

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

In the Matter of:

Christopher Dyhrkoff,

Petitioner.

17-VH-0163-AG-045

721009827

March 8, 2018

DECISION AND ORDER

This case is before the Office of Hearings and Appeals upon a *Request for Hearing* ("Hearing Request") filed by Christopher Dyhrkoff ("Petitioner,") on August 21, 2017, 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 pursuant to 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 August 21, 2017, 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 October 23, 2017, the Secretary filed his *Statement* along with documentation in support of his position. To date, Petitioner has failed to comply with the Court's Orders to file sufficient documentary evidence in support of his position that the debt does not exist. 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 August 15, 2015, Christopher Dyhrkoff ("Petitioner") and Jodie Dyhrkoff executed and delivered to the Secretary a Partial Claim Promissory Note ("Note"), dated July 29, 2014, in the amount of \$34,538.05. The Note secured a Subordinate Mortgage held by the Secretary. *Secretary's Statement (Sec'y. Stat.)*, ¶ 2, Ex. 1.

As a means of providing foreclosure relief to Petitioner, HUD advanced funds to Petitioner's FHA insured first mortgage lender; and in exchange for such funds, Petitioner executed the Note in favor of the Secretary. *Sec'y. Stat.*, Ex. 2, ¶ 3 *Declaration of Brian Dillon (Dillon Decl.)*,¹ ¶ 4. By terms of the Note, the amount to be repaid thereunder becomes due and payable when the first of the following events occurs (3)(A)[o]n November 1, 2046 or, if earlier, when the first of the following events occurs: (i) borrower has paid in full all amounts due under the primary note and related mortgage, deed of trust or similar security instrument insured by the Secretary; or (ii) the maturity date of the primary note has been accelerated; or (iii) the primary note and related mortgage, deed of trust or similar security instrument are no longer insured by the Secretary; or (iv) the property is not occupied by the purchaser as his or her principal residence. *Sec'y. Stat.*, ¶ 2, Ex. 1, 3.

On or about April 25, 2016, the Petitioner's first mortgage was paid in full and the FHA mortgage insurance was terminated. *Sec'y. Stat.*, Ex. 1, ¶ 4. Accordingly, HUD has attempted to collect the amount due under the Note, but Petitioner remains indebted to HUD. *Sec'y. Stat.*, Ex. 2, ¶¶ 5-7.

A Notice of Intent to Initiate Administrative Wage Garnishment Proceedings dated June 15, 2017, was mailed to Petitioner at his last-known address. *Sec'y. Stat.*, Ex. 2, ¶ 6.

Petitioner is justly indebted to the Secretary in the following amounts:

- a. \$33,936.68 as the unpaid principal balance as of October 12, 2017;
- b. \$226.16 as the unpaid interest on the principal balance at 1.0% per annum through October 12, 2017;
- c. \$627.60 as the unpaid penalties and administrative costs on the balance through October 12, 2017; and
- d. interest on said principal balance from October 13, 2017, at 1.0% per annum until paid.

Sec'y. Stat., ¶ 7; *Dillon Decl.*, ¶ 5.

To date, Petitioner's wages have been garnished four (4) times, totaling \$318.44. The balance claimed by HUD above reflects receipt of those garnishment payments. *Sec'y. Stat.*, ¶ 10, Ex. 2, *Dillon Decl.*, ¶ 9.

HUD proposes a debt repayment schedule of \$88.62 bi-weekly, or an amount equal to

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

15% of Petitioner's disposable income. *Sec'y. Stat.*, ¶ 7, Ex. 2, ¶ 9.

DISCUSSION

Petitioner does not dispute the amount of the debt. Instead, Petitioner challenges the existence of the debt because he alleges the subject debt was paid off. Along with his *Hearing Request*, Petitioner introduced into evidence copies of a *Confirmation of Loan Pay Off Letter (Confirmation Letter)* from Wells Fargo Mortgage, dated April 21, 2016, a *Substitution of Trustee and Full Reconveyance (Substitution)*, and a *Decree of Divorce (Divorce Decree)* allegedly issued by the District Court of Clark County, Nevada.² *Hearing Request*, Attachments.

