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

In the Matter of:

GINA LAMM,

Petitioner.

HUDOA No. 11-M-NY-LL16
Claim No. 7210058150B

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For the Secretary

DECISION AND ORDER

This case arises pursuant to Petitioner Gina Lamm's request for a hearing concerning the existence or enforceability of a debt allegedly owed to the Secretary of the U.S. Department of Housing and Urban Development ("HUD"). The Office of Appeals has been designated to conduct a hearing to determine whether the debt allegedly owed to HUD in this case is legally enforceable. 24 C.F.R. § 17.152(c). 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 February 11, 2011, until the issuance of a written decision by this Court. *See* 24 C.F.R. § 17.156.

Background

On October 23, 2000, Petitioner executed a Partial Claims Promissory Note ("Note") payable to the Secretary in the amount of $7,790.48. (Secretary's Statement that Petitioner's

Debt is Past Due and Legally Enforceable ("Sec'y Stat."), filed March 1, 2011, ¶ 3.) In exchange, HUD advanced funds to Wells Fargo Home Mortgage ("Wells Fargo") to bring Petitioner's FHA-insured home mortgage current. (*Id.*; Ex. B, Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center of the United States Department of Housing and Urban Development ("Dillon Decl."), dated February 28, 2011, ¶ 4.)

Paragraph 3 of the Note enumerates four specific events that cause the debt to become immediately due and payable, (Sec'y Stat., ¶ 4; Ex. A, Note.) one of which is the payment in full of the primary note. (Note at 3(A)(i).) The Note also specified that Petitioner was to make payment at the "Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, SW, Washington, DC 20410, or any such other place as [HUD] may designate in writing by notice to Borrower." (Note at 3(B).)

On March 31, 2003, Petitioner and her husband, Jimmy Lamm, refinanced their home through National City/Key Financial Corporation for $90,464.84. The closing agent requested and received an estoppel letter from Wells Fargo "for the payoff of all amounts in connection with the Wells Fargo loan." (Petitioner's Response to Order of Administrative Judge ("Petitioner's Response"), filed March 22, 2011.) After receiving the letter, Petitioner's closing agent submitted payment to Wells Fargo to pay off the primary note.

On or about April 7, 2003, the lender informed the Secretary that Petitioner's primary note was paid in full, thereby terminating the FHA insurance on the primary note and triggering parts 3(A)(i) and 3(A)(iii) of the Partial Note. (Dillon Decl., ¶ 4.)

The Secretary alleges that Petitioner failed to make payment on the Note at the place and in the amount specified in the Note. (Sec'y Stat., ¶ 7.) The Secretary has made efforts to collect this alleged debt from Petitioner but has been unsuccessful. (*Id.* at ¶ 8.) As such, the Secretary alleges that Petitioner is justly indebted to the Secretary in the following amounts:

(a) $7,552.62 as the unpaid principal balance as of January 31, 2011;
(b) $0.00 as the unpaid interest on the principal balance at 3% per annum through January 31, 2011; and
(c) interest on said principal balance from February 1, 2011 at 3% per annum until paid.

(*Id.*) A Notice of Intent to Collect by Treasury Offset, dated June 1, 2009, was sent to Gina Lamm. (*Id.* at ¶ 9.)

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 these cases, Petitioner bears the initial burden of submitting evidence to prove that the alleged 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 her response, Petitioner contests both the existence and legal enforceability of her alleged debt to HUD. (Pet'r's Response.) Petitioner raises three arguments: (1) that a payment of $9,130.18 to the Law Office of David J. Stern, P.A. ("David J. Stern") fully discharged the debt; (2) that Wells Fargo, acting as HUD's agent, negligently failed to record the Note and failed to identify it in an estoppel letter dated January 28, 2003; and (3) that Florida Statute Section 95.11 — creating a five-year statute of limitations for breach of a written contract — bars this collection action. Each argument is discussed below.

