

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

In the Matter of:

**Robert Winter,**

Petitioner.

17-VH-0191-AG-069

721008894

September 28, 2018

**DECISION AND ORDER**

On August 28, 2017, Robert Winter ("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. § 3720A), authorizes federal agencies to use administrative wage garnishment as a mechanism for the collection of debts allegedly 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 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 30, 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 18, 2017, the Secretary filed his *Statement* along with documentation in support of his position. On December 19, 2017, Petitioner filed his *Reply to the Order for Documentary Evidence*, along with documentary evidence in support of his position in response to the orders issued by this Court. This case is now ripe for review.

**FINDINGS OF FACT**

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.

On or about January 13, 2015, the HUD-insured loan on Petitioner's home was in default, and Petitioner was threatened with foreclosure. *Sec'y. Stat.*, ¶ 2; Ex. A, *Declaration of Gary Sautter*<sup>1</sup> ("*Sautter Decl.*"), ¶ 4. To prevent the lender from foreclosing, HUD advanced funds to Petitioner's lender to bring the primary note current. *Sec'y. Stat.*, ¶ 3; Ex. A, *Sautter Decl.*, ¶ 4.

On January 27, 2015, Petitioner executed a *Subordinate Note* ("Note" or "Subordinate Note") in the amount of \$5,557.57, in exchange for HUD advancing funds to Petitioners' FHA insured mortgage lender. *Sec'y. Stat.*, ¶ 4; Ex. B ("Note"), at 1, ¶ 2. The Note described four events that would make the debt immediately due and payable. *Sec'y. Stat.*, ¶ 5; Note, at 1, ¶ 4. One of these events was the payment in full of the primary note and related mortgage. *Id.* On or about March 4, 2016, the insurance on the first mortgage was terminated, as the mortgage was paid in full. *Sec'y. Stat.*, ¶ 6; Ex. A, *Sautter Decl.*, ¶ 4.

HUD states that it has attempted to collect on the Note from Petitioner, but without success. *Sec'y. Stat.*, ¶ 8; Ex. A, *Sautter Decl.*, ¶ 5. Consequently, the Secretary alleges that Petitioner is indebted to HUD in the following amounts:

- a. \$5,557.57 as the unpaid principal balance as of March 30, 2017;
- b. \$27.78 as the unpaid interest on the principal balance at 1% per annum through March 30, 2017;
- c. \$369.90 as the unpaid penalties and administrative costs on the balance through March 30, 2017; and
- d. Interest on said principal balance from April 1, 2017, at 1% per annum until paid.

*Sec'y. Stat.*, ¶ 9; Ex. A, *Sautter Decl.*, ¶ 5.

HUD sent a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings dated August 1, 2017 to Petitioner. *Sec'y. Stat.*, ¶ 10; Ex. A, *Sautter Decl.*, ¶ 6. In accordance with 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was afforded the opportunity to enter into a written repayment agreement with HUD under mutually agreeable terms. Petitioner has not entered into a written repayment agreement in response to the Notice. *Sec'y. Stat.*, Ex. A, *Sautter Decl.*, ¶ 7.

## **DISCUSSION**

In this case, Petitioner challenges the legal enforceability of the alleged debt by claiming that: (1) Nationstar Mortgage, LLC, operating as HUD's agent, represented to Petitioner that the subject debt would be paid off with the primary mortgage (*Pet'r's' Reply.*, pp. 3-5.); and, (2) a discrepancy exists between the principal amount due as reflected in the Note and the principal amount claimed by the Secretary. (*Pet'r's' Rep.*, p. 5.)

### **I. Agency Relationship**

Petitioner alleges that Nationstar Mortgage, LLC is an agent of HUD and that Nationstar Mortgage, LLC, operating as HUD's agent, represented to Petitioner that the subject debt would be paid off with the primary mortgage. More specifically, Petitioner claims that:

---

<sup>1</sup> Mr. Sautter is the Acting Director of the Asset Recovery Division of HUD's Financial Operations Center.

The Winters [herein Petitioner and his wife] are not liable on the Subordinate Mortgage and/or Subordinate Note as HUD, through its agent, Nationstar, indicated that the Notes would be collectively paid in full. The Winters entered into a Loan Modification Agreement with Nationstar and a Subordinate Mortgage at the same time. Nationstar drafted and presented all documents to the Winters, including the Subordinate Note and Subordinate Mortgage, at the same time. No HUD representatives ever communicated with the Winters regarding the Subordinate Note and/or Subordinate Mortgage. All communications relating to the Subordinate Note and Subordinate Mortgage were with Nationstar and not HUD. Nationstar always acted on HUD's behalf throughout the loan modification process.

