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

In the Matter of: **Elaine Baculis-Vatakis,** Respondent.	15-AM-0015-AG-013 7-21007842-0B June 6, 2016

DECISION AND ORDER

On November 13, 2014, Elaine Baculis-Vatakis ("Petitioner") filed a *Hearing Request* concerning the amount, enforceability, or payment schedule of a debt allegedly owed to the U.S. Department of Housing and Urban Development ("HUD" or "the Secretary"). 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 allegedly owed to the United States government.

The Secretary of HUD has 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 case 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.

Background

On or about September 28, 2012, Petitioner and her husband executed and delivered to the Secretary a Subordinate Note ("Note") in the amount of $25,353.54 which secured a Subordinate Mortgage held by the Secretary. (Secretary's Statement ("Sec'y Stat."), ¶ 2, filed January 26, 2015). In return, HUD advanced funds to Petitioner's Fair Housing Act ("FHA") insured mortgage lender, the holder of Petitioner's primary mortgage note ("primary note"), as a means of providing foreclosure relief to Petitioner. Id. at ¶ 3. The Note cited specific events that made the debt become due and payable, one of which includes the full payment of all amounts due under the primary note by Petitioner. (Declaration of Brian Dillon "Dillon Decl.", ¶ 4; Note, ¶ 4).

On January 26, 2013, HUD paid the insurance claim on the primary mortgage to the primary mortgage lender in the amount of $25,535.54. (Sec'y Stat., ¶ 9; Dillon. Decl., ¶ 8).

On or about January 27, 2014, the FHA Insurance on Petitioner's first mortgage was terminated, as the lender indicated that the mortgage was fully satisfied. (Dillon Decl. ¶ 4). HUD has attempted to collect on the claim from Petitioner, but Petitioner remains delinquent. (Sec'y Stat., ¶ 6; Dillon Decl., ¶ 5). As a result, the Secretary alleges that Petitioner is indebted to HUD in the following amounts:

(a) $25,353.54 as the unpaid principal balance as of December 31, 2014;
(b) $84.48 as the unpaid interest on the principal balance at 1% per annum through December 31, 2014;
(c) $1,561.61 as unpaid penalties as of through December 31, 2014; and
(d) interest on said principal balance from December 31, 2014 at 1% per annum until paid.

(Sec'y Stat., ¶ 7; Ex. 2, Dillon Decl., ¶ 5).

On October 23, 2014, a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings was sent to Petitioner. (Sec'y Stat., ¶ 8; Dillon Decl., ¶ 6). Pursuant to 31 C.FR. 285.11 (e)(2)(ii), Petitioner was given an opportunity to enter into a written repayment agreement under the terms acceptable to HUD. (Dillon Decl., ¶ 7). As a result, the Secretary proposes a repayment schedule in the amount of $750.00 per month or in the alternative, the Secretary proposes a repayment schedule of 15% of Petitioner 's disposable income. Id. The former option is in accordance with the recommendation of the Federal Claims Collection Standards and will liquidate the debt in approximately three years. Id.

Discussion

The Secretary bears the initial burden of proof to show the existence and amount of the alleged debt. 31 C.F.R. 285.11 (f)(8)(i). Petitioner, thereafter, must show by a preponderance of the evidence that no debt exists 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 to Petitioner, or that collection of the debt may not be pursued due to operation of law.

As evidence of Petitioner's indebtedness, the Secretary has filed a statement supported by documentary evidence, including a copy of the Note signed by Petitioner and her spouse, and the sworn declaration of Brian Dillon. (See Sec'y Stat.; Ex 1; Ex. 2). Accordingly, the Court finds that the Secretary has met his initial burden of proof.

Petitioner does not dispute the existence or amount of her alleged debt to HUD and does not deny signing the Note and Deed of Trust in favor of the Secretary for the amount of

$25,353.54. (Petitioner's Hearing Request, dated November 13, 2014 ("Pet'r's Hr'g Req."); Petitioner's Documentary Evidence, dated September 16, 2015 ("Pet. Doc. Evid.")). Petitioner does, however, contend that the debt is not enforceable for four reasons: (1) Under the doctrine of Promissory Estoppel she should only have to pay HUD $8,026.26 in addition to $3,262.95, "an amount representing a time reasonably needed for finalizing the document package."; (2) The Note and Deed of Trust in favor of the Secretary for the amount of $25,353.54 was executed under economic duress; (3) The Note and Deed of Trust in favor of the Secretary for the amount of $25,353.54 was executed through unilateral mistake; (4) Bank of America committed fraud against Petitioner and HUD in the execution of the Note and Deed of Trust; and (5) Petitioner also claims the difference between $25,353.54 and $8,026,26 as restitution and requests that the claim be "[...] reduced to $11,289.21 as settlement in full." (Pet'r's Hr'g Req.; Pet. Doc. Evid.)

