

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

In the Matter of:

Kenneth E. Thomas,

Petitioner.

19-AM-0060-AO-023

7210139010A

August 10, 2021

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a *Request for Hearing* (“*Hearing Request*”) filed on or about February 6, 2019, by Kenneth E. Thomas (“Petitioner”) concerning the existence, amount, or enforceability of a debt allegedly owed to the U.S. Department of Housing and Urban Development (“HUD” or “the Secretary”). The Debt Collection Improvement Act of 1996 authorizes federal agencies to use administrative offset as a mechanism for the collection of debts owed to the United States government. *See* 31 U.S.C. §§ 3716, 3720A.

The Office of Hearing and Appeals has jurisdiction to determine whether Petitioner’s debt is past due and legally enforceable pursuant to 24 C.F.R. §§ 17.61 *et. seq.* The administrative judges of this Court, in accordance with the procedures set forth in 24 C.F.R. §§ 17.69 and 17.73, have been designated to conduct a hearing to determine, by a preponderance of the evidence, whether the alleged debt is past due and legally enforceable.

PROCEDURAL BACKGROUND

Pursuant to 24 C.F.R. § 17.77, on February 11, 2019, this Court stayed the issuance of an administrative offset order until the issuance of this written decision. (*See Notice of Docketing, Order and Stay of Referral* (“*Notice of Docketing*”) at 2). On or about March 11, 2019, Petitioner filed a *Statement* (“*Petr’s. Stat.*”) and documentary evidence in support of his position. On October 10, 2019, the Secretary filed *Secretary’s Statement That Petitioner’s Debt is Past Due and Legally Enforceable* (“*Sec’y. Stat.*”), along with documentary evidence in support of his position.

FINDINGS OF FACT

In or about October 2014, the HUD-insured primary mortgage on Petitioner’s home was in default, and Petitioner was threatened with foreclosure. (*See Sec’y. Stat.*, ¶¶ 2-3; *Sec’y. Stat.*, Ex. 2, Declaration of Brian Dillon, (“*Dillon Decl.*”), ¶ 4). To prevent the lender from foreclosing,

HUD advanced funds to Petitioner's primary lender to bring the primary note current. (*See id.*) In exchange for foreclosure relief, on October 20, 2014, Petitioner executed a Subordinate Note ("Note") in the amount of \$34,569.41 in favor of the Secretary. (*See Sec'y. Stat.*, ¶ 2; *Sec'y. Stat.*, Ex. 1, Note, ¶ 2; *Dillon Decl.*, ¶ 4).

Paragraph 4(A) of the Note cites specific events that make the debt become due and payable. One of those events is the payment in full of the primary note. (*See Sec'y. Stat.*, ¶ 4; *Dillon Decl.*, ¶ 4; *Sec'y. Stat.*, Ex. 1, Note, ¶ 4(A)(i)). On or about April 30, 2018, the primary lender notified the Secretary that the primary note was paid in full. (*See Sec'y. Stat.*, ¶ 5; *Dillon Decl.*, ¶ 4). Upon payment in full of the primary note, Petitioner was to make payment to HUD on the Note at the "Office of the Housing FHA-Comptroller, Director of Mortgage Insurance Accounting and Servicing, 2488 E. 81st Street, Suite 700, Tulsa, OK 74137 or any such other place as [HUD] may designate in writing by notice to Borrower." (*See Sec'y. Stat.*, Ex. 1, Note, ¶ 4(B)).

Petitioner failed to make payment on the Note at the place and in the amount specified above. Consequently, the Secretary alleges that Petitioner's debt to HUD is delinquent. (*See Sec'y. Stat.*, ¶ 6; *Dillon Decl.*, ¶ 5). The Secretary has made efforts to collect this debt by sending a *Notice of Intent to Collect by Treasury Offset* ("Notice") to Petitioner at his last known address on or around October 15, 2018. (*See Sec'y. Stat.*, ¶ 8; *Dillon Decl.*, ¶ 6). By that *Notice*, Petitioner was afforded the opportunity to enter into a written repayment agreement under terms agreeable to HUD. Petitioner did not do so, and there is still no evidence to suggest Petitioner has paid off the Note. Therefore, the Secretary asserts that Petitioner is justly indebted to the Secretary in the following amounts:

- a) \$34,569.41 as the unpaid principal balance as of August 31, 2019;
- b) \$334.60 as the unpaid interest on the principal balance at 1% per annum through August 31, 2019;
- c) \$1,886.15 as the unpaid penalties through August 31, 2019;
- d) \$35.33 as the unpaid administrative costs through August 31, 2019; and
- e) interest on said principal balance from September 1, 2019 at 1% per annum until paid.

(*See Sec'y. Stat.*, ¶ 7; *Dillon Decl.*, ¶ 5).

DISCUSSION

31 U.S.C. § 3720A provides federal agencies with administrative offset of federal payments as a remedy for the collection of debts owed to the United States government. 31 U.S.C. § 3716 authorizes executive agencies such as HUD to collect debts owed to the United States Government through means including administrative offset. Pursuant to 24 C.F.R. § 17.69(b)-(c), Petitioners must show by a preponderance of the evidence that all or part of the alleged debt is either not past due or not legally enforceable.

