

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

In the Matter of:

Matthew Fackrell,

Petitioner.

17-VH-0002-AG-001

72-1008691

October 25, 2017

DECISION AND ORDER

On October 07, 2016, Matthew Fackrell (“Petitioner”) filed a hearing request concerning a proposed administrative wage garnishment relating to a debt allegedly owed to the U.S. Department of Housing and Urban Development (“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 owed to the United States government.

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 31 C.F.R. § 285.11(f) (4), on October 11, 2016, this 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*”), 2). On November 18, 2016, the Secretary filed a *Motion for Extension of Time* in order to review information regarding the existence of some communication between Petitioner and HUD’s Financial Operations Center. Upon due consideration and for good cause, this court granted the extension of time.

On December 20, 2016, the secretary filed her *Statement* along with documentation in support of her position. Petitioner filed his *Response* to the Secretary's *Statement* on January 5, 2017. On May 23, 2017, this Court issued an *Order for Documentary Evidence*. To date, Petitioner has failed to file any documentary evidence in support of his claim of financial hardship, or in response to the orders issued by this Court. 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 3720A, 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. § 3720A), 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 July 23, 2010, Petitioner and his wife Jennifer Fackrell, executed and delivered to the Secretary a Subordinate Note ("Note") in the amount of \$50,962.76. The Note secured a Subordinate Mortgage held by the Secretary. The Note cites specific events that make the debt become due and payable. One such event is the payment of the primary mortgage. *Sec'y. Stat.* ¶ 4. On or about January 26, 2015, the FHA mortgage insurance on the primary mortgage was terminated, as the lender indicated the primary note and mortgage was paid in full. *Sec'y. Stat.* ¶ 5. Once the primary mortgage was paid in full, the Subordinate Note became due and payable. Petitioner has not made any payments on this Note.

The Secretary has made efforts to collect this debt from Petitioner, but has been unsuccessful. (*Sec'y. Stat.*, ¶ 6.) As a result, Petitioner remains in default on the Note and is indebted to the Secretary in the following amounts:

- (a) \$50,962.76 as the total unpaid principal balance as of October 31, 2016;
- (b) \$127.35 as the unpaid interest on the principal balance at 1% per annum through October 31, 2016; and
- (c) interest on said principal balance from November 1, 2016 at 1% 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") dated September 26, 2016, was sent to Petitioner. (*Sec'y. Stat.*, ¶ 8). In accordance with 31 C.F.R. 258.11(e) (2) (ii), Petitioner was afforded the opportunity to enter into a written repayment agreement under mutually agreeable terms. Id. at ¶ 10. Petitioner did not enter into a written repayment agreement nor has paid the debt in full in response to the Notice. Id.

HUD attempted to determine Petitioner's current income for calculation of a wage garnishment amount. Id. However, information of Petitioner's current income was not provided to HUD. Id. Consequently, the Secretary proposed a repayment schedule of \$1,441.15 per

month, which would liquidate the debt in approximately three years, as recommended by the Federal Claims Collection Standards. Alternatively, the Secretary requested that the repayment be set at 15% of Petitioner's disposable income.

DISCUSSION

Petitioner does not dispute the existence or amount of the debt. Rather, Petitioner asserts that the Subordinate Note was not recorded, and there was a mistake in the Subordinate Mortgage. As a result, the Subordinate Mortgage never attached to the property; therefore, the Subordinate Mortgage never became a record of title to the property. On February 27, 2015, Petitioner refinanced with Primary Residential Mortgage, Inc., but the refinance did not include a payoff of HUD's Subordinate Note or Subordinate Mortgage. Therefore, Petitioner requests that HUD re-subordinate the Subordinate Note or, in the alternative, that the Court recognize that the proposed garnishment amount would create a financial hardship on Petitioner. *Petitioner's Hearing Request (Hrg. Req.)*, filed October 10, 2016.

