UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of: **Ramona Rios,** Petitioner	HUDOA No. 12-H-CH-PP26 Claim No. 721006898 May 18, 2012

DECISION AND ORDER

Petitioner was notified, pursuant to 31 U.S.C. §§ 3716 and 3720A, that the Secretary of the U.S. Department of Housing and Urban Development 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.

On February 1, 2012, Petitioner made a request for a hearing concerning the existence, amount, or enforceability of the debt allegedly owed to HUD. The Office of Hearings and Appeals has jurisdiction to determine whether Petitioner's debt is past due and legally enforceable pursuant to 24 C.F.R. § 17.61. [1] The administrative judges of the Office of Hearings and Appeals have been designated to conduct a hearing to determine whether the debt allegedly owed to HUD is legally enforceable. 24 C.F.R. §§ 17.69 and 17.73. As a result of Petitioner's hearing request, this Court temporarily stayed referral of the debt to the U.S. Department of Treasury for offset on February 10, 2012. (Notice of Docketing, Order, and Stay of Referral (Notice of Docketing)).

In response to the Notice of Docketing, and a subsequent Order issued to Petitioner on April 13, 2012, Petitioner submitted documentary evidence on April 22, 2012 and May 4, 2012 in support of her position. In response to an Order issued by the Court to the Secretary on May 10, 2012, the Secretary, through counsel, filed his Statement on May 11, 2012. The record is now ripe for review by this Court.

Background

On October 4, 2005, Ramona Rios ("Petitioner") executed and delivered to the Secretary a Subordinate Note ("Note"), and Security Instrument to secure a partial claim to pay the arrearages on Petitioner's FHA-insured mortgage and avoid foreclosure of her home. (Secretary's Statement ("Sec'y. Stat."), ¶ 1, filed May 11, 2012.) The amount to be repaid under

[1] It should be noted, for future purposes, that Title 24 of the Code of Federal Regulations, §§ 17.150- 17.161 regarding the Department's procedures for requesting the Department of the Treasury to offset Federal payments was amended, effective December 7, 2011.

the Subordinate Note is $8,339.95. (Sec'y Stat. ¶ 2.) The Note cited specific events that made the debt become due and payable, one of these events being if the Petitioner has paid in full all amounts due under the primary note and related mortgage insured by the Secretary. (*Id.*) On or about March 28, 2008, the FHA Insurance on the first mortgage was terminated, as the lender indicated the mortgage was paid in full. (Sec'y Stat., ¶ 3; Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center of HUD, ("Dillon Decl."), dated February 22, 2012, ¶ 4.)

HUD has attempted to collect on the claim from Petitioner, but Petitioner remains delinquent. The Secretary alleges that Petitioner is indebted to HUD on the claim in the following amounts:

(a) $3,339.95 as the unpaid principal balance as of November 30, 2011;
(b) $ 0.00 as the unpaid interest on the principal balance at 1% per annum through February 3, 2012;
(c) interest on said principal balance from February 4, 2012 at 1% per annum until paid.

(Sec'y Stat., ¶ 6; Dillon Decl., ¶ 5.)

A Notice of Intent to Collect by IRS Offset dated April 25, 2011 was mailed to Petitioner. (Sec'y Stat., ¶ 7; Ex. #2, Dillon Decl., ¶ 6.) Petitioner did not contact HUD to enter into a repayment agreement so HUD referred the debt, electronically, to the Treasury Offset Program ("TOP") on July 4, 2011. (Sec'y Stat., ¶ 7; Ex. #2, Dillon Decl.,¶ 7.)

On January 30, 2012, HUD received one TOP offset of $5035.00 that was collected by the Treasury by diverting Petitioner's tax refund to satisfy the debt that she owes to the Secretary. (Sec'y Stat., ¶ 9; Ex. #2, Dillon Decl.,¶ 8.) "Since Petitioner did not request a review by HUD's Office of Appeal until February 1, 2012, the referral to TOP and the subsequent offset in the amount of $5035.00 were not in violation of the stay imposed by the Court." (Sec'y. Stat., ¶ 10; Ex. #2, Dillon Decl., ¶ 9; Ex.#3, Petitioner's Request for Appeal.)

