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

In the Matter of:		
TRUDY BURKS,	HUDOA No.	10-M-CH-AWG62
	Claim No.	7-709008240B
Petitioner		

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DECISION AND ORDER

On February 22, 2010, 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 have been designated to determine whether the Secretary may collect the alleged debt by means of administrative wage garnishment if the debt is 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 a 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) and (f)(10), on March 9, 2010, this Office stayed referral by HUD of this matter to the U.S. Department of the Treasury for issuance of an administrative wage garnishment order until the issuance of this written decision.

Background

On December 9, 1994, Petitioner executed and delivered to Swain Roofing & Remodeling and Empire Funding Corp. a Retail Installment Contract and Disclosure Statement ("Note") in the amount of $11,966.00 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 ("Sec'y Stat."), filed April 1, 2010, ¶ 1, Ex. 1.) After Petitioner defaulted on the loan, Empire Funding Corp., Servicing Agent for 1st National Bank of Keystone, assigned the Note to the United States of America under the regulations governing the Title I Insurance Program. (*Id.* at ¶ 2, Ex. 1.)

The Secretary has attempted to collect the amounts due under the Note, but Petitioner remains delinquent. (*Id.* at ¶ 3; Declaration of Brian Dillon, Director, Asset Recovery Division, HUD Financial Operations Center ("Dillon Decl."), dated April 1, 2010, ¶ 4.) The Secretary has filed a Statement with documentary evidence in support of his position that Petitioner is indebted to HUD. The Secretary alleges that Petitioner is in default and is indebted to HUD in the following amounts:

a) $11,716.65 as the unpaid principal balance as of March 30, 2010;
b) $1,879.20 as the unpaid interest on the principal balance at 5% per annum through March 30, 2010; and
c) interest on said principal balance from April 1, 2010, at 5% per annum until paid.

(Sec'y Stat., ¶ 4; Dillon Decl., ¶ 4.) A Notice of Intent to Initiate Administrative Wage Garnishment Proceedings dated January 11, 2006, was sent to Petitioner. (Sec'y Stat., ¶ 6; Dillon Decl., ¶ 5.) In accordance with 31 C.F.R. §285.11(e)(2)(ii), Petitioner was offered the opportunity to enter into a written repayment agreement with HUD under mutually agreeable terms, but Petitioner has not entered such an agreement. (Sec'y Stat., ¶ 6; Dillon Decl., ¶ 6.)

A Wage Garnishment Order, dated June 1, 2006, was issued to Petitioner's previous employer, Russell-Sarles Title Inc. (Sec'y Stat., ¶ 7; Dillon Decl., ¶ 7.) Consequently, HUD received a total of $4,709.78 in garnishment payments. (Sec'y Stat., ¶ 8; Dillon Decl., ¶ 8.) These payments are reflected in the outstanding balance described above. (Sec'y Stat., ¶ 6; Dillon Decl., ¶ 6.) A Wage Garnishment Order, dated June 18, 2009, was issued to Petitioner's current employer, Security Title Company. (Sec'y Stat., ¶ 9; Dillon Decl., ¶ 9.) Based on the June 18, 2009 Wage Garnishment Order, HUD has received bi-weekly garnishment payments of $123.98 since July 2009. The eighteen garnishment payments, totaling $2,234.64, are reflected in the outstanding balance described above. (Sec'y Stat., ¶ 10; Dillon Decl., ¶ 10.) The

Secretary proposes a repayment schedule of $247.96 monthly or 15% of Petitioner's disposable pay. (Sec'y Stat., ¶ 11; Dillon Decl., ¶ 11.)

Discussion

31 U.S.C. §§3716 and 3720A provide federal agencies with administrative wage garnishment as a means of collecting debts owed to the United States Government. The burden of proof is on the debtor to show that the debt claimed by the Secretary is unenforceable and not past-due. 24 C.F.R. §17.152(b). Failure to provide documentary evidence that the alleged debt is unenforceable or not past-due shall result in a dismissal of the debtor's request for a review of the alleged debt. *Id.*

Petitioner argues that the alleged debt to HUD is unenforceable and not past-due because 1) HUD waited eleven years to collect the debt; 2) half of the debt is owed by her ex-husband; 3) collection of the alleged debt by wage garnishment is a violation of due process; 4) the debt was extinguished when the lender foreclosed on the property; 5) Petitioner had no notice or knowledge of the assignment of the Note to HUD; and 6) an administrative wage garnishment, at this time, would cause a financial hardship for Petitioner.

