

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

In the Matter of:

**CHARLES E. SIMPSON &
ELIZABETH MARY JACKSON,**

Petitioners

Case No. 12-M-NY-PP18

Claim Nos. 7-210070640A
7-210070640B

Date April 19, 2012

DECISION AND ORDER

Petitioners were notified that, pursuant to 31 U.S.C. §§ 3716 and 3720A, 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 to recover a claimed past-due, legally enforceable debt owed to HUD by referring the matter to the U.S. Department of the Treasury.

Petitioners 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 been designated to conduct a hearing to determine whether the alleged debt to HUD is legally enforceable. 24 C.F.R. § 17.69(c). As a result of Petitioners’ hearing request, referral of the debt to the U.S. Department of the Treasury for administrative offset was temporarily stayed by this Office on January 3, 2012, until the issuance of a written decision by the Administrative Judge. 24 C.F.R. § 17.73.

Background

On or about August 7, 2006, the FHA-insured loan on Petitioners’ home was in default and Petitioners were faced with the threat of foreclosure. (Secretary’s Statement (“Sec’y Stat.”), filed January 13, 2012, ¶ 2.) In order to prevent the lender from foreclosing on the home, HUD advanced funds to Petitioners’ lender to bring the primary note current. (*Id.* at ¶ 3.) In exchange for foreclosure relief, Petitioners executed a Subordinate Note (“Note”) in favor of HUD. (*Id.* at ¶ 4.) The amount borrowed under the Note was \$6,749.67. (*Id.*)

The Note provides that it becomes due and payable when “(i) The Borrower has paid in full all amounts due under the Primary Note and related mortgage, deed of trust or similar Security Instruments insured by the Secretary....” (Sec’y Stat. ¶ 5; Subordinate Note ¶ 4(A)(i).) On or about September 2007, the FHA insurance on Petitioners’ primary note was terminated when Petitioners’ lender notified HUD that the primary note had been paid in full. (Sec’y Stat. ¶

6.) At that time, the amount borrowed under the Note became due and payable. (See Subordinate Note ¶4(A)(i).) Pursuant to the Note, Petitioners were to make payments at the "U.S. Department of HUD, c/o First Madison Services, Inc., 4111 S. Darlington, Suite 300, Tulsa, OK 74135 or any other such place as Lender may designate in writing by notice to Borrower." (Subordinate Note ¶ 4(B). Petitioners failed to make any such payments. (Sec'y Stat. ¶ 8.)

The Secretary has made efforts to collect this debt from Petitioners, but Petitioners remain delinquent. (Sec'y Stat. ¶ 9) Petitioners are justly indebted to the Secretary in the following amounts:

- (a) \$6,749.67 as the unpaid principal as of December 31, 2011;
- (b) \$44.96 as the unpaid interest on the principal balance at 1% per annum through December 31, 2011;
- (c) \$238.91 as the unpaid penalties and administrative costs through December 31, 2011; and
- (d) interest on said principal balance from January 1, 2012 at 1% per annum until paid.

(Sec'y Stat. ¶ 9.)

On July 25, 2011, a Notice of Intent to Collect by Treasury Offset was sent to each Petitioner. (Sec'y Stat. ¶ 10.)

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, Petitioners bear the initial burden of submitting evidence to prove that the debt is not past-due or legally enforceable. 24 C.F.R. § 17.69(b); *Juan Velazquez*, HUDBCA No. 02-C-CH-CC049 (September 25, 2003).

On December 28, 2011, this Court received a letter from Petitioners requesting a hearing. (Petitioners' Hearing Request ("Pet'rs' Hearing Req."), dated December 21, 2011.) In response, this Court issued a Notice of Docketing, Order, and Stay of Referral ("Order") ordering the Secretary to file documentary evidence proving that Petitioners' alleged debt to HUD is enforceable and past due. (Notice of Docketing, Order, and Stay of Referral, dated January 3, 2012.) The Secretary filed the Secretary's Statement, setting forth the documentary evidence in support of the claim against Petitioners for the debt to HUD. (Secretary's Statement, dated January 13, 2012.) On February 1, 2012, the Secretary filed a Supplemental Statement.

On February 23, 2012, this Court ordered Petitioners to file documentary evidence to prove that the debt is not enforceable or not past due. (Order, dated February 23, 2012.) The Order further stated that: "Failure to comply with this Order shall result in a decision based on the documents in the record of this proceeding." (*Id.*)

Petitioners did not file any documentary evidence to show that the debt is not enforceable or not past due. Petitioners do, however, make several arguments in support of their position that

they are not liable for the debt. However, for the reasons set forth below, these arguments lack merit.

First, Petitioners appear to assert that too much time has passed for HUD to be able to collect this debt by way of administrative offset. Specifically, Petitioners claim, “We do not understand taking 4 years to be located [sic]....” (Pet’rs’ Hearing Req.) However, there is no limitation on the period within which an offset may be initiated. 31 U.S.C. § 3716(e)(1). The Secretary’s right to collect the debt arose on or about September 11, 2007, which was the date the FHA insurance on Petitioners’ primary note was terminated. (See Sec’y Stat. ¶¶ 6-7.) The Notice of Intent was sent to Petitioners on July 25, 2011. Therefore, the Secretary’s action to collect this debt via administrative offset is not barred by any limitations period.

