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

In the Matter of:	
LOUIS C. PEASLEY **JULIE E. PEASLEY,**	HUDOA No. 11-H-CH-LL12 Claim No. 7-807265990A HUDOA No. 11-H-CH-LL13 Claim No. 7-807265990B
Petitioners	

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For the Secretary

DECISION AND ORDER

Petitioners were notified, pursuant to 31 U.S.C. §§ 3716 and 3720A, that the Secretary of the U.S. Department of Housing and Urban Development ("HUD") intended to seek administrative offset of any federal payments due to Petitioners in satisfaction of a delinquent and legally enforceable debt allegedly owed to HUD.

Petitioners made a timely request for a hearing concerning the existence, amount, or enforceability of the alleged debt. 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(c). 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 January 20, 2011 until the issuance of a written decision by this Court as required by 24 C.F.R. § 17.156. (Notice of Docketing, Order, and Stay of Referral, issued January 20, 2011.)

Background

On July 24, 2007, the Petitioners executed and delivered to Domestic Bank an installment note in the amount of $25,000 for a home improvement loan that was insured against nonpayment by the HUD Secretary ("Secretary") pursuant to Title I of the National Housing Act (the "Act"). (Secretary's Statement ("Sec'y. Stat."), filed February 24, 2011, ¶ 2; Ex. B, Installment Note (the "Title I Note" or the "Note")). Petitioners failed to make payments as agreed in the Note. (*Id.*, at ¶ 3.) Domestic Bank subsequently assigned the Note to the United States of America in accordance with 24 C.F.R. § 201.54. (*Id.*)

Petitioners also held a first mortgage that was insured under Section 203(k) of the Act. (*Id.*, at ¶ 6.) Petitioners sold their home on August 27, 2009. (*Id.* at ¶ 6; Ex. B, Declaration of Brian Dillon, Acting Director, Asset Recovery Division, Financial Operations Center of HUD ("Dillon Decl."), ¶ 5.)

HUD has made efforts to collect from the Petitioners other than by administrative offset but has been unsuccessful. (Sec'y. Stat. ¶ 4; Dillon Decl. ¶ 4.) The Secretary has filed a statement alleging that Petitioner is justly indebted to HUD in the following amounts:

(a) $22,549.63 as the unpaid principal balance as of December 31, 2010;
(b) $622.16 as the unpaid interest on the principal balance at 1% per annum through December 31, 2010; and
(c) interest on said principal balance from January 1, 2011 at 1% per annum until paid.

(Sec'y. Stat. ¶ 5; Dillon Decl. ¶ 4.)

A Notice of Intent to Collect by Treasury Offset, dated December 27, 2010, was sent to Petitioners. (Petitioner's Hearing Request ("Pet'r's. Hr'g. Req."), p. 3, filed January 18, 2011.)

Discussion

The Deficit Reduction Act of 1984, 31 U.S.C. § 3720A provides federal agencies with the remedy of administrative offset of federal payments for the collection of debts owed to the United States Government. In administrative offset cases, Petitioner bears the initial burden of submitting evidence to prove that the debt is not past-due or legally enforceable. 24 C.F.R. § 17.152(b); *Juan Velazquez*, HUDBCA No. 02-C-CH-CC049 (September 25, 2003).

In this case, Petitioners contend that the debt as claimed by the Secretary does not exist and thus is unenforceable because: (1) the recapture provisions of 24 C.F.R. § 235 prohibit collection of the alleged debt; (2) the Note was discharged as part of the Pre-Foreclosure Sale of

Petitioner's home; (3) the proposed offset would cause undue financial hardship; (4) the Secretary did not weigh HUD's interest in settling the debt with a proposed repayment agreement; and, (5) Petitioners were victims of predatory lending and violations of the Fair Credit Reporting Act.

