In the Matter of:	:	
Jerry and Gayla Baker,	:	HUDBCA No. 04-D-CH-EE017
	:	Claim No. 770948336
Petitioners	:	

Jerry and Gayla Baker
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Pro se Petitioners

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For the Secretary

DECISION AND ORDER

Petitioners were notified by Due Process Notice that, pursuant to 31 U.S.C. § 3720A, the Secretary of the U.S. Department of Housing and Urban Development ("HUD") intended to seek administrative offset of any federal payments due to Petitioners in satisfaction of a delinquent and legally enforceable debt owed to HUD. The claimed debt has resulted from a defaulted loan that was insured against nonpayment by the Secretary pursuant to Title I of the National Housing Act. (12 U.S.C. § 1703).

Petitioners have made a timely request for a hearing concerning the existence, amount or enforceability of the debt allegedly owed to HUD. The administrative judges of this Board have been designated to conduct a hearing to determine whether the debt allegedly owed to HUD is legally enforceable. (24 C.F.R. § 17.152(c)). As a result of Petitioners' request, referral of the debt for offset was temporarily stayed by the Board until the issuance of this written decision.

Summary of Facts and Discussion

31 U.S.C. § 3720A provides federal agencies with remedies for collection of debts owed to the United States Government. The Secretary has filed a Statement with documentary evidence in support of his position that Petitioners are indebted to the Department in a specific amount.

On December 29, 1995, Petitioners executed and delivered to Erickson Supply and Construction Co., Inc. ("Erickson") an installment note for a property improvement loan that was insured against nonpayment by the Secretary pursuant to the National Housing Act, 12 U.S.C. § 1703. (Secretary's Statement, hereinafter "Secy. Stat.," Unmarked Exh.). The loan was for $6,000.00. The contract identified the work as "11 replacement windows." The loan was secured by the property to be improved. Erickson assigned the note to Empire Funding Corp. ("Empire"), the servicing agent for 1st National Bank of Keystone. Id.

Petitioners defaulted on the loan, and Empire, as the servicing agent for 1st National Bank of Keystone, assigned the note to HUD. (Secy. Stat., Exh. A, Declaration of Brian Dillon, hereinafter "Dillon Decl.," ¶ 3). The Secretary holds all right, title, and interest on the note on behalf of the United States of America pursuant to 12 U.S.C. § 1723. (Dillon Decl., ¶ 3). Petitioners are indebted to the United States in the following amounts: $2,484.76 as the unpaid principal balance as of February 29, 2004; $62.10 as the unpaid interest on the principal balance at 5% per annum through February 29, 2004; and interest on said principal balance from March 1, 2004, at 5% per annum until paid. (Dillon Decl., ¶ 4).

Petitioners contest the enforceability of the alleged debt. Petitioners contend that the contractor never completed the home improvements. (Secy. Stat., ¶ 6). In an attempt to prove that the work performed was incomplete, Petitioners allege that a fire destroyed their home before they signed the Completion Certificate on January 4, 1996. Id. Petitioners state the following in their letter postmarked March 8, 2004:

> a worker [for the contractor] showed up on 1-3-96 …. He replaced all but two windows … [and] returned on 1-4-96, telling us he had a family emergency & couldn't finish the work himself. [He] … begged us to sign a form saying his job was completed or else he would not get his pay. Jerry & I felt for the man & signed – it was actually a release form stating all contracted work was completed.

(Petitioners' Letter, hereinafter "Pets. Ltr.," postmarked March 8, 2004). Except for Petitioner's assertion, there is no documentary evidence to corroborate the employee's alleged statements, nor Petitioners' allegation that the work was incomplete on January 4, 1996.

The Completion Certificate signed by Petitioners on January 4, 1996 states in pertinent part:

> Do not sign this certificate until the dealer or contractor has satisfactorily completed the improvements in accordance with the terms of your contract or sales agreement.
> I (We) certify that:
> (1) The loan proceeds have been spent on property improvements that are eligible under the Title I regulations and in accordance with the contract or cost estimate furnished to the lender with my (our) credit application.
> (2) The property improvements have been completed in general accordance with the contract or cost estimate and to my (our) satisfaction.
> (3) I (We) have not obtained and will not receive any cash payment, rebate, cash bonus, sales commission, or anything of value in excess of $25 from the dealer or contractor as an inducement to enter into this loan transaction.
> (4) I (We) understand that the selection of the dealer or contractor and the acceptance of the materials used and the work performed is my (our) responsibility, and HUD does not guarantee the quality or workmanship of the property improvements.

