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

In the Matter of: **JOHNNY NEAL JR.,** Petitioner	HUDOHA No. 12-AM-CH-AO-49 Claim No. 7708645820A January 13, 2014

DECISION AND ORDER

On September 12, 2012, Johnny Neal Jr. ("Petitioner") requested a hearing challenging the U.S. Department of Housing and Urban Development's ("HUD" or "the Secretary") administrative offset of a portion of Petitioner's Social Security benefits. Pursuant to 31 U.S.C. §§ 3716 and 3720A, the offset was used to satisfy a past due debt allegedly owed to HUD. Petitioner contests the enforceability of the alleged debt and requests a refund of $1,982.70.

The Office of Hearings and Appeals has been designated to conduct a hearing to determine whether the alleged debt is valid and legally enforceable. 24 C.F.R. § 17.69(c). As a result of Petitioner's Hearing Request, referral of the debt to the U.S. Department of the Treasury ("the Treasury") for administrative offset was temporarily stayed by this Office until the issuance of this written decision. (Notice of Docketing, Order, and Stay of Referral ("Notice of Docketing"), dated September 12, 2012.)

Background

On or about May 17, 1994, Petitioner and Vivian Jean Neal executed and delivered to North Texas Credit Co. a Retail Installment Contract & Disclosure Statement ("Note") in the amount of $8,600.00. (Secretary's Statement ("Sec'y Stat.") ¶ 2, filed December 28, 2012; Ex. A, Note.) The Note was insured against nonpayment by the Secretary pursuant to Title I of the National Housing Act. (Sec'y Stat. ¶ 3; Exhibit B, Declaration of Brian Dillon[1] ("Dillon Decl."), ¶¶ 2-3.) After default by Petitioner, the Note was assigned to HUD. (Sec'y Stat. ¶ 4; Dillon Decl., ¶ 3.) HUD has attempted to collect the amount due under the Note, but has been unsuccessful. (Sec'y Stat. ¶ 5; Dillon Decl., ¶ 4.)

Accordingly, on June 6, 2011, HUD mailed Petitioner a Notice of Intent to Collect by Treasury Offset ("Notice of Intent"). (Sec'y Stat. ¶ 6; Dillon Decl., ¶ 5.) Petitioner did not respond to the Notice. As a result his debt was referred to the Treasury Offset Program ("TOP") on August 15, 2011. (Dillon Decl., ¶ 5.) Petitioner's Social Security benefits have since been

[1] Brian Dillon is the Director of the Asset Recovery Division of HUD's Financial Operations Center.

offset twelve times, for a total of $1,982.70. (Sec'y Stat. ¶ 8; Dillon Decl., ¶ 5.) The Secretary alleges that Petitioner remains indebted to HUD in the following amounts:

a. $1,151.76 as the unpaid principal balance as of November 30, 2012;
b. $9.60 as the unpaid interest on the principal balance at 5.0% per annum through November 30, 2012; and
c. interest on said principal balance from December 1, 2012, at 5.0% per annum until paid.

(Sec'y Stat. ¶ 7; Dillon Decl., ¶ 4.)

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. Petitioners bear the initial burden of submitting evidence to provide 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 (Sept. 25, 2003).

Here, Petitioner claims he does not owe the debt that is the subject of this proceeding because the collection of this debt has been barred permanently. More specifically, Petitioner states that:

> The collection of this debt is barred pursuant to a DECISION AND ORDER issued by Judge David T. Anderson, Administrative Judge, which ORDERED that the stay of referral of this matter to the IRS or U.S. Department of the Treasury for administrative offset of any payment due Petitioner shall be made permanent. 31 U.S.C. Section 3716(e)(1).

(Petitioner's Hearing Request, ("H'rg. Req."), filed September 12, 2012.) As support, Petitioner submitted a copy of the Decision and Order ("2006 Order"), issued on August 25, 2006, by the HUD Board of Contract Appeals, a predecessor body to this Court. The basis of this 2006 Order was based on the expiration of a ten-year limitation period of an administrative offset action. At the time, 31 U.S.C. § 3716(e)(1) prohibited a federal agency from seeking repayment of a debt if the debt was outstanding for more than ten years. The case was dismissed with prejudice and the Secretary did not seek an appeal.

