

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

In the Matter of:

Jessie Williams,

Petitioner.

HUDOHA 12-VH-CH-AG-122
Claim No. 721003331

December 21, 2012

DECISION AND ORDER

On August 17, 2012, Petitioner requested a hearing concerning 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 the collection of debts owed to the United States government.

APPLICABLE LAW

The administrative judges of this Court are designated to determine whether the Secretary may collect the alleged debt by means of administrative wage garnishment if such action is contested by a debtor. This hearing is conducted in accordance with the procedures set forth at 31 C.F.R. 285.11, as authorized by 24 C.F.R. 17.81. The Secretary has the initial burden of proof to show both the existence as well as the amount of the alleged debt. 31 C.F.R. 285.11(f)(8)(ii). In addition, Petitioner may present evidence 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.*)

Procedural Background

On August 29, 2012, the Court 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"). In response to a subsequent order issued by the Court on October 4, 2012, the Secretary's Statement was filed on October 24, 2012. To date, Petitioner has failed to comply with the orders issued by the Court on November 1, 2012 and thereafter on November 28, 2012 to produce documentary evidence in support of his position. This case is now ripe for review.

Findings of Fact

On June 4, 1999, Petitioner executed a Subordinate Deed of Trust and Affidavit ("Deed of Trust") to secure a Partial Claim made on her behalf to cure the arrearages on her primary FHA-insured mortgage. (Secretary's Statement ("Sec'y Stat.") ¶ 1, filed October 24, 2012;

Exh.1, "Note"; Exh.2, Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center of HUD ("Dillon Decl.") ¶ 4, dated October 23, 2012.) "While the Secretary, after a diligent search, has been unable to locate the Note, a copy of the Subordinate Deed of Trust as well as a Lost Note Affidavit is being submitted as documentary evidence of the debt owed to the Secretary." (Sec'y Stat., Ex. A.) On or around October 10, 2003, the FHA mortgage insurance on the original Note and Security Instrument was terminated as the mortgagee indicated the mortgage was paid in full. (Sec'y. Stat., Ex. 2, Dillon Decl. ¶4.) HUD has attempted to collect on the claim from Petitioner, but Petitioner remains delinquent. (Sec'y Stat. ¶ 6; Dillon Decl. ¶ 6.) HUD thereby alleges that the Petitioner is indebted to HUD in the following amounts:

- a) \$1,496.38 as the unpaid principal balance as of September 30, 2012;
- b) \$204.59 as the unpaid interest on the principal balance at 4% per annum through September 30, 2012;
- c) \$491.07 as the unpaid administrative costs and penalties as of September 30, 2012; and,
- d) Interest on said principal balance from October 1, 2012 at 4% per annum until paid.

(Sec'y Stat. ¶ 5; Dillon Decl. ¶ 6.)

A Notice of Intent to Initiate Administrative Wage Garnishment was mailed to Petitioner on February 26, 2009. (Sec'y Stat. ¶ 7, Ex. 2, Dillon Decl. ¶ 7.) In accordance with 31 C.F.R. 285.11 (e) (2) (ii), Petitioner was afforded the opportunity to enter into a written repayment agreement until terms agreeable to HUD. (Sec'y Stat., Ex. 2, Dillon Decl., ¶ 8.) Petitioner has not to this date entered into such an agreement in compliance with the February 26, 2009 Notice. (Id.) A Wage Garnishment Order was issued to Petitioner's employer on February 23, 2009. (Sec'y. Stat., ¶ 8, Ex. 2, Dillon Decl., ¶ 9.) As of the date of this Declaration, there have been no garnishments. (Id.)

As of October 23, 2012, Petitioner has not provided HUD with her current pay stub. (Sec'y. Stat., ¶ 9, Ex. 2, Dillon Decl., ¶ 10.) The Secretary proposes a repayment schedule of \$61.00 per month, which will liquidate the debt in approximately three years as recommended by the Federal Claims Collection Standards, or 15 percent of the Petitioner's disposable income as allowed by 31 C.F.R. 285.11(i)(2)(A). (Id.)

Discussion

Pursuant to 31 C.F.R. § 285.11(f) (8) (ii), Petitioner has to "present by a preponderance of the evidence that all or part of the alleged debt is unenforceable, does not exist, or is not past due. Petitioner claims that the alleged debt is unenforceable because "it does not exist" and he "does not owe it." (Petitioner's Hearing Request, "Pet'r's Hr'g. Req.," filed August 11, 2012.)

Petitioner failed to present, however, documentary evidence in support of his position, despite being ordered by the Court on three occasions to do so. (See Notice of Docketing; Order, dated November 1, 2012; and Order to Show Cause, dated November 28, 2012.) As such, without any evidence being made a part of the record, Petitioner's claims are considered by the Court as mere allegations. This Court has consistently maintained that "[a]ssertions without evidence are not sufficient to show that the debt claimed by the Secretary is not past due and or unenforceable." *Troy Williams*, HUDOA No. 09-M-CH-AWG52 (June 23, 2009) (citing *Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996)).

On the other hand, the Secretary presented as evidence a copy of the *Deed of Trust* associated with the property that is subject of the alleged debt involved in this proceeding. (Sec'y. Stat, Ex. 1.) A review of the *Deed of Trust* shows that Petitioner agreed to accept the terms contained in the Security Instrument. (*Id.*) Further, the Secretary produced a copy of a *Lost Note Affidavit* ("*Lost Note*") signed by then Acting Director of the Asset Recovery Division of HUD's Financial Operations Center. In the *Lost Note* it was acknowledged that "the Original Note was misplaced, lost or destroyed," and that "after [a] thorough and diligent search, no one has been able to locate the original Note." (Sec'y Stat., Ex. A.) However, the Director, by declaration, clarified and affirmed to the satisfaction of the Court that "[t]he Note has *not* been negotiated or assigned to any other person or party as of the date of this affidavit." (Emphasis added.) (*Id.*) The Secretary has presented sufficient evidence to establish what is required to prove the existence or enforceability of the debt, which is in fact the underlying purpose of this proceeding.

As a general rule, the existence or non-existence of the original Note is not a requirement for the Court to determine whether the subject debt exists or is owed by the debtor who is, in this case, Petitioner. (See *Newell v. La Font*, 251 S.W. 472, 474 (Mo. App. 1923), in which the court held "the question of sufficiency of proof of loss of a note sued upon rests largely with the discretion of the trial court" and that "each case must rest upon its own facts.") In *Newell*, the court further established that "where a party is proved to be the owner of the instrument at a given time, the presumption of law is that he so continues to be such owner until the contrary is shown by countervailing proof, or by some stronger countervailing presumption of law." Here, other credible documentary evidence was presented by the Secretary that otherwise persuaded this Court that the alleged debt is the responsibility of Petitioner, and further proved that such responsibility continued and rendered the subject debt enforceable and past due.

Based upon the evidence presented by Petitioner, I find that her claim fails for want of proof. As a result, I find that the Secretary prevails because, without any evidence being introduced by Petitioner to otherwise refute or rebut that presented by the Secretary, the Secretary has successfully met his burden of proof by presenting sufficient and credible evidence in support of his position.

ORDER

Based upon the foregoing, 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 is authorized to seek collection of this outstanding obligation by means of administrative wage garnishment in the amount of \$61.00 per month, or to the extent authorized by law.



Vanessa L. Hall
Administrative Judge