(Dillon Decl., Exh. C).

The statements above, which appear on the face of the Completion Certificate, clearly reveal the importance and significance of this document, and by signing it. Petitioners acknowledged that the work had been completed in accordance with the contract and to their satisfaction.

The Secretary argues that because the "certificate has expressed language releasing the creditor, and warning debtor not to sign unless they are ready to release both the contractor and the creditor….", once Petitioners signed the completion certificate, they effectively released HUD of any responsibility it may have had to redress the grievances of Petitioners. (Secretary's Supplemental Brief hereinafter "Secy. Supp. Br.," pp. 2-3). The Secretary states: "Where documents signed by Petitioner place all workmanship related risks on the debtor rather than the creditor, Petitioner's redress for grievances are against his/her contractors." Id at p. 3 citing Jesse High, HUDBCA No. 87-2663-H192 (Jan. 29, 1998).

Notwithstanding the law cited above, there is legal authority from the Eighth Circuit which holds that anyone who knowingly causes to be made a false completion certificate for a property improvement loan insured by the Federal Housing Administration commits a violation of 18 U.S.C.A. § 1010. See Moses v. United States,

8 Cir., 297 F.2d 621 (1961) (holding that defendant, who knowingly instigated transactions, out of which two false completion certificates for property improvement loans emanated, violated statute, even though he did not personally make false statements in certificates).

In the present case, Petitioners claim that the contractor misinformed them and misled them into signing the Completion Certificate prior to the completion of the work. (See "Pets. Ltr., postmarked March 8, 2004). However, there is no persuasive evidence in the record that demonstrates that Petitioners signed the Completion Certificate before the work was completed. (Dillon Decl., ¶ 10). Furthermore, the uncontested Declaration of Brian Dillon states that the "Title I Collection History Notes do not mention any complaints by the debtors concerning poor workmanship or incomplete work by the dealer." (Dillon Decl., Exh. D). There is no evidence in the record that would lend any credence to Petitioners' claim that the contractor mislead them into signing the Completion Certificate before the work was actually completed.

In Maurice Clayton, HUDBCA No. 87-2663-H192 (Jan. 29, 1988), this Board, in ruling that Petitioner's debt was enforceable, held that "although Petitioner asserted that no exterior repairs were ever performed to his home, Petitioner presented no evidence which dispute[d] the existence of the contract [with Midwest Exteriors] and home improvement loan for the exterior repairs at issue …[and that] Petitioner himself has certified that this work was satisfactorily completed." (Secy. Supp. Br., p. 3).

I find that Petitioners, having signed the Certificate of Completion, cannot now deny the work was originally satisfactorily completed. Richardo Montelongo, HUDBCA No. 99-D-CH-Y264 (Feb. 29, 2000) (quoting Tammie and Donald Purcell, HUDBCA No. 97-B-SE-W227 (Mar. 17, 1998) (internal quotations omitted)).

Petitioners also claim that a fire destroyed their home on January 8, 1996 before the work was completed. (Secy. Stat., ¶ 7). Petitioners' allegation that their home was destroyed by fire on January 8, 1996, before the work was completed, is not supported by any evidence in the record.

Petitioners argue that the insurance they paid for as part of their down payment should have covered the debt. (Secy. Supp. Br., p. 6). Petitioner states: "When this first happened…they told me that since I am on disability my income, and the insurance I had [sic] took out it was payed [sic]." (Pets. Ltr., dated May 10, 2003).

The Secretary has presented evidence that in accordance with the Deed of Trust, signed by Petitioners on December 29, 1995, Petitioners were required to "keep such improvements insured against loss or damage by fire and hazards or losses covered by the extended coverage endorsement, flood, and other causalities which may be required by Seller in companies and amounts satisactory to seller during the existence of the debt hereby secured…." (Secy. Supp. Br., pp. 6-7 citing Supplemental Declaration of Brian Dillon hereinafter "Dillon Supp. Decl., Exh. E, Deed of Trust"). However, Petitioners have failed to submit evidence that they maintained insurance as was required by the

Deed of Trust. (Secy. Supp. Br., p. 7). Furthermore, the Settlement Statement, signed by Petitioners on December 29, 1995, shows no evidence of insurance paid by Petitioners as part of the down payment. (Secy. Supp. Br., p. 6 citing Dillon Supp. Decl., Exh. F, Settlement Statement).

