

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

In the Matter of:

Mark Spivey,

Petitioner.

18-VH-0212-AG-109

721008283

November 6, 2018

DECISION AND ORDER

Petitioner, Mark Spivey, filed a *Request for Hearing* (“*Hearing Request*”) on July 6, 2018 concerning the existence, amount, or enforceability of a debt allegedly owed to the U.S. Department of Housing and Urban Development (“HUD” or “Secretary”). On July 10, 2018, the 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*”) at 2.

On July 24, 2018, the Secretary filed his *Statement* (“*Sec’y. Stat.*”), along with documentation in support of his position. On August 20, 2018, Petitioner submitted a *Statement* (“*Petr’s. Stat.*”) and documentation in support of his position. This case is now ripe for review.

JURISDICTION

The Office of Hearings and Appeals has been designated to adjudicate contested cases where the Secretary seeks to collect the subject debt by means of administrative wage garnishment. This hearing is conducted in accordance with the procedures set fourth at 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.81.

BACKGROUND

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. The Debt Collection Improvement Act of 1996, as amended (31 U.S.C. §3720D), authorizes federal agencies to use administrative wage garnishment as a mechanism for the collection of debts allegedly owed to the United States government.

Petitioner executed and delivered a Subordinate Note (“Note”) to the Secretary in exchange for foreclosure relief from HUD: the note was executed and delivered on June 20, 2007 in the amount of \$18,298.63. *Sec’y. Stat.*, ¶¶ 2-3. The Note lists specific events which renders the debt due and payable, one of which is the payment in full of the primary note, which was insured against default by the Secretary. *Sec’y. Stat.*, ¶ 4; *Ex. 1*, ¶ (4(A)(i)). On April 7, 2015 the FHA insurance

on the primary note was terminated, as the lender indicated the primary note and mortgage was paid in full. *Sec'y. Stat., Ex. 2, Declaration of Kathleen M. Porter, Acting Director, Assert Recovery Division, HUD Financial Operations Center ("Porter Decl.")*, ¶ 4.

Pursuant to 31 C.F.R §285.11 (e), a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings ("Notice") dated September 1, 2016 was mailed to Petitioner at his last known address. *Sec'y. Stat. ¶ 8; Ex. 2, Porter Decl., ¶ 6.*

The Secretary filed a *Statement* with documentary evidence, in support of his position that Petitioner is currently in default on the Note and the Petitioner is indebted to HUD for the following amounts:

- a) \$17,521.44 as the total unpaid principle balance as of June 30, 2018.
- b) \$ 262.80 as the unpaid interest on said principle balance at 1% per annum through June 30, 2018;
- c) \$1,198.75 as the unpaid penalties and administrative costs through June 30, 2018; and
- d) interest on said principle balance from July 1, 2018 at 1% per annum until paid.

Sec'y. Stat., ¶ 7; Ex. 2, Porter Decl., ¶ 5.

Treasury's records indicate a Wage Garnishment Withholding Order was issued to Petitioner's Employer on October 3, 2016. *Sec'y. Stat., ¶ 10; Ex. 2, Porter Decl., ¶¶ 8-9.* Petitioner's wages were garnished four times in the amount of \$521.37 and one time in the amount of \$539.74. *Id.*

HUD did not obtain Petitioner's income statement, and so the Secretary is proposing a debt repayment schedule of \$521.37, or 15 % of Petitioner's disposable income per pay period. *Sec'y. Stat., ¶ 10.*

DISCUSSION

In response to the Secretary's *Statement*, Petitioner disputes, in general, the existence and enforceability of the debt alleged by the Secretary because: 1) his insurance premium payments, in excess of amount owed, should absolve subject debt; 2) the subject debt was paid in full; and, 3) the Note was an extension agreement.

I. Insurance Premium Payments did not Absolve Subject Debt

Petitioner claims, without supporting evidence, that because of the amount he paid in insurance premiums exceeded the amount owed to HUD on the original mortgage, he should be absolved of the subject debt. *Petr's. Stat. ¶¶ 2, 4, 15 (h).* Petitioner's argument is implausible. 12 U.S.C. § 1710 (2) provides that when the mortgagor defaults, the insurer advances funds to the FHA insured lender to provide foreclosure relief for the mortgagor. This provision means that the FHA mortgage insurance only provides protection for the lender against the default of Petitioner who is the mortgagor in this case. Petitioner defaulted on the Note, and HUD provided foreclosure relief in exchange for the Note signed by Petitioner to pay the subject debt. The purpose of

mortgage insurance is not to protect Petitioner from the insurer's right to collect debts duly owed. Instead, the mortgage insurance protects the lender from Petitioner's default on the Note which, in this case, has occurred. Therefore, the Court finds that Petitioner's contractual obligation under the Note remains intact.

