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

In the Matter of:

CONNIE O'DONNELL aka
CONNIE MULLEN,

Petitioner.

HUDOA No. 10-H-NY-LL97
Claim No. 7-801004230A

Connie Mullen
1084 Doyle Road
Deltona, FL 32725

Pro se

Julia Murray, Esq.
U.S. Department of Housing and
Urban Development
Office of Regional Counsel
for New York/New Jersey Field Offices
26 Federal Plaza, Room 3237
New York, NY 10278

For the Secretary

DECISION AND ORDER

Petitioner 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" or "the Secretary") 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.

Petitioner made a timely request for a hearing concerning the existence, amount or enforceability of the debt allegedly owed to HUD. The Office of Appeals has jurisdiction to determine whether Petitioner's debt is past due and legally enforceable pursuant to 24 C.F.R. § 17.152. The administrative judges of the Office of Appeals 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, this Office temporarily stayed referral of the debt to the U.S. Department of Treasury for offset on March 23, 2010. (Notice of Docketing, Order and Stay of Referral ("Notice of Docketing"), dated Mar. 23, 2010.)

Background

On January 12, 1998, Petitioner executed and delivered a Note and Mortgage to D & E Mortgage Corporation in the amount of $25,000, which was insured against nonpayment by the Secretary, pursuant to Title I of the National Housing Act, 12 U.S.C. § 1703. (Sec'y Stat., ¶ 2; Sec'y Stat. Ex. A, Note.) Contemporaneously, on January 12, 1998, the Note and Mortgage were assigned by D & E Mortgage Corporation to Statewide Mortgage Company. (Sec'y Stat., ¶ 3; Sec'y Stat., Ex. B, Assignment.) Petitioner failed to make payment on the Note as agreed. (Sec'y Stat., ¶ 4.) As a result, on December 10, 1998, Norwest Home Improvement, Inc. f/k/a Statewide Mortgage Company assigned the Note and Mortgage to the United States of America in accordance with 24 C.F.R. § 201.54. (*Id*; Sec'y Stat., Ex. C, Assignment.)

The Secretary has filed a statement alleging that Petitioner is currently in default on the Note. (Sec'y Stat. ¶ 5.) The Secretary has attempted to collect this alleged debt from Petitioner, but has been unsuccessful. (*Id.*) The Secretary alleges that Petitioner is justly indebted to the Secretary in the following amounts:

(a) $24,990.10 as the unpaid principal balance as of March 31, 2010;
(b) $15,636.71 as the unpaid interest on the principal balance at 5% per annum through March 31, 2010; and
(c) interest on said principal balance from April 1, 2010 at 5% per annum until paid.

(*Id*; Declaration of Gary Sautter ("Sautter Decl."), ¶ 4.) A Notice of Intent to Collect by Treasury Offset, dated February 22, 2010, was sent to Petitioner. (Sec'y Stat. ¶ 6.)

Discussion

The Deficit Reduction Act of 1984, 31 U.S.C.A. §3720, provides federal agencies with a means of collecting debts owed to the United States Government. Petitioner bears the initial burden of submitting evidence to prove that the alleged debt is unenforceable or not past due. 24 C.F.R. § 17.152(b). Petitioner argues that the debt is not legally enforceable because: 1) the debt is barred by the statute of limitations; and 2) the Note and Mortgage was never recorded; 3) she never received consideration for the loan; and 4) HUD failed to give her proper notice as required by 24 C.F.R. § 17.151. (Pet'r's Mot. to Dismiss, filed Apr. 19, 2010.)

First, Petitioner argues a 10-year statute of limitations bars the Secretary from collecting this debt from Petitioner and cites *Billy W. Page,* HUDBCA No. 86-1344-F350 (Jan. 31, 1986) and Jack McAdoo, HUDBCA No. 03-A-NY-DD021 (May 13, 2005) to support her argument. The Secretary acknowledges that although 31 U.S.C. § 3716 "once prohibited the use of administrative offset to collect non-tax federal debts outstanding for more than 10-years, that prohibition was repealed effective June 18, 2008." (Sec'y Stat. ¶ 8.) The Secretary states that "[t]here is no longer a prohibition against referring delinquent debts to the Treasury for offset of tax payments," (Sec'y Stat. ¶ 10) and cites 31 C.F.R. § 285.2(d)(6)(i) which provides that, "[HUD] may submit debts to [Treasury] for collection by tax refund irrespective of the amount of time the debt has been outstanding. Accordingly, all nontax debts, including debts that were

delinquent for ten years or longer prior to December 29, 2009 may be collected by tax refund offset." 31 C.F.R. § 285.2(d)(6)(i) (2010). Previously, 31 U.S.C. § 3716 contained a ten-year statute of limitations and the limitations period only applied to federal payment in administrative offset cases, and not administrative wage garnishment cases. However, the governing statute in 31 U.S.C. § 3716(e)(i) that contained the ten-year statute of limitations period has since been amended to eliminate the ten-year statute of limitations entirely. *See Karen T. Jackson*, HUDOA No. 09-H-NY-AWG87, at p. 4 (June 3, 2009). Thus, I find that Petitioner remains legally obligated to pay the alleged debt that is the subject of this proceeding.

