

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

In the Matter of:

Denise Passingham ,

Petitioner.

18-VH-0127-AG-067

721009734

November 5, 2019

DECISION AND ORDER

This case is before the Office of Hearings and Appeals upon a *Request for Hearing* (“*Hearing Request*”) filed by Denise Passingham (“Petitioner”) on February 27, 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”). The Debt Collection Improvement Act of 1996, as amended (31 U.S.C. § 3720D), authorizes federal agencies to use administrative wage garnishments 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 February 28, 2018, the Court stayed the issuance of a wage withholding order until the issuance of this written decision. *See Notice of Docketing, Order, and Stay of Referral* (“*Notice of Docketing*”) at 2. On March 30, 2018, the Secretary filed a *Secretary’s Statement* along with documentation in support of his position. On April 4, 2018 Petitioner filed her *Petitioner’s Statement and Documentary Evidence* in support of her claim. 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 3720D, as a result of a defaulted loan that was insured against non-payment by the Secretary.

Petitioner executed and delivered to the Secretary a Subordinate Note ("Note") dated December 10, 2002 in the amount of \$6,917.50. *Sec'y Stat.* ¶ 2; Ex. 1, Note. As a means of providing foreclosure relief to Petitioner, HUD advanced funds to Petitioner's FHA insured mortgage lender which was the holder of Petitioner's primary mortgage note. *Sec'y Stat.*, ¶ 3; Ex. 2, *Declaration of Brian Dillon* ("Dillon Decl."). In exchange for such funds, Petitioner executed the Note in the favor of the Secretary. *Sec'y Stat.*, ¶ 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)[o]n October 2028 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.* ¶ 4; Ex. 1, Note.

On or about September 21, 2015, the FHA mortgage on Petitioner's primary mortgage was terminated, as the lender indicated the mortgage was paid in full. *Sec'y Stat.*, ¶ 5; Ex. 2, *Dillon Decl.* ¶ 4. Petitioner has not provided any documentation from her primary mortgage lender or any other source which demonstrates that the FHA insurance on the primary mortgage was reinstated or is currently active. *Sec'y Stat.* ¶ 5.

HUD has attempted to collect the amount due under the Note, but Petitioner remains indebted to HUD. *Sec'y Stat.*, ¶6; *Dillon Decl.*, ¶ 5. The Secretary therefore asserts that Petitioner is indebted to HUD in the following amounts:

- a. \$6,254.00 as the unpaid principal balance as of February 28, 2018;
- b. \$31.26 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., ¶ 7, Ex. 2, *Dillon Decl.*, ¶ 5.

On June 15, 2017, a *Notice of Intent to Initiate Wage Garnishment Proceedings* ("Notice") was mailed to Petitioner. *Sec'y Stat.*, ¶ 8; *Dillon Decl.*, ¶ 7. In accordance with 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was afforded an opportunity to enter into a written repayment agreement. Petitioner did not enter into a repayment agreement or pay the debt in full in response to the *Notice*. *Id.* The Secretary proposes a repayment schedule of \$174.59 per month which will liquidate the debt in approximately three years as recommended by the Federal Claims Collection Standards, or an amount equal to 15% of Petitioner's disposable income. *Sec'y Stat.*, ¶ 11, Ex. 2, *Dillon Decl.*, ¶ 5.

DISCUSSION

Petitioner does not dispute the amount of the debt. Instead, Petitioner challenges the existence of the debt because she alleges that the subject debt should have already been paid off by CitiMortgage on Petitioner's behalf. More specifically, Petitioner states:

I spoke to Citi-Mortgage and your office, numerous times (requesting a lien release for the old 2nd mortgage for \$6,917.50) prior to closing and both Citi Mortgage and HUD assured me that the payoff from Citi Mortgage released both mortgages. HUD refused to give me a payoff statement and/or lien release telling me they had to no record of Ms. Passingham owing any them money. Based on this, Ms. Passingham clearly does not owe the amount alleged. If she had, your office would have sent me a payoff statement when I contact HUD numerous times prior to closing. (Emphasis in original); *Hearing Request* at 1.

Along with her *Hearing Request*, Petitioner offers into evidence copies of her Payoff Statement from CitiMortgage and communications between Petitioner's attorney and a CitiMortgage representative. *Hearing Request*, Attachments filed February 28, 2018.

For Petitioner to prove full satisfaction of the subject debt, there must be a written release directly from HUD, or evidence of valuable consideration accepted by HUD from Petitioner. *See Hedieh Rezai*, HUDBCA No. 04-A-NY-EE016 (May 10, 2004). After reviewing Petitioner's documentary evidence, the Court has determined that the evidence is insufficient as proof that the subject debt does not exists or is unenforceable. For Petitioner not to be held liable for the full amount of the debt, there must be either a release in writing directly from the former lender (herein HUD) 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 position because neither of the documents show that Petitioner was released directly by HUD from her contractual obligation to pay this debt. The payoff amount in the Statement only reflected the amount paid for the primary mortgage, not the amount of the subject debt. In this case, the onus falls on Petitioner, not CitiMortgage, 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 cannot be provided, then the burden falls on Petitioner to provide evidence of valuable consideration in satisfaction of the subject debt. Neither occurred in this case.

Petitioner's execution of the *Note* immediately obligated her to make a payment to HUD in the event that "the borrower has paid in full all amounts due under the primary Note and related mortgage, deed of trust or similar Security Instruments issued by the Secretary." *Sec'y Stat.*, Ex. 1, Note ¶ 4(A)(i). The *Note* contained specific instructions on how and where payment should be made to the Secretary, and those instructions were unambiguous. *Id.* at Note ¶ 4(B). The terms of the *Loan Modification Agreement* referenced by Petitioner in her appeal do not form the basis for determining the obligations of the parties according to the terms of the *Note* because HUD is not a party to the *Loan Modification Agreement*.

In this case, the Secretary's right to collect the subject debt emanates from the terms of the *Note*, not from the terms of a response letter from the primary lender. *See Bruce R. Smith*, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). The documentation offered by Petitioner is simply insufficient as proof that she was released from the subject debt. Because Petitioner has failed to produce evidence of a written release directly from HUD or evidence of valuable consideration paid by Petitioner to HUD in satisfaction of the subject debt, the Court finds that

Petitioner has failed to meet her burden of proof to successfully refute or rebut the evidence presented by the Secretary.

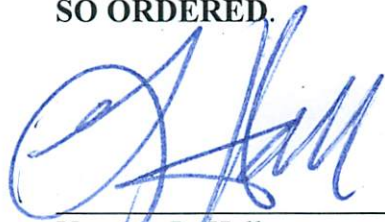
ORDER

Based on the foregoing, Petitioner remains contractually obligated to pay the subject debt.

The Order imposing the stay of referral of this matter issued on February 28, 2018 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 of \$174.59 per month or an amount equal to 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 this *Decision and Order*, and shall be granted only upon a showing of good cause.