As evidence of Petitioner's indebtedness, the Secretary has filed *Secretary's Statement That Petitioner's Debt is Past Due and Legally Enforceable* (see *Sec'y. Stat.*); a sworn declaration by Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center (see *Dillon Decl.*); and a copy of the Note (see *Sec'y. Stat.*, Ex. 1). Accordingly, the Court finds that the Secretary has met his initial burden of proof.

"A petitioner has the burden of producing evidence which demonstrates that the claimed debt is not past-due or legally enforceable." (See *Sec'y. Stat.*, ¶ 9, quoting *Michael Cook*, HUDBCA No. 87- 2782-H307 (Aug. 11, 1988)). In the case at bar, Petitioner maintains he should not be held responsible for the subject debt because he was not advised by his primary lender and/or closing title company that there was an outstanding mortgage or lien prior to closing of his home. (See *Petr.'s Stat.* at 1; see also *Sec'y. Stat.*, ¶ 9; *Dillon Decl.*, ¶ 7). Petitioner introduced, as support for his position, a copy of his April 24, 2018 LoanDepot.com LLC ("LoanDepot") Closing Disclosure (see *Petr.'s Stat.* at 10-16); LoanDepot Closing Worksheet (see *Petr.'s Stat.* at 17-20); and LoanDepot Closing Instructions. (See *Petr.'s Stat.* at 21-24).

After examining Petitioner's documentary evidence, the Court finds that Petitioner has failed to meet his burden of proof that the debt herein is fully satisfied and thus unenforceable. Here Petitioner's evidence pertains only to his mortgage refinance with LoanDepot, which has no bearing on the Note or the subject debt owed to HUD. Furthermore, although Petitioner was not advised by his primary lender and/or closing title company of any outstanding mortgages or liens prior to closing, "a third party's error or negligence does not normally relieve Petitioner of liability for the debt ... Petitioner's obligation to pay the debt derives from the terms of the Note." See *Stephond West*, HUDOA No. 17-AM- 0026-AG-006 (March 14, 2018), citing *Bryan McClees*, HUDOA No. 17-AM- 0037-AO-010 (February 14, 2018) and *Cydine A. Taylor*, HUDOA No. 14- AM-0063-AO-005 (October 22, 2014). Thus, any advisement or lack thereof to Petitioner by his primary lender or LoanDepot is unrelated to the enforceability of the subject debt owed to HUD.

Differently stated, the Secretary's right to collect the alleged debt in this case emanates from the terms of the Note, not from the representations made by a primary lender or mortgage company. See *Bruce R. Smith*, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). The Note signed by Petitioner when he was threatened with foreclosure clearly states under the heading "Borrower's Promise to Pay" that "[i]n return for a loan received from Lender, Borrower promises to pay the principal sum of ... \$34,569.41..." (See *Sec'y. Stat.*, Ex. 1, Note, ¶ 2) (emphasis added). "Lender" is defined under the heading "Parties" as "the Secretary of Housing and Urban Development." (See *Sec'y. Stat.*, Ex. 1, Note, ¶¶ 1 & 2) (emphasis added).

For Petitioner not to be held liable for the full amount of the debt, Petitioner must produce either a release in writing explicitly relieving Petitioner's obligation under the terms of the Note or proof of "valuable consideration accepted by the lender" that indicates HUD's intent to release. See *Cecil F. and Lucille Overby*, HUDBCA No. 87-1917-G250 (Dec. 22, 1986). Petitioner has failed to produce either in this case.

This Court has consistently maintained that "assertions without evidence are insufficient to show that the debt claimed by the Secretary is not past due and legally enforceable." See *Sara*

Hedden, HUDOA No. 09-H-NY-AWG95 (July 8, 2009), quoting *Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996). In this case, Petitioner failed to introduce into evidence proof of a written release, directly from HUD, that effectively discharged Petitioner from the debt associated with the Note. Because Petitioner agreed in the Note to pay the subject debt, the onus falls on Petitioner, not on the primary lender, title company, or LoanDepot, to ensure that the subject debt was satisfied. Hence, the Court finds that the Petitioner's claim fails for lack of proof and the subject debt is past due and enforceable.

Although Petitioner claims an inability to pay the debt because of financial hardship, this Court only determines whether, as a matter of law, the subject debt is legally enforceable against Petitioner. Unfortunately, evidence of hardship, no matter how compelling, cannot be taken into consideration in determining whether a debt is legally enforceable. See *Frank and Jessie Collins*, HUDBCA No. 02-C-CH-CC053 (March 19, 2003), citing *Anna Filiziana*, HUDBCA No. 95-A-NY-T11 (May 21, 1996). If Petitioner wishes to address repayment terms with the Department, Petitioner should contact Michael DeMarco, the Director of HUD Albany Financial Operations Center, at 52 Corporate Circle, Albany, NY 122030-5121. His telephone number is 1-800-669-5152, extension 2859.

ORDER

Based on the foregoing, 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 seek collection of this outstanding obligation by means of administrative offset in the amount so claimed by the Secretary.

SO ORDERED,



H. Alexander Manuel
Administrative Judge

Review of determination by hearing officers. A motion for reconsideration of this Court's written decision, specifically stating the grounds relied upon, may be filed with the undersigned Judge of this Court within 20 days of the date of the written decision, and shall be granted only upon a showing of good cause.