Second, Petitioner claims that the Note is unenforceable because the Note and Mortgage were not recorded. (Pet'r's Mot. to Dismiss.¶ 3.) Specifically, Petitioner claims that:

> [T]he debt itself is invalid and illegal as it was not recorded as required by law. The HUD mortgage can only be enforceable if it is legally valid within the perimeters of the laws that govern the state IN WHICH it originated. The state of Florida is a recording state. All mortgage and promissory notes must be recorded to be enforceable.
>
> (Emphasis in original.) (*Id.*)

Petitioner, in a sworn Affidavit of Fact ("Pet'r's Affidavit"), stated that: "I have reviewed the documents from HUD and all I can find is a credit application and a promissory note. The promissory note makes reference to a mortgage loan and no such loan exists." (Pet'r's Affidavit., dated April 15, 2010.) Petitioner also included an Affidavit of Fact, dated April 15, 2010, and signed by Michael O'Donnell ("O'Donnell Affidavit"). In the O'Donnell Affidavit it reads: "I went to the Volusia County Courthouse, public records division and I searched the records and no mortgage exists that states Connie O'Donnell borrowed money from D & E Mortgage. There are no recorded [mortgages] against Connie O'Donnell for home improvements or for any other purpose." (O'Donnell Affidavit). Petitioner submitted what appears to be a printout of Michael O'Donnell's search of recording instruments recorded in Volusia County to support her argument. (O'Donnell Affidavit, Ex. C, Official Records/Recording-Instrument Inquiry – Volusia County – Clerk of Court ("Recording Instrument Inquiry"), Attached.)

The Secretary submitted, in response, a copy of the Note that was signed by Petitioner, along with the Mortgage securing the Note. (Sec'y Stat., Ex. A, Mortgage, attached.) The Secretary states, "as evidenced by the recorder's notation in the upper right hand corner, the Mortgage was recorded in public records of Volusia County, Florida in Book 4273, Page 590 on February 2, 1998.) (*Id.* at p. 1.) The Secretary also states that, "Petitioner has failed to provide any evidence to substantiate her claim that the Note must be recorded before it can be enforced, and no such requirement can be found on the Note itself." (Sec'y Stat., ¶ 14.)

Since federal law is silent on whether the Note and Mortgage need to be recorded in order to be enforced by the Secretary, we look to the laws of the state of Florida, 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.") Florida Statutes, § 695.0 provides that:

> No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law.

By statute, only the Mortgage is required to be recorded, but the statute does not require recordation of the Note. In this case, the Secretary produced sufficient and credible evidence to prove that the Mortgage had been recorded. (Sec'y Stat., Ex. C., Recording Instrument.) Finally, the recordation of the Assignment of the Mortgage indicates that the Mortgage in this case was recorded on February 2, 1998 in Official Public Records of Real Property of Volusia County, Florida. (Id.) Without evidence from Petitioner to refute or rebut the evidence presented by the Secretary regarding recordation of the Note or Mortgage, I find that the debt in this case is legally enforceable against Petitioner because the Mortgage securing the Note was properly recorded in Volusia County, Florida.

Third, Petitioner contends that, "HUD has failed to produce proof that the Peti[ti]oner received any consideration." (Pet'r's Mot. Dismiss. ¶ 5.) Petitioner further contends that:

> [there were] no cancelled checks or proof of funding in that there is no evidence whatsoever that the Petitioner received any funds or compensation from HUD or D&E Mortgage. In order for a promissory note to be valid, there must be proper disbursements, a signed HUD settlement form and proof of funding. No such proof exists and no funding was ever disbursed to the Petitioner.
>
> (Id.)

In response, the Secretary asserts that, "[i]n the Note signed by Petitioner, she acknowledged receipt of the funds, which HUD now seeks to collect. Specifically, Petitioner expressly acknowledged in paragraph 1 of the Note that, '*In return for a loan that I have received*, I promise to pay U.S. $25,000.00 … to the Lender.'" (emphasis in original) (Sec'y Stat., ¶ 16; Sec'y Stat., Ex. A., Note.) Petitioner's acknowledgement of receipt of the loan proceeds is sufficient to establish that Petitioner received consideration for the loan at issue in this case. To date, Petitioner has not offered any other argument or evidence to refute or rebut the Secretary's position that consideration was, in fact, received. Based upon the evidence presented, I find that Petitioner did receive consideration for the loan and, as a result, remains legally obligated to pay the debt that is the subject of this proceeding.

Finally, Petitioner contends that the alleged debt is not legally enforceable because HUD failed to give her proper notice as required by 24 C.F.R. § 17.151. (Letter from Pet'r, dated Sept. 15, 2010.) Petitioner further contends that:

> [t]he debt is uncollectible due to lack of notice as per 24 C.F.R. 17.151 as the Department failed to properly notice [sic] the Petitioner prior to the Petitioner applying for a mortgage loan. After the Petitioner filed for a mortgage loan, the lien appeared and when Petitioner disputed the debt, then the Petitioner was advised of the debt.
>
> (*Id.*)

The notice requirement under 24 C.F.R. § 17.151 requires the Secretary to give notice to Petitioner prior to issuing a notice to offset the federal payments due to Petitioner. More specifically, Section 17.151 states, "[a] request for deduction from a Federal payment will be made only after the Secretary…provides the debtor with 65 calendar days written notice." According to the record in this proceeding, a Notice of Intent to Collect by Treasury Offset was sent to Petitioner as required in 24 C.F.R. § 17.151 (Sec'y Stat., ¶ 6). Petitioner also admitted that she received the Notice of Intent to Collect by Treasury Offset. (Pet'r's Hr'g Req., Notice of Intent, Attached.) Therefore, I find that Petitioner's claim of insufficient notice is not supported by the evidence presented in the record of this proceeding.

ORDER

Based upon the foregoing reasons, I find that the debt that 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 federal payment due Petitioner.

Vanessa L. Hall
Administrative Judge

April 6, 2011