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

In the Matter of: **Simone and Brian Kern,** Petitioners	HUDOA No. 10-H-CH-LL135 Claim No. 721006143

RULING ON MOTION FOR RECONSIDERATION

A Decision and Order ("Decision") was issued on October 14, 2010 in which it was held that the Secretary is authorized to seek collection of Petitioners' debt to the U.S. Department of Housing and Urban Development ("HUD," "Secretary" or "Department") by means of administrative offset of any federal payments due to Petitioners, to the extent authorized by law. On November 12, 2010, Petitioners timely filed a Motion for Reconsideration ("Pet'r Mot.").

Upon due consideration, on February 4, 2011, Petitioners' Motion was GRANTED. The Secretary was also ordered to file a response to the averments set forth in Petitioners' Motion. (Ruling on Motion for Reconsideration and Order, filed February 4, 2011.) On February 11, 2011, the Secretary complied with the Order by filing his Supplemental Statement ("Sec'y Suppl. Stat."), followed by a response from Petitioners filed on February 23, 2011.

As a basis for reconsideration, Petitioners contend that their debt to HUD is not legally enforceable against them because their primary mortgage with Wells Fargo Home Mortgage ("Wells Fargo") and their Partial Claims Promissory Note to HUD[1] constitute the same loan. Petitioners more specifically claim: (1) both loans were treated as one loan package by Wells Fargo, allegedly acting as HUD's agent; (2) Petitioners were unsophisticated and did not understand the difference between the two loans.

First, Petitioners argue that "[b]oth loans were administered by Wells Fargo under one loan number, 936-604856914, and were at all times treated as one loan package handled by the Secretary's agent Wells Fargo Home Mortgage." (Pet'r Response, ¶ 3.) Petitioners further contend that the Deed of Trust supports the fact that both loans were treated as one Wells Fargo

[1]On July 3, 2007, Petitioners executed and delivered to the Secretary a Partial Claims Promissory Note ("Note"), promising to repay a partial claim paid on their behalf by the Secretary to cure the arrearages on their primary FHA-insured mortgage with Wells Fargo and to avoid the foreclosure of their home. (Secretary's Statement ("Sec'y Stat."), ¶ 1, filed July 13, 2010.)

loan package is. *Id.* Petitioners claim that Wells Fargo's "failure . . . to collect on Loan Number 936-604856914 on behalf of HUD was negligent," and that HUD should be held responsible for the actions of its agent. (Pet'r Mot., pp. 1-2.)

The relationship between HUD and Wells Fargo, however, was not that of principal and agent. HUD never authorized Wells Fargo to collect Petitioners' debt to HUD on its behalf. Aside from Petitioners' assertion, Petitioners have failed to produce any documentary evidence to prove that Wells Fargo was HUD's agent. A re-examination of the Note signed by Petitioners on July 7, 2007 indicates that the subject debt was an agreement between Petitioners ("Borrower") and HUD ("Lender"). (*See* Sec'y Stat., Ex. 1, Note.) The Note also shows that the debt to HUD became due and payable when Petitioners had paid in full all amounts due under the primary note and related mortgage insured by the Secretary. (Sec'y Stat., ¶ 2, Ex.1, Note; Dillon Decl., ¶ 4.) Petitioners were to make payments to "U.S. Department of HUD, C/O First Madison Services, Inc., 4111 South Darlington, Suite 300, Tulsa, OK 74135[,] or any such other place *as Lender may designate in writing by notice to Borrower*." (emphasis added.) (See Sec'y Stat., Ex. 1, Note ¶ 3(B)).

