Office of Appeals
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of:

DIANNE T. GERGELY,

Petitioner.

HUDOA No. 10-H-NY-AWG128
Claim No. 78-015934-60A

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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 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. §17.170. 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 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 September 24, 2010, 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 ("Notice of Docketing"), dated Sept. 24, 2010.)

Background

On August 15, 1996, Petitioner executed and delivered a Note to Real Estate Mortgage Acceptance Co. in the amount of $25,000.00, which was insured against nonpayment by the Secretary, pursuant to Title I of the National Housing Act. (Secretary's Statement ("Sec't Stat."), ¶ 2, filed Oct. 20, 2010; Sec'y Stat., Ex. A, Note.) Contemporaneously, on August 15, 1996, the Note was assigned by Real Estate Mortgage Acceptance Co. to Mego Mortgage Corporation. (Sec'y Stat., ¶ 2; Ex. A, Endorsement of Note.) Subsequently, Mego Mortgage Corporation assigned the Note to First Trust of New York, National Association. (Sec'y Stat., ¶ 4, Ex. B, Assignment; Declaration of Brian Dillon, ("Dillon Decl."), Director of Asset Recovery Division, HUD's Financial Operations Center, ¶ 3, dated Oct. 7, 2010.) After default by Petitioner, the Note was allegedly assigned to the United States of America in accordance with 24 C.F.R. § 201.54 on June 28, 1999. (Sec'y Stat., ¶ 5; Ex. B, Assignment.) The Secretary alleges that he is the holder of the Note on behalf of the United States of America. (Sec'y Stat., ¶ 5.)

The Secretary has made efforts to collect this alleged debt from Petitioner, but has been unsuccessful. (Sec'y Stat., ¶ 6.) The Secretary alleges that Petitioner is justly indebted to HUD in the following amounts:

(a) $23,956.42 as the unpaid principal balance as of September 30, 2010;
(b) $11,573.23 as the unpaid interest on the principal balance at 5% per annum through September 30, 2010; and
(c) interest on said principal balance from October 1, 2010 at 5% per annum until paid.

(Sec'y Stat., ¶ 6, Ex. C, Dillon Decl., ¶ 4.) Pursuant to 31 C.F.R. § 285.11(e), a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings ("Notice of Intent") dated August 25, 2010 was sent to Petitioner. (Sec'y Stat., ¶ 7.) In accordance with 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was afforded the opportunity to enter into a written repayment agreement with HUD under mutually agreeable terms but Petitioner did not elect to do so. (Sec'y Stat., ¶ 13.) Although Petitioner has not provided HUD with a copy of her pay statement (Sec'y Stat., ¶ 14) Petitioner's employer informed HUD that Petitioner's gross pay rate is $33.94 per hour (Sec'y Stat., ¶ 15). The Secretary proposes a repayment schedule of 15% of Petitioner's disposable pay. (*Id.*)

Discussion

Pursuant to 31 C.F.R. § 285.11(f)(8)(ii), Petitioner bears the burden of proving, by a preponderance of the evidence, that no debt exists or that the amount of the alleged debt is incorrect. Petitioner contends, through counsel, that: 1) the collection of the subject debt is barred by the statute of limitations; 2) "no affidavit, declaration or other evidence has been presented showing that the endorsements [attached as Exhibit B] are attached to the Note, or that the Secretary holds the Note and is in possession of the original of the Note;" (Supplement to

Petition ("Suppl. Pet."), ¶ 8, filed November 23, 2010); 3) the Secretary never filed documentary evidence in support of the alleged debt against Petitioner; and, 4) Petitioner "had no knowledge of assignments" prior to receiving the Notice of Intent. (Id.)

Petitioner first claims that:

> No action may be pursued against [Petitioner] with respect to the claim because it is barred by the applicable Statute of Limitations, which is set forth in Florida statutes, Section 95.11 (2). The Administrative Wage Garnishment is only to be pursued if the debt is valid and legally enforceable, which it is not.

(Petitioner's Hearing Request, filed Sep. 23, 2010.)

In response, the Secretary cites to *Erie Railroad Co. v. Tompkins*, to support his argument that "[c]ontrary to Petitioner's contention, the laws of the State of Florida are not controlling. Florida law does not apply to matters governed by the Federal Constitution or acts of Congress." (Sec'y Stat., ¶ 9.) The Secretary states further that since "Section 3720D of the United States Code does not contain a limitation of time within which the Secretary must bring actions to collect the debts he is owed via administrative wage garnishment," (Sec'y Stat. ¶ 11) the Secretary is therefore "authorized to use administrative wage garnishment as a means to collect the debts he is owed pursuant to the Debt Collection Improvement Act of 1996, as amended…and the implementing regulations found at 31 C.F.R. § 285, et seq" (Sec'y Stat., ¶ 10.)

Petitioner's allegation that this claim is barred by the statute of limitations is without merit because there is no statute of limitations for administrative wage garnishment. In the case of *In Re Douglas P. Hansen* (Decision Order and Reconsideration), HUDBCA No. 06-A-CH-AWG03 at 3(February 13, 2007), the Office of Appeals adopted the holding of the U.S. Supreme Court in *BP America Prod. Co v. Burton*, 127 S.Ct. 638,643 (2006) and reversed its decision in the initial *Hansen* decision by finding that "no statute of limitations exists in administrative proceedings without the inclusion of a clear, legislative time period by Congress." *See BP America Prod. Co. v. Burton*, 127 S. Ct. 638 (2006); *In Re Karen T. Jackson* (Decision and Order), HUDOA No. 09-H-NY-AWG87 at 3 (June 3, 2009). Furthermore, the controlling statute in the instant case, 31 U.S.C. § 3720D, does not contain a time limitation in which the government is required to bring such administrative actions. No statute of limitations bars agency enforcement action by means of administrative wage garnishment. Therefore, consistent with statutory regulations and case law precedent, I find that the Secretary is not barred by the statute of limitations from collecting, by means of administrative wage garnishment, the debt that is the subject of this proceeding.

