



**Office of Appeals
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001**

In the Matter of :
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DATA MORTGAGE, INC., :
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:
Petitioner :
:
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HUDOA No. 08-H-CH-JJ69
Claim No. 7-207057800A

Roland Weedon, President
Data Mortgage, Inc.
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For Petitioner

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For the Secretary

DECISION AND ORDER

On July 14, 2008, Petitioner, Data Mortgage, Inc. (“Data Mortgage”), was notified that, pursuant to 31 U.S.C. §§ 3716 and 3720A, the Secretary of the U.S. Department of Housing and Urban Development (“HUD”) intended to seek administrative offset of any federal payments due to Petitioner in satisfaction of a delinquent and legally enforceable debt allegedly owed to HUD.

On August 5, 2008, Petitioner made a request for a hearing concerning the existence, amount or enforceability of the debt allegedly owed to HUD. The administrative judges of this Office have been designated to conduct a hearing to determine whether the debt allegedly owed to HUD is legally enforceable. 24 C.F.R. §§ 17.152 and 17.153. As a result of Petitioner’s hearing request, referral of the debt to the U.S. Department of the Treasury for administrative offset was temporarily stayed by this Office on August 6, 2008 until the issuance of a written decision by the administrative judge. 24 C.F.R. § 17.156.

Background

On March 1, 2001, Data Mortgage, Inc. ("Petitioner"), d/b/a Essex Mortgage, streamline refinanced Loan No. 197-1893181 (the "Initial Loan"). This loan was insured against default by the Federal Housing Administration ("FHA") pursuant to the National Housing Act, 12 U.S.C. § 1709(b)(i). (Secretary's Reply to Petitioner's Letter ("Sec'y Reply"), filed January 28, 2008, 1-2, Ex. B1-B5, Declaration of Michael DeMarco ("DeMarco Decl."), Director, Insurance Operations Division, HUD Financial Operations Center, ¶ 5.) At the time of the loan, Petitioner served as a direct endorsement mortgage lender and originated FHA insured home loans. (Sec'y Reply, p.1).

According to HUD's records, FHA case number 197-1893181 was subsequently streamline refinanced into FHA case number 197-2029719. (DeMarco Decl., ¶ 5.) FHA case number 197-2029719 originated on January 22, 2001 and default occurred on July 1, 2001. HUD paid an insurance claim (Part A) for this loan on September 26, 2002 and a secondary insurance claim (Part B) on November 1, 2002, totaling \$140,623.23. (Id.; Sec'y Reply, p.2, Ex. B3 - B5, and Ex. C). HUD also incurred additional expenses totaling \$20,605.37 in repairs, maintenance, taxes, and marketing and closing fees. (Sec'y Reply, p.2.) The accumulated interest on this debt at five percent per annum (5%) was \$619.22 as of July 30, 2008. (Id.)

In January 2003, HUD sold the property for \$140,000.00 at a loss to HUD of \$21,228.60. (Sec'y Reply 2, Ex.B1 - B5.) HUD has computed the Department's loss on this case as follows:

Partial Settlement (Part A Claim Payment)	\$132,109.06
Final Settlement (Part B Claim Payment)	\$8,514.17
Maintenance and Operation	\$5,882.21
Taxes	\$1,218.10
Sales Expenses	\$13,505.06
[less] Sales Price	(\$140,000.00)
Total Loss on Sales [sic] of Property	\$21,228.60

(Sec'y. Reply 2, Ex. A10 and A13-A14, Demarco Decl., ¶ 6.)

Since the sale of the property did not provide sufficient funds to cover all of HUD's loss, HUD sought indemnification from Petitioner for HUD's remaining loss. On March 3, 2003, HUD's lender monitoring team found non-compliant lending activities by Petitioner dba Essex Mortgage on FHA case number 197-1893181.¹ (DeMarco Decl. ¶ 4.) These activities exposed HUD to an unacceptable level of risk. On December 1, 2003, to resolve these findings, Petitioner agreed to indemnify HUD for any loss HUD incurred as insurer of this loan. (Id.) The Indemnification Agreement ("Agreement") was executed by HUD for Loan No. 197-1893181. (Id., Ex. A1; Sec'y. Reply, p. 2.)

