

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

In the Matter of:

Sula Adams,

Petitioner.

17-VH-0213-AG-087

721010638

November 16, 2018

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a *Request for Hearing* (*Hearing Request*) filed on September 19, 2017, by Petitioner Sula Adams (“Petitioner”) concerning the existence, amount, or enforceability of the payment schedule of the 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 31 C.F.R. § 285.11(f)(4), on September 19, 2017, this Court stayed the issuance of a wage garnishment order until the issuance of this written decision. (*Notice of Docketing, Order and Stay of Referral* (“*Notice of Docketing*”) at 2. On September 29, 2017, the Secretary filed his *Statement* (*Sec’y. Stat.*) along with documentation in support of his position. Petitioner filed, along with her *Hearing Request*, documentary evidence on September 19, 2017, and subsequently on November 6, 2017, Petitioner filed a brief written *Statement*, along with additional evidence, alleging financial hardship. This case is now ripe for review.

FINDING OF FACTS

This debt resulted from a defaulted loan which was insured against non-payment by the Secretary, from an overpayment by HUD, from delinquent rent payments due to HUD, or due to other reasons.

In this case, on June 10, 2015, Petitioner sought financial assistance from HUD to help her avoid possible foreclosure of her mortgage with her primary lender, PennyMac ("primary lender"). HUD loaned Petitioner the sum of \$78,478.13 to help her avoid defaulting on her mortgage with PennyMac. *Secretary's Statement*, ("Sec'y Stat."), ¶ 4; Ex. A, Declaration of Gary Sautter, ("Sautter Decl."), Acting Director of Asset Recovery Division, HUD Financial Operations Center, ¶ 4). Petitioner executed and duly delivered a subordinate note ("Note"), evidencing this loan to HUD. *Sec'y Stat.*, Ex. B, Note, dated June 10, 2015.

Under the terms of the Note, Petitioner was to pay the principal amount of the unpaid balance on the Note until it was paid in full. *Sec'y Stat.*, Ex. B, ¶2. The Note cited specific events that could cause the remaining unpaid balance of the debt to become immediately due and payable - one of which was when Petitioner's underlying mortgage to her primary lender was refinanced or otherwise paid in full. *Sec'y Stat.*, Ex. B, ¶¶ 4(A)(i) & (iii).

On or before October 3, 2016, Petitioner's primary lender notified HUD that Petitioner's underlying mortgage with PennyMac had been paid in full. This automatically triggered both the termination of PennyMac's insurance contract with the Federal Housing Administration, as well as the provisions of ¶ 4(A)(i) & (iii) of the Note, requiring Petitioner to pay the full amount owed under the Note to HUD. HUD, thereafter, made its demand upon Petitioner to pay the amounts owed, but Petitioner failed to do so. Thus, the Secretary alleges that Petitioner is indebted to HUD in the following amounts:

- a) \$78,487.13 as the unpaid principal balance as of August 31, 2017;
- b) \$326.85 as the unpaid interest on the principal balance at 1% per annum through August 31, 2017;
- c) \$4,759.71 as the unpaid penalties and administrative costs through August 31, 2017; and
- d) interest on said principal balance from September 1, 2017 at 1% per annum until paid.

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

On August 25, 2017, a Notice of Intent to Initiate Wage Garnishment Proceedings ("Notice") was mailed to Petitioner. *Sec'y Stat.*, ¶ 10; Ex. A, *Sautter Decl.*, ¶ 7. Pursuant to 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was given an opportunity to enter a written repayment agreement under terms acceptable to HUD. *Sec'y Stat.*, ¶ 11, Ex. A, *Sautter Decl.*, ¶ 7. Petitioner did not provide a copy of her most recent pay statement before the Secretary submitted his statement on September 29, 2017. *Sec'y Stat.*, ¶ 15; Ex. A, *Sautter Decl.*, ¶ 9. As a result, the Secretary proposes a repayment schedule in the amount of \$2,321.24 per month or, in the alternative, the Secretary proposes a repayment schedule of 15% of the Petitioner's disposable income. *Sec'y Stat.*, ¶ 15, Ex. A, *Sautter Decl.*, ¶ 9.

DISCUSSION

Petitioner maintains that she should not be held responsible for the subject debt because: 1) it should have been paid off at closing by PennyMac Mortgage; and, 2) imposition of the proposed wage garnishment would create a financial hardship. Petitioner introduced, as support for her position, copies of the PennyMac Loan Services, LLC agreement; the Affidavit of Abby Robertson, attorney for the property's purchaser; the HUD Mortgagee Payoff Letter; PennyMac balance statements as proof of alleged "forgiveness amounts;" Petitioner's pay statement for September 2017; and, a list of Petitioner's monthly expenses, along with supporting documentation, to substantiate her claim of financial hardship.

