, it is enforceable against Petitioner.

Petitioner also maintains that "[s]ince the sale of the property, every [tax refund] check from the government is rerouted back to the Treasury Department" and further maintains "these funds should be returned" because the debt could have been satisfied using the Trustee sale of the property. (Pet'r Hr'g Req.) As support, Petitioner refers to Sections 580a and 580c of the California Code of Civil Procedure as a basis for challenging the enforceability of the debt that is the subject of this proceeding.

Section 580a "prescribes a specific procedure for obtaining a personal judgment for a deficiency remaining after a creditor has exercised the power of sale in a trust deed or mortgage." *Mariners Savings and Loan Association v. Neil*, 22 Cal. App. 3d 232 (1972). Petitioner states that "on November 8, 2001[,] the property was sold via Trustee's sale by the [first] lien holder" and the Secretary provided documentary evidence confirming this, which stated "[t]he improved property, 2220 W. 102nd St., Inglewood, CA, 90302, was sold via Trustee's sale on November 8, 2001." (Pet'r Hr'g Req.; Sec'y Stat., Ex. C, Dillon Decl., ¶ 6, Ex. A.) The Secretary also asserts that the Note that is the subject of this proceeding "was a trust junior to [the] foreclosing first party lien holder" and Petitioner submitted evidence supporting this assertion by providing a copy of the "Trustee's Deed Upon Sale," which listed "Professional Lenders Alliance, LLC as Trustee" and stated that the "Trustee...sold said real property at public auction on 11/08/2001." (Sec'y Stat., ¶ 9; Pet'r Submission, attach.) Therefore, because HUD did not exercise the power of sale in their junior trust deed, Section 580a of the California Code of Civil Procedure is not applicable. Similarly, Petitioner's reliance on Section 580c of the California Code of Civil Procedure, which "refers to attorneys' fees for conducting the sale[,]" is misplaced because HUD did not exercise the power of sale. *O'Connor v. Richmond Savings and Loan Association*, 262 Cal. App. 2d 523, 528 (1968).

Based on the foregoing, HUD is not barred by the California Code of Civil Procedure Sections 726 and 580a-d from pursuing a deficiency action against Petitioner for the alleged debt, thus I find the debt that is the subject of this proceeding to be legally enforceable against Petitioner.

Finally, Petitioner asserts that HUD does not have the right to pursue collection of this debt because collection is barred by Section 343 of the California Code of Civil Procedure. Section 343 of the California Code of Civil Procedure states that "[a]n action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." CAL. CIV. PROC. CODE § 343 (2006). This Office has previously held that "[s]tate statutes of limitations are superseded by Federal law whenever the United States becomes entitled to a claim in its governmental capacity." *Abe Bradley*, HUDOA No. 07-H-CH-HH40 at 3 (May 7, 2008) (citing *United States v. Summerlin*, 310 U.S. 414, 416-17 (1940); *accord United States v. Tilleraas*, 709 F.2d 1088, 1090-91 (6th Cir. 1983), and *Gerrard v. U.S. Office of Education*, 656 F.Supp. 570,

574-75 (N.D. Cal. 1987)). Therefore, this four-year limitation period under California state law does not apply to this proceeding.

Furthermore, 24 C.F.R. § 17.160 provides that "[t]he Secretary may not initiate offset of Federal payments due to collect a debt for which authority to collect arises under 31 U.S.C. § 3716 more than 10 years after the Secretary's right to collect the debt first accrued...." In this case, the ten-year statute of limitations under 31 U.S.C. § 3716(a) supersedes the four-year statute of limitations under § 343 of the California Code of Civil Procedure. Therefore, I find Petitioner's allegation that collection of the debt is barred by application of the statute of limitations contained in Section 343 of the California Code of Civil Procedure is not justified.

ORDER

For the reasons set forth above, I find that the debt which is the subject of this proceeding is legally enforceable against Petitioner in the amount 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 refer this matter to the U.S. Department of the Treasury for administrative offset of any payment due Petitioner.

/s/

Vanessa L. Hall
Administrative Judge

November 14, 2008