First, Petitioner asserts that she received a "Commitment and Offer to Modify Mortgage and for Partial Claim" ("Commitment") from Bank of America, which reflected a delinquent amount of $8,026.26. (Pet'r's Hr'g Req.) Petitioner claims that a series of delays with the finalization of arrears to be $25,353.54. Id. Petitioner contends that she detrimentally relied on Bank of America's misrepresentations of the delinquent amount by continuing to make her payments. Id. According to Petitioner, this misrepresentation, coupled with the fact that HUD is the "recipient of the acts of Bank of America as guarantor of Bank of America's loan," making HUD liable for Bank of America's wrongdoings, deems HUD's claims of $25,353.54 unenforceable. Id. Petitioner argues that "[i]f HUD received the benefits of its guarantee of the Bank of America Loan and the Deed of Trust resulting from Bank of America's acts, then legally they are liable for the wrongdoings of Bank of America." Therefore, according to Petitioner, HUD is estopped from claiming the amount of $25,353.54.

Asserting a claim of estoppel against the federal government is unavailing for Petitioner. The United States Supreme Court has stated that, "it is well settled that the Government may not be estopped on the same terms as any other litigant." Heckler v. Compty Health Serv. Of Crawford Country, Inc., 467 U.S. 50, 60 (1984). When asserting equitable estoppel against the government "at a minimum, [Petitioner] must show some *affirmative* misconduct in addition to establishing the other elements of estoppel." (emphasis added) Premo v. United States, 599 F.3d 540, 547 (6th Cir. 2010) (citing Mich. Express Inc. v. United States, 374 F.3d 424, 427 (6th Cir. 2004)). Additionally, Petitioner must show that "the government's act will cause a serious injustice and the imposition of estoppel will not unduly harm the public interest." Pauly v. U.S. Dep't of Agric., 348 F.3d 1143, 1149 (9th Cir. 2003)) (quoting S & M Inv. Co. v. Tahoe Reg'l Planning Agency, 911 F.2d 324, 329 (9th Cir. 1990)).

Here, Petitioner admits that it was Bank of America's representations that Petitioner "prudently and reasonably" relied upon, not any representations made by HUD. (Pet'r's Hr'g Req.) Assuming, *arguendo*, that HUD is responsible for the wrongdoings of Bank of America, Petitioner will still have failed to prove HUD's *affirmative misconduct*. The degree of separation between the wrongful act and HUD is enough of a moat to protect HUD against any claim of

Estoppel that Petitioner may assert. Therefore, Petitioner's estoppel argument does not hold water. Petitioner's grievances were the result of the "unreasonable and inexcusable" delay caused by Bank of America, not HUD. (Pet'r Hr'g Req.) Petitioner has failed to provide proof that receiving the "benefits of its guarantee of the Bank of America Loan and the Deed of Trust resulting from Bank of America's acts" amounts to an affirmative misconduct that will cause a serious injustice. Furthermore, Petitioner has not provided proof that estoppel will not unduly harm the public interest. Had Petitioner provided such proof, an estoppel claim may have been viable.

Second, Petitioner alleges the debt is not enforceable because of economic duress. (Pet'r's Hr'g Req.; Pet'r Doc. Evid.) Specifically, Petitioner contends that she accepted the final Note and Deed of Trust involuntarily because the alternative was to face foreclosure. Id.

A contract or agreement is void if a party's assent was induced by an *improper* threat that leaves the victim with no reasonable alternative. RESTATEMENT (Second) OF CONTRACTS §175(1) (2013). Economic duress exists only where there is a *wrongful* compulsion. (emphasis added) U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68, 81 (1974) (citing Thompson Crane & Trucking co. V. Eyman, 123 Cal. App. 2d 904, 908-09 (1954)). It is not duress to threaten nonperformance of a contract, to institute litigation, or "otherwise do what one has *a legal right* to do." (emphasis added) U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68, 81 (1974) (citing London Homes, Inc. V. Korn, 234 Cal. App. 2d 233, 240 (1965)).

In light of the foregoing case law, Petitioner's claim of economic duress against HUD is futile. Here, as the mortgage insurer, HUD's claim of $25,353.54 is specifically authorized by Section 2(c) of the National Housing Act ("Act"). Under the act, it is not *wrongful* compulsion to require Petitioner to execute a Note in return for the amount that HUD advanced to prevent Petitioner's foreclosure. Petitioner claims that she faced the threat of foreclosure, but foreclosure is a legal remedy and therefore is not an *improper* threat. There is no evidence to refute the fact that Petitioner stood to gain from the loan given by HUD. It is untenable to argue that securing a note in the exact amount that was advanced to Petitioner to save her from foreclosure is in any way a *wrongful* compulsion.

Third, Petitioner contends that Bank of America induced a unilateral mistake, as Petitioner was not aware of the language of the Deed of Trust they signed. (Pet'r Doc. Evid.) As Petitioner states, "we would have NEVER signed the Deed of Trust knowing an untruth was being executed; inasmuch as, we were never delinquent with our loan payments." Id. To support her claim, Petitioner states she "had less than 24 hours to sign, notarize, and mail the documents to Bank of America [...] this did not give us time to properly audit and conduct a thorough analysis of the paperwork." Id.

In order to claim a defense under unilateral mistake, the mistake has to be of "one party at the time a contract was made as to a basic assumption on which he made the contract has a

material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake." RESTATEMENT (Second) OF CONTRACTS §153 (2013).