Discussion

Petitioner claims that she "was not aware that HUD was going to offset my refund so please help me in this matter..." (Petitioner's Hearing Request, (Hr'g. Req.), filed February 1, 2012.)[2] Pursuant to Rule 26.10 (a) of Title 24 of the Code of Federal Regulations, "service shall be made by delivery, by first class mail or overnight delivery, to that person's last known address." Consistent with this provision, this Court has previously held that a Notice of Intent is effective upon dispatch, *if properly and reasonably addressed.* (emphasis in original.) *Kenneth V. Holden*, HUDBCA No. 89-3781-K293 (June 6, 1989); *William and Bonnie Autry*, HUDBCA No. 90-5291-L709 (August 24, 1990); *David L. Hinkle*, HUDBCA No. 99-A-CH-Y179 (January 12, 2000); *Shirley Robinson*, HUDOA No. 08-H-CH-JJ43, (September 25, 2008).

[2] In Petitioner's Hearing Request she references the administrative wage garnishment HUDOA docket number (12-H-CH-AWG22) for her appeal, but, based on the language in Petitioner's Hearing Request, it is evident that the appeal was intended to be an administrative offset appeal and as such was filed as an offset appeal under case file HUDOA No. 12-H-CH-PP26.

Consequently, based upon Rule 26.10 (a) and relevant case law, the standard for determining sufficiency of service is effective dispatch of service. In other words, was the notice sent to Petitioner properly addressed and mailed (or electronically transmitted) to Petitioner's last known address?

Here, the Secretary states that "a Notice of Intent to Collect by IRS Offset dated April 25, 2011 was mailed to Petitioner," and provides as support a Declaration from Brian Dillon, Director of HUD's Financial Operations Center (FAO). (Sec'y. Stat. ¶ 7; Dillon Decl. ¶ 6.) The record of this proceeding does not show that such dispatch of service was ineffective, or that Petitioner even challenged sufficiency of notice based upon ineffective dispatch of service to an improper mailing address. (*See Shirley Robinson*, HUDOA No. 08-H-CH-JJ43, (September 25, 2008) (where the administrative judge ruled that Notice of Intent was not properly and reasonably addressed to the Petitioner's address of record, and thus the Notice was determined to be legally deficient because it failed to comply with the provisions of 24 C.F.R. § 17.151[now 24 C.F.R. § 17.65].[3])

Furthermore, in Rule 26.10 (b) it provides that, "proof of service... may be established prima facie by *affidavit, certificate of service of mailing, or electronic receipt of sending.* (emphasis added.) The record shows that the Secretary did provide the Declaration of Brian Dillon as proof that a Notice of Intent to Collect by IRS Offset dated April 25, 2011 was in fact mailed to Petitioner. (Sec'y. Stat., Ex. #2, Dillon Decl.¶ 7.) 28 U.S.C.A. § 1746 provides, in general, that any matter required to be proved by a sworn declaration or affidavit may "with like force and effect, be supported, evidenced, established, or proved by the *unsworn declaration...as true under penalty of perjury, and dated,*" if it states, "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date), " and is signed by the declarant. Such proof exists in this case and is sufficient to prove proof of service. Because the notice was effectively dispatched and properly and reasonably addressed, and because the Declaration of record from the Director of the FAO not only proves sufficiency of service, but also meets the standard under 28 U.S.C.A. § 1746, I find that Petitioner's claim of insufficient notice lacks merit.

Petitioner next claims that "this house was foreclosed on by Value Home Loans on July of 2007" and that she no longer owns the home. (Petitioner's Letter (Pet'r's. May Ltr.), filed May 4, 2012 .) As support , Petitioner submitted a copy of the grant deed for "proof that Value [,]the 2nd lender[,] sold the property to new owner's [sic] and no[t] the Rios. Property foreclosed by the 2d Lender." (*Id.*, Attach.) Petitioner also submitted, as proof of foreclosure and proof that she no longer owned the home, a copy of the Confirmation of Loan Payoff letter from Wells Fargo dated October 12, 2011, along with copies of collection notices from Wells Fargo, and property tax bills that she claims continued to be mailed to her even though she no longer owned the home. (*Id.*)

The Secretary states, however, that even though "the FHA mortgage insurance on the original Note and Security Instrument was terminated, as the mortgage indicated the mortgage was paid in full." The Secretary further states that "pursuant to the terms and conditions of the

[3] It should be noted, for future purposes, that Title 24 of the Code of Federal Regulations, §§ 17.150- 17.161 regarding the Department's procedures for requesting the Department of the Treasury to offset Federal payments was amended, effective December 7, 2011.