Petitioners first assert that they do not owe this debt because the Title I Note falls within the purview of 24 C.F.R. § 235 and its loan recapture provisions. (Petitioner's Hearing Request, "Pet'r's. Hr'g. Req.," p. 1). Petitioners state that "The mortgage in question was a HUD FHA Section 235 mortgage." (Id.) As support for their argument, Petitioners cite to HUD Mortgagee Letter 2008-43, dated December 24, 2008, that provides: "Section 235 mortgages released in a HUD Pre-Foreclosure Sale are not subject to recapture when no equity exists in the property." (*Id.*) The Secretary claims, on the other hand, that Petitioners' primary mortgage was secured with a Section 203(k) mortgage, while the Note in question here was insured under Title I of the National Housing Act. (Sec'y. Stat., ¶ 6; Dillon Decl., ¶ 5; Ex. B1.)

Under 24 C.F.R. § 235, "HUD assists mortgagors in making their monthly mortgage payments by paying directly to the mortgagee a portion of the mortgagor's monthly payment." (*See* Chapter 10 HUD Handbook 4330.1, Rev. 5, (Section 235 Mortgages.) The mortgage payment assistance program that distinguishes Section 235-type mortgage programs from other HUD-insured mortgages requires the mortgagee to enter into an assistance payment contract with HUD. (*Id.*) To secure repayment in the event of default, the mortgagor is required to execute, at the time of closing of the first mortgage, a second note and mortgage (the "HUD lien" or "recapture lien"), with addendum, in favor of the Secretary. (*See* HUD Handbook 4330.1, Rev., 5, Chapter 11 (Recapture of Section 235 Assistance Payments).

The recapture language relied upon by Petitioners refers to the recapture by HUD of its mortgage assistance payments, not the loan itself. (*See* 24 C.F.R. Part 235 § 1210 (Recapture of Assistance Payments). According to the record, Petitioners owed $225,000 on the home at the time of the Pre-Foreclosure Sale, which netted $120,000. (Pet'r's. Hr'g. Req., p. 9.) Petitioners therefore claim no equity in the property. (*Id.* at p. 1.) Furthermore, while the information cited by Petitioner correctly states the HUD policy regarding Section 235 mortgages, it has no bearing on the collection of the alleged debt in this proceeding because Petitioners' debt was secured with a Section 203(k) mortgage, not with the Section 235 mortgage.

Even if the mortgage in this case was a Section 235 mortgage, Petitioners' lack of equity would not support a finding that the alleged debt on the primary note is unenforceable. As a result, the record does not provide sufficient evidence to support Petitioners' contention that they do not owe this debt because the Title I Note is a Section 235 mortgage subject to the loan recapture provisions. This Office has consistently maintained that "[a]ssertions without evidence are not sufficient to show that the debt claimed by the Secretary is not past due and or unenforceable." *Troy Williams*, HUDOA No. 09-M-CH-AWG52 (June 23, 2009)(citing *Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996)). Accordingly, I find that Petitioners' claim fails for lack of proof and that Petitioners remain legally obligated to pay the debt that is the subject of the Title I Note in this proceeding.

Second, Petitioners claim that "The alleged debt ... was to be discharged in the HUD Pre-Foreclosure Sale". (Pet'r's. Hr'g. Req. p. 1.) However, the Pre-Foreclosure Sale discharged only the original 203(k) Note, not the debt associated with the Title I Note that is the subject of this proceeding. (*See* Sec'y. Stat., Ex. D.) On August 27, 2009, the same day the Pre-Foreclosure Sale was completed, Petitioners signed a loan affidavit regarding the Title I loan involved in this case, and in that affidavit, Petitioners acknowledged that although Domestic Bank agreed to discharge the primary mortgage, "the release of the security does not exempt our liability on [the Title I] obligation. ... We will continue to make payments according to the terms of the note until the obligation has been satisfied." (*See* Sec'y. Stat., Ex. D.) Without evidence to otherwise show a discharge of the Title I Note, Petitioners' admission that the release of the security did not exempt them from their liability on the Title I loan obligation is sufficient to support a finding that the alleged debt was not discharged by the Pre-Foreclosure Sale. Therefore, I find that the debt that is the subject of this proceeding remains past due and legally enforceable.