First, Petitioner states that PennyMac Mortgage incorrectly identified the amounts owed in this case as "forgiveness amounts." *Hearing Request* at 1. But, Petitioner later was informed that PennyMac Mortgage would satisfy both mortgages [primary and subordinate], "upon payment as provided in their payoff statement." *Petitioner's Statement (Pet'r's Stat.)*, Attached Letter (Abby Robertson), dated June 12, 2017. Petitioner discovered, however, that PennyMac later indicated that "they will not satisfy the second mortgage on the property," and also acknowledged that the information they provided earlier was in error. *Id.*

After examining Petitioner's documentary evidence, the Court has determined that Petitioner has failed to meet her burden of proof that the debt herein is fully satisfied and thus unenforceable. The Secretary's right to collect the alleged debt in this case emanates from the terms of the Note, not from the representations made by a mortgage company or title company. Bruce R. Smith, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). For Petitioner not to be held liable for the full amount of the debt, Petitioner must produce either a release in writing from the former lender explicitly relieving Petitioner's obligation under the terms of the Note, or, produce "valuable consideration accepted by the lender" that indicates HUD's intent to release. Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (Dec. 22, 1986). Petitioner has failed to produce either in this case. Instead, the evidence submitted by Petitioner merely demonstrates that Petitioner was provided erroneous information from PennyMac Mortgage upon which Petitioner relied upon as binding.

It is well established that "assertions without evidence are insufficient to show that the debt claimed by the Secretary is not past due and legally enforceable." Sara Hedden, HUDOA No. 09-H-NY-AWG95 (July 8, 2009), quoting Bonnie Walker, HUDBCA No. 95-G-NY-T300 (July 3, 1996). Therefore, the Court must find that the evidence presented by Petitioner is insufficient and that Petitioner remains contractually obligated to pay the debt so claimed by the Secretary.

Next, Petitioner contends that if there is a finding that she is responsible for the subject debt, imposition of the proposed wage garnishment would create a financial hardship. While financial hardship does not invalidate a debt or release a debtor from the obligation to pay, financial hardship factors are relevant in determining the amount of administrative garnishment that will be allowed. See Raymond Kovalski, HUDBCA No. 87-1681-G18 (December 8, 1986);

See 31 C.F.R. §§ 285.11(f)(2) and (k)(3). Here, Petitioner's disposable income for purposes of administrative wage garnishment is defined as that part of Petitioner's compensation that remains after the deduction of health insurance premiums and any amounts required by law to be withheld. Such deductions include social security taxes and withholding taxes, but not amounts withheld pursuant to court order. See 31 C.F.R. § 285.11 (c).

In this case, Petitioner receives \$6,916.53 for her monthly gross income, before deductions required by law that, here, total \$2253.28 for FICA, FIT, Medicare, State Tax, and insurance. Thus, after deductions, Petitioner's monthly disposable income is \$4663.25.

Petitioner has produced sufficient evidence for the Court to determine whether the Secretary's proposed garnishment amount would cause financial hardship. Petitioner's essential monthly expenses include: three substantiated student loan payments, \$1,072.84; auto loan, \$588.99; monthly auto insurance, \$393.47; gasoline, \$360; rent, \$1,200 (includes utilities); and, a valid cell phone payment, \$308. Petitioner's total for essential monthly expenses is \$3923.30. The cable television at \$225 per month was excluded as non-essential from the Court's calculations. While it is customary for the Court to credit expenses necessary to run any household, such as costs for basic food, clothing, and shelter, such documentation to substantiate food expenses (i.e. grocery) was missing from Petitioner's evidence. *Michelle Edwards*, HUDOHA No. 12-M-CH-AWG23, at 3; *In re: Elva and Gilbert Loera*, HUDBCA No. 03-A-CH-AWG28 (July 30, 2004). Acknowledging that food is a basic essential, the Court will adopt Petitioner's calculation of monthly expenses at \$4271.36 and use the difference between the Court's calculation at \$3923.30, and Petitioner's calculation of \$4271.36, as the amount that captures Petitioner's monthly allotment for food at \$348.06 [$\$4271.36 - 3923.30 = \348.06].

Petitioner's monthly disposable income of \$4663.25, less her total monthly essential household expenses of \$4271.36, yields a positive balance of \$391.89 per month to cover non-essential monthly expenses. However, at a 15% garnishment rate, Petitioner's monthly garnishment payment would be \$699.48, and at a 10% garnishment rate, would be \$466.32, both of which obviously exceed the positive balance calculated \$391.89 after expense deductions. Petitioner would have, at 15%, a negative balance of (-\$307.59) at the end of the month and, at 10%, a negative balance of (-\$74.43) at the end of the month. Petitioner would be left with no balance to cover non-essential expenses by the end of each month.

Pursuant to 31 C.F.R. §285.11(e)(8)(ii), this Court has the discretion to modify the Secretary's proposed repayment schedule if there is a bona fide showing of financial hardship based on the record and such has been proven in this case. The Court finds that Petitioner has successfully persuaded the Court, with sufficient documentation, that imposition of the proposed garnishment amount at the rate of 15% would in fact create a financial hardship for Petitioner.

While the Secretary has successfully proven that the debt is past due and enforceable, the 15% garnishment rate is burdensome for Petitioner. But, the Court will use its discretionary power under 31 C.F.R. §285.11(e)(8)(ii) to modify the Secretary's proposed repayment schedule

at the rate of 15%, by reducing the garnishment rate to 5%. The proposed garnishment rate shall be reduced from 15% to a garnishment rate of 5% of Petitioner's monthly disposable income, unless Petitioner's financial circumstances otherwise improve in the future.

ORDER

Based on the foregoing, the Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative wage garnishment is **VACATED**.

The Secretary is authorized to seek collection of this outstanding obligation by means of administrative wage garnishment an amount equal to 5% of Petitioner's monthly disposable income.

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.