

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

In the Matter of:

Kelly Gullingsrud,

Petitioner.

17-VH-0215-AG-089

721010528

April 19, 2019

DECISION AND ORDER

This case is before the Office of Hearings and Appeals upon a *Request for Hearing* ("*Hearing Request*") filed by Kelly Gullingsrud ("Petitioner,") on September 19, 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"), and responding to the *Notice of Intent to Initiate Administrative Wage Garnishment Proceedings* issued to Petitioner on August 25, 2017.¹

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 September 19, 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 December 6, 2017, the Secretary filed his *Statement* along with documentation in support of his position. On January 5,

¹ Petitioner later filed another Notice of Intent to Initiate Administrative Wage Garnishment Proceedings dated March 1, 2018. The Court determined that the debt at issue in the later submission was identical to the subject debt reflected in the *Hearing Requests* submitted with the earlier Notice because it reflected the same FedDebt Case Identification Number, 6434660, as before.

2018 and March 27, 2018, Petitioner filed *Petitioner's Answer to Secretary's Statement (Petitioner's Answer)* and Petitioner's Letter, respectively, along with documentary evidence in support of her position. 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 April 8, 2014, Kelly Gullingsrud ("Petitioner") executed and delivered to the Secretary a Subordinate Note ("Note") in the amount of \$ 43,163.41. The Note secured a Subordinate Mortgage (Mortgage) held by the Secretary. *Secretary's Statement*, (Sec'y. Stat.) Ex. 2, Note.

As a means of providing foreclosure relief to Petitioner, HUD advanced funds to Petitioner's FHA insured mortgage lender; and in exchange for such funds, Petitioner executed the Note in favor of the Secretary. *Sec'y. Stat., Ex. 1, Declaration of Brian Dillon*² (*Dillon Decl.*), ¶ 4.

By terms of the Note, the amount to be repaid thereunder becomes due and payable when the first of the following events occurs: "(4)(A) on April 1, 2044, or, if earlier, when...(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., Ex. 2, ¶ 4.*

On or about November 15, 2016, the FHA mortgage insurance on Petitioner's primary mortgage was terminated as the primary lender indicated the primary mortgage was paid in full. *Sec'y. Stat., Ex. 1, Dillon Decl.*, ¶ 4. HUD has attempted to collect the amount due under the Note, but Petitioner remains indebted to HUD. *Sec'y. Stat., Ex. 1, Dillon Decl.*, ¶ 5.

A Notice of Intent to Initiate Administrative Wage Garnishment dated April 17, 2016, was mailed to Petitioner at her last-known address. *Sec'y. Stat., Ex. 1, Dillon Decl.*, ¶ 4-5. Petitioner is justly indebted to the Secretary in the following amounts:

- a. \$42,584.98 as the total unpaid principal balance as of October 30, 2017;
- b. \$70.94 as the unpaid interest on the principal balance at 1% per annum through October 30, 2017; and
- c. interest on said principal balance from November 1, 2017 at 1% per annum until paid.

Sec'y. Stat., Ex. 1, Dillon Decl., ¶ 5.

² Brian Dillon is Director of Asset Recovery Division for the U.S. Housing and Urban Development.

HUD proposes a debt repayment schedule of \$88.62 bi-weekly, or an amount equal to 15% of Petitioner's disposable income. *Sec 'y. Stat., ¶ 7, Ex. 2, ¶ 9.*

DISCUSSION

Petitioner first disputes the amount of the subject debt and contends the subject debt does not exist because it was paid off. More specifically, Petitioner claims:

I am attaching documentation that I had received in regard to this debt. In June of 2016 I reached out to my mortgage company (Nation Star) in regard to doing a modification and was told by Monica Vu about this debt (see attached Exhibit A). I contacted the Lien Release Department with this information and corresponded with Perry Hazel (Exhibit B). Ms. Hazel said that they would execute a satisfaction and sent me a copy of the same (Exhibit C); therefore, I do not owe this debt.