First, Petitioner states that on August 24, 2001, she "remitted $9,130.18, to [t]he Law Office of David J. Stern, P.A.'s, Trust Account for the purpose of paying all amounts due under the mortgage and bringing the mortgage back into good standing. The [Subordinate] Note should have been cancelled at that time." (Pet'r's Resp., at p. 2.)

In support of her argument, Petitioner submitted to HUD a copy of a cashier's check made payable to the Law Offices of David J. Stern in the amount of $9,130.18. (Dillon Decl., Ex. A.) There is, however, no evidence in the record to suggest that HUD ever received payment from Stern.[1] As the Secretary notes, "HUD never authorized Wells Fargo nor David J. Stern to receive partial claims payments on its behalf. Also, HUD has not received any payments from Wells Fargo nor David J. Stern related to Petitioners' debt." (Dillon Dec., ¶ 10.)

The Note clearly states that "Payment shall be made at the following address: Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 451 Seventh Street, SW, Washington, DC 20410 or any such other place as Lender may designate in writing by notice to Borrower." (Note, at ¶ 3(B).) Absent proof that payment was received at the required location, or written notice that HUD had designated Stern to receive such payment, I find that Petitioner has not met her burden to show that the debt was actually satisfied. This Office has consistently held that, in order to prove that Petitioner is no longer liable for the debt, "[t]here 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." (emphasis added) *Hedieh Rezai*, HUDBCA No. 04-A-NY-EE016 (May 10, 2004) (citing *Cecil F. and Lucille Overby*, HUDBCA No. 87-1917-G250 (December 22, 1986); *Jesus E. and Rita de los Santos*, HUDBCA No. 86-1255F262 (February 28, 1986)).

Petitioner's evidence, therefore, is sufficient only to prove that $9,130.18 was remitted to the Law Offices of David J. Stern. It fails to prove that that payment was ever applied to repay the debt in this case. Accordingly, I find that Petitioner is indebted to HUD in the amount claimed by the Secretary.

Petitioner also asserts that Wells Fargo negligently failed to record the Note as a mortgage on Petitioner's home, preventing the outstanding debt from appearing on the estoppel

[1] After the Lamms executed the Partial Claims Promissory Note in December 2000, they again fell behind on their mortgage. A second foreclosure action was initiated in June 2001. A letter to Petitioner's counsel cited in the Dillon Declaration stated that, "[the] cashier's check in the amount of $9,130.18 that was sent to the law firm handling the foreclosure, likely represented the arrears and fees related to the second delinquency, as HUD's Partial Claim brought the first delinquency current." (Dillon Decl., Ex. B.)

letter and in a title search conducted at the time of the refinancing. (Pet'r's Resp., p. 2.)[2] Petitioner further claims that Wells Fargo "was HUD's agent for purposes of having the Partial Claims Promissory Note executed by the Lamms," (*Id.* at p. 3.) and so its negligent failure to include the Note in the estoppel letter prohibits both Wells Fargo and HUD from pursuing collection on the debt. Petitioner appears to be confusing the obligations owed Wells Fargo with those owed to HUD. Wells Fargo was at no time HUD's agent vis-à-vis the Note, and no evidence has been introduced to suggest such a relationship. Indeed, Wells Fargo's interest terminated once the primary note was paid in full; the same event that triggered the repayment obligation at issue here. (*See* Note at 3(A)(i).) Wells Fargo was never, as Petitioner contends, "the recipient of the funds backed by a Partial Claims Promissory Note and mortgage," (Pet'r's Resp., at p. 4.) and so would have no reason to include the Note in its estoppel letter.