Petitioners next assert that they “assumed HUD was taken care of at closing 10/10/07 [sic].” (Pet’rs’ Hearing Req.) This assumption does not absolve Petitioners of their indebtedness to HUD. The language in the Note explicitly states, “ ‘Secretary’ or ‘Lender’ means the Secretary of Housing and Urban Development and its successors and assigns” (Note ¶ 2.) Furthermore, the Note provides that the place where payment was required to be made was “U.S. Department of HUD, c/o First Madison Services, Inc., 4111 S. Darlington, Suite 300, Tulsa, OK 74135 or any other such place as Lender may designate in writing by notice to Borrower.” (Note ¶ 4(B).) This language clearly states who the parties to the agreement are and where payment on the note was to be made. As the record lacks any evidence that the proceeds from the sale of the home were used to pay the Note, and Petitioners never made any payments in the manner specified, they were unjustified in assuming that the Note was satisfied at the closing absent such a representation from HUD. In order for this argument to have merit, the lender (HUD) would have had to have given Petitioner a written release, or other documentary evidence, indicating an intent to release, supported by legally sufficient consideration. See *Ann Zamir (Schultz)*, HUDBCA No. 99-A-NY-Y155 (October 4, 1999). There is simply no such evidence in the record.

Petitioners also argue that the agreement was “breached” when Washington Mutual, the primary lender, recorded the subordinate mortgage in the wrong county. (Pet’rs’ Letter.) While this event is unfortunate, it does not relieve Petitioners from liability on the Note. The Secretary is not seeking to foreclose on the property due to a breach of the Subordinate Mortgage/Security Instrument. (Sec’y Stat. ¶ 12.) Rather, the Secretary has initiated this proceeding because of Petitioners breach of the Subordinate Note. (*Id.*) Liability on the Note is not conditioned upon the recording of the subordinate mortgage. The subordinate mortgage was merely collateral for Petitioners’ promise to repay. (See Note ¶ 3.) The Uniform Commercial Code, which has been adopted in Florida, provides, in pertinent part,

[A] promise...is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another record, or (iii) that rights or obligations with respect to the promise or order are stated in another record. A reference to another record *does not of itself* make the promise...conditional.

UCC § 3-106 (2002) (emphasis added); Fla. Stat. Ann. § 673.1061 (West 2011). The Note does not contain an express condition to payment, does not purport to be governed by another instrument, nor does it state that the parties' rights and obligations are set forth in a separate instrument. Furthermore, the official comment to Section 3-106 provides, "a note would *not be made conditional* by the following statement: 'This note is secured by a security interest in collateral described in a security agreement.'" UCC § 3-106 cmt. 1 (2002) (emphasis added). This language is almost identical to the language contained in the Note. The Note only states that the "Borrower's promise to pay is secured by a mortgage." (See Note ¶ 3.) Thus, the Note's reference to the Security Instrument does not incorporate any of the terms and conditions of that document into the Note. Accordingly, the recording of the subordinate mortgage did not become a condition of the Note, and Petitioners' liability was unaffected when the subordinate mortgage was recorded in the wrong county.

Lastly, Petitioners describe their present economic situation and assert that the offset would produce a financial hardship. Unfortunately, evidence of financial hardship, no matter how compelling, cannot be considered in determining whether the debt is past due or legally enforceable. *Hedieh Rezai*, HUDBCA No. 04-A-NY-EE016 (May 10, 2004) (quoting *Charles Lomax*, HUDBCA No. 87-2357-G679 (Feb. 3, 1987)). Financial adversity does not invalidate a debt or release or release a debtor from a legal obligation to repay it. *Hedieh Rezai*, HUDBCA No. 04-A-NY-EE016 (May 10, 2004) (quoting *Raymond Kovalski*, HUDBCA No. 87-1681-G18 (Dec. 8, 1986)).

Petitioners note that the date of debt on the Notice of Intent is incorrect. The Notice of Intent lists the date of debt as December 10, 2001, whereas the actual date of debt is August 7, 2006. This error, however, is not material in nature. The notice to the debtor need only provide the basis for the indebtedness and the rights, if any, the debtor may have to seek review within the agency. 31 C.F.R. § 901.2(b)(1). The Notice of Intent satisfied all of these requirements. Petitioners were made aware of the debt in question, provided with adequate notice, afforded the opportunity for a review, and provided with copies of documents pertaining to their debt.

In sum, Petitioners have failed to prove that the debt is not past due or legally enforceable. I therefore find that the Secretary is therefore entitled to collect the debt via administrative offset. Petitioners have submitted a copy of a letter dated January 3, 2012 which indicates that there has already been one offset reduction in the amount of \$219.75. This amount was offset prior to the issuance of the temporary stay and shall be credited to the amount to which Petitioner remains indebted.

ORDER

For the reasons set forth above, I find the debt that is the subject of this proceeding to be 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.



H. Alexander Manuel
Administrative Judge

April 19, 2012