After reviewing Petitioner's documentary evidence, the Court has determined that the evidence submitted by Petitioner is insufficient as proof that the subject debt does not exist and is not enforceable. For Petitioner not to be held liable for the full amount of the debt, there must be either a release in writing from the former lender explicitly relieving Petitioner's obligation to HUD, "or valuable consideration accepted by the lender" indicating intent to release. Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (Dec. 22, 1986).

The evidence introduced by Petitioner fails to support Petitioner's contention that the subject debt does not exist because neither document shows Petitioner was released from his contractual obligation to pay this debt. First, the language in the *Substitution* refers only to a debt recorded on October 22, 2010. The debt record in October 2010 is noticeably separate and distinct from the subject debt dated in the Note nearly four years later, on July 29, 2014. This inconsistency alone makes it impossible, chronologically, to reconcile the two debts because the subject debt post-dates the recordation date of the debt in the *Substitution*. Second, the language in the *Confirmation Letter* merely informs Petitioner that Wells Fargo will notify HUD that the "loan is paid off." It does not state that Petitioner was released from the subject debt. In a case such as this one, the onus falls on Petitioner to produce evidence of a written release directly from HUD that specifically states that Petitioner has been discharged from the subject debt, or otherwise proves valuable consideration has been paid in satisfaction of the subject debt. Neither occurred in this case so, accordingly, the Court finds Petitioner's claim fails for lack of proof.

Next, Petitioner submitted a copy of a *Divorce Decree* in which his former spouse, "Jodi L. Dyhrkopp" [sic] was adjudged to assume and pay the Wells Fargo Mortgage. *Hearing Request*, Attached *Divorce Decree*, at 7. While there is no record of Petitioner specifically alleging property distribution by divorce as a basis for not enforcing the subject debt, the Court will, for the record, address this matter as an acknowledgement of Petitioner's additional evidence.

In this case, Petitioner is jointly and severally liable with his former spouse for repayment of the debt according to the terms of the *Note* and, consequently, the Secretary may proceed against any co-signer for the full amount of the debt. Jo Dean Wilson, HUDBCA No. 03-A-CH-AWG09 (Jan. 30, 2003). The *Divorce Decree* herein only determined the rights and liabilities between Petitioner and his former spouse, but not the rights and liabilities between Petitioner and third parties. Kimberly S. Kim. (Thiedel), HUDBCA No. 89-4587-L74 (April 23, 1990). Such a

² The credibility of the *Divorce Decree* is questionable as it reflects the last names of parties that differ from the parties involved in this proceeding. Perhaps this may be a typographical error. But also, the date the Decree was allegedly issued by the District Court of Clark County, Nevada is missing.

document purporting to release Petitioner from his joint-obligation under the *Divorce Decree* does not affect the claims of an existing creditor unless the creditor was a party to the action. Janet T. Rodocker, HUDBCA No. 00-A-CH-AA17 (May 22, 2000).

While Petitioner may be divorced from his former spouse, neither the Secretary nor the lender was a party to that divorce action. So, as a recourse, Petitioner may seek to enforce, in the state or local court, the divorce decree that was granted to his former spouse so that Petitioner may recover from his former spouse monies paid by him to HUD in satisfaction of subject debt. See William Holland, HUDBCA No. 00-A-NY-AA83, dated Oct. 12, 2000; Michael York, HUDBCA No. 09-1-1-CH-AWG36 dated June 26, 2009, at 3. That course of action of course would be separate and distinct from this proceeding. Hence, in this case, without proof of a written release directly from HUD, Petitioner remains obligated to pay the subject debt as a co-signor on the *Note*.

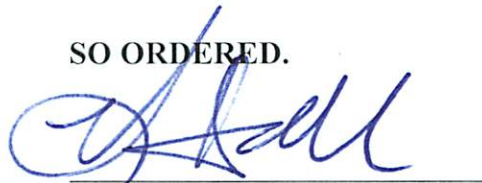
ORDER

Based on the foregoing, I find that the debt that is the subject of this proceeding exists and is enforceable in the amount alleged by the Secretary.

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 at 15% of Petitioner's disposable income.

SO ORDERED.



Vanessa L. Hall
Administrative Judge

Review of determination by hearing officers. A motion for reconsideration of the Court's written decision, specifically stating the grounds relied upon, may be filed with the undersigned Judge of this Court within 30 days of the date of the written decision, and shall be granted only upon a showing of good cause.