*Pet'r's Rep.*, pp. 3-5.

According to Petitioner, "In spite [of] Nationstar's representations that the Modification Agreement and Subordinate Mortgage were joint documents with one common payoff and in spite of Nationstar having been paid, HUD is still attempting to collect on its promissory note and mortgage." *Pet'r's' Rep.* at 3. Petitioner concluded that because HUD delegated all tasks associated with drafting and executing documents to Nationstar, "Nationstar had the apparent authority to act for and on behalf of HUD." Petitioner further concluded that, "It was perfectly reasonable, under the circumstances, to rely on the belief that Nationstar could agree to the payoff for HUD." *Pet'r's' Rep.* at p. 5.

As support, Petitioners submitted, along with his *Reply*, documentary evidence including copies of the Survivorship Deed; Open-End Mortgage; Assignment of Mortgage; Loan Modification Agreement; Subordinate Mortgage; Subordinate Note; an email from Land Title to counsel for Petitioners dated March 24, 2017; a written note dated February 17, 2016; the Paid In Full Note for FHA# 412-6776213-703; an undated payoff letter from Nationstar Mortgage LLC; a certificate of release of Nationstar Mortgage # 0605802479; a general warranty deed; and, the Demand Notice for the subject debt.

Citing 24 C.F.R. Part 203, *et seq.*, the Secretary claims, in response, that "It is important to note at the outset that FHA-insured lenders are regulated by HUD and must act in accordance with HUD's program requirements." "While the regulations and Mortgagee Letter require mortgagees to facilitate the borrower's execution of the subordinate note and subordinate mortgage," explains the Secretary, "nowhere in the regulations or guidance does it permit a mortgagee to provide payoff figures for HUD and/or issue a mortgage satisfaction extinguishing HUD's indebtedness without HUD's express consent." *Sec'y. Stat.*, Ex. C, Mortgagee Letter 2013-19 (May 21, 2013). The Secretary maintains further that, "HUD has its own contractor, Novad Management Consulting, that is responsible for handling payoff requests for single-family HUD-held assets--including partial claim subordinate notes--and this information is readily available on HUD's website." *Sec'y. Stat.*, Ex. D. The Secretary finally contends that "the Note itself explicitly states where payment on the Note should be made when it became due and payable." *Sec'y. Stat.*, Ex. B., Note at ¶ 4(B).

In support of his position, the Secretary submitted, along with his *Statement*, documentary evidence including copies of an affidavit from the Director of HUD's Financial

Operation Center; the Subordinate Note signed by Petitioner; Mortgagee Letter 2013-19 (May 31, 2013); and, information on the responsibilities of the Secretary-Held Assets Servicing Contractor.

As a preliminary matter, the Court must first address what defines an agency relationship based on Ohio law. For an agency relationship to exist between HUD and Nationstar Mortgage, certain criteria must be met. First, HUD must exhibit actions that represented Nationstar Mortgage as its agent; and second, Petitioners must have known of these actions and had reason to believe, and did believe in good faith, that Nationstar Mortgage was an agent of HUD. Brainard v. Am. Skandia Life Assur. Corp., 432 F.3d 655, 662–63 (6th Cir. 2005). “[A] court’s focus during an inquiry into the existence of apparent authority must be on the acts of the principal and whether those actions manifested a conveyance of authority to the agent.” Id at 663.

In this case, HUD’s actions do not form a reasonable basis for concluding that HUD authorized Nationstar Mortgage to act on its behalf and discharge payoffs of subordinate mortgages, or that HUD conveyed apparent authority for Nationstar Mortgage to operate as its agent. HUD is a regulatory body overseeing FHA-insured lenders and acts in accordance with statutory requirements. See 24 C.F.R. § 203, et seq. In this case, Petitioner was threatened with foreclosure on January 13, 2015 and HUD advanced funds to Petitioner’s lender to prevent foreclosure in accordance with 24 C.F.R. § 203.371(b). One of the conditions for this payment or advancement of funds is the execution of a Subordinate Mortgage which the lender, by regulation, must facilitate. See 24 C.F.R. § 203.371(c).<sup>2</sup>

