

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

In the Matter of:

JUANITA W. JOHNSON,

Petitioner.

HUDOA No. 12-M-CH-AG116

Claim No. 721007232

February 7, 2013

DECISION AND ORDER

On July 28, 2013, Juanita Johnson ("Petitioner") requested a hearing to contest a proposed administrative wage garnishment in relation to a debt allegedly owed to the U.S. Department of Housing and Urban Development (HUD). The Debt Collection Improvement Act of 1996, as amended, 31 U.S.C. § 3720D, authorizes federal agencies to use administrative wage garnishment as a mechanism for collection of debts owed to the United States government.

Applicable Law

The administrative judges of this Office are designated to determine whether the Secretary of HUD ("Secretary") may collect on alleged indebtedness by means of administrative wage garnishment when such action is contested by a debtor. This Court conducts these hearings in accordance with procedures set forth in 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.81.

The Secretary has the initial burden to prove the "existence or the amount of the alleged debt." 31 C.F.R. § 285.11(f)(8). Thereafter, Petitioner must show "by a preponderance of the evidence that no debt exists or that the amount ... is incorrect. In addition, the Petitioner [may show] that the terms of the proposed repayment schedule are unlawful, would cause an undue financial hardship to Petitioner, or that collection of the debt may not be pursued due to operation of law." Id.

On August 9, 2012, this Office stayed the issuance of a wage withholding order until the issuance of this written decision. (Notice of Docketing, Order, and Stay of Referral ("Notice of Docketing."))

Background

On or about November 6, 2010, Petitioner executed and delivered to HUD a subordinate promissory note ("Subordinate Note" or "Note"), secured by a mortgage, in the amount of \$8,671.49. (Secretary's Statement ("Sec'y Stat.") Ex. A, Note; Ex. B, Mortgage.) The Subordinate Note was a means of foreclosure relief that HUD provided to make the Petitioner's

payments current on the primary note. (Sec'y Stat. Ex. C, Declaration of Brian Dillon ("Dillon Decl.") ¶ 4).

The terms of the Subordinate Note provided for conditions that would make the Note immediately due and payable. Two of these conditions were: (1) the Secretary no longer insured the primary mortgage, or (2) the property was not the purchaser's principal residence. (Ex. A, Note ¶ 4(A)(iii), (iv).)

On or around May 31, 2011, Petitioner's homeowner insurance provider, Balboa Insurance Group, issued payment to the primary note holder, Bank of America Home Loans Servicing, LP (BAC). (Ex. C, Dillon Decl. ¶ 4; Petitioner's Documentary Evidence ("Pet'r Doc. Evid."); Balboa letter of June 1, 2011.) Balboa issued the full policy limit, or \$75,000.00, after Petitioner's property sustained heavy wind damage. (*Id.*) Around this time, approximately \$70,632.59 was due to BAC for the lien to be released. (Pet. Doc. Evid., BAC payoff statement, dated May 16, 2011 ("Payoff Statement."))

After the Balboa payment to BAC, BAC indicated the loan under the primary note was paid in full. (Dillon Decl. ¶ 4.) The Asset Recovery Division stated that on or around May 31, 2011, HUD received notice the primary note had been paid in full. (Dillon Decl. ¶ 4.) This made the debt payable under the Subordinate Note due to HUD. (Ex. A, Note.)

Petitioner neither satisfied the terms of the Subordinate Note, nor arranged for repayment. (Ex. C, Dillon Decl. ¶¶ 4, 6-7.) On June 28, 2012, a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings was sent to Petitioner. (Ex. C, Dillon Decl. ¶ 6.) Petitioner had the opportunity to negotiate a payment arrangement, in accordance with 31 C.F.R. § 285.11, (Ex. C, Dillon Decl. ¶ 6-7,) but Petitioner requested a hearing before this Court. (Request for Hearing.) On the Hearing Request Form, Petitioner claimed she knew nothing of the debt.

On August 9, 2012, this Court issued a Notice of Docketing, wherein, it ordered both the Secretary and the Petitioner to file documentary evidence.¹ On August 16, 2012, the Secretary filed, among other documents, a Statement That Petitioner's Debt was past due, a statement from the HUD Asset Recovery Division, and copies of the Subordinate Note and Mortgage. (Sec'y Stat. Ex. A-C.)

The Declaration from the HUD Asset Recovery Division alleges that Petitioner is indebted to HUD as follows:

- a) \$8,671.49 as the unpaid principal balance as of July 31, 2012;
- b) \$79.42 as the unpaid interest on principal at 1% per annum through July 31, 2012;
- c) \$557.35 as unpaid administrative costs and penalties, as of July 31, 2012; and
- d) Interest on principal balance from August 1, 2012 at 1% per annum until paid.

