
In the Matter of:

Cynthia Abernethy,

Petitioner

HUDBCA No. 04-D-NY-AWG39
Claim No. 780596976

Cynthia Abernethy
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Pro se

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For the Secretary

DECISION AND ORDER

Petitioner requested a hearing concerning a proposed administrative wage garnishment relating to a debt allegedly owed to the U.S. Department of Housing and Urban Development (“HUD”). The Debt Collection Improvement Act of 1996, as amended (31 U.S.C. § 3720D), authorizes Federal agencies to utilize administrative wage garnishment as a remedy for the collection of debts owed to the United States Government.

The administrative judges of this Board have been designated to determine whether the Secretary may collect the alleged debt by administrative wage garnishment if contested by a debtor. 24 C.F.R. § 17.170(b). This hearing was conducted in accordance with the procedures set forth at 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.170. The Secretary has the initial burden of proof to show the existence and amount of the debt. 31 C.F.R. § 285.11 (f)(8)(i). Petitioner thereafter must present by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. In addition, Petitioner may present evidence that the terms of the repayment schedule are unlawful,

would cause a financial hardship to the Petitioner, or that collection of the debt may not be pursued due to operation of law, 31 C.F.R. § 285.11 (f)(8)(ii). Pursuant to 31 C.F.R. § 285.11 (f)(10)(i), issuance of a wage withholding order was stayed by this Board until the issuance of this written decision.

Summary of Facts and Discussion

On October 29, 1989, Petitioner executed and delivered to Green Tree Acceptance of North Carolina, Inc. (“Green Tree”) a retail installment contract and security agreement (“note”) in the amount of \$49,056.80 for a home improvement loan that was insured against nonpayment by the Secretary pursuant to Title I of the National Housing Act, 12 U.S.C. §1703. (Secretary’s Statement, hereinafter “Secy. Stat.,” Exh. A). Petitioner failed to make payments as agreed in the note. Consequently, Green Tree assigned the note to the United States of America in accordance with 24 C.F.R. § 201.54. (Secy. Stat., Exh. B). The Secretary is the holder of the note on behalf of the United States of America. *Id.* Petitioner is currently in default on the note. The Secretary alleges that Petitioner is indebted to the Government in the following amounts: \$2,462.64 as the unpaid principal balance as of July 30, 2004; \$174.50 as the unpaid interest on the principal balance at 2% per annum through July 30, 2004; and interest on said principal balance from August 1, 2004 at 2% per annum until paid. (Secy. Stat., Exh. C, Declaration of Brian Dillon, hereinafter “Dillon Decl.,” ¶ 4).

The Secretary has filed a Statement with documentary evidence in support of his position that the Petitioner is indebted to the Department in the claimed amounts. Petitioner disputes the enforceability of the debt. (Petitioner’s hearing request dated August 12, 2004, hereinafter “Pet. Hrg. Req.”).

Petitioner alleges that she did not receive notice of the sale. *Id.* In support of the allegation, Petitioner claims that she “divorced Jeff Abernethy in 1991, at which time he assumed ownership of the debt on [the] mobile home.” *Id.*

Under North Carolina law, a notice of sale of collateral need not be received to be considered commercially reasonable, so long as it was sent in a commercially reasonable manner. North Carolina Nat’l Bank v. Burnette, 297 N.C. 524, 256 S.E. 2d 388 (1979). The requirement of reasonable notification is a question of fact to be determined only after considering all the facts and circumstances of the individual case. Parks Chevrolet, Inc. v. Watkins, 74 N.C.App 719, 329 S.E.2d 728 (1985).

The Secretary has submitted a copy of the Notice of Sale dated August 22, 2003, which was sent by certified mail to Petitioner at 3564 Hwy 73, Iron Station, N.C. 28080-7718. (Dillon Decl., Exh. B). The Secretary has also submitted the shipping details for the Notice of Sale provided by the United States Postal Service. The United States Postal Service reported several delivery attempts at the Iron Station, NC address before delivering the Notice of Sale addressed to Petitioner “at 2:16 pm on September 10, 2003, in Winston Salem, NC 27103.” (Dillon Decl., Exh. C). Petitioner has not asserted that this was not her mailing address at the time, nor that she had notified the lender of any

other address at which she could be reached. I therefore find that the Notice of Sale was sent in a commercially reasonable manner.

Petitioner also claims that she is not liable to the Secretary for the debt at issue because upon their divorce in 1991, the co-signor on the note, Jeff Abernethy, assumed responsibility for making payments on the mobile home loan. However, Petitioner herself later admits that “[a]t the time of [their] divorce, stipulations in the separation papers regarding the fact that he [Jeff Abernethy] was keeping the home and should make payments [were] not put in the divorce papers...and this was the divorce lawyer’s failure.” (Petitioner’s Letter dated September 11, 2004, hereinafter “Pet’s Ltr.,” ¶ 3).

