

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

In the Matter of:

FRED D. GWALTNEY,

Petitioner

HUDOA No.: 12-M-CH-AWG31

Claim No.: 78-02526870A

Date: May 30, 2012

DECISION AND ORDER

On December 14, 2011, 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 use administrative wage garnishment as a mechanism for the collection of debts owed to the United States government.

The administrative judges of this Office are designated to determine whether the Secretary may collect the alleged debt by means of administrative wage garnishment if contested by a debtor. This hearing is conducted in accordance with the procedures set forth at 31 C.F.R. § 285.11, as authorized by 24 C.F.R. §17.81. 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 show by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. 31 C.F.R. § 285.11(f)(8)(ii). In addition, Petitioner may present evidence that the terms of the repayment schedule are unlawful, would cause an undue financial hardship to Petitioner, or that collection of the debt may not be pursued due to operation of law. *Id.* Pursuant to 31 C.F.R. §285.11(f)(4), on December 19, 2011 this Office stayed the issuance of a wage withholding order until the issuance of this written decision. (Notice of Docketing, Order and Stay of Referral, dated December 19, 2011.)

Background

On or about September 19, 2006, Petitioner executed and delivered to Mission Hills Mortgage Corporation (“Mission Hills”) a promissory note (“the Note”) in the amount of \$25,000 for a property improvement loan. (Secretary’s Statement (“Sec’y Stat.”) ¶ 2, filed January 5, 2012.) The loan was insured by the Secretary pursuant to Title I of the National Housing Act, 12 U.S.C. § 1703. (*Id.*)

Petitioner defaulted on the Note and Mission Hills assigned the Note to HUD. (*Id.* at ¶ 3.) HUD has attempted to collect the amount due under the Note, but Petitioner remains delinquent. (*Id.*) Petitioner is justly indebted to the Secretary in the following amounts:

- (a) \$6,367.37 as the unpaid principal as of December 31, 2011;
- (b) \$3,418.33 as the unpaid interest on the principal balance at 5% per annum through December 31, 2011; and
- (c) Interest on said principal balance from January 1, 2012 at 5% per annum until paid.

(*Id.* at ¶ 5.)

A Notice of Intent to Initiate Administrative Wage Garnishment Proceedings was mailed to Petitioner on November 30, 2011. (*Id.* at ¶ 4.) Pursuant to 31 C.F.R. ¶ 285.11(e)(2)(ii), Petitioner was afforded an opportunity to enter into a written repayment agreement under terms acceptable to HUD. (*Id.*) Petitioner did not enter into any such agreement. (*Id.*)

Discussion

On December 15, 2011, this Court received Petitioner's hearing request. (Petitioner's Hearing Request ("Pet'r's Hearing Req."), dated December 14, 2011.) In response, this Court issued a Notice of Docketing, Order, and Stay of Referral ("Order") ordering the Secretary to file documentary evidence proving that Petitioner's alleged debt to HUD is enforceable and past due in addition to the Secretary's proposed repayment plan. (Notice of Docketing, Order, and Stay of Referral, dated December 19, 2011.) Furthermore, this Court ordered Petitioner to file documentary evidence proving that the alleged debt was not past due or legally enforceable. The Secretary filed his Statement on January 5, 2012. Petitioner failed to respond to the Order.

On March 1, 2012, this Court issued a second Order to Petitioner directing him to file documentary evidence to prove that the alleged debt was not past due or legally enforceable. (Order, dated March 1, 2012.) The Order further stated that "[f]ailure to comply with this Order may result in...the entry of judgment in favor of the opposing party in this case, a decision based on the documents of record, or other sanctions deemed necessary and appropriate by the Administrative Judge." (*Id.*) Petitioner failed to respond to the second Order.

On April 19, 2012, having not received a response from Petitioner to the March 1 order, this Court issued a third Order to Petitioner. Again, Petitioner was directed to file documentary evidence to prove that the alleged debt was not past due or legally enforceable. (Order for Documentary Evidence, dated April 19, 2012.) To date, Petitioner has not responded to any of the three Orders for Documentary Evidence.

In Petitioner's hearing request, he sets forth several reasons as to why he believes he is not responsible for the alleged debt: (1) he is not liable for the debt because the divorce agreement between him and his former spouse absolves him of all liability; (2) he did not agree or sign for the alleged debt; (3) he has not received any documents indicating that his former spouse was released from personal liability for the debt; (4) he did not consent to the settlement agreement between his former spouse and HUD; (5) the interest penalties are unreasonable

because HUD failed to pursue its claim against Petitioner in a timely manner; and (6) the Secretary's proposed repayment schedule would result in a financial hardship for Petitioner. For the reasons set forth below, the first five arguments presented by Petitioner are without merit. Petitioner's final argument—that the proposed repayment schedule will create a financial hardship—must fail for want of proof.