¹ FHA case number 197-1893181 was subsequently streamline refinanced into FHA case number 197-2029719.

The Agreement provides:

Indemnification shall be made in accordance with the following terms: . . .

(c) Where a HUD/FHA insurance claim has been paid in full and the property has been sold by HUD to a third party, the amount of indemnification is HUD's investment . . . minus the sales price of the property.

(f) Where, after the date that the Agreement is signed, if any loan(s) included in this Agreement are streamline refinanced by DMI [Petitioner], the Agreement will extend to the new loan.

(Sec'y Reply, Ex. A, pp. pp. A3-A4, Indemnification Agreement, ¶ 1.)

The Secretary alleges that Petitioner is delinquent in paying HUD's claim under the Indemnification Agreement and that Petitioner is indebted to the Secretary in the following amounts:

- a) \$21,228.60 as the unpaid principal balance as of July 30, 2008;
- b) \$619.22 as the unpaid interest on the principal balance at 5% per annum through July 30, 2008;
- e) interest on the principal balance from August 1, 2007, at 4.0% per annum until paid.

(Sec'y Reply pp. 2-3, Ex. A, pp. A13-A14, B, DeMarco Decl., ¶ 7.)

On July 14, 2008, Petitioner was served with a Notice of Intent to Collect by Treasury Offset. (Sec'y Reply, p.3; Ex. F1, DeMarco Decl. ¶ 8.) Petitioner appealed the debt and requested HUD's documentation, which was later provided to Petitioner and filed with this Office. (Sec'y Reply, Ex. A1-12, Ex. A14; DeMarco Decl. ¶ 9.) In a letter dated July 21, 2008 sent to HUD's Office of Appeals, Petitioner requested a copy of HUD's records/file. (Sec'y Reply, p.3; DeMarco Decl., ¶ 9., Ex. D.) HUD has complied with this request by sending the file documentation to the Petitioner on August 20, 2008. (Id., Ex. E.)

DISCUSSION

31 U.S.C. § 3716 provides federal agencies with a remedy for collecting debts owed to the United States Government. The Secretary has filed a Reply to Petitioner's Letter with documentary evidence in support of his position that Petitioner is indebted to HUD in a specific amount. Petitioner contends that the debt owed under the Agreement is unenforceable because: (1) HUD has not provided the records upon which the subject debt is based; (2) Petitioner was released from the obligation to pay the subject debt because the loan had been streamline refinanced; (3) the property that is the subject of the debt in this proceeding had already been sold so HUD incurred no loss; and, 4) this action is barred by the statute of limitations.

(Petitioner's Letter, "Pet'r December I Letter" dated December 24, 2008; Petitioner's Letter "Pet'r December II Letter" dated December 31, 2008.)

First, Petitioner claims that HUD has not provided the records upon which the subject debt is based. Petitioner states "We have repeatedly requested a copy of HUD's records as allowed for in the original Notice of Intent to Collect and as of this date have not received any documentation." (Letter from Petitioner, "Pet'r November Letter" filed November 14, 2008). However, in response to an Order issued by this Office on November 23, 2008, the Secretary filed a Notice of Compliance and Filing in which the Secretary conceded that these records could have been lost or otherwise misdirected by the postal service. (Notice of Compliance and Filing, "Notice" filed December 11, 2008). Nevertheless, the Secretary, as a result, submitted to this Office and to Petitioner the records related to the debt that is the subject of this proceeding. (Notice, ¶¶1-7, Ex. A-D, and Ex. F, DeMarco Decl. ¶ 5, ¶ 7.) Upon review of the documents submitted by the Secretary, I find that HUD provided Petitioner with the necessary records related to the subject debt, including documentation verifying receipt of Notice to Petitioner regarding the subject debt, correspondence to HUD from Petitioner regarding the debt, and an Agreement, signed by Petitioner and a HUD representative, along with a Single Family Indemnification Worksheet referencing the subject debt and documenting the amount of loss to the Secretary. (Id.)