However, it is important to note that even if Petitioner’s divorce decree did stipulate that her ex-husband, Jeff Abernethy, was to assume responsibility for the mobile home loan, under existing law, Petitioner would still be liable to HUD for the debt. This is because, generally, cosigners for a loan are jointly and severally liable to the obligation. “Liability is characterized as joint and several when a creditor may sue the parties to an obligation separately or together.” Mary Jane Lyons Hardy, HUDBCA No. 87-1982-G314, at 3 (July 15, 1987). A divorce decree purporting to release Petitioner from this joint obligation does not affect the claims of an existing creditor unless the creditor was a party to the action. Wendy Kath, HUDBCA No. 89-4518-L8, at 2 (December 26, 1989). In this case, neither the Secretary nor the lender was a party to the divorce action, thus binding Petitioner to her prior contract obligations. Petitioner’s divorce decree only determined rights and liabilities between Petitioner and her former spouse. Kimberly S. King (Theide), HUDBCA No. 89-4587-L74 (April 23, 1990). Petitioner may enforce the divorce decree against her ex-husband in state or local court to recover monies paid to HUD by her to satisfy this obligation. However, this does not preclude the Secretary from enforcing this debt against Petitioner. Deborah Gage, HUDBCA No. 86-1276-F283 (January 14, 1986). Therefore, Petitioner remains jointly and severally liable to the contract at issue and the Secretary has the right to enforce the obligation against her individually.

The Secretary has the burden of going forward to prove the existence or amount of the debt. 31 C.F.R. § 285(f)(8)(i). The Secretary has carried his burden of proof by submitting: (1) a copy of the contract signed by Petitioner; (2) a document relating to the assignment of the contract; (3) a document which shows that the United States Postal Service delivered the Notice of Sale address to Petitioner on September 10, 2003, in Winston Salem, NC 27103; (4) the uncontested Declaration of Brian Dillon, Director of the Albany Asset Recovery Division, that Petitioner defaulted on his obligation to repay the loan and that certain specified amounts in unpaid principal and interest are now due; and (5) the uncontested Supplemental Declaration of Brian Dillon, hereinafter “Dillon Supp. Decl.” (Secy. Stat., Exhs. A and B; Dillon Decl., ¶¶ 3-8; Dillon Decl., Exhs. A, B, and C; Dillon Supp. Decl.) Thereafter, “Petitioner . . . must present by a preponderance of the evidence that no debt exist or that the amount of this debt is incorrect.” 31 C.F.R. § 285.11(f)(8)(ii).

Petitioner has not satisfied her burden of proof because she has neither presented documentary evidence to support her allegations nor rebutted the Secretary's evidence that the debt does in fact exist and is enforceable against her in the amounts claimed by the Secretary.

Finally, Petitioner claims that "with [her] three sons, and since [her] wages are minimal... this garnishment of [her] wages would... cause a financial hardship for [her] family. (Pet. Ltr.). (emphasis in original).

Evidence in the record reveals that based upon the issuance of a Wage Garnishment Order issued to Petitioner's employer on August 30, 2004, Treasury received payments of \$146.44, on October 4, 2004, and \$173.55 on November 1, 2004. (Dillon Decl., ¶ 12). The garnishment amount was calculated by Petitioner's employer based on the Wage Garnishment Order for a garnishment of 15% of Petitioner's net disposable pay per period. (Supp. Dillon Decl., ¶ 4). Dillon states in his Declaration that these payments were not received or reflected in the outstanding balance allegedly owed to the Secretary. Id.

Petitioner is presently subject to administrative wage garnishment and has failed to submit documentary evidence to substantiate her claim that the administrative wage garnishment of her disposable pay would cause financial hardship. Petitioner had the opportunity to submit such evidence to the Board, but she failed to respond to the Board's Order dated December 6, 2004 and the Board's subsequent Order dated January 21, 2005.

Therefore, upon due consideration of the un rebutted assertions, evidence, and declarations set forth in or attached to the Secretary's Statement, I find that the debt which is the subject of this proceeding is legally enforceable against Petitioner in the amounts claimed by the Secretary.

Petitioner has also expressed an interest in negotiating a payment amount acceptable to Petitioner. This Board is not authorized to extend, recommend, or accept any payment plan or settlement offer on behalf of the Department, Petitioner may wish to discuss this matter with 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 his financial status by submitting to that HUD Office a Title I Financial Statement (HUD Form 56142).

ORDER

For the reasons set forth above, I find that the debt which is the subject of this proceeding is legally enforceable against Petitioner in the amount claimed by the Secretary. The Order imposing the stay of referral of this matter to the U.S. Department of Treasury for administrative wage garnishment is vacated.

It is hereby ORDERED that the Secretary is authorized to seek collection of this outstanding obligation by means of administrative wage garnishment to the extent authorized by law.

Jerome M. Drummond
Administrative Judge

March 23, 2005