Even assuming, *arguendo*, that Wells Fargo was acting as HUD's agent, or, alternatively, that HUD itself had received and responded to Petitioner's estoppel request, Petitioner has still failed to prove her case. The United States Supreme Court has held that when a party is claiming equitable estoppel against the United States government, "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Comty Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). When asserting equitable estoppel against the government, "at a minimum, [Petitioner] must show some *affirmative misconduct* by the government in addition to establishing the other elements of estoppel ... Affirmative conduct is more than mere negligence. It is an act by the government that either intentionally or recklessly misleads the claimant." (emphasis added, internal quotations omitted) *Premo v. United States,* 599 F.3d 540, 547 (quoting *Mich. Express Inc. v. United States*, 374 F.3d 424, 427). In addition to "affirmative misconduct going beyond mere negligence," Petitioners must show that "the government's act will cause a serious injustice and the imposition of estoppel will not unduly harm the public interest." *Pauly v. U.S. Dep't of Agric.*, 348 F.3d 1143, 1149 (9th Cir. 2003) (quoting *S & M Inv. Co. v. Tahoe Reg'l Planning Agency*, 911 F.2d 324, 329 (9th Cir. 1990)).

In this case, Petitioner's argument is insufficient to overcome the heightened governmental estoppel standard because Petitioner does not cite any "affirmative misconduct" by any governmental actor. Instead, Petitioner alleges mere negligence on the part of HUD or Wells Fargo (Pet'r's Resp., at p. 2.) Accordingly, as the courts have found that "affirmative misconduct" must go beyond mere negligence, I find that HUD is not estopped from collecting this debt against Petitioner.

Lastly, Petitioner argues that, "[e]ven if the Lamms had not satisfied the Partial Claims Promissory Note either in 2001 or 2003, collection on this debt is barred by the Statute of Limitations, Florida Statute Section 95.11." (Pet'r's Resp., at p. 4.) Petitioner correctly asserts that Florida law includes a five-year statute of limitations for, "[a] legal or equitable action on a contract, obligation, or liability founded on a written instrument...." Fla. Stat. § 95.11(2)(b) (2010). However, "a state statute is void to the extent that it actually conflicts with a valid federal statute." *Edgar v. Mite Corporation*, 457 U.S. 624, 631 (1982). HUD's present claim is brought under 31 U.S.C § 3716, which states that "notwithstanding any other provision of law,

[2] "Wells Fargo was responsible for recording a mortgage on the Lamm's property, but due to their neglect, or HUD's neglect, or because the Partial Claims Promissory Note had already been paid off, no such mortgage was ever recorded." (Pet'r's Response).

regulation, or administrative limitation, no limitation on the period within which an offset may be initiated or taken pursuant to this section shall be effective." 31 U.S.C. § 3716(e)(1) (2008). In addition, although federal law once prohibited the use of administrative offsets to collect nontax federal debts outstanding for more than 10 years, the prohibition was repealed effective June 18, 2008. *See* Pub. L. No. 110-234, § 14219(b), 112 Stat. 923. Federal regulation now states that HUD is authorized to submit debts to the U.S. Department of Treasury for collection by tax refund "irrespective of the amount of time the debt has been outstanding." 31 C.F.R. § 285.2(d)(6)(i) (2010). The regulation goes on to state that, "[a]ll nontax debts, including debts that were delinquent for ten years or longer prior to December 29, 2009 may be collected by tax refund offset." *Id.* Accordingly, I find that the Secretary is not precluded from collecting this debt by the Florida statute applying a five-year statute of limitation because the Florida statute is in direct conflict with the plain language of 31 U.S.C. §3716 and therefore is effectively preempted.

ORDER

Upon consideration, I find the debt that is the subject of this proceeding to be legally enforceable against Petitioner in the amount claimed by the Secretary. It is hereby

ORDERED that the Secretary is authorized to seek collection of this outstanding obligation by means of administrative offset of any federal payments due to Petitioner.

The Order imposing the stay of referral of this matter to the Internal Revenue Service or to the U.S. Department of the Treasury for administrative offset is **VACATED**.

H. Alexander Manuel
Administrative Judge

June 6, 2011