Next, Petitioner contends that: "no affidavit, declaration or other evidence has been presented showing that the endorsements [attached as Exhibit B] are attached to the Note,…." (Suppl. Pet., ¶ 7.)

Florida Statute Annotated § 673.2041 states that, "[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument." According to §673.2041(1), while Petitioner's endorsements in this case were not reflected on the face of the Note, the endorsements made on the attachments to the Note sufficiently met the standard set forth under Florida state law. Such attachment would be deemed, by statute, affixed to the Note and thus would be deemed to be a part of the Note, and as such, the endorsements attached to the Note at issue will be treated as affixed to the Note in this case.

Petitioner further contends that "no affidavit, declaration or other evidence has been presented showing that ...the Secretary holds the Note and is in possession of the original of the Note." (Suppl. Pet., ¶ 7.) Petitioner's argument as presented is not fully supported by the record in this proceeding. Since federal law does not provide the legal standard for determination of the Secretary's status as a holder of the Note, we look to the laws of the state of Florida, where the Note at issue was signed. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state"); *Boseman v. Connecticut General Life Insurance Co.*, 301 U.S. 196, 202 (1937) ("In every forum a contract is governed by the law with a view to which it was made"); *see also Karen T. Jackson*, HUDOA No. 09-H-NY-AWG87 (June 3, 2009). Under Florida Statute § 673.3021 it provides:

> "Holder in due course" means the holder of an instrument if:
>
> (a) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
>
> (b) The holder took the instrument:
>
> 1. For value;
>
> 2. In good faith;
>
> 3. Without notice that the instrument is overdue or has been dishonored or that there is an incurred default with respect to payment of another instrument issued as part of the same series;
>
> 4. Without notice that the instrument contains an unauthorized signature or has been altered;
>
> 5. Without notice of any claim to the instrument described in s. 673.3061; and

6. Without notice that any party has a defense or claim in recoupment described in s. 673.3051(1).

Petitioner has failed to prove, by a preponderance of the evidence, that HUD is not a holder in due course pursuant to Florida Statute § 673.3021. Thus, Petitioner's claim fails for lack of proof.

Thirdly, Petitioner claims that "Pursuant to the Order, the Secretary is required to file documentary evidence proving the alleged debt to HUD is enforceable. Petitioner has not yet received such documentary evidence." (Petitioner's Petition, ("Pet'r Pet.") filed November 9, 2010.) According to Rule 26.10, Title 24 of the Code of Federal Regulations, "service may be established by written receipt signed by or on behalf of the person served, or may be established prima facie by affidavit, *certificate of service of mailing*, or electronic receipt of sending." (emphasis added.) In this case, the record contains a certificate of service that certifies that Petitioner's counsel was served via facsimile and first class mail on October 20, 2010 the Secretary's Statement and Proposed Repayment Schedule, along with documentary evidence. (Sec'y Stat., Attached Certificate of Service.) Petitioner's claim is therefore without merit.

Finally, Petitioner claims that she had "no knowledge of any purported assignments of the Note and did not consent to the assignments of the Note" and further claims that she "never agreed to become obligated to the United States and does not owe the United States any amount of money with respect to the Note." (Suppl. Pet.,¶ 8.) Petitioner claims that because "[n]o debt owing by Petitioner to her sovereign, the United States, can be created without her consent or due process of law, [t]he Note and the collection efforts of the Secretary are not governed by Federal law, because the obligations owing under the Note do not constitute Debt [sic] owing to the United States." (Suppl. Pet., ¶¶ 9- 10.)

Petitioner's argument that she did not consent to the assignments of the Note is inconsistent with the evidence in the record. A careful examination of the record shows that Petitioner not only agreed to pay the subject debt, but that she also agreed to be indebted to anyone who takes the Note by transfer and is entitled to payment of the debt as the Note Holder. The terms of the Note bearing Petitioner's signature provides:

> 1. **BORROWER'S PROMISE TO PAY**: In return for a loan that I have received, I promise to pay $25,000.00 (this amount is called "principal"), plus interest, to the order of the Lender. I understand that the Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called a "Note Holder."

(Sec'y. Stat., Ex. A., ¶ 1.)

By signing, executing, and delivering the Note to the lender, Petitioner became bound by the terms and conditions contained therein. *See Brian Goddard*, HUDBCA No. 98-B-SE-W333, (H.U.D.B.C.A. Nov. 23, 1998). Therefore, Petitioner agreed to remain legally obligated to pay the subject debt to "anyone who takes this Note by transfer and who is entitled to receive payments under this Note and called the 'Note Holder.' " (Sec'y. Stat., Ex. A., ¶ 1.) In this case,

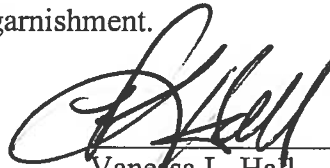
the Note Holder is HUD. As a result, I find that Petitioner did in fact agree to the assignments of the Note, and further find her claim that she did not consent to the assignments fails for lack of proof.

ORDER

Based on the foregoing, Petitioner remains legally obligated to pay the debt that is the subject of this proceeding.

The Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative wage garnishment shall be **VACATED**. It is hereby

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



Vanessa L. Hall
Administrative Judge

April 7, 2011