According to Petitioners, Castle, Meinhold & Stawiarski LLC ("Castle"), Wells Fargo's attorney, stated in a letter to them that the enclosed check in the amount of $187,145.86 "represent[s] the amount necessary to cure the default and payoff the above referenced loan," referring to the Wells Fargo loan number 936-0604856914, with no reference to the HUD loan (Pet'r Mot., Attach.; Petitioners' Documentary Evidence ("Pet'r Evid."), dated May 21, 2010.) A Wells Fargo representative also explained to Petitioners in a letter, "[Wells Fargo] *did not collect the partial claim funds to pay off the partial claim.* Per the enclosed Partial Claims Promissory Note that you signed, the payoff of the partial claim *is to be made by you directly to HUD.* Wells Fargo Home Mortgage is *unable to release HUD's lien* on the property; therefore *you will need to contact HUD directly* . . . ." (emphasis added) (Pet'r Evid.)

In addition, a payoff statement from Castle on behalf of Wells Fargo shows certain amounts and fees included in the balance due of the loan and the HUD loan, in the amount of $9,889.22, was not included in the Castle payoff statement. (Sec'y Stat., ¶ 6; Dillon Decl., ¶ 8, Ex. A.) The April 13, 2009 HUD 1 Settlement Statement indicates that $187,145.86 was paid to Castle when Petitioners sold their home. There is, however, no indication that Petitioners' debt to HUD for the Partial Claims debt was paid as a result of this sales transaction, or that the amount paid to Castle at the closing included the Partial Claims Debt owed to HUD. (Sec'y Stat., ¶ 7; Dillon Decl., ¶ 9, Ex. B.)

As stated in the previous Decision and Order, in order to prove that Petitioners are no longer liable for the debt, "there must either be a release in writing from the lender specifically discharging Petitioner's obligation, or valuable consideration accepted by the lender from Petitioner, which would indicate an intent to release." *In re Hedieh Rezai,* HUDBCA No. 04-A-NY-EE016, at 3 (May 10, 2004) (*citing In re Cecil F. and Lucille Overby,* HUDBCA No. 87-1917-G250 (December 22, 1986)). Petitioners have neither proffered a release in writing from the Partial Claims debt owed to HUD, nor have they shown that valuable consideration was accepted by HUD that indicated an intent to be released from the Partial Claims debt.

As further support, Petitioners contend that, "a thorough look at the Deed of Trust which was recorded in this matter by the Secretary's agent, shows that on the cover page of the Deed of Trust and on page 1, the Secretary's loan . . . was treated under the Wells Fargo Home Mortgage Loan Number 936-604856914 as part and parcel of the entire Wells Fargo loan package." (Pet'r Response, ¶ 4.) Petitioners conclude that, "although the Secretary claims that the settlement statement does not reflect a payoff of the debt [to HUD], the actions of the agent selected by the Secretary . . . , Wells Fargo Home Mortgage, in collecting the total debt owed under Wells Fargo loan number 936-604856914 should include the amount of the debt owed to [HUD]." (Pet'r Mot., p. 2.)

In addressing Petitioners' claim, it should be noted that the terms to which parties agree are not governed by the cover page but by the actual terms and provisions as set forth in the language of the agreement. Upon a review of the Deed of Trust, it is evident that Petitioners signed the Deed on July 28, 2008 to secure the repayment of the alleged debt to HUD. (Pet'r Response, Ex. B; Pet'r Mot., Ex. B.) The Deed of Trust also shows that the debt, secured by this Deed of Trust against Petitioners' property, is an agreement specifically between Petitioners ("Borrower") and HUD identified as "The Secretary of Housing and Urban Development, the lender" ("Lender"). (*Id.*) Its title page shows two separate and distinct loan numbers, a "Wells Fargo Loan Number" and a "FHA Case Number." (*Id.*) But, more relevant is the language of the Deed of Trust which does not state or suggest that the debt to HUD is considered to be the same as the Wells Fargo loan, or that Wells Fargo was acting as HUD's agent. In fact, the Deed of Trust provides, with specificity, that "If the lender's interest in this Security Instrument is held by the Secretary and the Secretary requires immediate payment in full under Paragraph 7 of the Subordinate Note, the Secretary may invoke the nonjudicial power of sale provided in the Single Family Mortgage foreclosure Act of 1994 ("Act") .... (*See* Sec'y's Stat., Ex. B, Deed of Trust,¶ 7.) It further provides "Nothing in the preceding sentence shall *deprive the Secretary of any rights otherwise available to a lender under this paragraph or applicable law.*" (emphasis added.) (*Id.*)

