

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

In the Matter of:

Sarah McKinney,

Petitioner.

17-VH-0119-AO-063

7-210093930A

May 21, 2018

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a *Hearing Request* filed on June 21, 2017, by Petitioner Sarah McKinney (“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”).

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 forth at 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 June 21, 2017, the Court stayed the issuance of an administrative offset of any federal payment due to Petitioner until the issuance of this written decision. *Notice of Docketing, Order, and Stay of Referral (Notice of Docketing)* at 2. On July 21, 2017, Petitioner filed her *Statement* and additional documentary evidence in support of her position. On August 16, 2017, the Secretary filed a *Secretary’s Statement (Sec’y. Stat.)* along with documentary evidence, in support of his position. This case is now ripe for review.

BACKGROUND

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 the Secretary. The Debt Collection Improvement Act of 1996, as amended (31 U.S.C. 3720A), authorizes federal agencies to use administrative offsets as a mechanism for the collection of debts allegedly owed to the United States government.

On or about July 17, 2014, the HUD-insured loan on Petitioner's home was in default, and Petitioner was threatened with foreclosure. *Sec'y. Stat.* at ¶ 2, Ex. A, *Declaration of Brian Dillon*¹ ("*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 August 8, 2014, Petitioner executed a Partial Claims Promissory Note ("Note") in the amount of \$43,113.48 in favor of the Secretary. *Sec'y. Stat.* at ¶ 2, Ex. B, Note. Paragraph 3(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 Note at ¶ 3(A)(i). On or about September 21, 2015, 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.* at ¶6; Ex. A, *Dillon Decl.* ¶ 4; Ex. B, Note at ¶ 3(A)(i & iii).

Upon payment in full of the primary note, Petitioner was to make payment to HUD on the Note at "U.S. Department of HUD, C/O DEVAL LLC, Westpoint 1 – 1255 Corporate Drive, Suite 300, Irving, TX 75038, ... or any such other place as [HUD] may designate in writing by notice to Borrower." *Sec'y. Stat.* at ¶ 7, Ex. B, Note, ¶ 3(B).

Petitioner failed to make payment on the Note at the place and in the amount specified above. Consequently, Petitioner's debt to HUD is delinquent. *Sec'y. Stat.* at ¶8; Ex. A, *Dillon Decl.* ¶ 5.

The Secretary has made efforts to collect this debt from Petitioner but has been unsuccessful. Therefore, Petitioner is justly indebted to the Secretary in the following amounts:

- (a) \$43,113.48 as the unpaid principal balance as of July 31, 2017;
- (b) \$287.28 as the unpaid interest on the principal balance at 1% per annum through July 31, 2017;
- (c) \$2,630.76 as the unpaid penalties and administrative costs through July 31, 2017; and
- (d) interest on said principal balance from August 1, 2017 at 1% per annum until paid.

Sec'y. Stat. at ¶ 9; Ex. A, *Dillon Decl.* ¶ 5.

A Notice of Intent to Collect by Treasury Offset dated January 17, 2017 was sent to Petitioner at 656 Norwood Creek Road, Winchester, TN 37398-2982. *Sec'y. Stat.* at ¶ 10; Ex. A, *Dillon Decl.* ¶ 6.

¹ Brian Dillon is Director of Asset Recovery Division for the U.S. Housing and Urban Development.

DISCUSSION

Petitioner does not deny that she owes the subject debt so claimed by the Secretary. Instead, Petitioner claims that:

I used the services of Metropolitan Escrow, a title company, to close the transaction on September 18, 2015. Metropolitan Escrow, acting on my behalf, obtained a payoff statement from Wells Fargo Home Mortgage, the servicer of the deed of trust in question. Relying in good faith on the payoff statement provided by the servicer, the funds demanded were paid and received by the mortgage holder via a wire transfer.

Affidavit of Sarah McKinney (Affidavit), filed July 26, 2017.