Here, in her assertion that the unilateral mistake was induced by Bank of America's imposed time restriction, Petitioner seems to contradict herself as well as the Deed of Trust. (See Pet. Doc. Evid.; Pet'r Hr'g Req. Ex. 4; Ex 5.) The documents read that they were sent on September 12, 2012, and that they were signed on September 28, 2012. (Pet'r Hr'g Req.; Ex. 4; Ex 5.) Meanwhile, Petitioner states that she received the paperwork in August 2012 and that it had to be signed within 24 hours. (Pet'r Doc. Evid.) The Court is unable to reach Petitioner's conclusion on how paperwork that was sent by Bank of America on September 12, 2012, and was subsequently returned to Bank of America by Petitioner on September 28, 2012, amounts to a 24-hour period. Petitioner's representation of events becomes even more puzzling keeping in mind Petitioner claims she received the documents in August 2012. (Pet'r Doc. Evid.) Therefore, Petitioner's assertion of the time-pressure is not supported by the evidence on file.

Assuming, *arguendo*, that the documents indeed had to be returned within 24 hours, and that Petitioner met this deadline, neither of the grounds in § 153 apply. Enforcement of the contract would not be unconscionable, as the basic rule is that "absent fraud, duress, or mutual mistake, one having the capacity to understand a written document who reads and signs it, or without reading it, having it read to him, signs it, is bound by his signature in law." Ray v. Eurice, 93 A.2d 272 at 278 (1952). Furthermore, there is no evidence to refute the fact that Petitioner reaped the benefits of the Note and Deed of Trust she signed; Petitioner stood to gain from the loan given by HUD making it untenable to argue that securing a note in the exact amount that was advanced to Petitioner to save her from foreclosure in any way unconscionable. Bank of America also had no reason to know of Petitioner's mistake, as neither the Note nor the Deed of Trust strikes this Court as a document that is difficult to comprehend; they are short documents with straightforward language. (See Pet'r Hr'g Req.; Ex. 4; Ex 5.)

Fourth, Petitioner claims that Bank of America committed fraud by providing "HUD with false and erroneous information regarding the status of our loan" and "presenting a Deed of Trust signed under false pretenses". (Pet'r Doc. Evid.)

Fraud would require the fraudulent party to intend through misrepresentation "to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion. (2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." RESTATEMENT (Second) OF CONTRACTS § 162 (2013)

HUD is attempting to collect on the Note as is in accordance with the Note and Deed of Trust Petitioner signed. (Dillon. Decl., ¶ 4). Petitioner's claim of fraud against Bank of America does not dispute that Petitioner has paid in full all amounts due under the primary note and related, mortgage insured by the Secretary, which led to the termination of the FHA Insurance on the mortgage, allowing HUD to collect on the Note. Id. The amount HUD is claiming is in accordance with the Note, and Petitioner provides no evidence that this amount owed is not in accordance with the Note. (See Pet'r Hr'g Req; Pet'r Doc. Evid.) On the contrary, Petitioner does not dispute the existence or amount of her alleged debt to HUD and does not deny signing the Note and Deed of Trust in favor of the Secretary for the amount of $25,353.54. Id. Therefore, Petitioner's evidence does not meet the requirements of fraud.

Lastly, Petitioner claims the amount of $17,327.28 as restitution against Bank of America for allegedly violating for California Business and Professional Code, § 17200. This Court is of the opinion that Petitioner's grievances against Bank of America has no bearing in this Court's responsibilities of determining whether a debt is past due and enforceable.

Petitioner's request that the claim of $25,353.54 be reduced to $11,289.21 as settlement in full cannot be granted by this Court. (See Pet'r Hr'g Req.) Petitioner seems to assert potentially coming into financial difficulty by paying the amount due, however, Petitioner also states she is willing "to pay the amount due immediately." (Pet'r Doc. Evid.) This Court is only authorized to make a "[...] determination of whether the debt is past due and enforceable, and in what amount." Edgar Joyner Sr., HUDBCA No. 04-A-CH-EE052 (June 15, 2005). This Court is not authorized to "[...] establish either a debtor's repayment amounts or a schedule of payments." Id. Petitioner is free to negotiate with Department in an effort to adjust repayment terms, but this Court has no authority to "[...] extend, recommend, or accept any payment plan or settlement offer on behalf of the Department." Id. Should Petitioner wish to negotiate repayment, Petitioner may contact Michael DeMarco, Director HUD, at 1-800-669, extension 2859 or write to HUD Financial Operation Center, 52 Corporate Circle, Albany, N.Y., 12203-5121.

In light of the available documentary evidence, Petitioner has not met her burden of proof that the debt was not past due or enforceable, refuting the Secretary's *prima facie* proof of Petitioner's indebtedness. I, therefore, find that Petitioner is indebted to HUD in the amounts claimed by the Secretary.

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 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

Review of determination by hearing officers. A motion for reconsideration of this Court's written decision specifically stating the grounds relied upon, may be filed with the undersigned Judge of this Court within 20 days of the date of the written decision, and shall be granted upon a showing of good cause.