Even if Petitioners had produced evidence of insurance on the home improvement loan, Petitioners would still remain liable for the debt. As the Secretary notes, in Darold W. Nelson, HUDBCA No. 88-2871-H395 (Dec. 31, 1987), where the Petitioner alleged that this debt was unenforceable because the loan was "covered with disability insurance" through his credit union, this Board held that:

> [e]ven if Petitioner produced conclusive evidence of the insurance company's obligation to pay the debt, Petitioner would still remain liable for the debt because a transfer of Petitioner's obligation to repay this debt to an insurance company would not release Petitioner of his obligations under the note. See Jesus E. and Rita de los Santos, HUDBCA No. 86-1255-H262 (February 28, 1986). Absent evidence of a release of Petitioner by the lender, or a novation, Petitioner would remain liable on the note even if the obligation to repay the note was transferred to a third party. Alfred Wright, HUDBCA No. 87-2276-G605 (June 12, 1987). While Petitioner may have a cause of action against the credit union or one of the insurance companies, HUD is not barred from seeking a tax offset, as HUD was not a party to the disability insurance contract.

Darold W. Nelson, HUDBCA No. 88-2871-H395 (Dec. 31, 1987).

The Secretary also cites Section 379.185 of the Missouri Annotated Statutes for the proposition that if Petitioners did have Insurance on the home improvement loan, "Petitioners' recource is against the insurance company, and not the holder of the note." (Secy. Supp. Br., pp. 7-8). Section 379.185 states:

> Whenever any loss or damage shall be suffered in this state from fire, by any person, …upon property insured under a policy of insurance of any fire insurance company doing business in this state, and notice of the fact that such loss or damage has occurred shall be given by the person, …to the insurance company issuing such policy, …then it shall thereupon become the duty of such insurance company to furnish to the person, persons or corporation incurring such loss or damage….

In light of the previous decisions of this Board and the cited section of the Missouri Annotated Statutes, I agree with the Secretary and find that even if Petitioners did not insure the home improvement loan against loss or damage by fire, Petitioners remain liable on the note even if the obligation to repay was transferred to their insurance company and as HUD was not a party to the insurance contract, the Secretary is not barred from seeking repayment of this debt by means of an administrative offset. (Secy. Supp. Br., pp. 7-9).

Petitioners also assert that they are unable to repay the debt due to physical and financial hardship. (Dillon Decl., Exh. A; Pets. May 10th Ltr.). Unfortunately, evidence of hardship, no matter how compelling, cannot be taken into consideration in determining whether the debt is past-due and legally enforceable. Shirley Elliot, HUDBCA No. 03-A-CH-DD001 (February 14, 2003) (citing Anna Filizianna, HUDBCA No. 95-A-NY-T11 (May 21, 1996). This Board is only authorized to determine whether, as a matter of law, this debt is past-due and legally enforceable against Petitioners. 24 C.F.R. § 17.152.

Finally, Petitioners request that the Board "set up payments . . ." (Pets. Ltr., postmarked March 8, 2004). This Board is not authorized to extend, recommend, or accept any payment plan or settlement offer on behalf of the Department. Petitioners may wish to discuss this matter with counsel for the Secretary or Lester J. West, Director, HUD Albany Financial Operations Center, 52 Corporate Circle, Albany, NY 12203-5121. His telephone number is 1-800-669-5152, extension 4206. Petitioner may also request a review of their financial status by submitting to that HUD Office a Title I Financial Statement (HUD Form 56142). A review of Petitioners' financial status may be conducted if Petitioners submit to that HUD Office a Title I Financial Statement (HUD Form 56142).

ORDER

Upon due consideration of the entire record of this proceeding, I find that the debt which is the subject of this proceeding is legally enforceable against Petitioners in the amount claimed by the Secretary.

The Order imposing the stay of referral of this matter to the Internal Revenue Service or to the U.S. Department of the 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 of any Federal payments due to Petitioners.

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Jerome M. Drummond
Administrative Judge

March 23, 2005