

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

In the Matter of:

AnnMarie Bennett and Joseph Erivez,

Petitioners.

19-VH-0042-AO-011

7-210143960A

7-210143960B

December 20, 2019

DECISION AND ORDER

This proceeding is before the Office of Hearings and Appeals upon a *Hearing Request* filed on January 29, 2019 by Ann Marie Bennett and Joseph Erivez (“Petitioners”) 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 January 30, 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 February 22, 2019, Petitioners filed their Statement along with evidence in support of their position that they are not responsible for the subject debt. On March 22, 2019, the Secretary filed a *Secretary’s Statement*, 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.

Petitioners executed and delivered to the Secretary a Subordinate Note (Note) dated November 17, 2012 in the amount of \$4,942.52. *Sec'y Stat.* at ¶ 2, Ex. 1, *Declaration of Brian Dillon*¹ ("*Dillon Decl.*"), ¶ 4. As a means of providing foreclosure relief to Petitioners, HUD advanced funds to Petitioners' FHA insured mortgage lender which was the holder of Petitioners' primary mortgage not (Primary Note). *Id.* In exchange for foreclosure relief, Petitioners executed a Subordinate Note ("Note") in favor of the Secretary. *Sec'y Stat.* at ¶ 3, *Dillon Decl.*, Ex. 1.

By terms of the Note, the amount to be repaid thereunder becomes due and payable when the first of the following events occurs (4)(A)[o]n November 1, 2041 or, if earlier, when the first of the following events occurs: (i) borrower has paid in full all amounts due under the primary note and related mortgage, deed of trust or similar security instrument insured by the Secretary; or (ii) the maturity date of the primary note has been accelerated; or (iii) the primary note and related mortgage, deed of trust or similar security instrument are no longer insured by the Secretary; or (iv) the property is not occupied by the purchaser as his or her principal residence. *Sec'y Stat.*, ¶ 4; Ex. 2, Note.

On or about July 23, 2018, the FHA mortgage on Petitioners' primary mortgage was terminated because it was paid in full. *Sec'y Stat.*, ¶ 5; Ex. 1, *Dillon Decl.* ¶ 4. The Note became immediately due and payable, pursuant to the terms of the Note. *Sec'y Stat.* ¶ 6; Ex. 1, *Dillon Decl.*, ¶ 4.

HUD has attempted to collect the amount due under the Note, but Petitioner remains indebted to HUD. *Sec'y Stat.*, ¶6; *Dillon Decl.*, ¶ 5. The Secretary therefore asserts that Petitioner is indebted to HUD in the following amounts:

- (a) \$4,492.52 as the unpaid principal balance as of February 28, 2019;
- (b) \$16.48 as the unpaid interest on the principal balance at 1% per annum through February 28, 2019;
- (c) \$402.10 as the unpaid penalties and administrative costs as of February 28, 2019; and
- (d) Interest on said principal balance from March 1, 2017 at 1% per annum until paid.

Sec'y Stat., ¶ 7; *Dillon Decl.*, ¶ 5.

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

A Notice of Intent to Collect by Treasury Offset dated December 10, 2018 ("Notice") was sent to Petitioner. Id. at 6.

The Secretary respectfully requests that the Court find Petitioner's debt past due and legally enforceable.

DISCUSSION

Petitioners acknowledge that the subject debt was owed but instead contend that such debt should have been satisfied at closing. More specifically, Petitioners allege:

When we decided to sell our home due mandatory relocation for my employment, we assumed that any and all balances associated with our account with Bank of America had been transferred to Carrington when they acquired the loan. At the time of closing the sale, we assumed the amount listed in the documents which was described as "deferred Pursuant to Loan Modification" was the amount that was owed to HUD. We are grateful that HUD provided us with assistance and allowed us to retain our home and do not dispute the amounts or conditions of the loan modification. However, we do feel that Bank of America and Carrington Mortgage Services had a responsibility to notify us that any remaining obligation to HUD was not going to be transferred to Carrington Mortgage Services when they acquired our loan or included the payoff amounts they were providing to the title company.

There is no record of evidence from Petitioners in support of their position that the subject debt was satisfied or that Petitioners were released from their obligation to pay.

In response, the Secretary's contends that "Petitioners have not demonstrated that they received a release from HUD of their obligation to repay the Note. In order for a debtor to escape liability for a debt, there must be a release, in writing, from the lender specifically discharging the debtor's obligation, for valuable consideration accepted by the lender from the debtor, which would indicate intent to release. *Sec'y's Stat.* ¶ 9; Ex. 1, *Dillon Declaration* at ¶ 6.

The Secretary's position is accurate. The Secretary's right to collect the subject debt in this case emanates from the terms of the Subordinate Note. See Bruce R. Smith, HUDBCA No. 07-A-CH-AWG11 (June 22, 2007). "[I]f satisfaction of a senior deed of trust prevents a junior trust holder from enforcing a junior trust deed on the same real property, the junior trust holder may collect the debt, now unsecured, by initiating collection efforts based on the obligations in the loan note." Mitchell and Rosalva Fajjo, HUDBCA No. 99-C-CH-Y200 at 3 (March 20, 2000). Here, Petitioners became contractually obligated to pay the debt when they signed the Note and promised to pay the principal sum of the subject debt to the Lender, therein identified as the Secretary of Housing and Urban Development. *Sec'y's Stat.* ¶ 3, Ex. 2, Note, ¶¶ 1-2. As the junior trust holder, HUD may initiate collection efforts in accordance with the terms of the Note because the Primary Note had been paid in full.

For Petitioners not to be held liable for the full amount of the debt, there must either be evidence of a release in writing from the former lender explicitly relieving Petitioners' obligation to pay, "or valuable consideration accepted by the lender" indicating intent to release. Cecil F. and Lucille Overby, HUDBCA No. 87-1917-G250 (Dec. 22, 1986). In this case, Petitioners' failure to produce sufficient evidence of a written release directly from HUD renders the subject debt enforceable. This Court has consistently maintained that "[a]ssertions without evidence are not sufficient to show that the debt claimed by the Secretary is not past due and or unenforceable." Troy Williams, HUDOA No. 09-M-CH-AWG52 (June 23, 2009) (citing Bonnie Walker, HUDBCA No. 95-G-NY-T300 (July 3, 1996)).

Therefore, the Court finds that Petitioners' claim that the subject debt was satisfied fails for lack of proof, and further finds that Petitioners remain contractually obligated to pay the debt amount so claimed by the Secretary.

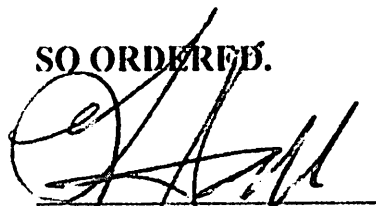
ORDER

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

The *Order* imposing the stay of referral of this matter on January 30, 2019 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. Mall

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.