

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

In the Matter of:

WILLIAM SMITHEY,

Petitioner.

HUDOA No. 13-AM-0103-AG-045
Claim No. 721002978-0A

June 19, 2013

DECISION AND ORDER

On March 28, 2013, William Smithey ("Petitioner") filed a request for hearing concerning an administrative wage garnishment related to a debt allegedly owed to the U.S. Department of Housing and Urban Development ("HUD" or "the Government"). 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.

The Secretary of HUD designated the administrative judges of this Office to adjudicate contested cases where the Secretary seeks to collect debts by means of administrative wage garnishment. This Court conducts these hearings in accordance with 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.81. Pursuant to 31 C.F.R. § 285(f)(4), on April 01, 2013, this Court stayed wage withholding until the issuance of this written decision. (Notice of Docketing, Order, and Stay of Referral ("Notice of Docketing."))

Background

On September 13, 2002, the HUD-insured primary mortgage on Petitioner's home was in default and Petitioner was threatened with foreclosure. (Secretary's Statement ("Sec'y Stat.") filed April 9, 2013, ¶ 2.) To prevent foreclosure, HUD advanced funds to Petitioner's lender to bring the primary note current. (*Id.* at ¶ 3, and Ex. A, Declaration of Brian Dillon¹ ("Dillon Decl."), ¶ 4.) In exchange for foreclosure relief, Petitioner executed and delivered a subordinate note ("Subordinate Note") to HUD, in the amount of \$5,511.68. (Sec'y Stat., ¶ 4; Ex. B, Note.) The terms of the Subordinate Note provided that the balance would be due when the existing mortgage was paid in full. (Sec'y Stat., Ex. B at ¶ 4(a).)

On September 21, 2006, HUD received notification that the mortgage was paid in full, which made the Subordinate Note immediately due to HUD. (Dillon Decl. ¶ 4.) Petitioner failed to make payment as specified in the terms of the Subordinate Note. (Sec'y Stat., ¶ 8.) The

¹ Brian Dillon is the Director of the Asset Recovery Division of HUD's Financial Operations Center, Albany, N.Y.

Secretary has made efforts to collect this debt from Petitioner, but has been unsuccessful.² Accordingly, the Secretary alleges Petitioner is indebted to HUD in the following amounts:

- a) \$3,804.61 as the unpaid principal balance as of April 08, 2013;
- b) \$3.36 as the unpaid interest on principal at 4 percent per annum through April 08, 2013; and
- c) interest on principal balance from April 09, 2013 at 4 percent per annum until paid.

(Sec'y Stat., ¶ 9; Dillon Decl. ¶ 5.)

A Notice of Intent to Initiate Administrative Wage Garnishment Proceedings ("Garnishment Notice"), dated February 5, 2013, was mailed to Petitioner, in accordance with 31 C.F.R. § 285.11(e). (Sec'y Stat. ¶ 10; Dillon Decl. ¶ 6.) The Garnishment Notice afforded Petitioner the opportunity to enter into a written repayment agreement, as required by 31 C.F.R. § 285.11(e)(2)(ii). To date, Petitioner has not entered into such an agreement. (Sec'y Stat. ¶ 11; Dillon Decl. ¶ 7.) Accordingly, the Secretary proposes withholding 15 percent of Petitioner's disposable pay to satisfy the alleged debt. (Sec'y Stat. ¶ 14; Dillon Decl. ¶ 10.)

Discussion

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)(i). Thereafter, Petitioner must show, by a preponderance of the evidence, that the debt does not exist or that the amount of the debt is incorrect. 31 C.F.R. § 285.11(f)(8)(ii). Additionally, Petitioner may present evidence that the terms of the proposed repayment schedule are unlawful, would cause an undue financial hardship, or that collection of the debt may not be pursued due to operation of law. Id.

As evidence of the existence and amount of the debt, the Secretary filed a statement supported by documentary evidence, including a copy of the Note and the sworn testimony of the Director of the HUD Asset Recovery Division. (See Sec'y Stat., Ex. A and B.) Conversely, Petitioner's evidence consists of Petitioner's *Hearing Request*, dated March 21, 2013, and no other documentary evidence disputing the existence or amount of the alleged debt. Consequently, I find that the Secretary has met the burden of proof as to the amount of debt.