Petitioner's assertion that the divorce agreement absolves him of liability for the alleged debt lacks merit because the divorce agreement only determines the rights and liabilities between Petitioner and his former wife. Specifically, Petitioner claims that at the time of the marriage separation "I signed over and gave mortgage on house [sic], which included Title I property Improvement Loan [sic] to my ex wife, Reesa Gwaltney." (Pet'r's Hearing Req.) Petitioner does offer any documentation of any such agreement. However, even if Petitioner were to produce such an agreement, it would be of no avail to him because the Note shows that Petitioner signed his name as a co-borrower, thus making him jointly and severally liable for the amount borrowed.¹ (Note, dated September 18, 1996). A divorce or separation agreement purporting to release one from a joint and several liability does not affect the claims of an existing creditor unless the creditor was a party to the agreement. *See Cynthia Abernethy*, HUDBCA No. 04-D-NY-AWG39 (March 25, 2005) (citing *Wendy Kath*, HUDBCA No. 89-4518-L8 (December 26, 1989)). Here, HUD was not a party to the divorce agreement between Petitioner and his former spouse. Thus, Petitioner's obligation to HUD is not affected by any divorce agreement he may have with his former spouse.

Petitioner next asserts that he "did not agree or sign for the alleged debt." (Pet'r's Hearing Req.) However, Petitioner's signature clearing appears on both Exhibit C-1 and C-2 attached to the Secretary's Statement, which contain photocopies of the Note in question. (*See* Government Exhibits C-1, C-2.) Absent an evidentiary showing to the contrary, it is evident that Petitioner did in fact assume the obligations set forth in the loan agreement.

Petitioner's claim that the settlement agreement between his former spouse and HUD is invalid is equally without merit. It is irrelevant that he did not consent to the settlement or receive any documentation of said settlement. As per the terms of the Note, Petitioner, as a co-borrower, is jointly and severally liable for the amount of the obligation. This is further evidenced by the written release sent to Petitioner's former spouse after she entered into the settlement agreement. The letter states that Petitioner's former spouse is released "from all further personal liability to [HUD] from this claim." (*See* Government Exhibit B.) Furthermore, the letter also provides that the personal liability of Petitioner is unaffected by the settlement agreement. (*Id.*)

Petitioner also contends that HUD did not timely pursue its claim against him. Petitioner asserts that had he been aware of the debt, he would have "taken steps to resolve this matter before accumulating such a large amount of interest penalties over a period of 10 years [sic]." (Pet'r's Hearing Req. (emphasis in original).) The terms of the Note, however, are directly contrary to Petitioner's assertion. The note provides that "[petitioner] will pay interest at a yearly rate of 13.990%. Interest will be charged on unpaid principal until the full amount of principal

¹ Specifically, Paragraph 9 of the Note entitled "Responsibility of Persons Under This Note" states, "[i]f more than one person signs this Note, each of us is fully and personally obligated to pay the full amount owed."

has been paid.” (Gov’t Exhibit C-1 ¶ 2.) In addition, Paragraph 4(c) provides that in the event of default, HUD can require the immediate payment of the full loan amount plus all accrued interest. (*Id.* at ¶ 4(c).) Thus, by signing the Note, Petitioner acknowledged that he was assuming responsibility for all interest that would accrue as a result of the loan. Furthermore, a delay in HUD pursuing its claim does not preclude the Secretary from enforcing the terms of the Note at a later date. *See Gary Cannady*, HUDBCA No. 04-D-SE-AWG45 (December 8, 2004) (*citing David Olojo*, HUDBCA No. 07-0-CH-AWG19 (October 4, 2007)). More importantly, the controlling statute, 31 U.S.C. § 3720D, does not contain a time limitation in which the Government is required to bring administrative actions. Thus, there is no limitations period that bars the Secretary from bringing this action at the present time.

Lastly, Petitioner contends that the Secretary’s proposed repayment plan will create a financial hardship for him. However, Petitioner has failed to file any documentary evidence to prove this assertion, despite being ordered to do so on three separate occasions. Petitioner listed several expenses on a Debt Resolution Program Financial Statement that he submitted with his request for a hearing; however, without any documentary evidence substantiating these claimed expenses, such expenses cannot be considered by this Court. This Court has consistently held that “[a]ssertions without evidence are not sufficient to show that the debt claimed by the Secretary is not past due or enforceable.” *Marie O. Gaylor*, HUDBCA No. 03-D-NY-AWG04 (February 7, 2003) (quoting *Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996)). This claim must fail for lack of proof.

In sum, Petitioner has failed to prove that this debt is not past due or legally enforceable. Furthermore, Petitioner has failed to make an evidentiary showing that the Secretary’s proposed repayment plan will create a financial hardship for him. The Secretary is therefore entitled to collect this debt via administrative wage garnishment.

ORDER

For the reasons set forth above, I find the debt that is the subject of this proceeding to be 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 the Treasury for administrative wage garnishment is **VACATED**. It is hereby

ORDERED that the Secretary is authorized to refer this matter to the U.S. Department of the Treasury for administrative wage garnishment to the extent authorized by law.



H. Alexander Manuel
Administrative Judge

May 30, 2012