The Secretary contends that Petitioner's debt is past due and legally enforceable and, as a result, seeks the Court's authorization of her proposed repayment schedule for Petitioner. The Secretary also contends that on January 26, 2015, the FHA mortgage insurance on the primary mortgage was terminated, and the lender indicated that the primary note and mortgage were paid in full. Furthermore, the Secretary asserts that any defects that might exist in the legal description attached to the Subordinate Mortgage are inconsequential to the enforceability of the Note. Petitioner executed the Note and thus knew of its existence and is obligated to pay. The Secretary also attempted to determine Petitioner's current income for calculation of a wage garnishment, but such information was not provided by Petitioner. Therefore, the Secretary proposed a repayment schedule of \$1,441.15 per month, or a repayment of 15% of Petitioner's disposable income. See *Sec'y. Stat.*, Ex. 1, *Porter Declaration*, ¶ 4.

The Subordinate Note is a separate and distinct debt from the primary mortgage. See *Catherine Coley*, HUDOA No. 16-VH-0147-AG-039 at 3 (July 24, 2017). The Note clearly indicates that it becomes due and payable when "Borrower has paid in full all amounts due under the primary Note and related mortgage deed of trust or similar Security Instruments insured by the Secretary." *Sec'y. Stat.*, Ex. 2 ¶ 4(A)(i). On or about January 26, 2015, Petitioner's primary mortgage was paid in full, which triggered the timeline for the Subordinate Note to become due. As such, Petitioner's contractual obligation to pay on the Note remained intact.

Petitioner also asks that the Court recognize that the proposed garnishment amount would create a financial hardship on Petitioner. Specifically, Petitioner requests that this Court "recognize Petitioner's financial hardship and limit Petitioner's requirement to make monthly payments as allowed by his budget." *Petitioner's Reply* ¶ 8(2). However, Petitioner has failed to submit any documentary evidence that would persuade this Court in accepting Petitioner's financial hardship claim.

Pursuant to 31 C.F.R. § 285.11 (f)(8)(ii), Petitioner is required to show, by a preponderance of the evidence, that the proposed wage garnishment repayment schedule would

create a financial hardship. In a case involving a claim of financial hardship, Petitioner “must submit ‘particularized evidence,’ including proofs of payment, showing that she will be unable to pay essential subsistence costs such as food, medical care, housing, clothing or transportation.” Ray J. Jones, HUDAJF 84-1-OA at 2 (March 27, 1985).

Petitioner did not submit any financial statements to this Court. Specific evidence was needed to assist this Court in making its determination of financial hardship. Petitioner was ordered to submit additional documentation, and he was informed that, “documentary evidence should not be limited to a mere list of expenses, but instead must include proof of payment, where applicable.” See *Order for Documentary Evidence*, dated May 23, 2017. The Court outlined, with specificity, the types of documentary evidence that could be considered in reviewing Petitioner’s claim of financial hardship. Petitioner however did not produce any documentation.

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)). In the absence of documentary evidence that supports Petitioner’s alleged income and expenses, the Court is unable to determine whether the proposed wage garnishment repayment schedule would create a financial hardship for Petitioner. Thus, the Court finds Petitioner’s financial hardship claim fails for lack of sufficient proof.

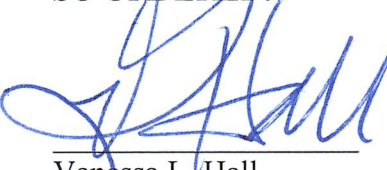
Without a record of evidence from the Petitioner that either refutes or rebuts what the Secretary has presented, the Court must also find that petitioner remains contractually obligated to pay the alleged debt as so claimed by the Secretary.

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**.

The Secretary is authorized to seek collection of this outstanding obligation by means of administrative wage garnishment in an amount equal to the lesser of \$1,441.15 per month or 15% of Petitioner’s monthly disposable pay.

SO ORDERED.



Vanessa L. Hall
Administrative Judge