Subordinate Note the debt is now past due and legally enforceable." (Sec'y Stat., ¶ ¶ 3-4.) "On January 30, 2012, HUD received one TOP offset of $5,035.00 that was collected by the Treasury by diverting Petitioner's tax refund to satisfy the debt that she owes to the Secretary." (Sec'y Stat., ¶ 9.) The Secretary provides, as support, a copy of the Subordinate Note that shows that the alleged debt becomes due and payable "when the borrower pays the primary Note in full," and proof that the primary Note was "paid in full as of March 28, 2008." (Sec'y Stat., ¶ 2, Ex. #1, Note, ¶ 4(A)(i)).

This Court has consistently maintained that repossession of a debtor's home does not relieve the debtor of an obligation to pay the remaining balance on a loan. In short, repossession of the collateral by the lender does not relieve a debtor of liability. *See Elnora Brevard*, HUDBCA No. 07-H-NY-AWG43, (January 17, 2008), citing *Marie O. Gaylor*, HUDBCA No. 03-D-NY-AWG04 (February 7, 2003); *See also*, *Theresa Russell*, HUDBCA No. 87-2776-H301 (March 24, 1988). Petitioner became legally obligated to pay the debt when Petitioner signed the Note. In order for Petitioner not to be held legally responsible for the alleged 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 that would indicate intent to release. *Jo Dean Wilson*, HUDBCA No. 03-A-CH-AWG09 (January 30, 2003); *Cecil F. and Lucille Overby*, HUDBCA No. 87-1917-G250 (December 22, 1986); *Jesus E. And Rita de los Santos*, HUDBCA No. 86-1255-F262 (February 28, 1986). Petitioner has failed to produce a written release, and failed to provide proof of valuable consideration as a result of foreclosure. Therefore, Petitioner remains obligated to pay the alleged debt.

In addition, this Court has also maintained that "[i]f satisfaction of a senior deed of trust prevents a junior trust holder from enforcing a junior trust deed on the same real property, the junior trust holder may collect the debt, now unsecured, by initiating collection efforts based on the obligations in the loan note." *Mitchell and Rosalva Fraijo*, HUDBCA No. 99-C-CH-Y200 at 3 (March 20, 2000); *John Bilotta*, HUDBCA No. 99-A-CH-Y258 (December 29, 1999) (citing *Kimberly S. (King) Thede*, HUDBCA No. 89-4587-L74 (April 23, 1990)). Because Petitioner has failed to submit evidence to establish the requirements for a valid claim, the alleged debt is now due in accordance with the terms of the Note because the primary Note has been paid in full. Therefore, I again find that Petitioner is not only not relieved of her obligation to pay the alleged debt, but I further find that Petitioner still remains legally obligated to pay the alleged debt in the amount claimed by the Secretary.

Finally, Petitioner claims financial hardship and requests that the Court "rerun my federal tax return based on the fact that I was never informed of an offset [and] I received two eviction [sic] due to this matter because I pay my Feb. and March rent with the refund." (Petitioner's Letter (Pet'r. April Ltr.), filed April 22, 2012.) She also states that "I found myself having to borrow my rent to. [sic] not be on the street." (*Id.*)

While the Court acknowledges Petitioner's financial circumstances, the law provides that "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 regulation or statute currently exist that 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 case law precedent and statutory limitations, I find that financial hardship cannot be considered as a defense in this case as the debt owed by Petitioner is sought to be collected by means of administrative offset.

Petitioner may wish to negotiate repayment terms with the Department as this Court is not authorized to extend, recommend, or accept any payment plan or settlement offer on behalf of the Department. Petitioner also may want to discuss this matter with Legal Counsel for the Secretary or Lester J. West, Director, HUD Financial Operations Center, 52 Corporate Circle, Albany, NY 12203-5121, who may be reached at 1-800-669-5152, and in addition, request a review of her financial status by submitting to the HUD Office a Title I Financial Statement (HUD Form 56142).

ORDER

Based on the foregoing, the Order imposing the stay of referral of this matter to the U.S. Department of Treasury for administrative offset is **VACATED**. It is hereby

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

Vanessa L. Hall
Administrative Judge