Consistent with the documentary evidence presented, the primary FHA-insured note and security instrument together act as a separate and distinct debt from the Partial Claim debt alleged in this case. It is the Partial Claim debt that first was secured by the subject Deed of Trust and Note, and now is being currently sought by the Secretary to enforce. (Sec'y Suppl. Stat., ¶ 8; Pet'r Evid.) As such, I find that Petitioners' claim that the alleged debt is unenforceable because the Wells Fargo and HUD loans are the same must fail because Petitioners have failed to demonstrate sufficiently that they have been released from their legal obligation to pay the debt that is the subject of this proceeding.

Second, Petitioners argue that they "were unsophisticated and did not understand any difference between the loan owed to Wells Fargo Home Mortgage pursuant to an underlying Deed of Trust and the debt owed to [HUD], since they had been making only one payment to [Wells Fargo] who was acting as the agent for [HUD] and had carried both debts on its books under the same loan number." (Pet'r Mot., p.2.) Petitioners further argue that since they are not experts in this lending situation, they should not be held responsible for a payment of the total debt which would have and could have been taken care of at the time of closing." (Id.)

While lack of expertise is not a known basis for declaring a loan unenforceable, the Court will examine the feasibility of this argument in light of the record of this proceeding. Petitioners have admitted, on their own, that they did not understand the difference "between the two loans." (Pet'r's Mot., p. 2.) Yet, by their own admission, they not only acknowledge the existence of *two loans*, but they, in essence, admit to the existence of two separate and distinct loans. Petitioners have not thus far presented sufficient evidence to fully persuade the Court that they were led to believe that the two loans were treated as one loan package. The record shows that all the relevant loan documents show that Petitioners were notified of HUD's involvement in their home financing. The record also supports that Petitioners agreed to the terms and conditions of the Note and the Deed of Trust in which it stated: "By signing the next page, Borrower accepts and agrees to the terms contained in this Security Instrument (Deed of Trust) and in any rider(s) executed by Borrower and recorded with it." (Pet'r Response, Ex. B; Pet'r Mot., Ex. B.)

Furthermore, Petitioners' professed lack of knowledge regarding the identity of the insurer on their primary note, even if true, still would not be a valid defense against the enforceability of the debt. A similar defense was raised in *Raymond A. Ingram v. Andrew M. Cuomo*, 51 F. Supp. 2d 667 (U.S. Dist. Ct, M.D. North Carolina, May 5, 1999) in which the debtor claimed ignorance of the loan as a defense against enforcing the debt. The court concluded that "it is well-established that ignorance of the federal character of the loan as a defense against HUD's ability to pursue enforcement of the note against Petitioners is not a defense." (*See also Miguel A. Vigil*, HUDBCA No. 90-4868-L348 (Dec. 28, 1989) (*citing Bill Lee*, HUDBCA No. 87-2775-H300, at 2 (Mar. 17, 1988); *James F. Walsh,* HUDBCA No. 87-2230-G560 (March 13, 1987) (whether Petitioners knew HUD insured the note is irrelevant to its legal enforceability.) In this case, Petitioners properly executed the subject Note and Deed of Trust, and, consistent with *Raymond A. Ingram* and *James Walsh*, their profession of ignorance against the enforceability of the alleged debt is without merit. The Secretary's right to pursue payment from Petitioners of the alleged debt under the terms of the Note and Deed of Trust is valid. As a result, Petitioners remain legally obligated to pay the debt in the amount claimed by the Secretary. Based on the foregoing, it is hereby

ORDERED that the Decision and Order issued in this matter on October 14, 2010 in *In re: Simone and Brian Kern,* HUDOA No. 10-H-CH-LL135 shall not be modified and shall remain in FULL FORCE AND EFFECT.

Vanessa L. Hall
Administrative Judge

January 31, 2012