However, two years after issuance of the 2006 Order, Section 14219(a) of Public Law 110-246 amended 31 U.S.C. § 3716(e) to eliminate the ten-year statute of limitations. Specifically, the amended statute provides:

> (e)(1) Notwithstanding any other provision of law, 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.

Section 14219(b) also provides that "[t]he amendment made by subsection (a) shall apply to any debt outstanding on or after the date of the enactment of this Act." As a result of this amendment, all debts, including those previously ineligible for collection through administrative offset due to the expiration of the statute of limitation, may be collected by administrative offset.

Accordingly, the Secretary argues that, by operation of this amended statute, the Treasury's offset action against Petitioner was revived and HUD was authorized to collect its debt. The Secretary contends that there is "no conflict between a presumption of antiretroactivty and the principle that a court should apply the law in effect at the time of decision" because the Supreme Court, in Landgraf v. USI Film Prods., 511 U.S. 244 (1994), held that the courts are bound by congressional mandate where a statute unambiguously applies to preenactment conduct. The Secretary also argues that this Court has previously held that "31 U.S.C. § 3716(e)(1), as amended, eliminated the limitation period on actions to recover delinquent debts, and revived all actions that would otherwise have been time barred so long as the debt was 'outstanding' on the date of enactment." (In the Matter of Laura J. Owens, 10-M-NY-LL53 (June 25, 2010).)

The problem with the Secretary's claim, however, is that it overlooked the possibility of preclusive effect that the 2006 Order, itself, has on this case. Specifically, the doctrine of *res judicata* has long been applied in judicial proceedings, as well as federal administrative determinations to bar subsequent litigation on claims previously decided on the merits.

Although *res judicata* is not as rigidly applied in administrative cases (see Facchiano v. U.S. Dept. of Labor, 859 F.2d 1163, 1167 (3d. Cir. 1988)) and "there is much flexibility which is intended to adapt the doctrine to the unique problems of administrative justice" (see Stuckey v. Weinberger, 488 F.2d 904, 911 (9th Cir. 1973); Grose v. Cohen, 406 F.2d 823 (4th Cir. 1969)), the U.S. Supreme Court has applied the doctrine in administrative decisions. For example, United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966), *superseded by statute,* Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, stated in pertinent part:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Utah Constr., 384 U.S. at 422. The force of this statement is to put aside court decisions that have held that *res judicata* can never apply in any administrative proceeding. 2 Admin. L. & Prac. § 5:72 (3d ed.). Later, the Supreme Court reaffirmed this "long favored application of the common-law doctrines of .... *res judicata* (as to claims) to those determinations of administrative bodies that have attained finality." Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991).

The *Solimino* Court also elaborated on the policy reasoning behind this particular doctrine:

> Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. . . . The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, . . . , which acts in a judicial capacity.

Solimino, 501 U.S. at 107-08.

In general, *res judicata* bars a second suit if a prior suit: (1) involved the same parties or their privies, (2) resulted in a valid, final judgment on the merits, and (3) was based on the same claim or cause of action. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597-98 (1948).

Because the same Petitioner is involved in the first and the second proceedings brought by HUD, based on the same alleged debt, the requisite elements for the applicability of *res judicata*, set forth in (1) and (3), are met. The second requirement for a "valid, final judgment on the merits," however, bears additional analysis since the 2006 Order was decided primarily on procedural grounds, or more precisely, expiration of the statute of limitations.

It is well-settled that a time bar does not suggest that the substantive claim is not meritorious, or even that it ceases to be a continuing moral obligation, but "only bars the remedy." See Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001); Cloverleaf Realty of New York, Inc. v. Town of Wawayanda, 572 F.3d 93, 95 (2d Cir. 2009); In re Marino, 181 F.3d 1142, 1145-46 (9th Cir. 1999). Most federal courts, however, have held that a dismissal on statute of limitations grounds constitutes an adjudication on the merits for *res judicata* purposes. See, e.g., Murphy v. Klein Tools, Inc., 935 F.2d 1127, 1128–29 (10th Cir.1991); Shoup v. Bell & Howell Co., 872 F.2d 1178, 1180 (4th Cir.1989); Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc., 870 F.2d 1044, 1046 (5th Cir.1989); S. Cal. Fed. Sav. & Loan Ass'n v. United States, 52 Fed.Cl. 444, 454 (2002); see also 21A Fed. Proc., L.Ed. § 51:246 (stating that "[t]he prevailing view is that a dismissal for failure to comply with the statute of limitations is an adjudication on the merits"). Since the 2006 Order was clearly decided based on the applicable statute of limitations in effect at that time, I find that the requirement for a "valid, final judgment on the merits" is met for purposes of the second prong of the *res judicata* enunciated in Sunnen.

