

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

In the Matter of:

**Joel Lozano,**

Petitioner.

18-VH-0137-AO-042

7-210124030A

November 4, 2019

**DECISION AND ORDER**

This proceeding is before the Office of Hearings and Appeals upon a *Hearing Request* filed on March 12, 2018 by Petitioner Joel Lozano (“Petitioner”) 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. 3720A), authorizes federal agencies to use administrative offsets as a mechanism for the collection of debts allegedly owed to the United States government.

**JURISDICTION**

The Office of Hearings and Appeals has jurisdiction to determine whether Petitioner’s debt is past due and legally enforceable pursuant to 24 C.F.R. §§ 17.61 *et. seq.* The administrative judges of this Court, in accordance with the procedures set forth at 24 C.F.R. §§ 17.69 and 17.73, have been designated to conduct a hearing to determine, by a preponderance of the evidence, whether the alleged debt is past due and legally enforceable.

**PROCEDURAL HISTORY**

Pursuant to 24 C.F.R. § 17.81(a), on March 12, 2018, the Court stayed the issuance of an administrative offset of any federal payment due to Petitioner until the issuance of this written decision. *Notice of Docketing, Order, and Stay of Referral* (Notice of Docketing) at 2. On June 8, 2018, the Secretary filed a *Secretary’s Statement*, along with documentary evidence, in support of his position. On April 4, 2018 and May 16, 2018, Petitioner filed his Statement and documentary evidence in support of his 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, as a result of a defaulted loan that was insured against non-payment by the Secretary.

On or about March 8, 2013, Petitioner executed and delivered to the Secretary a Subordinate Note ("Note") in the amount of \$83,686.89.64. *See Sec'y Stat.* ¶ 2; Ex. 2, 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. *See Sec'y Stat.*, ¶ 3; Ex. 1, *Declaration of Brian Dillon* ("Dillon Decl."). In exchange for such funds, Petitioner executed the Note in the favor of the Secretary. *Sec'y Stat.*, ¶ 3, Ex. 1, *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)[o]n February 1, 2043 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. 2, Note.

On or about August 9, 2017, the FHA mortgage on Petitioner's primary mortgage was terminated. *Sec'y Stat.*, ¶ 5; *Dillon Decl.* ¶ 4. The Note became immediately due and payable, pursuant to the terms of the Note. *Sec'y Stat.* ¶ 6; Ex. 1, *Dillon Decl.*, ¶ 4.

HUD has attempted to collect the amounts due under the Note, but Petitioner remains delinquent and 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. \$83,686.89 as the total unpaid principal balance as of April 30, 2018;
- b. \$278.84 as the unpaid interest on the principal balance at 1% per annum through April 30, 2018;
- c. \$5,073.27 as the unpaid penalties and administrative costs through April 30, 2018; and,
- d. interest on said principal balance from May 1, 2018 at 1% per annum until paid. Exhibit 1, ¶ 5.

*Sec'y Stat.*, ¶ 7, Ex. 2, *Dillon Decl.*, ¶ 5.

A Notice of Intent to Collect by Treasury Offset dated February 19, 2018 ("Notice") was mailed to Petitioner. *Sec'y's Stat.* ¶ 8, Ex. 1, *Dillon Declaration* at ¶ 6.

The Secretary respectfully requests a finding that the Petitioner's debt is past due and legally enforceable; and that the stay of referral of this matter to the U.S. Department of Treasury for collection by Treasury Offset be vacated, so that the Secretary may proceed with Administrative Offset against Petitioner.

## **DISCUSSION**

Petitioner contends that he is not responsible for payment of the subject debt because the debt should have been paid at closing or, in the alternative, should have been paid in full as a result of his loan modification agreement. Petitioner also contends that if it is determined that he owes the debt alleged, he cannot afford to pay it. As support, Petitioner offers as evidence copies of the

*Deed of Trust*; Subordinate Note (*Note*); Settlement Statement; *Affidavit and Hold Harmless List* identifying accounts that were paid in full at the time of closing; and, the *Loan Modification Agreement* and related documentation.

I. The Subject Debt Was Not Paid in Full at Closing by the Title Company

Petitioner contends that:

In August of 2017 I went back to Bank of America to request a refinance so I can pay of some credit cards that were still lingering from the time my hours were reduced in 2012. I was approved for a refinance and quickly received the money to pay off my credit cards. During that process to get a refinance, I was never informed of the deferred amount from the partial claim. Had I been informed, I would have never requested a refinance.

Petitioner further states that, "In January of 2018, I received several notices and demand letters from HUD and from your agent, Luis Madera. I was confused by this amount [,] so I went to the Bank to ask about this and I was referred to a HUD approved counseling agency that was close to my home, Operation Hope." "They said that it was the Title Company's fault," according to Petitioner.

The record is void of proof that Petitioner paid directly to HUD the subject debt associated with the *Subordinate Note*, or proof that upon default on the *Note*, Bank of America or the Stuart Title Guarantee Company paid the subject debt or was otherwise negligent in failing to do so. Furthermore the *Affidavit and Hold Harmless List* submitted by Petitioner listed other debtor accounts that were paid in full at closing, but the subject debt was not on that list. Even if the bank or the title company had been responsible for payment but failed to do so, a third party's negligence does not relieve Petitioner of liability for the debt. See Brvan McClees, HUDOA No. 17-AM-0037-AO-010 (February 14, 2018). The terms of the *Note* executed on March 8, 2013 are binding on Petitioner and HUD alone, not on Petitioner, HUD, and Bank of America or Stuart Title Company. This means that the onus falls on Petitioner, not on the mortgage company or title company, to ensure that the subject debt is fully satisfied. In this case, a default occurred. Petitioner has failed to meet his burden of proof that he has paid in full the debt alleged in this case to cure the default. The Court therefore finds that Petitioner's claim of full payment by the title company fails for lack of sufficient proof.

