

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

In the Matter of:

James P. Minchener,

Petitioner.

18-VH-0156-AO-050

7-210126450A

November 15, 2019

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a *Hearing Request* filed on April 5, 2018, by Petitioner James P. Michener (“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, 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.

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 April 6, 2019, 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 April 16, 2018, April 27, 2018, May 25, 2018, and November 14, 2018, Petitioner filed her *Statement* and documentary evidence, and subsequently filed additional evidence in support of his position. On May 30, 2018, 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.

FINDINGS OF FACT

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.

In August 2011 and again in March 2016, the HUD-insured primary mortgage 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 26, 2011 and again on March 7, 2016, Petitioner executed Subordinate Notes ("Notes") in the amount of \$16,088.48 and \$34,619.62, respectively, in favor of the Secretary. *Sec'y. Stat.* at ¶ 2, Ex. B, Notes. 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. See Notes at ¶ 4(A)(i). On or about November 15, 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.* at ¶6; Ex. A, *Dillon Decl.* ¶ 4; Ex. B, Notes at ¶ 4(A)(i & iii).

Upon payment in full of the primary note, Petitioner was to make payment to HUD on the Notes at the place identified in paragraph 4(B) of the Notes. *Sec'y. Stat.* at ¶ 7, Ex. B, Notes, ¶ 4(B). Petitioner failed to make payment on the Notes 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) \$50,708.10 as the unpaid principal balance as of April 30, 2018;
- (b) \$126.72 as the unpaid interest on the principal balance at 1% per annum through April 30, 2018; and
- (c) Interest on said principal balance from May 1, 2018 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 March 19, 2018 was sent to Petitioner. *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 claims financial hardship and then challenges the existence of the subject debt on the premise that the debt should have been paid by the Title Company or the mortgage lender. Petitioner claims that:

I had NO REASON to believe that ANY OTHER MONIES were owed to ANYONE.

The sale went through smoothly and up until the notice [I] received from HUD on 2/20/18 I had NO IDEA that any monies were owed you. I will be providing you with documentation to back up what I am saying. Fuss Law Firm failed in their duties to do a Title Search, and I have my Lawyer drawing up a letter to them as we speak. As soon as I have that letter in my hand[,] I will send it along. (Emphasis in Original) *Hearing Request* at 1-2.

Petitioner further claims that **“Carrington Mortgage did the last Loan Mod on my home in 2016....Why was this amount NOT INCLUDED in my payoff?? If I am not aware of something, how am I responsible for it??** (Emphasis in Original) *Id.* Finally, Petitioner claims “I will say, being on SSDI [social security disability insurance] for 9 years now I can tell you that ANY garnishment of my payments...I mean ANY, would cause a serious hardship on my part as I am barely making it month to month as it is. I realize you have the option to garnish at 15%. I will be sending you a breakdown of my expenses and you will see that this would make it IMPOSSIBLE for me to survive. *Hearing Request* at 2. As support, Petitioner offers into evidence copies of the Notes and related documentation; General Warranty Deed; Loan Modification Agreement; proofs of payment for household expenses; and, Certificate of Satisfaction of Deed of Trust. *Hearing Request, Attachments; Pet’r’s Doc. Evid.* filed on April 13, 2018 and November 14, 2018.

The Court is not convinced that the evidence submitted by Petitioner meets his burden of proof. The Secretary’s right to collect the subject debt in this case emanates from the terms of the Note, not from the terms of 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 offered by Petitioner, the Court has determined that Petitioner’s evidence is insufficient and fails to support his claim that the subject debt is not enforceable against him because the responsibility of Carrington Mortgage or Fuss Law Firm. 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). Such documentation is not reflected in the record of this proceeding.

The Court also notes that in the May 1, 2018 letter introduced by Petitioner from Carrington Mortgage it was specifically stated that, “As CMS is neither the lender nor the servicer of the

above-described Subordinate Note, we are unable to satisfy the outstanding debt. For this reason, CMS advised in our Payoff Statement that HUD needed to be contacted to determine the outstanding debt for your Subordinate Note.” *Pet’r’s. Doc. Evidence*, Attachments. The debt paid by Petitioner, as identified in that letter, did not include the subject debt. The onus falls on Petitioner, not on Carrington Mortgage or Fuss Law Firm, to ensure that the subject debt was verified as a debt that was paid in full. Again, no such verification existed.

Petitioner failed to introduce evidence of a written release directly from HUD that effectively discharged Petitioner from the debt associated with the Subordinate Note herein. 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 against Petitioner due to lack of sufficient and credible proof.

As a final point, Petitioner contends that collection of the subject debt “would cause a serious hardship on my part as I am barely making it month to month as it is.” *Hearing Request* at 1. No regulation or statute currently exists that permits consideration of financial hardship in cases involving debt collection by means of administrative offset. Consistent with statutory limitations, case law precedent also has been established that “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). Thus, the Court finds that financial hardship cannot be considered as a defense herein because the debt owed by Petitioner is sought to be collected by means of administrative offset.

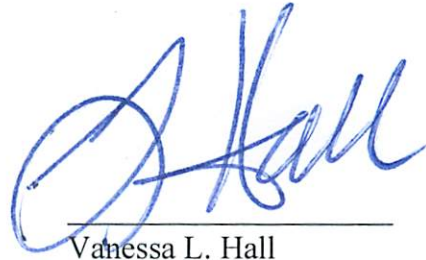
ORDER

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 on April 6, 2018 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.