The other salient doctrine that operates to bar relitigation of the underlying claim in the 2006 Order, is the fact that the prior case was dismissed "with prejudice". See Colonial Auto Center v. Tomlin (In re Tomlin), 105 F.3d 933, 936-37 (4th Cir.1997); Daewoo Electronics Corp. of America, Inc. v. Western Auto Supply Co., 975 F.2d 474, 478 (8th Cir.1992); In re

Marino, 181 F.3d at 1144. This Court finds no substantial basis for disturbing the findings reached in that decision.

In particular cases, there may be special circumstances in which the logic of a particular administrative or remedial scheme dictates that the dismissal of a first untimely complaint should not preclude a second complaint that is timely. For example, in a bankruptcy case, the Ninth Circuit held that the new timely complaint was not precluded by the *res judicata* effect of dismissing the complaint in the Chapter 11 proceeding with prejudice because the Chapter 7 proceeding created "a wholly different time limitation, which did not even exist before." In re Marino, 181 F.3d at 1145. This case, however, simply lacks such special circumstances.[2] Certainly, the Secretary has not pointed to any administrative or remedial scheme akin to Title 11 of the U.S. Code that would be applicable to the debt collection action in this case.

Besides this special exception to the application of *res judicata*, "the suitability [of preclusion] may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedure." Solimino, 501 U.S. at 110. But the Administrative Judges and Administrative Law Judges of this Court, which is an independent judicial office within the Office of the Secretary at HUD, conduct hearings and make determinations regarding formal complaints or adverse actions initiated by HUD, based upon alleged violations of federal statutes and implementing regulations that apply to federal agencies across-the-board. This Court's hearing procedures are governed by HUD regulations, and are guided by the broad statutes and rules applicable to trials in federal courts, generally. There is no comprehensive remedial scheme that specifically governs administrative offset claims heard by the HUD Office of Hearings and Appeals.

Concluding that giving *res judicata* effect to the 2006 Order is consistent with the precedent of the U.S. Supreme Court and other federal circuit courts that this Court is bound to follow, the next issue then becomes whether the change in law, i.e., elimination of the ten-year statute of limitation, creates an exception and requires this Court to refrain from applying *res judicata* in this case. Indeed, the Supreme Court noted that "[c]ourts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand." Solimino, 501 U.S. at 108. In this context, "the question is not whether administrative estoppel is wise but whether it is intended by the legislature." *Id.*

As the amended 31 U.S.C. § 3716(e)(1) reads, "[n]otwithstanding any other provision of law, regulation, or administrative limitation," there can be no statute of limitation for an initiation of an administrative offset, the legislature clearly intended to lift the bar that used to prevent HUD from collecting debts that has been outstanding for more than ten years. Because the Code does not define the term "administrative limitation," however, whether the legislature intended for it to include a previous dismissal of the case by the administrative judge is not clear. And where Congress has failed expressly or impliedly to evidence any intention, this Court reiterates that *res judicata* is favored as a matter of judicial policy. Therefore, due to the preclusive impact of the 2006 Order on this case, this Court finds that the Secretary's alleged claim against Petitioner in this case is not legally enforceable.

[2] The *Mario* court also noted that its holding is limited in the "unique world of the bankruptcy rules." 181 F.3d at 1146.

ORDER

For the reasons set forth above, I find the debt that is the subject of this proceeding is not legally enforceable against Petitioner. Therefore, it is

ORDERED that the Order imposing the Stay of Referral of this matter to the U.S. Department of the Treasury for administrative offset shall be made **PERMENANT**. It is

FURTHER ORDERED that the Secretary is not authorized to refer this matter to the U.S. Department of the Treasury for administrative offset of any federal payment due Petitioner.

SO ORDERED.

H. Alexander Manuel
Administrative Judge