II. The Loan Modification Agreement Did Not Pay in Full the Subject Debt

Petitioner next contends that the subject debt was paid in full because his *Loan Modification Agreement* with Bank of America should have resulted in payment of the debt owed to HUD. Petitioner states:

This letter is to explain my dilemma with this debt and why I believe I do not owe this debt. I, Joel Lozano, purchase my home on March 3, 2010. I was affected by the economic downturn and I requested a modification in 2012 through a LR Financial Consultants who charged me \$3,000.00 to get help applying for a modification. I was pleased at

the time with this arrangement and I signed the modification papers with Bank of America. *Pet'r's Hearing Request* at 1.

Petitioner further states that "Bank of America managers have admitted that they made the mistake of refinancing my modified loan without include the partial claim of \$80,000.00[.] Now Bank of America managers say that they can fix this problem by offering me another refinance to include the debt of \$83,000...." *Id.*

The Secretary's right to collect the subject debt in this case emanates from the terms of the Note. Bruce R. Smith, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). For Petitioner not to be held liable for the subject debt, she must submit evidence of either (1) a written release from HUD showing that Petitioner is no longer liable for the debt; or (2) evidence of valid or valuable consideration paid to HUD to release her from her obligation. Franklin Harper, HUDBCA No. 01-D-CH-AWG41 (March 23, 2005) (citing Jo Dean Wilson, HUDBCA No. 03-A-CH-AWG09 (January 30, 2003)); William Holland, HUDBCA No. 00-A-NY-AA83 (October 12, 2000); Ann Zamir (Schultz), HUDBCA No. 99-A-NY-Y155 (October 4, 1999); Valerie L. Karpanai, HUDBCA No. 87-2518-H51 (January 27, 1988); Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (December 22, 1986); and Jesus E. and Rita de los Santos, HUDBCA No. 86-1255-F262 (February 28, 1986). The terms of the *Loan Modification Agreement* 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*.

When Petitioner paid in full the primary mortgage pursuant to section 4(a)(i) of the Note, the amount of the subject debt immediately became due based on the agreement between Petitioner and HUD in the Note. The loan modification adjusted the terms of the primary mortgage agreement, not the terms of the Note. The Note functions as a Security Instrument to protect HUD from losses which might result if the Borrower (herein Petitioner) defaults. In this case, such default has occurred but the record lacks evidence that the default has been cured. Thus far, the evidence offered by Petitioner claimed to be associated with the *Loan Modification Agreement* only reflects full payment of the primary mortgage. *Pet'r's Doc. Evid.*, Attachments. Petitioner has failed to otherwise produced additional evidence of a written release or of consideration exchanged that would sufficiently prove Petitioner's paid in full the subject debt. The Court therefore finds again that Petitioner's claim that said debt was fully paid by the loan modification fails for lack of proof.

### III. Financial Hardship for Petitioner

As a final point, Petitioner claims, "I went back to Luis Madera, your agent and explained what was said and he said to submit a payment plan request. Unfortunately, my budget is very tight [.] and I do not have much of a surplus. So he denied me a payment arrangement." It is not entirely clear whether Petitioner is specifically raising a financial hardship claim, but the Court is acknowledging that this issue was identified by Petitioner as a concern.

Case law precedent has been established that "in administrative offset cases evidence of financial hardship, no matter how compelling, cannot be taken into consideration in determining whether the debt is past-due and enforceable." *Edgar Joyner, Sr.*, HUDBCA No. 04-A-CH-EE052 (June 15, 2005); *Anna Filiziana*, HUDBCA No. 95-A-NY-T11 (May 21, 1996); *Charles Lomax*,

HUDBCA No. 87-2357-G679 (February 3, 1987). Also, no regulation or statute currently exists that permits financial hardship to be considered as a basis for determining whether a past-due debt may be collected in administrative offset cases. Consistent with case law precedent and statutory limitations, the Court finds that financial hardship cannot be considered herein as a defense because the debt owed by Petitioner is sought to be collected by means of administrative offset. Should this matter currently be a concern for Petitioner, it is not one that the Court is authorized to resolve. Petitioner may wish to discuss this matter with Counsel for the Secretary or Michael DeMarco, Director, HUD Financial Operations Center, 52 Corporate Circle, Albany, NY 12203-5121, who may be reached at 1-800-669-5152, extension 2859. Petitioner may also request a review of her financial status by submitting to the HUD Office a Title I Financial Statement (HUD Form 56142).

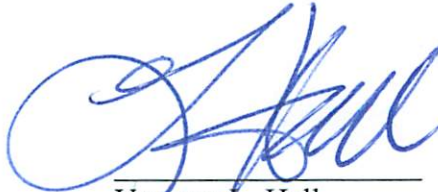
### **ORDER**

Based on the foregoing, Petitioner remains contractually obligated to pay the subject debt in the amount so claimed by the Secretary.

The *Order* imposing the stay of referral of this matter on March 12, 2018 to the U.S. Department of Treasury for administrative offset is **VACATED**. It is hereby

**ORDERED** that the Secretary is authorized to seek collection of this outstanding obligation by means of administrative offset in the amount so claimed by the Secretary.

**SO ORDERED.**



Vanessa L. Hall  
Administrative Judge

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