

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

In the Matter of:

Rosse Gonzalez,

Petitioner.

20-VH-0029-AO-005

7-210157040A

September 9, 2021

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a *Request for Hearing* (“*Hearing Request*”) filed on November 5, 2019, by Petitioner Rosse Gonzalez (“Petitioner”) concerning the existence, amount, or enforceability of a debt allegedly owed to the U.S. Department of Housing and Urban Development (“HUD” or “Secretary”).

JURISDICTION

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 *et. seq.* The administrative judges of this Court, in accordance with the procedures set for 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 HISTORY

Pursuant to 24 C.F.R. § 17.81(a), on November 5, 2019, this Court stayed the issuance of an administrative offset until the issuance of this written decision. *Notice of Docketing, Order and Stay of Referral* (“*Notice of Docketing*”) at 2. On April 1, 2020, Petitioner filed a *Statement* (“*Petr’s Stat.*”) and documentary evidence in support of her position. On September 16, 2020, the Secretary filed his *Statement* (“*Sec’y. Stat.*”), along with documentary evidence in support of his position. This case is now ripe for review.

FINDING OF FACTS

This is a debt collection action brought pursuant to Title 31 of the United States Code, section 3720A, because of a defaulted loan that was insured against non-payment by HUD’s Federal Housing Administration (“FHA”).

In or about July 2015, the HUD-insured primary mortgage on Petitioner's home was in default, and Petitioner was threatened with foreclosure. *Sec'y Stat.*, ¶ 2; *Sec'y Stat.*, Ex. A, Declaration of Brian Dillon, ("*Dillon Decl.*"), ¶ 4. To prevent the lender from foreclosing, HUD advanced funds to Petitioner's lender to bring the primary note current. *Id.* In exchange for foreclosure relief, on July 27, 2015, Petitioner executed a Subordinate Note ("Note") in the amount of \$44,535 in favor of the Secretary. *Sec'y Stat.*, Ex. B, Note, ¶ 2.

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. Note, ¶¶ 4(A)(i) & (iii). On or about May 31, 2019, the FHA insurance on Petitioner's primary note was terminated when the primary lender notified the Secretary that the primary note was paid in full. *Sec'y Stat.*, ¶ 6; *Dillon Decl.* ¶ 4; Note, ¶¶ 4(A)(i) & (iii). 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, 451 Seventh Street, SW, Washington, DC 20410 or any such other place as [HUD] may designate in writing by notice to Borrower." *Sec'y Stat.*, ¶ 7; Note, ¶ 4(B).

A *Notice of Intent to Collect by Treasury Offset* dated October 14, 2019 ("*Notice*") was sent to Petitioner. *Sec'y Stat.*, ¶ 10; *Dillon Decl.*, ¶ 6. 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. *Sec'y Stat.*, ¶ 9; *Dillon Decl.*, ¶ 5. The Secretary has made efforts to collect this debt from Petitioner but has been unsuccessful. Therefore, the Secretary asserts that Petitioner is justly indebted to the Secretary in the following amounts:

- a) \$44,535.00 as the unpaid principal balance as of August 20, 2020;
- b) \$445.20 as the unpaid interest on the principal balance at 1% per annum through August 30, 2020;
- c) \$2,528.92 as the unpaid penalties and administrative costs through August 30, 2020; and
- d) interest on said principal balance from September 1, 2020 at 1% per annum until paid.

(*Id.*)

DISCUSSION

Petitioner maintains she should not be held responsible for the subject debt because it should have been paid off at the closing of the primary note. Petitioner introduced, as support for her position, copies of a Loan Modification Agreement entered into with the primary lender in August 2015; the May 8, 2019 Payoff Letter for the primary note, which was paid off when Petitioner sold the underlying property; the HUD Subordinate Mortgage dated July 27, 2015; and emails from Jessica Wagemaker, an attorney for a title insurance company, to a representative of CEO Closings Services, LLC, which was involved in the property sale, as proof of the alleged

merging of the primary and subordinate notes and alleged subordinate note payoff. *Petr.'s Stat.*, Exs. A-D.

After examining Petitioner's documentary evidence, the Court finds that Petitioner has failed to meet her burden of proof that the debt herein is fully satisfied and thus unenforceable. 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 mortgage company or title company. Bruce R. Smith, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). Jessica Wagemaker, an attorney for a title insurance company, incorrectly informed a representative of CEO Closings Services, LLC on May 8, 2019 that the "HUD mortgage does not represent a separate debt." *Petr.'s Stat.*, Ex. D, Emails. In reality, the loans are separate. The loans also require two separate releases, as acknowledged by Ms. Wagemaker on May 10, 2019 in her email to a representative of CEO Closings Services, LLC. *Sec'y Stat.*, ¶¶ 13 & 14; *Petr.'s Stat.*, Ex. D, Emails.

Petitioner's payment of \$129,061.84 paid in full the primary note. *Petr.'s Stat.*, ¶ 6; *Petr.'s Stat.*, Ex. B, Payoff Statement. However, Petitioner has not produced any evidence that the Subordinate Note was paid off or that HUD released her from her obligation to pay it off. The May 8, 2019 Payoff Letter does not indicate the subordinate loan was paid off, only the primary loan. *Petr.'s Stat.*, Ex. B, Payoff Statement. Likewise, the August 2015 Loan Modification Agreement, introduced by Petitioner to prove that the Loan Modification Agreement included both loans, shows instead that the subordinate loan was not included. *Petr.'s Stat.*, Ex. A, Loan Modification Statement. HUD is not a party to the Loan Modification Agreement, and Paragraph 1 expressly states that the Agreement applies to the October 6, 2008 mortgage note (i.e., the primary mortgage note, not the subordinate).

The Note signed by Petitioner when she 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 ... \$44,535.00..." Note, ¶ 2 (emphasis added). "Lender" is defined under the heading "Parties" as "the Secretary of Housing and Urban Development." *Sec'y Stat.*, ¶ 12; 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 produce "valuable consideration accepted by the lender" that indicates HUD's intent to release. Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (Dec. 22, 1986). Petitioner has failed to produce either in this case. Furthermore, HUD did not release its lien on the subject property. *Sec'y Stat.*, ¶¶ 14 & 15. Thus, the evidence submitted by Petitioner merely demonstrates that Petitioner was provided erroneous information upon which Petitioner relied as binding, an occurrence which "does not normally relieve Petitioner of liability for the debt...[because] Petitioner's obligation to pay the debt derives from the terms of the Note." 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); see also Judith Herrera, HUDOA No. 12-M-CH-AWG27 (July 12, 2012) (wherein, this Court found that a statement to petitioner by a title company that "all was okay and petitioner did not owe debt" was insufficient evidence to prove that HUD had been paid).

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.” 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 subordinate note. Because Petitioner agreed in the Note to pay the subject debt should a default occur, the onus falls on Petitioner, not on the primary lender or on Ms. Wagemaker, 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.

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.


Vanessa L. Hall
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.