Second, Petitioner contends that the alleged debt is unenforceable and that he was released from the obligation to pay the subject debt because the loan had been streamline refinanced. Petitioner states "Case #197-2029719 was not included in the settlement agreement signed 12/1/03, nor was it a subsequent refinance of Case#197-1893191 as called for in paragraph 1(f) of said [Indemnification] agreement." (Letter from Petitioner "Pet'r Oct. Letter", filed October 7, 2008.) Petitioner further states "[w]e have repeatedly argued the enforceability of the indemnification. The case number listed on the indemnification was no longer an active case and had been refinanced prior to the indemnification request." (Letter from Petitioner "Pet'r February Letter" filed February 9, 2009.) Petitioner's belief that, on the one hand, the debt due on the subject loan *was not a refinance* but yet, on the other hand, alleging that it *was refinanced*, just inactive, is inconsistent and misleading. In either case, Petitioner relies on Section 1(f) of the Agreement as a basis for this argument. Section 1(f) of the Indemnification Agreement states:

(f) Where, after the date that the Agreement is signed, if any loan(s) included in this Agreement are streamline refinanced by DMI [Petitioner], the Agreement will extend to the new loan.

(Sec'y. Reply, Ex. A1.)

Petitioner interprets Section 1(f) of the Agreement as excluding the subject debt as a streamlined refinance governed by the Agreement, but this interpretation is misplaced. As support, Petitioner offers no documentary evidence to prove that he has been released from his legal obligation to pay the subject debt as a result of a streamline refinance.

Upon review of the language in Section 1(f) of the Agreement, it is clear that the intent of the parties was to ensure that the Agreement extended to the new loan in the event the subject loan was streamline refinanced. Both Petitioner and the Secretary agreed upon these terms as contracting parties. A contracting party's claimed intent in entering into a contract is immaterial, where the party has agreed in writing to a clearly expressed and unambiguous intent to the contrary. Hart v. Vermont Inv. Ltd. Partnership, 667 A.2d 578 (D.C. App., 1995). Parties to a contract will be held to a reasonable interpretation of that contract and will not be permitted to assert their individual subjective intent. NTA National, Incorporated v. DNC Services Corporation, 511 F.Supp. 210, 222 (D.C. D.C., 1981) citing Minmar Builders, Inc. v. Beltway Excavators, Inc., 246 A.2d 784 (C.A.D.C., 1968) and 1901 Wyoming Avenue Cooperative Association v. Lee, 345 A.2d 456 (C.A.D.C., 1975). These same principles apply to indemnification agreements.

As a practice, financial institutions doing business with HUD often elect to enter into indemnification agreements with the Department in lieu of having allegations of non-compliant lending activities referred to the Department's Mortgagee Review Board for review and a determination as to whether the imposition of an administrative sanction is warranted. The Mortgage Review Board is empowered to impose, where appropriate, administrative sanctions such as probation, debarment, or suspension. (HUD Handbook, 4000.4 Rev-1 Chg-2, Chapter 5, Program Management, Section 5-8, Indemnification Agreements). It seems apparent that Petitioner acted in his own best interest when he elected to execute the indemnification agreement. It seems equally apparent that Petitioner should be bound by the terms of that agreement as a matter of law. In this case, this Office is neither willing nor empowered to now create or enforce new terms in the indemnification agreement which might prove, at this time, beneficial to Petitioner. Therefore I find that the subject debt remains legally enforceable against Petitioner, and further find that Petitioner was not released from his legal obligation to pay the subject debt because the loan had been streamline refinanced.

