

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

In the Matter of:

Daniel J. Murvin,

Petitioner.

16-VH-0091-AG-030

721008321-0A

August 21, 2017

DECISION AND ORDER

This case is before the Office of Hearings and Appeals upon a *Request for Hearing* (*Hearing Request*) filed by Daniel J. Murvin (“Petitioner”), on May 19, 2016, concerning the existence, amount, or enforceability of a debt allegedly owed to the U.S. Department of Housing and Urban Development (“HUD” or “the Secretary”).

JURISDICTION

The administrative judges of this Court have been designated to adjudicate contested cases where the Secretary seeks to collect an alleged debt by means of administrative wage garnishment. 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 the existence and amount of the debt. 31 C.F.R. § 285.11(f)(8)(i). Thereafter, Petitioner 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). In addition, Petitioner may present evidence that the terms of any 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 History

Pursuant to 24 C.F.R. § 17.8 (a), on May 20, 2016, the Court stayed the issuance of an administrative wage garnishment order due to Petitioner until the issuance of this written decision. *Notice of Docketing, Order, and Stay of Referral* (“*Notice of Docketing*”). On June 13, 2016, the Secretary filed a *Motion for Extension of Time* (*Extension Motion*), requesting a 45-day extension to file the *Secretary’s Statement* and documentary evidence to prove the debt in this case is past due and legally enforceable. This Court granted the *Extension Motion* and extended the filing deadline to August 1, 2016. The *Secretary’s Statement* was filed on August 4, 2016, three days after the filing deadline.

In response to the Secretary’s Statement Petitioner filed a *Petitioner’s Reply to the Secretary’s Statement that Petitioner’s Debt is Past Due and Legally Enforceable* on August 4, 2016. Petitioner also filed, on August 4, 2016, a *Motion for Default Judgment* (*Default Motion*) based on “HUD’s failure to comply” with the Court’s Orders in a timely manner. See 24 C.F.R.

§ 26.4. The Court acknowledged the untimely filing of the Government's *Statement*, but the Court determined that, based on case law precedent, the three-day delay did not rise to the level of the heightened standard required for entry of default judgement. The Court further concluded that applicable case law precedent illustrates a clear preference for cases to be decided on the merits, and as such should be preferred in this case. See Sun Bank of Ocala v. Pelican Homestead & Sav. Assn., 874 F.2d 274 (5th Cir. 1989); In re Thermal Reduction Co., 4 E.A.D. 128, 131 (EAB 1992); Pecarsky v. Galaxiworld, Ltd., 249 F.3d 167, 174 (2d 2001). Thus, the *Default Motion* was denied.

On September 19, 2016, Petitioner filed a *Motion for Sanctions, Remedial, and Injunctive Relief (Sanction Motion)*. Petitioner argued that HUD disclosed his outstanding debt to credit bureaus and consumer reporting agencies during this appeal process. Petitioner further argued that such reporting was in violation of federal law and evidence of bad faith on the part of HUD. See 31 U.S.C. § 3711 (e)(1)(D)(ii); 31 U.S.C. § 3711 (e)(2). This *Sanction Motion* was held in abeyance to afford the Secretary the opportunity to respond. Subsequently, the Secretary filed a *Motion for Extension of Time to Respond to Petitioner's Motion for Sanctions, Remedial, and Injunctive Relief (Extension Motion)*.

The *Extension Motion* was denied by the Court and rendered moot after it was confirmed in the record that the Secretary timely filed a response to Petitioner's *Sanction Motion*. It was evident, upon review of the Court's governing regulations, that the issues raised by Petitioner and the relief sought were beyond the scope of this Court's jurisdiction which is, by law, limited to a review of debt collection matters, and does not include debt reporting matters. See 31 C.F.R. § 285.11 (f)(8). This case is now ripe for review.

Background

This is a debt collection action brought pursuant to Title 31 of the United States Code, section 3720D, because of a defaulted loan that was insured against non-payment by 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.

On or about September 11, 2012, Petitioner executed and delivered to the Secretary a Subordinate Note ("Note") in the amount of \$9,821.35. The Note secured a Subordinate Mortgage ("Mortgage") held by the Secretary. *Secretary's Statement* Ex. 1. HUD advanced funds to Petitioner's FHA insured mortgage lender, Bank of America, to bring the Petitioner's mortgage current. Subsequently, Petitioner executed the Note in favor of the Secretary. Ex. 2, *Declaration of Brian Dillon*¹ (*Dillon Decl.*), ¶ 4. On or about April 30, 2015, the FHA mortgage insurance on the primary mortgage was terminated. *Dillon Decl.* at Ex. 2 ¶ 4. The Note became due and payable since Petitioner paid the full amount due under the primary mortgage. *Dillon Decl.* Ex. 1 ¶ 4.

Petitioner remains in default and is indebted to the Secretary in the following amounts:

- (a) \$9,821.35 as the unpaid principal balance as of May 30, 2016;

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

(b) \$16.36 as the unpaid interest on the principal balance at 1% per annum through May 31, 2016; and

(c) interest on said principal balance from May 31, 2014, at 1.0% per annum until paid.

