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

In the Matter of: **Chiryl Arnott,** Petitioner.	18-VH-0112-AO-032 721011883 November 15, 2019

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a *Request for Hearing (Hearing Request)* filed on February 5, 2018, by Petitioner Chiryl Arnott ("Petitioner") concerning the existence, amount, or enforceability of the payment schedule of the 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 February 5, 2018, this 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 June 14, 2018, Petitioner filed a brief *Statement*, along with additional evidence, in support of her position. In response, the Secretary filed his *Statement* on July 24, 2018 in support of his position. This case is now ripe for review.

FINDING OF FACTS

In July 2012, the HUD-insured primary mortgage on Petitioner's home was in default, and Petitioner was threatened with foreclosure. *Secretary's Statement,* ¶ 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

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

relief, on July 23, 2012, Petitioner executed a Subordinate Note ("Note") in the amount of $57,407.85 in favor of the Secretary. *Sec'y. Stat.*, Ex. B, Note.

Paragraph 4(A) of the Notes cite specific events that make the debt become due and payable. One of those events is the payment in full of the primary note. *Sec'y. Stat.* ¶ 5, Ex. B, Notes. On or about October 11, 2016, 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, Ex. B, Note, ¶ 4(A)(i) & (iii); Ex. A, *Dillon Decl.* at ¶ 4.

Upon payment in full of the primary note, Petitioner was to make payment to HUD on the Note at the "Office of 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, Ex. B, Note, ¶ 4(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.* ¶ 8, Ex. A, *Dillon Decl.* at ¶ 5.

The Secretary has made efforts to collect the debt amounts due under the Notes but has been unsuccessful. *Sec'y. Stat.*, Ex. A, *Dillon Decl.*, ¶ 4-5. As of June 30, 2018, Petitioner is justly indebted to the Secretary in the following amounts:

a) $57,407.85 as the unpaid principal balance;
b) $430.38 as the unpaid interest on the principal balance at 1% per annum;
c) $3,455.95 as the unpaid penalties;
d) $35.33 as the unpaid administrative costs; and,
e) Interest on said principal balance from July 1, 2018 at 1% per annum until paid.

Sec'y. Stat., ¶ 9, Ex. A, *Dillon Decl.*, ¶ 4-5.

A Notice of Intent to Collect by Treasury Offset dated November 20, 2017 was mailed to Petitioner. *Sec'y. Stat.*, ¶ 10, Ex. A, *Dillon Decl.*, ¶ 6. The Secretary respectfully requests that the Court find Petitioner's debt past due and legally enforceable. *Sec'y. Stat.*, ¶ 19, Ex. A, ¶ 8.

DISCUSSION

Petitioner denies the existence and enforceability of the subject debt because she claims, through counsel, that subject debt was paid off when the primary mortgage was satisfied and further that the signature on the Note was forged. Petitioner further claims that enforcing the subject debt would create financial hardship for her and her husband. *Hearing Request* at 1; *Petitioner's Documentary Evidence* (*Pet'r's Doc. Evidence*) filed June 14, 2018.

For Petitioner to prove full satisfaction of the subject debt, there must be either a release in writing directly from the former lender (herein HUD) explicitly relieving Petitioner's obligation to HUD, "or valuable consideration accepted by the lender" indicating intent to release. Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (Dec. 22, 1986); see also Hedieh Rezai, HUDBCA No. 04-A-NY-EE016 (May 10, 2004).

The Court has determined, based on the evidence presented, that there is insufficient proof that the subject debt does not exists or is unenforceable. None of the documentation shows that Petitioner was released directly by HUD from her contractual obligation to pay this debt. Instead it shows that the primary mortgage was satisfied. Petitioner, through counsel, provided a response letter to HUD's Debt Servicing Representative dated January 9, 2018 in which it was stated:

> My title search reveals that the original mortgage recorded in Record Book 4091, page 193, was satisfied on November 4, 2016, by Mortgage Satisfaction Piece recorded in Wayne County Record Book 5088, page 170 (copy enclosed). If the original mortgage of August 31, 2010, was modified on July 23, 2012, and then satisfied November 4, 2016, as what appears occurred, the mortgage debt of Ms. Arnott has been clearly satisfied of record. Moreover, the text of the entire "subordinate mortgage" refers to the original mortgage. Thusly, if the subordinate mortgage was a modification of the mortgage that was satisfied, the US Department of Housing and Urban Development's demand for payment is erroneous and onerous. The mortgage debt has been satisfied.

Petitioner is in error. The Subordinate Note is a separate and distinct debt from the primary mortgage. See Catherine Coley, HUDOA No. 16-VH-0147-AG-039 at 3 (July 24, 2017). The language of the Note clearly states that it [subject debt] becomes due and payable when "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.*, Ex. 2 ¶ 4(A)(i). On or about October 11, 2016, Petitioner's primary mortgage was paid in full, and payment in full of the primary mortgage triggered the timeline for the Subordinate Note to become due. Petitioner's contractual obligation to pay on the Note thus remained intact and immediately became due. Without evidence to prove to the contrary that Petitioner was directly notified by HUD to be released from the subject debt or notified directly by HUD that the subject debt was satisfied, Petitioner remains contractually obligated to pay the subject debt.