Again, Petitioner does not dispute the existence or amount of the debt. Rather, Petitioner claims that repayment in the amounts proposed by the Secretary would cause him financial hardship. Specifically, Petitioner states, "The Wage Garnishment Order to deduct up to 15% disposable pay each pay period, I believe will cause me to fall behind my bills and mortgage." (Petitioner's Hearing Request ("Pet'r's Hr'g Req."), filed March 28, 2013.) Instead of the fifteen

² The Secretary previously sought repayment of this debt by means of administrative wage garnishment. The matter was dismissed on February 3, 2009 after the parties agreed that Petitioner would pay \$250 per month to the Secretary until the debt was satisfied. However, Petitioner failed to make any voluntary payments to HUD in accordance with the agreement. (Sec'y Stat., ¶ 15.)

percent proposed garnishment, Petitioner proposes a repayment schedule in the amount of \$200.00 per month.³ (Petitioner's Documentary Evidence ("Pet. Doc. Evid."), Statement.)

Pursuant to HUD regulations, the Secretary may collect up to 15 percent of disposable pay or an amount that will satisfy the debt within three years. 31 C.F.R. § 285.11(i)(2)(A) and(B). While financial adversity does not invalidate a debt or release a debtor from a legal obligation to repay it, the existence of financial hardship requires mitigation of the amount of the garnishment allowable by law. 31 C.F.R. §285.11(K). To prove the proposed rate would create financial hardship, Petitioner must show that his income will not subsidize both his material financial obligations and the proposed garnishment amount. See 31 C.F.R. § 285.11(K)(1), (2).

In support of his position, Petitioner filed a number of receipts and account invoices, tax year 2010 and 2012 tax returns, and a written statement. (Pet. Doc. Evid.) Petitioner's evidence indicates Petitioner has the following essential monthly household expenses: mortgage, \$559.03; property tax and storm water fee, \$149.16; homeowner's insurance, \$56.08; water bill, \$110.31 (average); electric bill, \$153.93 (average); prescriptions for children, \$100.00; waste water, \$50.88 (average); gas, \$200.00; automobile insurance, \$66.20; tax and registration for one car, \$14.73; phone, \$136.66; and food for a family of five \$550.00.

Petitioner also submits bills for satellite TV and tax for a second vehicle, as well as receipts for various clothing purchases. (Pet'r's Hr'g Req.; Pet'r's Doc. Evid.) However, such expenses are not deemed to be essential by this Court and will thus be excluded from the calculation of Petitioner's household expense for the purposes of determining financial hardship. See Charles R. Chumley, HUDOA No. 09-M-CH-AWG09 (Apr. 6, 2009). Evidence of Petitioner's medical bills from Sentara Health Care and Emergency Physicians of Tidewater are also being excluded as Petitioner has not demonstrated that these are recurring monthly expenses. Accordingly, the Court finds Petitioner's essential monthly expenses total \$2,146.98.

With regard to his disposable income, Petitioner states, "my job pays me 20.00 hr that is 800.00 wk before taxes and ins, after that been taken 580.00 (I think) (sic)..." (Pet'r's Hr'g Req.) However, Petitioner does not provide a pay statement to support this claim. Rather, Petitioner submits his 2010 and 2012 tax returns which reflect annual pay that is significantly higher than Petitioner's stated monthly income of roughly \$3200.00. It is important to note that Petitioner has not provided his pay statement or other proof as to the amounts of payroll deductions for taxes, unemployment insurance, health care or other deductions that could be used to calculate the precise amount of his disposable pay per the terms of 31 C.F.R. §285.11(c). Therefore, the Court finds that a calculation based on the amounts garnished on March 18, March 25, and April 1 of this year to be an accurate and credible representation of Petitioner's disposable pay. Accordingly, the Court finds Petitioner's average monthly disposable pay for the purposes of administrative wage garnishment totals \$4,108.10.

Petitioner's monthly disposable income of \$4,108.10, less his essential monthly expenses of \$2,146.98, leaves Petitioner with a remaining balance of \$1,961.12. The Secretary's proposed

³ The Court is not authorized to extend, recommend, or accept any payment plan or settlement offer on behalf of HUD. Petitioner may wish to discuss this matter with Julia M. Murray, counsel for the Secretary, or Lester J. West, Director of the HUD Albany Financial Operations Center. He may be reached at 52 Corporate Circle, Albany, New York, 12203-5121 or 1-800-669-5152 extension 8206.

garnishment of fifteen (15) percent per pay period or roughly \$616.22 would leave Petitioner with \$1,344.91 monthly. Therefore, this Court finds Petitioner's evidence fails to support his financial hardship claim as required by 31 C.F.R. § 285.11(k).

ORDER

For the reasons set forth above, the *Order*, dated April 1, 2013, 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 to the extent authorized by law.



H. Alexander Manuel
Administrative Judge