(Sec'y Stat., ¶ 7; Ex. C, Dillon Decl. ¶ 5.)

¹ This Court issued an Order for Documentary Evidence again on September 24, 2012.

In a letter dated September 30, 2012 ("Petitioner's Letter"), Petitioner raises two arguments. (Petitioner's Letter ("Pet'r Letter.")). First, Petitioner argues that the \$75,000 payment from Balboa to BAC was not apportioned correctly, and BAC should have transferred the amount due under the Subordinate Note to HUD. The Petitioner filed documentary evidence including BAC loan statements, the Balboa Letter, and notice from the HUD Albany Office. (BAC Loan Statements ("BAC Loan Stat."); Balboa Letter; HUD Notice.)

Second, Petitioner argues that even if she does owe HUD the amount due under the Subordinate Note, wage garnishment would create financial hardship. (Pet'r Letter.) For support, Petitioner filed documentary evidence, including statements of car payment (Ally), car insurance (State Farm), credit card balances for two cards (HSBC I, HSBC II), rent (Birmingham Housing Authority), and medical charges (Vision America). (Account Statements ("Acc. Stat."))

The rent statement filed does not include an address or identify a renter. Although not directly naming her, it appears the Petitioner may have been qualified for rental assistance by the Birmingham Housing Authority. (Pet'r Doc. Evid., Acc. Stat.) Further, Petitioner's credit report indicates Petitioner has several accounts in collections, amounting to roughly \$4,000.00. (Pet'r Doc. Evid; Credit Report.) Debt payable for medical care is \$510.00. *Id.* Lastly, Petitioner is past due on most accounts she filed to support her financial hardship claim.

Finally, the Secretary alleges that on August 14 and 15, 2012, Petitioner was contacted to obtain copies of her pay statements, but Petitioner filed none. (Ex. C, Dillon Decl. ¶ 8.) The Secretary seeks a monthly wage garnishment totaling \$258.56 per month, which will satisfy the alleged debt in approximately three years. (Sec'y Stat. ¶ 10; Ex. C, Dillon Decl. ¶ 8.)

Discussion

Petitioners may present evidence to contest the amount or existence of an alleged debt to HUD. 31 C.F.R. § 285.11(f)(8). Here, Petitioner argues that either BAC or Balboa should have paid off the balance that she owed to HUD under the Subordinate Note from the proceeds that Balboa paid to BAC under Petitioner's homeowner insurance policy. (Pet'r Letter.) Petitioner's theory is that there should have been funds remaining after Balboa made payment to BAC, and HUD should have received the remaining funds as payment on the Subordinate Note. Petitioner's documentary evidence suggests that around the time of that payment, the payoff amount on the Primary Note was near \$70,633.00. (Payoff Stat.) Balboa issued a \$75,000.00 payment to BAC. (Balboa Letter.) Petitioner questions BAC's accounting. (Pet'r Letter.)

The problem with Petitioner's argument is that nothing contained in the terms of the Subordinate Note creates an obligation for any person, other than Petitioner, to pay the amounts owed under the Subordinate Note. Also, Petitioner has failed to establish that any such excess amounts from the Balboa Insurance Co. proceeds were actually paid to HUD, thereby reducing or potentially eliminating Petitioner's liability under the Note. To the contrary, Petitioner filed a subsequent statement from BAC, stating that after the Balboa Insurance Co. proceeds were applied to Petitioner's primary mortgage pay-off, a balance of \$27.55 for unpaid mortgage insurance premiums remained. (Pet'r Doc. Evid., Notice dated September 1, 2011.) It follows then that there were no excess funds remaining after payoff of the primary mortgage that was

available to be applied to the indebtedness on the Subordinate Note. Moreover, Petitioner has not come forward with any evidence to prove that she made any other payment on the Subordinate Note to HUD. Based on these facts, and because Petitioner does not otherwise challenge the debt alleged by the Secretary, the Court finds that Petitioner is indebted to HUD in the amounts claimed by the Secretary.

Petitioner also contends that repayment of this debt would create a financial hardship for her. (Pet. Letter.) In some circumstances, “financial hardship” is a valid reason for this Court to reduce the Secretary’s proposed wage garnishment schedule to a more manageable amount for the Petitioner. 31 C.F.R. § 285.11(k). In those cases, Petitioners must present evidence that their existing financial obligations, including the proposed wage garnishment, could not be supported by their disposable income, and that relief is warranted in light of the adverse circumstances that would arise from the rate of garnishment sought by the Secretary. Id.

