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

In the Matter of: **Sheryl Townsend,** Petitioner	HUDOA No. 09-M-CH-AWG22 Claim No. 78-002055-5

Sheryl Townsend
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Pro se

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For the Secretary

DECISION AND ORDER

Petitioner requested a hearing concerning a proposed administrative wage garnishment relating to a debt allegedly owed to the U.S. Department of Housing and Urban Development ("HUD"). 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 owed to the United States Government.

The administrative judges of this Office have been designated to determine whether the Secretary may collect the alleged debt by means of administrative wage garnishment if the debt is contested by a debtor. This hearing is conducted in accordance with the procedures set forth at 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.170. 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). Petitioner, thereafter, 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 the repayment schedule are unlawful, would cause a financial hardship to Petitioner, or that collection of the debt may not be pursued due to operation of law. *Id.* Pursuant to 31 C.F.R. § 285.11(f)(4) and (f)(10), on December 31, 2008, this Office stayed referral by HUD of this matter to the U.S. Department of the Treasury for issuance of an

administrative wage garnishment order until the issuance of this written decision, unless a wage garnishment order had previously been issued against Petitioner.

Background

On October 7, 1994, Petitioner executed and delivered to CMH Homes, Inc., dba LUV Homes, a Retail Installment Contract ("Note") for the purchase of a manufactured home in the amount of $20,683.00. (Secretary's Statement ("Sec'y Stat."), filed January 16, 2009, Ex. 2.) The Note was contemporaneously assigned to Vanderbilt Mortgage and Finance, Inc. ("Vanderbilt"). (*Id.*) After default by Petitioner, the Note was assigned to the Unites States of America on July 31, 1997, pursuant to the regulations governing the Title I Insurance Program. (Sec'y Stat., Ex. 1, Declaration of Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center ("Dillon Decl."), ¶ 3, Ex. 3.) The Secretary of HUD is the holder of the Note on behalf of the United States of America. (Sec'y Stat., Ex. 1, Dillon Decl., ¶ 3.)

HUD has attempted to collect this debt from Petitioner, but Petitioner remains in default. (Sec'y Stat., Ex. 1, Dillon Decl., ¶ 4.) The Secretary alleges that Petitioner is indebted to HUD on the Note in the following amounts:

> (a) $7,873.77 as the unpaid principal balance as of December 30, 2008;
> (b) $1,855.27 as the unpaid interest on the principal balance at 5.0% per annum through December 30, 2008; and
> (c) interest on the unpaid principal balance at 5.0% per annum from January 1, 2009 until paid.

(Sec'y Stat., Ex. 1, Dillon Decl., ¶ 4.)

A Due Process Notice dated October 5, 1998 was sent to Petitioner. (Sec'y Stat., ¶ 4, Ex. 1, Dillon Decl., ¶ 5.) As a result, four Treasury Offset Payments totaling $4,876.25 were posted to the account, and are reflected in the balance above. (*Id.*)

A Notice of Intent to Initiate Wage Garnishment Proceedings dated December 5, 2008, was sent to Petitioner. (Sec'y Stat., Ex. 1, Dillon Decl., ¶ 6.) In accordance with 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was afforded the opportunity to enter into a repayment agreement under terms agreeable to HUD, and as of January 13, 2009, Petitioner has not entered into a written repayment agreement. (Sec'y Stat., ¶ 6, Ex. 1, Dillon Decl., ¶ 7.) The Secretary's proposed repayment schedule is 15% of Petitioner's disposable pay. (Sec'y Stat., ¶ 7, Ex. 1, Dillon Decl., ¶ 11.)

Petitioner filed her request for a hearing on December 30, 2008 ("Pet'r Hr'g Req."). On December 31, 2008, this Office issued an Interim Decision dismissing Petitioner's statute of limitations defense. (Notice of Docketing, Interim Decision, Stay and Order, dated December 31, 2008.)

Discussion

Petitioner challenges collection of the debt on the grounds that: (1) the debt was paid through IRS tax refunds, (2) she was not given notice of foreclosure of the manufactured home, and (3) repayment of the debt will cause a financial hardship.