Third, Petitioners claim that any administrative offset would result in undue financial hardship. While this Office acknowledges Petitioner's financial circumstances, the law provides "unfortunately, in administrative offset cases evidence of financial hardship, no matter how compelling, cannot be taken into consideration in determining whether the debt is past-due and enforceable." *Edgar Joyner, Sr.*, HUDBCA No. 04-A-CH-EE052 (June 15, 2005); *Anna Filiziana*, HUDBCA No. 95-A-NY-T11 (May 21, 1996); *Charles Lomax*, HUDBCA No. 87-2357-G679 (February 3, 1987). Financial adversity does not invalidate a debt or release a debtor from a legal obligation to repay it. *Raymond Kovalski*, HUDBCA No. 87-1681-G18 (December 8, 1986). Furthermore, no existing regulation or statute permits financial hardship to be considered as a basis for determining whether a debt is past-due and enforceable in cases involving debt collection by means of administrative offset. Thus, consistent with statutory limitations and case law precedent, I find that financial hardship cannot be considered as a defense in this case, as the debt owed by Petitioners is sought to be collected by means of administrative offset.

Fourth, Petitioners state that 24 C.F.R. § 17.106 requires the Secretary to weigh HUD's interest in "settling the debt against hardship to the debtor in offset cases." (Petitioners' Letter ("Pet'r's. Ltr."), filed March 30, 2011.) The regulation states that "a debtor has 20 days from the date of Notice of Intent to Collect by Treasury Offset to submit a proposed written repayment agreement." (Petitioner's Letter, filed April 4, 2011, "Pet'r's. Ltr. A.," *citing* 24 C.F.R. § 17.106(a)). Petitioner further states that the Secretary "may accept or reject the proposal at his discretion, but if the existence and amount of the debt are undisputed, the proposal can only be accepted if an offset would result in undue financial hardship or would be against equity and good conscious." (Pet'r's. Ltr. A, *citing* 24 C.F.R. § 17.106(b)).

24 C.F.R. § 17.106 is a procedural regulation designed to avoid the administrative burden of an offset hearing. As such, the written submission must occur within 20 days of the initial receipt of Notice. (*See* 24 C.F.R. § 17.106(a)). The record does not show that Petitioners ever submitted a proposed written repayment agreement to the Secretary. What the record does contain is a letter dated March 30, 2011 in which Petitioners requested that, "HUD considers[s] a written agreement to repay," but Petitioners failed to provide the specific terms of the proposed

repayment agreement. Further, the March 30th letter was submitted nearly three months after the Notice of Intent was sent to Petitioners and then was directed to this Court, and not to the Secretary. The March 30th letter therefore does not meet the procedural requirements set forth in 24 C.F.R. § 17.106, and as such, cannot be considered a proposed written repayment agreement. But, while this Office is not authorized to extend, recommend, or accept any payment plan, or consider any settlement offer on behalf of HUD, Petitioners may wish to discuss this matter with either Counsel for the Secretary, or submit a HUD Office Title I Financial Statement (HUD Form 56142) to Lester J. West, Director, HUD Financial Operations Center, 52 Corporate Circle, Albany, NY 12203-5121, who may be reached at 1-800-669-5152.

Finally, Petitioners argue that the Title I Note is unenforceable because they have been the victims of predatory lending and violations of the Fair Credit Reporting Act by their mortgagee, Domestic Bank. (Pe't'r's. Hr'g. Req., p. 2; Pet'r's.' Ltr., pp. 1-2.) Petitioners failed to provide, however, a legal basis for their argument beyond their assertion that they are the victims of predatory lending. Petitioners also did not identify, along with supporting documentation, the actions that constituted predatory lending in this case. As a result, I find that Petitioners' claim fails for lack of proof. (*See Troy Williams*, HUDOA No. 09-M-CH-AWG52 (June 23, 2009) (assertions unaccompanied by evidence fail for lack of proof.) Furthermore, this Court is authorized only to decide the past-due status and legal enforceability of debts brought by HUD. 31 U.S.C. § 3720A(b)(2)(3). As such, Petitioners' claim regarding the alleged bad acts of Domestic Bank is beyond the scope of this Court's jurisdiction. Petitioners may wish to pursue this claim in their respective state or local court as a more appropriate venue.

ORDER

For the reasons set forth above, I find that the debt that is the subject of this proceeding is legally enforceable against Petitioners 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

August 18, 2011