Third, Petitioner contends that the property that is the subject of the debt had already been sold so HUD incurred no loss for which HUD should be compensated. Petitioner states:

At the time the indemnification was executed we reviewed FHA Connection and could see that the property had already sold for over \$16,000 of the original mortgage amount. To receive a demand for payment over 5 years later for \$21,288 with no

supporting documentation for loss other than a general description for each line item seems unreasonable.

(Pet'r February Letter.)

Petitioner further states “[h]ad we known that [the] property sold for a loss we would have challenged the indemnification request vehemently. Now all records of our loan have been destroyed and we are at an extreme disadvantage in this matter.” (Id.) However, the Agreement reflects Petitioner’s agreement to “indemnify HUD for losses that have been or may be incurred related to the following FHA Case Numbers where these loans go into default within five years from the date of signing.” (Sec’y. Reply, ¶ 1.) One of the loans identified was the loan that is the subject of this proceeding. (Id.) The Agreement further provides:

Indemnification shall be made in accordance with the following terms:...

- c) Where a HUD/FHA insurance claim has been paid in full and the property has been sold by HUD to a third party, the amount of indemnification is HUD’s investment as defined in paragraph (a) minus the sales price of the property.

(Sec’y Reply, Ex. A1, ¶1(c).)

Upon review of the records, Petitioner refinanced the original FHA loan #197-1893181 through FHA’s streamline program. (Sec’y Reply, Ex. A13, ¶ 5.) The streamlined loan number is 197-2029719. (Id.) The streamlined loan was originated on January 22, 2001 and closed on March 1, 2001. (Id., Ex. A5-A7.) Upon default on the streamlined loan, foreclosure proceedings were initiated and the property was eventually conveyed to HUD in September 2002. (Id.) HUD paid the insurance claims totaling \$140,623.23, but also incurred additional expenses totaling \$20,605.37 in repairs, maintenance, taxes, and marketing and closing fees. (Id.) The property was eventually sold in January 2003 for \$140,000.00 at a loss of \$21,228.60, with an accumulated interest on this debt at 5% totaling \$619.22 as of July 30, 2008. (Id.; Ex. A9.) Petitioner has not provided any documentary evidence to refute the evidence as presented by the Secretary. Thus, consistent with the terms of the Agreement, Petitioner remains legally obligated to reimburse HUD for the loss incurred when the property was sold in January 2003.

Fourth, Petitioner raises the issue of the statute of limitations by contending that “Due to the length of time, over six years have past, since this matter arose, I no longer have any loan records and am unable to obtain a copy from H.U.D. for my defense.” (Pet’r December Letter I.) 24 CFR §17.160 bars the Secretary’s collection of debts by means of administrative offset “under more than 10 years after the Secretary’s right to collect the debt first accrued.” However, the governing statute in 31 USC § 3716 (e)(1) was amended

last year to eliminate the ten-year limitation.² The regulation implementing the statute is therefore superseded by the amended statute. As a result, no statute of limitations applies in this case.

As a final point, Petitioner has extended an offer of \$2,000 to settle the debt that is the subject of this proceeding, but the offer of settlement was declined by the Secretary on January 12, 2009. (Id.) Thus, the debt against Petitioner remains enforceable in the amount alleged by the Secretary.

ORDER

For the reasons set forth above, I find that the debt which is the subject of this proceeding is legally enforceable against Petitioner in the amount claimed by the Secretary. The Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative offset is **VACATED**.

It is hereby **ORDERED** that the Secretary is authorized to refer this matter to the U.S. Department of the Treasury for administrative offset of any payment due Petitioner.

/o/ original signature _____

Vanessa L. Hall

Administrative Judge

April 22, 2009

² On May 22, 2008, 31 U.S.C. 3716 (e)(1) was amended in Public Law No. 110-234, § 14219 to now state: Elimination of statute of limitations applicable to collection of debt by administrative offset.