This Court adheres to 31 C.F.R. § 285.11 (f)(8) and (k), when deciding whether to adjust for financial hardship any wage garnishment proposed by the Secretary. Accordingly, we review documentation filed by Petitioners for circumstances that would make Petitioners incapable of complying with the proposed wage garnishment. This involves an inquiry into the Petitioner’s “disposable pay.” Disposable pay is the difference between gross pay and any deduction for medical insurance premiums, taxes, unemployment insurance, or other deductions withheld as required by law. 31 C.F.R. § 285.11(c). The Court ordinarily deduces disposable pay from a pay statement filed by Petitioner.

Petitioner has filed no pay statement in this case. Normally, this Court would take under consideration the fact that a Petitioner appears *pro se*, and it might give the Petitioner the benefit of filing additional evidence should a Petitioner fail to file proper evidence the first time around. However, where the record suggests a Petitioner has had more than ample notice and opportunity to negotiate, file evidence, and to communicate with the Court, it will assume the Petitioner has filed all the evidence intended. This is the case with Petitioner, who actually filed documentary evidence on at least two occasions. Therefore, it appears Petitioner had adequate opportunity to file documentary evidence as to financial hardship.

The Secretary states that two attempts were made to obtain Petitioner’s pay statement, to no avail. (Dillon Decl. ¶ 8.) Petitioner has also failed to file pay statements herself. Additionally, the Petitioner filed incomplete account statements. These incomplete account statements fall short of the dispositive evidence needed to establish financial hardship. For example, Petitioner filed a rent statement of balance due with no address of the home or name of the renter on the account. (Pet’r Doc. Evid., Birmingham Housing Authority.) Another example is Petitioner’s car insurance statement from State Farm. This statement shows only the entire balance due on the account; it does not show monthly premiums. (Pet. Doc. Evid., State Farm Stat.) Most, if not all, of Petitioner’s documentary evidence suffers from these same infirmities. As a result, this Court would have to guess at Petitioner’s monthly expenses, which is not an appropriate means of calculating monthly expenses in this case.

Ordinarily, the Secretary may garnish wages at 15 percent of disposable pay. 31 C.F.R. § 285.11(i)(2)(A). Where a Petitioner fails to provide a pay statement, the Federal Debt Collection Standards Act recommend garnishing wages at a rate that will satisfy the debt within three years.

Section 901.8(b) states: “The size and frequency of installment payments should bear a reasonable relation to the size of the debt and the debtor's *ability to pay* ... [T]he installment payments *should be* sufficient in size and frequency to liquidate the debt in three years or less (emphasis added).”

31 C.F.R. § 901.8(b). Consequently, the requirement that Petitioners satisfy their debt within three years is not absolute. The Secretary used this method of calculation because the Petitioner did not file a pay statement. The Secretary's proposed monthly wage garnishment is \$258.56. (Sec'y Stat., ¶ 10.)

The preponderance of the evidence standard applies to financial hardship matters. 31 C.F.R. § 285.11(f)(8)(ii). The question is whether Petitioner would suffer financial hardship at the rate of garnishment the Secretary seeks. If the evidence shows it is more likely the case that she would, this Court should downward adjust the rate of garnishment. *See Ray J. Jones*, HUDAJF 84-1-OA at 2 (March 27, 1985); *August C. Frazier*, HUDALJ 86-05-OA at 2 (April 11, 1986); *Judith Herrera*, HUDOA No. 12-M-CH-AWG27 (July 13, 2012); 31 C.F.R. § 285.11(k)(2). Petitioner presents potentially compelling evidence of financial hardship, including (1) her apparent qualification for rental assistance by the Birmingham Housing Authority, (2) \$510.00 in past due medical bills, (3) past due notices on almost every account statement filed, and (4) approximately \$4,000.00 of debt in collections. The Court further notes that around the time this action commenced, Petitioner's house was totally destroyed by heavy wind damage. However, the relatively incomplete financial documents produced by Petitioner, coupled with the lack of documentation with which to calculate Petitioner's disposable pay or income, compels the Court to reach a finding that financial hardship has not been demonstrated.

Accordingly, I find that Petitioner is indebted to HUD in the amounts claimed by the Secretary and that Petitioner's claim of financial hardship is denied.

ORDER

For the reasons set forth above, the Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative wage garnishment is **VACATED**. It is hereby

ORDERED that the Secretary may seek collection of this outstanding debt by means of administrative wage garnishment to the extent authorized by law.



H. Alexander Manuel
Administrative Judge