Petitioner next contends that her signature was forged on the Note related to the subject debt. According to Petitioner:

> The letter from HUD shows a signature on the application which is not hers. Looking at it, you can see it was written by her husband. A sample of her actual signature which has never changed is attached. Her signature was forged, and the document was notarized by a local magistrate. In addition, the letter from HUD stated that the persons who signed the loan application were responsible for the debt. Chiryl [Petitioner] did not sign it nor did she know anything about it. Her husband said nothing and there was never any documentation in their files. Any correspondence he received from HUD must have been discarded. She did not sign it and we feel she is not responsible. *Petitioner's Doc. Evid.* at 1.

Pursuant to 31 C.F.R. § 285.11(f)(8)(ii), the burden of proof is on the Petitioner to show, by a preponderance of the evidence, that no debt exists or that the amount of the debt is incorrect, or to prove that the collection of the debt may not be pursued due to operation of law. In a forgery case, like the instant case, this Court must determine whether the evidence submitted by Petitioner is sufficient to meet Petitioner's burden of proof that her signatures are forged or unauthorized. "If the validity of a signature is denied in the pleadings, the burden of establishing validity is on

the person claiming validity, but the signature is presumed to be authentic and authorized..." Uniform Commercial Code (UCC) § 3-308(a). Relying on the guidance provided from the UCC, it is evident that the Secretary is not required to prove that the signature on the Notes are valid until other evidence has been introduced to support a finding that the signature in question is unauthorized or is a forgery. Official comment 1 to UCC § 3-308. Herein, Petitioner's signature is presumed to be authentic and authorized. There is no record of evidence that supports Petitioner's position that her signature was unauthorized, beyond of course her mere allegation of forgery. Until the burden of proof of forgery is met by Petitioner, the Court is not equipped to establish the credibility of Petitioner's allegation of forgery.

"Administrative judges are not handwriting experts, and thus, must depend on the scientific testimony of experts in order to find that forgery has occurred." In the Matter of Lawrence Syrovatka, HUDOA No. 07-A-CH-HH10 (November 18, 2008). Until sufficient evidence is offered by Petitioner from an expert witness as support for finding forgery, "the burden of proof for establishing the authenticity of the signature by a preponderance of the evidence shifts to the plaintiff," who herein is the Secretary. See Justito Poblete, HUDBCA No. 98-A-SE-W302 (April 30, 2010). In this case, for example, Petitioner has not offered an official police report of forgery, or an expert testimony based on a handwriting analysis of the signature in question that, in this case, could have been compared to the forged signature alleged by Petitioner.

Had the Court determined that Petitioner's signature was forged, Petitioner's retention of benefits upon execution of the Note would then have come into question. Her retention of the benefits from the loan acted as a retroactive adoption of the alleged unauthorized signature. Petitioner not only retained the benefits from the execution of the Note, but she also admittedly paid in full the primary mortgage associated with the same Note that is associated with the debt that is the subject of this proceeding. "Ratification is a retroactive adoption of the unauthorized signature by the person whose name is signed and may be found from conduct as well as from express statements. For example, it [ratification] may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature." Official comment 3 to UCC § 3-403.

Upon further review of the record of this proceeding, the Court is again not equipped to decide whether the signature on the Note is forged as alleged by Petitioner due to the lack of evidence. Petitioner's claim of forgery is merely an allegation without sufficient proof. It has consistently maintained by the Court 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). The Court therefore must find that Petitioner's claim of forgery fails again for lack of proof.

As a final point, Petitioner contends that collection of this debt at this time would create a financial hardship for her and her husband. Unfortunately, no regulation or statute currently exists that permits financial hardship to be considered as a basis for determining whether a debt is unenforceable in administrative offset cases. Financial hardship is not a factor permitted by law to be considered when determining the enforceability or validity of a debt owed in offset cases. See Hedieh Rezai, HUDBCA No. 04-A-NY-EE016 (May 10, 2004) ("Evidence of hardship, no matter how compelling, cannot be taken into consideration in determining whether the debt is past-due and enforceable."); Raymond Kovalski, HUDBCA No. 87-1681-G18 (Dec. 8, 1986) ("Financial

adversity does not invalidate a debt or release a debtor from a legal obligation to repay it."). Thus, consistent with case law precedent and statutory limitations, the Court must find that financial hardship cannot be considered as a defense against the payment of the debt owed by Petitioner herein because the subject debt is sought to be collected by means of administrative offset.

ORDER

Based on the foregoing, the debt that is the subject of this proceeding exists, is past due, and is enforceable in the amount so 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 on February 5, 2018 is **VACATED.** It is hereby

ORDERED to seek collection of this outstanding obligation by means of administrative offset of any federal payments due to Petitioner 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.