First, Petitioner states: "IRS has taken our tax refund for several years to pay this debt." (Pet'r Hr'g Req.) The Secretary has filed credible evidence of the amount of the debt, which includes the amounts already collected by the Department of the Treasury through offset of federal payments due Petitioner. Therefore, the Secretary has met his initial burden of proof to show the existence and amount of the debt. 31 C.F.R. § 285.11(f)(8)(i). Petitioner, however, has not presented any evidence to prove that the debt no longer exists or that the amount of the debt is incorrect. 31 C.F.R. § 285.11(f)(8)(ii). Petitioner has not met her burden of proving that the debt has been paid off and this Office therefore finds that the amount of the debt, as alleged by the Secretary, is correct.

Second, Petitioner argues the debt is not enforceable because: "At the time the house was [repossessed,] we were not given foreclosure documents. Only a phone call from LUV housing stating "Get out of my house"." (Pet'r Hr'g Req.)

Since the federal laws and regulations governing this proceeding do not provide the standard for analyzing notice of foreclosure by a private lender, we must look to the laws of the state of Texas, where the Note at issue was signed. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state"); *Boseman v. Connecticut General Life Insurance Co.*, 301 U.S. 196, 202 (1937) ("In every forum a contract is governed by the law with a view to which it was made"). *See also Gay Lee Marriott*, HUDBCA No. 87-2534-H67 (March 22, 1988) (applying Texas law governing disposition of collateral after default on a manufactured home loan held by HUD).

Texas law governing notification before disposition of collateral requires a secured party to send the debtor "a reasonable authenticated notification of disposition." Tex. Bus. & Com. § 9.611(b). The notice must be reasonable as to "the manner in which it is sent, its timeliness..., and its content." Official Comment 2 to UCC § 9-611. Timeliness is a question of fact, and "generally means that the notification must be sent at a reasonable time in advance of...the date after which a private disposition is to be made." Tex. Bus. & Com. § 9.612(a); Official Comment 2 to UCC § 9-612. Whether the contents of a notification are sufficient is also a question of fact. Tex. Bus. & Com. § 9.613.

The Secretary has filed a copy of a "Notice of Acceleration, Repossession, Right to Redemption, Sale and Intent to Pursue Deficiency" from Vanderbilt Mortgage and Finance, Inc., dated May 14, 1997. (Sec'y Stat., Ex. 1, Dillon Decl., Ex. D.) The Notice is addressed to Petitioner at the location of the manufactured home, and was sent by

certified mail. (*Id.*) The Notice states that the manufactured home "will be offered for private sale on or after 5/27/97." (*Id.*)

This Office finds that the Notice is sufficient to provide Petitioner with "a reasonable authenticated notification of disposition." Tex. Bus. & Com. § 9.611(b). It was sent by mail to a correct address. It was timely in that it gave Petitioner thirteen days notice before the private sale. The Notice sufficiently describes the debtor, the secured party, the collateral, and Petitioner's rights. Moreover, the Texas Business and Commerce Code does not require actual receipt of the notification before disposition of collateral. *See* Tex. Bus. & Com. §§ 9.611-13. This Office has held that actual receipt by the debtor of a notice of repossession and sale is not required under Texas law. *Alvin Ray Hoppe*, HUDBCA No. 02-D-CH-CC041 (January 23, 2003); *Gay Lee Marriott*, HUDBCA No. 87-2534-H67, citing *Byrd v. General Motors Acceptance Corporation*, 581 S.W. 2d 198 (Tex. Civ. App. 1979). Therefore, Petitioner's argument that she was not given notice of foreclosure must fail.

Finally, Petitioner claims that collection of the debt by administrative wage garnishment would cause a financial hardship for her. Petitioner states: "We are barely making ends meet now. Paying on this debt will make my family lose our home. Please don't do this." (Petitioner's Financial Statement ("Pet'r Fin. Stat."), filed January 22, 2009.)