As support, Petitioner offered into evidence copies of email communications between Petitioner and Nationstar Mortgage, a *Satisfaction of Mortgage* dated August 4, 2016, the Note associated with the subject debt, and a *Notice of Servicing Transfer* from PHH Mortgage to Nationstar in which Petitioner was notified that mortgage payments going forward would be collected by Nationstar Mortgage. *Hearing Request, Attachments; Petitioner's Answer, Attachments; and Petitioner's Documentary Evidence (Petitioner's Evidence).*

After reviewing the record of evidence, the Court has determined that the evidence introduced by Petitioner falls short of meeting her burden of proof that the subject debt no longer exists and is unenforceable. 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 her contention that the subject debt does not exist because none of the documentation proves that Petitioner was directly released by HUD from her contractual obligation to pay this debt. First, the language in the email communications state, "We received your request for the lien release, and I have executed it and it is currently being e-recorded. I will provide you with all the information once it is available, which most likely is tomorrow. In the interim, I am attaching the **UNRECORDED** release for your records. Once I have the recording information, I will send it to you." (Emphasis in original). *Petitioner's Answer, Ex. B.* The release attached was first, unrecorded; and second, not issued directly by HUD to Petitioner.

Second, the *Satisfaction of Mortgage* offered does not state that Petitioner was released from the subject debt. Instead it reflects that Petitioner was released from the primary mortgage. In this case, the onus falls on Petitioner to produce evidence of a written release directly from HUD that specifically states that HUD has discharged Petitioner from the subject debt, or otherwise proves that valuable consideration has been paid in satisfaction of the subject debt. The Secretary's right to collect the alleged debt in this case emanates from the terms of the Note, not from the terms of a *Satisfaction of Mortgage* for the primary mortgage that is not associated with

the subject debt. See Bruce R. Smith, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). The title company's *Satisfaction of Mortgage* does not provide sufficient evidence that Petitioner has been released from the subject debt. Because Petitioner has failed to produce evidence of a written release from HUD for his obligation to pay the subject debt, or evidence of valuable consideration paid by Petitioner to HUD in satisfaction of the subject debt. Since neither occurred in this case, the Court finds, accordingly, that Petitioner's claim fails for lack of sufficient proof.

Next, Petitioner claims that the proposed administrative wage garnishment would create a financial hardship. Herein, Petitioner alleges in her *Answer* that:

HUD was only wanting me to enter into a payment arrangement of \$1,186.12 per month to repay this debt, a debt I do not believe that I owe, and that amount is more than fifty percent of my monthly income and I am a single mother; therefore impossible.

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 such a case, 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). An allegation of financial hardship alone is not sufficient to convince the Court that the proposed repayment scheduled would create a financial hardship for Petitioner.

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, expenses, and potential financial hardship, the Court is unable to determine whether Petitioner's claim of financial hardship is credible. As a result, Petitioner's claim again fails for lack of proof.

Finally, Petitioner contends, "There is a big discrepancy as to the amount HUD is claiming I owe. In the document submitted to the Court on December 6, 2017, the amount is \$43,163.41; however, the amount listed on my wage garnishment document shows the balance I owe is \$58,804.51 (this document has previously been submitted to the Court)." Based on the record, an apparent lapse of time has transpired since the issuance of the Notice of Intent in this case and the amount reflected in the record as the current amount owed on the subject debt. Petitioner may wish to discuss or clarify this matter further, if feasible, with either Counsel for the Secretary or Michael DeMarco, Director, HUD Albany Financial Operations Center, 52 Corporate Circle, Albany, NY 12203-5121, or call 1-800-669-5152, extension 2859. Otherwise, based on the evidence available in the record, the amount so claimed by the Secretary is currently owed by Petitioner.


ORDER

Based on the foregoing, the Court finds 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 on September 19, 2017 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 and **FURTHER ORDERED** that Petitioner shall make such information regarding her disposable income available.

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.