

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

In the Matter of:

Cynthia Rivera,

Petitioner.

18-VH-0115-AG-059

721009780

June 6, 2019

DECISION AND ORDER

This case is before the Office of Hearings and Appeals upon a *Request for Hearing* ("*Hearing Request*"), along with documentary evidence, filed by Cynthia Rivera ("Petitioner,") on February 21, 2018, 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 AND STANDARD OF REVIEW

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 February 21, 2018, 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 March 6, 2018, the Secretary filed his *Statement* along with documentation in support of his position. On February 21, 2018 and March 6, 2018, Petitioner filed a statement and documentary evidence in support of her 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.

In February 2011 and again in October 2014, the HUD-insured primary mortgage on Petitioner's home was in default, and Petitioner was threatened with foreclosure. *Sec'y. Stat.*, ¶ 2; Ex. A, *Declaration of Brian Dillon*¹ ("*Dillon 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, *Dillon Decl.*, ¶ 4.

In exchange for foreclosure relief, on February 11, 2011 and October 9, 2014, Petitioner executed *Subordinate Notes* ("*Notes*") in the amount of \$20,298.16 and \$22,919.35, respectively, in favor of the Secretary. *Sec'y. Stat.*, ¶ 4; Ex. B ("*Note*"), at 1, ¶ 2. Paragraph 4(A) of the Note described four events that would make the debt immediately due and payable. *Sec'y. Stat.*, ¶ 5; Note, at 1, ¶ 4. One of those events is payment in full of the primary note. *Id.* On or about November 15, 2016, the FHA insurance on Petitioner's primary mortgage was terminated when the primary lender notified the Secretary that the primary note was paid in full. *Sec'y. Stat.*, ¶ 6; Ex. A, *Dillon Decl.*, ¶ 4.

Upon payment in full of the primary note, Petitioner was to make payment to HUD on the Note at the "Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 2488 E 81st St., Suite 700, Tulsa, OK 74137 or any such other place as [HUD] may designate in writing by notice to Borrower." *Sec'y. Stat.*, ¶ 5; Note, at 1, ¶ 4(B). Petitioner failed to make payment on the Note at the place and in the amount specified above. Consequently, Petitioner's debt to HUD is delinquent. *Sec'y. Stat.*, ¶ 8; Ex. A, *Dillon Decl.*, ¶ 5.

The Secretary has made efforts to collect this debt from Petitioner but has been unsuccessful. *Sec'y. Stat.*, ¶ 9; Ex. A, *Dillon Decl.*, ¶ 5. Therefore, Petitioner is justly indebted to the Secretary in the following amounts:

- (a) \$43,217.51 as the unpaid principal balance as of February 28, 2018;
- (b) \$163.27 as the unpaid interest on the principal balance at 1% per annum through February 28, 2018; and,
- (c) Interest on said principal balance from March 1, 2018 at 1% per annum until paid.

Sec'y. Stat., Ex. A, *Dillon Decl.*, ¶ 5.

A Notice of Intent to Initiate Administrative Wage Garnishment Proceedings dated July 15, 2017 ("*Notice*") was sent to Petitioner. *Id.* at ¶ 5. 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. *Sec'y. Stat.* ¶ 11, Ex. A, *Dillon Decl.*, ¶ 7. However, to date, Petitioner has not entered into any such agreement.

HUD proposes a debt repayment schedule of \$1204.02 per month, or an amount equal to 15% of Petitioner's disposable income. *Sec'y. Stat.*, ¶ 19.

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

DISCUSSION

Petitioner does not dispute the amount of the subject debt. Instead, Petitioner challenges the existence of the debt because Petitioner claims the subject debt has already been paid off by OCWEN Mortgage on her behalf. More specifically, Petitioner claims, "When I sold my property, which was a multi-family property that I had occupied a portion of, OCWEN was paid off, and a discharge of mortgage was recorded." Petitioner adds:

I am not aware of any payment owed to HUD and unaware as to why this debt is being collected. It is my understanding that there is no debt owed after the sale of my home over 2 years ago. Please provide me with a copy of HUD records to prove this debt is owed. I am also requesting an immediate extension for further review of ROD records in order to appeal the process for the determination of enforceable Treasury offset, and this will cause a financial hardship. I will have a legal representative assisting me with this matter.

Letter from Petitioner (Pet'r March Letter) dated March 24, 2017.

While Petitioner states in her *Hearing Request* that her intent was to seek legal counsel in this matter, the Court has yet to be notified by Petitioner that she subsequently acquired legal representation. So, the Court shall review based on the evidence presented to date by Petitioner. As support for her position, Petitioner offers as evidence copies of a *Mortgage Instrument* dated October 31, 2008; a *Settlement Statement* from Residential Mortgage Services dated June 30, 2015; a *Release of Mortgage* from OCWEN Loan Servicing LLC dated July 7, 2015; and two different *Notices of Intent* to Petitioner to collect by Administrative Wage Garnishment, dated June 15, 2017, and another by Administrative Offset, dated February 6, 2017. *Hearing Request*, Attachments.

After reviewing the record of evidence, the Court has determined that Petitioner has failed to meet her burden of proof that the subject debt no longer exists or is paid in full. The evidence introduced by Petitioner is not only insufficient, but also fails to prove that Petitioner was released from her obligation to pay 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 *Release of Mortgage* from the primary lender or from a *Settlement Statement* at closing. See 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, 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).

Herein, the *Release of Mortgage* from the primary lender and the *Settlement Statement* at closing fail to show discharge of Petitioner from her contractual obligation of said debt. First, the *Release of Mortgage* refers only to the primary mortgage as paid in full. It does not refer to payment in full of the subject debt owed to HUD. Second, the *Settlement Statement* from the closing does not list the subject debt as one of the debts that was paid in full upon settlement. The onus ultimately 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. If a written release does not exist, then sufficient evidence must be offered to prove that valuable consideration has

been paid by Petitioner to satisfy the debt herein. Neither occurred in this case so, accordingly, the Court finds that Petitioner's claims fail for lack of sufficient proof.

Next, Petitioner offers as evidence a copy of a *Demand Notice* to collect by administrative offset. However, submission of this Notice in this case is not relevant to the outcome of the Court's review of the Secretary's proposed repayment schedule to collect by means of administrative wage garnishment. Petitioner has the right, upon receipt of a *Demand Notice* for Administrative Offset, to file with the Court a separate request for review on appeal of the offset. But this is not the appropriate forum to address the offset claim. *See* 31 C.F.R. § 285.11(f)(8)(ii). *See also Donald McMillan*, HUDOA No. 09-H-NY-AWG03 (April 6, 2009).

Finally, Petitioner claims that if the proposed repayment schedule is authorized, it "will cause a financial hardship." *Pet'r March Letter*. Petitioner however did not introduce evidence in support of her financial hardship claim. Without such evidence, the Court is not equipped to assess the credibility of Petitioner's hardship claim. Therefore, the hardship claim also fails for lack of proof.

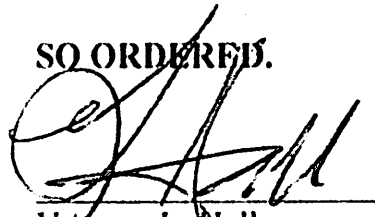
ORDER

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 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 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.