Petitioner states that “HUD’s only communications to Petitioner were the Subordinate Note and Subordinate Mortgage.” *Pet’r’s’ Reply* at 1. But, neither document identifies Nationstar Mortgage as an agent for HUD. Instead the Subordinate Note, acknowledged by Petitioner as received, provide in unambiguous terms where payments on the Note should be submitted: “**Office of Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, SW, Washington, DC 20410** or any such other place as [HUD] may designate in writing by notice to borrower.” (emphasis in original); *Pet’r’s’ Reply*, Ex. 10; *Sec’y. Stat.*, ¶ 7. Further, the Secretary indicates that “HUD has its own contractor, Novad Management Consulting, that is responsible for handling payoff requests for single-family HUD-held assets – including partial claim subordinate notes – and this information is readily available on HUD’s website. *Sec’y. Stat.*, ¶ 17, Ex. D, Secretary-Held Assets Servicing Contractor online at [https://www.hud.gov/program\\_offices/housing/sfh/nsc/fmaddr](https://www.hud.gov/program_offices/housing/sfh/nsc/fmaddr).

The evidence presented by Petitioners was insufficient and did not convince the Court that Nationstar had apparent authority to act as HUD’s agent. Without evidence to refute the evidence presented by the Secretary, Petitioners fall short of meeting their burden of proof in support of their position. As a result, the Court finds that HUD’s actions do not reflect with certainty that HUD intended to appoint Nationstar as its agent and further finds that Petitioners did not possess a good faith belief that Nationstar Mortgage operated as HUD’s agent.

---

<sup>2</sup> 24 C.F.R. § 203.371 (c) – Partial claim. (c) Repayment of the subordinate lien. The mortgagor must execute a mortgage in favor of HUD with terms and conditions acceptable to HUD for the amount of the partial claim under §203.414(a). HUD may require the mortgagee to be responsible for servicing the subordinate mortgage on behalf of HUD.

## II. Discrepancy on the Amount Owed

Next, Petitioner alleges that HUD is attempting to collect more than the amount stated in the Note. *See Pet'r's' Reply* at 3, Ex. 14. Petitioner received a letter, dated February 13, 2017, from the Department of the Treasury alleging that Petitioner owed HUD \$7,610.87. *Pet'r's' Rep.*, Ex. 14. The Secretary concedes that the principal owed by Petitioner is \$5,557.57, as also claimed by Petitioner. *Sec'y. Stat.*, ¶ 9; Ex. A, *Sautter Decl.*, ¶ 5. However, interest and penalties continued to accrue from the date the Subordinate Note became due and payable.

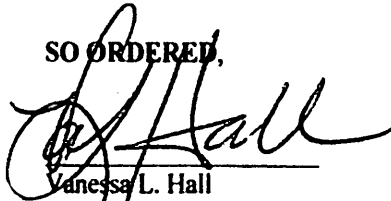
Under 31 U.S.C. § 3717<sup>3</sup>, and 31 C.F.R. 901.9<sup>4</sup>, HUD can charge interest and penalties toward debts owed. *Sec'y. Stat.*, Ex. A, *Sautter Decl.*, ¶ 8. After the primary mortgage was paid in full, the Note immediately became due and payable. The principal amount has since accrued additional interest and penalties for which Petitioner is also responsible. So, the amount of \$7610.87 includes the additional interest and penalties on the principal amount of \$5,557.57 as required by law. Accordingly, the Court finds that Petitioner is obligated to pay not only the principal amount so claimed by the Secretary, but also the additional interests and penalties accrued herein.

### 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 the amount of \$167.00 per month, which will liquidate the debt in three years as recommended by the Federal Claims Collection Standards, or 15% of Petitioner's disposable pay.

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 20 days of the date of the written decision, and shall be granted only upon a showing of good cause.

---

<sup>3</sup> 31 U.S.C. § 3717 (a)(1) The head of an executive, judicial, or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point.

<sup>4</sup> 31 C.F.R. 901.9 (a) Except as provided in paragraphs (g), (h), and (i) of this section, *agencies shall charge interest, penalties, and administrative costs on debts owed to the United States pursuant to 31 U.S.C. 3717*. An agency shall mail or hand-deliver a written notice to the debtor, at the debtor's most recent address available to the agency, explaining the agency's requirements concerning these charges except where these requirements are included in a contractual or repayment agreement. These charges shall continue to accrue until the debt is paid in full or otherwise resolved through compromise, termination, or waiver of the charges. (emphasis added)