(*Id.*)

Pursuant to 31 C.F.R. § 285.11(e), a notice of Intent to Initiate Administrative Wage Garnishment Proceedings (“Notice of Intent”) dated May 5, 2016, was sent to Petitioner. *Sec’y Stat.*, Ex. 2, ¶ 6. In accordance with 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was afforded an opportunity to enter into a written repayment agreement. *Sec’y Stat.*, Ex 6. Petitioner did not enter into a written repayment agreement or pay the debt in full in response to the Notice of Intent.

The Secretary’s proposed repayment schedule is \$277.50 per month. Alternatively, the Secretary requests a repayment schedule equal to 15% of Petitioner’s monthly disposable income. *Sec’y Stat.*, ¶ 13.

Discussion

Petitioner does not dispute the existence of the subject debt but instead challenges, on appeal, the amount of the debt so claimed by the Secretary. According to Petitioner’s *Hearing Request*, “A portion (TBD) of the purported debt in the amount of \$9,829.53 set forth in the Garnishment Notice (the ‘Partial Claim’) is not past due and is not legally enforceable.” “The HUD Debt Balance should,” according to Petitioner, “be reduced by \$2,249.91 based on the Petitioner’s earned Federal Pay-For-Performance Incentive under the Home Affordable Modification Program (‘HAMP’).” *Petitioner’s Petition* (“*Petition*”) filed July 21, 2017.

To qualify for FHA-HAMP, Petitioner was required to execute and return: 1) a Loan Modification Agreement; 2) the Subordinate Deed of Trust; 3) the Subordinate Note; and 4) the Dodd-Frank Certification. *Petitioner’s Reply* at ¶ 1. Petitioner states that he became eligible for a reduction of the principal amount of his modified loan under the guidelines for FHA-HAMP’s pay-for performance incentive because he produced evidence that he met the eligibility requirements. Petitioner further states that because he met the eligibility requirements, any alleged amount recoverable by HUD must be reduced by the amount of principal reduction Petitioner was entitled to under the FHA-HAMP’s pay-for-performance incentive. *Id.*

The Secretary concedes that Petitioner has provided evidence of an executed FHA-HAMP Loan Modification Agreement with Bank of America. *Sec’y Stat.* ¶ 1. But, the Secretary not only questions whether the Petitioner indeed qualifies for the pay-for-performance incentives and likewise “refutes the notion that HUD has any obligation to ensure that Petitioner’s mortgage with Bank of America be credited with pay-for-performance principal reduction payments.” *Id.* Additionally, the Secretary contends that Petitioner has failed to produce sufficient evidence that proves the subject debt, a separate and distinct second mortgage, requires any reduction in the principal amount owed. *Id.*

I. FHA-HAMP Incentive Program Does Not Entitle Petitioner to a Reduction in the Debt Owed to HUD

The core of Petitioner's argument challenging the amount of the subject debt rests on Petitioner's interpretation of the FHA-HAMP Incentive Program, the requirements for participating in the program, and Petitioner's understanding of the impact his loan modification should ultimately have on the amount of the debt that is the subject of this proceeding.

Petitioner claims that his qualification for the pay-for-performance incentive program under FHA-HAMP entitles him to a reduction of the debt amount claimed by HUD to be owed. Petitioner explains that he "is not claiming that Bank of America 'improperly failed to credit Petitioner's primary mortgage with pay-for-performance incentives...', " but instead, Petitioner claims that "HUD is responsible for paying the HAMP federal pay-for-performance incentive and failed to do so." *Petitioner's Reply* at ¶ 1. Because of HUD's failure to pay the incentives, Petitioner concludes that "he is entitled to a setoff of the purported debt amount evidenced by the Note due to the bargained for, qualified for, and earned HAMP Federal Pay-for-Performance incentive that HUD failed to pay, which absolutely has a bearing on the existence or enforceability of the Note and debt owed to HUD." In other words, Petitioner maintains that his loan modification under FHA-HAMP should entitle him to a setoff of the subject debt amount because of Petitioner's earned FHA-HAMP incentives HUD failed to pay. Petitioner's argument is inapposite.

In short, it is not within the scope of this Court's jurisdiction to determine whether the subject debt should have been credited with pay-for-performance incentive payments or treated as a setoff based on earned FHA-HAMP incentives. The Court must rely on governing regulations and laws associated with performing its responsibility. Herein, the Court's responsibility is limited to determining the past due status and enforceability of the subject debt. To reach beyond the scope of the Court's jurisdiction to address issues raised by Petitioner based on Petitioner's interpretation of the FHA-HAMP program is not the course of action the Court should take and, in this case, will not take.