Pursuant to 31 C.F.R. § 285.11(f)(8)(ii), Petitioner "may present evidence that the terms of the repayment schedule...would cause a financial hardship...." In support of Petitioner's argument, Petitioner provided this Office with a financial statement, copies of a pay statement, and copies of bills and payments. (Pet'r Fin. Stat.; Petitioner's Documents, filed February 12, 2009 ("Pet'r Feb. Docs.") and March 6, 2009 ("Pet'r March Docs.").) Petitioner alleges her household includes her husband and three dependants. (Pet'r Fin. Stat.)

Petitioner provided this Office with a copy of her monthly pay statement for the month of January 2008. (Pet'r March Docs.) Petitioner's pay statement reflects that her gross pay totals $3,550.00 monthly. (*Id.*) The Secretary is authorized to garnish "up to 15% of the debtor's disposable pay," which is determined "after the deduction of health insurance premiums and any amounts required by law to be withheld...[including] amounts for deductions such as social security taxes and withholding taxes...." 31 C.F.R. §§ 285.11(c) and (i)(2)(i)(A). After subtracting allowable deductions for: federal taxes, $271.00; Medicare, $46.60; health insurance $65.20; and retirement, $250.28, Petitioner is left with a disposable pay of $2,916.92 monthly. (*Id.*)

Petitioner submitted copies of household bills and payments, which include monthly amounts owing for: rent, $1,400; car payment, $489.13 (average); home phone, $39.95; car insurance, $175.94 (average); utilities (water, gas, electric), $607.54 (average); and life insurance, $78.20. (Pet'r March Docs.; Pet'r Feb. Docs.) In addition, this Office has determined that credit may be given for certain essential household expenses, such as rent and food, where Petitioner has not provided bills or other

documentation, yet the "financial information submitted by Petitioner...[was found to be] generally credible...." *David Herring*, HUDOA No. 07-H-NY-AWG53 (July 28, 2008) (citing *Elva and Gilbert Loera*, HUDBCA No. 03-A-CH-AWG28 (July 30, 2004). Thus, in accordance with the holding in *Herring* and *Loera*, this Office will credit Petitioner with her alleged monthly expense for food of $800 for a household of five, resulting in total essential household expenses of $3,590.76 monthly.

Petitioner's evidence of the following expenses were not credited by this Office because Petitioner has not established that they are payments for essential household expenses: cable television, internet service, cellular phone service, school loans, and unidentified debit card purchases from her Wells Fargo account. (Pet'r March Docs.; Pet'r Feb. Docs.)

Petitioner's husband also generates income to the household in the alleged amount of $1,492.00 monthly. (Pet'r Fin. Stat.) Therefore, this Office finds it reasonable to attribute payment of approximately one-third of these monthly essential household expenses to her husband. Therefore, I find Petitioner's two-thirds share of essential household expenses is $2,405.81.

Petitioner's monthly disposable pay of $2,916.92, less her share of essential expenses to cover basic subsidies of $2,405.81, leaves Petitioner with a remaining balance of $511.11. A 15% garnishment rate of Petitioner's current monthly disposable pay would equal $437.54, and leave Petitioner with a monthly disposable income of $73.57. A ten percent garnishment of Petitioner's monthly disposable pay would equal $291.69, and leave Petitioner with a monthly disposable income of $219.42. A five percent garnishment of Petitioner's monthly disposable pay would equal $145.85, and leave Petitioner with a monthly disposable income of $365.26.

Pursuant to 31 C.F.R. § 285.11(k)(3), this Office has the authority to order garnishment at a lesser rate based upon the record before it. After including amounts to cover Petitioner's essential expenses, I find that an order for administrative wage garnishment of Petitioner's disposable income at the rate of 5% would enable Petitioner to meet expenses to cover additional household expenses. Thus, I find that Petitioner has submitted sufficient documentary evidence to substantiate her claim that administrative wage garnishment of her disposable pay, in the amount sought by the Secretary, would cause financial hardship.

ORDER

For the reasons set forth above, this Office finds the debt that is the subject of this proceeding to be past-due and 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 in the amount of 5% of Petitioner's disposable pay.

/s/ original signed

H. Alexander Manuel
Administrative Judge

April 28, 2009