First, Petitioner argues that the alleged debt to HUD is unenforceable because HUD waited eleven years to collect the debt. In support, Petitioner states:

> The alleged debt which is the subject of this proceeding originated in 1994 and became delinquent in 1995 when Petitioner and her husband ceased paying after the house was foreclosed that was the object of the improvements for which the alleged debt was created . It was not until eleven (11) years later in 2006, when collection by garnishment was initiated. We submit that the federal and state of Texas statutes of limitation in effect in 1994, when the contract was signed, bar the enforcement of the alleged debt.
>
> In the alternative, we would show that the contract which was signed by Petitioner and her now former husband was by its terms controlled by and subject to the laws of the State of Texas, and the statutes of limitation in Texas in effect in 1995, bar enforcement of the debt more than four years after it[s] accrual, which [was] 1995.

(Petitioner's Supplemental Statement ("Pet'r Suppl. Stat."), filed August 13, 2010, ¶¶ 1-2.) This Office previously held that an "alleged delay in pursuing HUD's claim does not prevent the Secretary from enforcing the terms of the Note." *Lora Foley*, HUDOA No. 09-M-AWG20 (March 23, 2009); *citing David Olojo*, HUDOA No. 07-H-CH-AWG19 (October 4, 2007) ("It is well-established, however, that the United States is not generally subject to the defense of laches"). Furthermore, the U.S. Supreme Court held, in *BP America Prod. Co. v. Burton*, that no statute of limitations bars agency enforcement actions by means of administrative wage garnishment. 127 S. Ct. 638,643 (2006); *see also Douglas Hansen*, HUDBCA No. 06-A-CH-AWG03 at 3 (February 13, 2007) ("There is no time impediment to HUD's attempt to collect

Petitioner's debt by means of administrative wage garnishment"). Therefore, I find that no statute of limitation applies to this action.

Second, Petitioner claims that the alleged debt to HUD is inaccurate because half of the debt is allegedly owed by her ex-husband. In support of her argument, Petitioner states:

> The [Note] was signed . . . by Petitioner and her former husband, Ryan W. Burks. Ryan W. Burks is jointly and severally liable for the amount owed under said contract and is therefore a necessary party to this proceeding.

(Pet'r Suppl. Stat., ¶ 3.) The Note signed by Petitioner and her ex-husband states, "Buyers (Petitioner and her ex-husband) hereby, jointly and severally, promise to pay to the order of Seller (Swain, Roofing & Remodeling) or any other holder of this Contract $11,966.00 together with time price differential thereon . . . ." (Sec'y Stat., Ex. 1.) As one of the signatories on the Note, Petitioner is jointly and severally liable along with the other signatory for repayment of the alleged debt. "Liability is characterized as joint and several when creditors may sue the parties to an obligation separately or together." *Edgar Joyner, Sr.*, HUDBCA No. 04-A-CH-EE052 (June 15, 2005) (*citing Mary Jane Lyons Hardy*, HUDBCA No. 87-1982-G314 (July 15, 1987)).

Even if the terms of a court order allocate half of the responsibility for the alleged indebtedness to Petitioner's ex-husband, "Petitioner remains liable to HUD for payment of the Note pursuant to the terms of the Note and existing law." *Terri Kutz*, HUDOA No. 09-M-NY-KK08 (March 20, 2008). The terms of the divorce only determine the rights and liabilities between Petitioner and her ex-husband, they do not bind their creditors. *See Pee Dee State Bank v. Prosser*, 367 S.E.2d 708, 712 (S.C. App. 1988) (overruled in part on other grounds); *Kimberly S. King* (*Theide*), HUDBCA No. 89-4587-L74 (April 23, 1990); *see also Cynthia Abernethy*, HUDBCA No. 04-D-NY-AWG39 (March 23, 2005). The Secretary may proceed against any signatory for the full amount of the debt. *Terri Kutz*, HUDOA No. 09-M-NY-KK08 (March 20, 2008.) Although Petitioner may be able to seek indemnification from other signatories on the Note, this does not prevent HUD from seeking payment solely against Petitioner. (*Id.)* Therefore, I find that Petitioner is jointly and severally liable to HUD for the full amount of the alleged debt.

Third, Petitioner contends that HUD's collection of the alleged debt by wage garnishment violates due process. Petitioner states the following:

> In the alternative, Petitioner would show that garnishment of one's wages is an extreme remedy and both federal and state courts have universally held that it is a remedy of last resort and can only be exercised after a court of competent jurisdiction has passed judgment on the validity of the alleged debt. No such court, federal or state, has issued a judgment which would support a garnishment of wages. To do otherwise would be a clear violation of due process of law.

(Pet'r Suppl. Stat., ¶ 4.) HUD, however, is fully authorized under applicable federal codes and regulations to collect debts owed to it by the use of administrative wage garnishment. 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. Section 3720D specifically provides as follows:

> Notwithstanding any provision of State law, the head of an executive, judicial, or legislative agency that administers a program that gives rise to a delinquent nontax debt owed to the United States by an individual may in accordance with this section garnish the disposable pay of the individual to collect the amount owed, if the individual is not currently making required repayment in accordance with any agreement between the agency head and the individual.