II. Subject Debt Not Paid in Full

Petitioner maintains that the subject debt was paid in full because: 1) the results of a title search "did not produce any "security instrument" as referenced in the Subordinate Note, except the original 1st Mortgage from CitiMortgage." *Petr's. Stat.* ¶ 15 (d); 2) the Payoff Transmittal was for "payment in full and termination of the encumbrance held..." *Petr's. Stat.* ¶ 15 (d); *Ex. 6*, ¶ 1; 3) the mortgage was paid off, and no shortages were reported. *Petr's. Stat.* ¶ 15 (f-g); and, 4) a year had lapsed between when the payoff occurred, and when the Demand Notice was issued. *Petr's. Stat.* ¶ 15 (g). Petitioner introduced into evidence a copy of a Payment Transmittal.

For Petitioner to prove that a debt owed to the Secretary has been satisfied, there must be either a written release from HUD or evidence of valuable consideration accepted by HUD from Petitioner. See Hedieh Rezai, HUBCA No. 04-A-NY-EE016 (May 10, 2004). Here, Petitioner concedes to signing the Note, thus establishing his obligation to pay the debt arising from the Note. *Petr's. Stat.* ¶ 15 (b). The Note lists specific events which render the subject debt due and payable, one of which is payment in full of the primary note as has occurred in this case. The results of the title search have no bearing on Petitioner's contractual obligation under the Note because the Secretary's right to collect the subject debt emanates from the terms of the Note, not from the terms of the Security Instrument. While Petitioner maintains in his *Statement* that the Payoff Transmittal to CitiMortgage was adequate proof of full payment of the subject debt, the Transmittal alone is insufficient as proof because it only shows the debt was due and payable. Finally, Petitioner's claim that the statute of limitations applies in this case is misplaced. The statute of limitations does not apply in administrative proceedings, and thus does not apply in administrative wage garnishment cases such as this one.¹

The Secretary, in response, contends that full payment of the subject debt was never received, and that Petitioner remains contractually obligated to pay the debt so claimed. The Secretary further contends that "the FHA mortgage insurance on the primary mortgage was terminated, as the lender indicated the primary note and mortgage was paid in full." See Sec'y. Stat., *Ex. 1*. Upon termination, the amount alleged became due and payable yet was not paid by the Petitioner. The Secretary introduced into evidence copies of a sworn affidavit from the Acting Director of HUD's Asset Recovery Division and of the Note bearing Petitioner's signature. In the Note, Petitioner agreed to pay the subject debt should the mortgage be paid in full. The Note also gives specific instructions on how and where payments should be made to the Secretary, and those instructions were unambiguous.

¹ The Supreme Court has held that no statute of limitations exists in administrative proceedings. B.P. America Prod. Co. v. Burton [,] 127 S. Ct. 638 (2006).

As a result, the Court finds that Petitioner has failed to demonstrate sufficiently his claim that the subject debt was paid in full, and therefore, Petitioner's claim fails for lack of proof.

a. **Non-existence of "Security Instrument" does not release Petitioner from Subject Debt**

As support for the debt no longer being owed, Petitioner additionally claims that the security instrument was never presented or delivered to him, and that the title search did not produce the "security instrument." On this premise, Petitioner concluded that the debt must not be owed. *Petr's Stat.* ¶¶6, 15. Mortgagees are required to provide HUD with the *original* security instrument within a certain time frame. See 24 C.F.R. § 203.371. (emphasis added). So, the regulations require that the mortgagee must deliver the security instrument to HUD. In this case, Petitioner's understanding that the existence, or non-existence, of the security instrument forms the basis for releasing him from his obligation under the Note is misguided. Because the governing regulations only require the mortgagee, not the mortgagor, to deliver the security instrument to HUD, failure to deliver the security instrument to Petitioner is not an indication that the subject debt is no longer owed.

The Secretary's right to collect the subject debt in this case again emanates from the terms of the Note, not from the terms of a security instrument, or the existence or non-existence of the same. Bruce R. Smith, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). As such, the Court finds Petitioner's argument to be unpersuasive and inconsistent with the governing regulations.

III. **Insufficient Evidence of Note as Extension Agreement**

Petitioner claims that CitiMortgage characterized the Note as an extension agreement. The Note unambiguously commits Petitioner to repay the debt. Petitioner's claim that the Note has been mischaracterized as an extension agreement is unsubstantiated. Here, Petitioner signed the Note and the Note is notarized, so Petitioner agreed to repay this loan from HUD. *See Petr's Stat.* ¶ 15 (b); *Ex. 1*, ¶ 7. The Court has maintained that "assertions without evidence are not sufficient to show that a debt claimed by the Secretary is not past due or unenforceable." Troy Williams, HUDOA No. 09-M-CH-AWG52 (June 23, 2009); see also 31 C.F.R. 285.11 (f)8(ii).

Without sufficient evidence to otherwise refute or rebut the claims made by the Secretary, Petitioner remains indebted to HUD in the amount so claimed by the Secretary. Therefore, the Court finds again that this claim fails for lack of proof.

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. It is hereby

ORDERED that the Secretary is authorized to seek collection of this outstanding obligation by means of administrative wage garnishment of \$521.37 per pay period, or in an amount equal to 15% of Petitioner's disposable pay.

SO ORDERED,

A handwritten signature in blue ink, appearing to read 'V. Hall', is written over a horizontal line.

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.