Petitioner further claims, through counsel, that when selling her home, she “requested a payoff, ...and funds equal to said payoff was mailed to the lender by the closing company. Therefore, we believe that as she [Petitioner] received information that the payoff was only \$104,485.58, and said payment was made, that the new determination some 1½ years later is improper and will cause an undue financial hardship.” *Hearing Request, Attached Letter* dated May 31, 2017.

As support, Petitioner introduced into evidence copies of a letter from Wells Fargo Home Mortgage dated September 16, 2015 referencing an inquiry about the Payoff Amount; an email indicating that a certain amount of \$104,485.58 was wired to Wells Fargo Bank from an account that appears to be in the name of Petitioner; and, a Partial Claims Promissory Note bearing Petitioner’s signature. *Hearing Request, Attachments; Affidavit*, Ex. 1, Ex.2.

The Court is not convinced that the evidence presented by Petitioner meets her burden of proof. The Secretary’s right to collect the alleged debt in this case emanates from the terms of the Note, not from the terms of the payoff statements from the primary lender. Bruce R. Smith, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). After a careful examination of the documentary evidence produced, the Court has determined that Petitioner’s documentation is insufficient and fails to support her claim that the subject debt became unenforceable upon payment of \$104,485.58 to Wells Fargo Bank. For Petitioner not to be held liable for the full amount of the subject debt, there must be either a release in writing from the former lender explicitly relieving Petitioner’s obligation, “or valuable consideration accepted by the lender” indicating intent to release. Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (Dec. 22, 1986).

The Court notes further that, according to the Secretary, “HUD has its own contractor, Novad Management Consulting, that is responsible for handling payoff requests for single-family HUD-held assets--including partial claim subordinate notes--and this information is readily available on HUD’s website.” *Sec’y’s Stat.*, Ex. C. It is also reflected in the Note where the payment of the subject debt is to be made. See *Sec’y Stat.*, Ex. B, ¶ 3(B). In fact, upon further review of the Wells Fargo letter introduced by Petitioner, it was specifically stated

that, “All figures are subject to final verification *by the noteholder*,” who, in this case, would be Petitioner. (Emphasis added). *Affidavit*, Attachment, Ex. 1 at 2. The debts identified by Wells Fargo did not include the amount owed to HUD. So, the onus is on Petitioner, not on Metropolitan Title Company or Wells Fargo Bank, to ensure that the subject debt was verified as paid in full.

Another letter introduced by Petitioner from HUD’s Financial Operations Center also advised Petitioner that:

HAMP is intended to assist borrowers to avoid foreclosure by permanently reducing their monthly mortgage payment through the use of a partial claim. The partial claim defers the repayment of up to 30% of the unpaid mortgage principal through an interest-free subordinate mortgage that is not due until the first mortgage is paid off. *This is a debt owed to HUD, not your mortgage lender/servicer. When you paid off the first mortgage in 2015, the entire amount of the partial claim became due and payable immediately. That provision is spelled out in the Subordinate Note, Section 3.*

(Emphasis added). *Hearing Request*, Attached Letter dated February 24, 2017.

Petitioner herein failed to introduce into evidence a written release from HUD that effectively discharged Petitioner from the debt associated with the Subordinate Note. 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). Accordingly, the Court finds, consistent with case law precedent, that the subject debt remains past due and enforceable because Petitioner lacks sufficient and credible proof to prove otherwise.

As a final point, Petitioner, through counsel, alleged that collection of the subject debt “will cause an undue hardship.” *Hearing Request*, Attached Letter dated May 31, 2017. Case law precedent has been established that maintains “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). Unlike administrative wage garnishment cases, no regulation or statute currently exists that permits financial hardship to be considered as a basis for determining whether a past-due debt may be collected in administrative offset cases. So, consistent with case law precedent and statutory limitations, the Court finds that financial hardship cannot be considered as a defense in this case because the debt sought to be collected from Petitioner is by means of administrative offset.

ORDER

Based on the foregoing, Petitioner remains contractually obligated to pay the debt so claimed by the Secretary.

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 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 30 days of the date of the written decision, and shall be granted only upon a showing of good cause.