In the Making Home Affordable (MHA) Handbook, it provides that if a borrower is determined to be eligible, "the borrower is eligible for pay-for-performance compensation and the servicer is eligible for pay-for-success compensation from the *Treasury*. (Emphasis added) *Sec'y. Stat.*, Ex. 3 MHA HANDBOOK v. 5.1, p. 212, ¶ 1, Introduction. Based on a review of the record, the evidence presented by Petitioner is insufficient to support a finding that HUD should be responsible for administering or determining the use, credit, or setoff of FHA-HAMP payment incentives, particularly as it relates to collection of the subject debt. Compliance with the incentive requirements is determined by the Treasury Department, not HUD. *Id.*

In the case at hand, the alleged debt is associated with the Subordinate Note to HUD. The terms of this Note address what is required to take place should the debtor default. It does not address or include what steps to take should the case involve a payment-for-performance incentive under FHA-HAMP. Petitioner is conflating the two mortgages by insisting that the principal balance be reduced on the Subordinate Note based on previous timely payments on his primary mortgage. But, the Subordinate Note is a separate and distinct debt from the primary mortgage

of the Bank of America. Any qualification for the payment incentive program is therefore immaterial towards assessing the amount of the subject debt. Even if Bank of America was derelict in crediting Petitioner's first mortgage with incentive payments, it again would not impact Petitioner's contractual obligation to pay the debt that is the subject of this proceeding.

Because Petitioner has failed to meet his burden of proof that he is entitled to a reduction of the subject debt based on payment incentives made by means of the FHA-HAMP Incentive program, and further has failed to meet his burden of proof that a correlation exists between the FHA-HAMP Incentive Program and the enforceability of the subject debt in this case, the existing debt remains past due and enforceable. Therefore, the Court finds that Petitioner's claim lacks merit.

II. The Debt owed to HUD is Past Due and Legally Enforceable.

The language in the Note indicates, in unambiguous terms, that the amount to be repaid becomes due and payable when the "borrower has paid in full all amounts due under the primary note and related mortgage." See *Subordinate Note: Sec'y Stat. Ex. 1* ¶ 4(A)(i); *Petitioner's Petition*. HUD is seeking an amount consistent with that identified in the Note. The FHA Insurance on Petitioner's first mortgage was terminated on or around April 30, 2015. This event triggered the HUD Note to become immediately due. The record does not reflect payment in full, or in part, of the subject debt by Petitioner.

Petitioner contends that the Subordinate Deed of Trust was incorrectly described, which caused it to remain undetected at the closing of the sale of the property in April 2015. *Petition*, ¶ 17. The Secretary does not refute that the Deed of Trust had defects. *Sec'y Stat.* ¶ 10. Indeed, an examination of the Subordinate Deed of Trust appears to reflect an incorrect property address for Petitioner. See *Petition Ex. G*. However, Petitioner's contractual obligation emanates from the terms and covenants of the Note (indeed a contract), not from the Deed of Trust. Bruce R. Smith, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007); Dimitris and Andrea Baldwin, HUDOA No. 12-AM-CH-AO-47 (April 8, 2013). The Deed of Trust simply operates as a security instrument for the protection of HUD, the lender. This distinction is why defective deeds of trust do not relieve borrowers from their contractual obligation to pay under the Note. See Joseph and Jacqueline Ragimierski, HUDOA No. 07-M-NY-HH53 (November 4, 2008); Gwendolyn S. Wisler, HUDOA No. 15-AM-AG-008 (July 20, 2016). Consequently, Petitioner became contractually obligated to pay the debt when he signed the Subordinate Note, regardless of the erroneous description on the Deed of Trust.

For Petitioner not to be held liable for the alleged debt, he must produce evidence of either (1) a written release from HUD specifically discharging Petitioner's obligation for payment of the alleged debt; or (2) evidence of valid or valuable consideration paid to HUD that released Petitioner from his obligation, or was accepted by the lender with the intent to release petitioner from his legal obligation. Franklin Harper, HUDBCA No. 01-D-CH-AWG41 (March 23, 2005) (citing Jo Dean Wilson, HUDBCA No. 03-A-CH-AWG09 (January 30, 2003)); William Holland, HUDBCA No. 00-A-NY-AA83 (October 12, 2000); Ann Zamir (Schultz), HUDBCA No. 99-A-NY-Y155 (October 4, 1999); Valerie L. Karpanai, HUDBCA No. 87-2518-H51 (January 27, 1988); Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (December 22, 1986); and Jesus

E. and Rita de los Santos, HUDBCA No. 86-1255-F262 (February 28, 1986). According to the record herein, Petitioner failed to produce evidence of any written release from HUD of the subject debt or full satisfaction of the same.

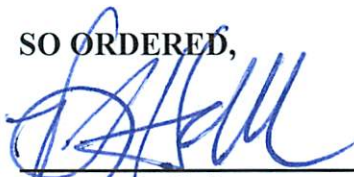
Because the Secretary has successfully met his burden of proof and has fully persuaded the Court that the subject debt is past due and legally enforceable, without sufficient evidence from Petitioner to prove otherwise, the Court again finds Petitioner's claim fails for lack of proof. This Court has 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)). Accordingly, the Court finds that the debt as so claimed by the Secretary is past due and legally enforceable against Petitioner.

ORDER

Based on the foregoing, the Order imposing the stay of referral of this matter to the U.S. Department of 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 \$277.50 per month, or in an amount equal to 15% Petitioner's monthly disposable pay.

SO ORDERED,



Vanessa L. Hall
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 only upon a showing of good cause.