31 U.S.C. § 3720D(a). Moreover, Petitioner failed to cite case law that supports her proposition that wage garnishment is "a remedy of last resort and can only be exercised after a court of competent jurisdiction has passed judgment on the validity of the alleged debt." (Pet'r Suppl. Stat., ¶ 4.)

Fourth, Petitioner argues that the debt was extinguished when the lender foreclosed on the property. Petitioner states as below:

> The debt [which is the subject of this action (the "Debt")] and lien were secondary to a first lien purchase money mortgage on the property. The first lien mortgage was foreclosed in 1995 and Petitioner and her husband (the Co-Obligor on the Debt) ceased paying on the debt because they no longer owned the home and believed that the second lien (the subject Debt) was extinguished by the foreclosure of the first lien.

(Response of Petitioner ("Pet'r Response"), filed April 12, 2010, ¶ 1.) Regardless of whether Petitioner is currently in possession of the property or not, Petitioner remains legally responsible for the debt unless she obtains a release in writing from the lender specifically discharging Petitioner's obligation, or gives valuable consideration to the lender, which would indicate the lender's intent to release. *Franklin Harper*, HUDBCA No. 04-D-CH-AWG41 (March 23, 2005). Petitioner has not submitted any documentary evidence to support her contention that either the lender or HUD, as successor in interest to the lender, was a party to an agreement to release Petitioner from liability. Therefore, I find that Petitioner was not released from liability on her debt to HUD by the foreclosure of the property referenced in the Note.

Fifth, Petitioner contends that she had no notice or knowledge of the assignment of the Note to HUD. In support, Petitioner states the following:

> There is no language whatsoever in [the Note] to indicate that the loan could be assigned to the United States Dept. of Housing and [Urban] Development and become subject to the regulations of the Title I Insurance Program.

(Pet'r Response, ¶ 3.) On the other hand, the Secretary asserts that "[a]fter the Petitioner defaulted on the loan, Empire Funding Corp., Servicing Agent for 1st National Bank of Keystone, assigned the Note to the United States of America under the regulations governing the Title I Insurance Program." (Sec'y Stat., ¶ 2, Ex. 1, Page 2; Dillon Decl., ¶ 3.) The copy of the Note filed by the Secretary provides that "[a]ll right, title and interest of the undersigned is hereby

assigned," and that "the loan qualifies for insurance to the United States of America (U.S. Department of Housing and Urban Development," the statement signed by the Assistant Vice-President for Servicing Agent on May 13, 1996. (Sec'y Stat., Ex. 1, Page 2.)

While the Secretary has met his burden of proof to show that the Note was assigned to HUD, Petitioner has filed no documentary evidence to support her assertion that she had no notice or knowledge of the assignment of the Note to HUD. "Assertions without evidence are insufficient to show that the debt claimed by the Secretary is not past due or enforceable." *Bonnie Walker*, HUDBCA No. 95-G-NY-T300 (July 3, 1996). Therefore, Petitioner's assertion that the amount of the debt is incorrect must fail for want of proof.

Moreover, Petitioner has received proper notice of HUD's intent to collect the alleged debt based on the Note by means of administrative wage garnishment. Pursuant to 31 C.F.R. § 285.11(e), a federal agency seeking administrative wage garnishment "shall mail, by first class mail, to the debtor's last known address a written notice informing the debtor of" the nature and amount of the alleged debt, the agency's intent to collect the same by means of administrative wage garnishment, and an explanation of the alleged debtor's rights "at least 30 days before the initiation of garnishment proceedings." By mailing a Notice of Intent to Initiate Administrative Wage Garnishment Dating, dated January 11, 2006, and another notice of the same title, dated February 23, 2006, to Petitioner's last known address, the Secretary has satisfied the requirements of 31 C.F.R. § 285.11(e). (Sec'y Suppl. Stat., ¶ 5.)

Finally, Petitioner argues that the alleged debt to HUD is unenforceable because the Secretary's proposed repayment schedule would result in a financial hardship for Petitioner. In support, Petitioner states:

> In the alternative, Petitioner would show that forced payment of the alleged debt by garnishment as proposed would result in severe financial hardship on Petitioner. An Affidavit by Petitioner has been submitted which demonstrates the severity of the hardship.

(*Id.* at ¶ 5.) On April 12, 2010, this Office ordered Petitioner to "file documentary proof of financial hardship." (Order, dated April 12, 2010.) On June 28, 2010, Petitioner filed a letter with documents including Petitioner's affidavit, list of monthly expenses, bills and statements, letter from Petitioner's landlord verifying the amount of Petitioner's rent and letter from Petitioner's employer verifying the amount of Petitioner's salary. (Petitioner's Letter ("Pet'r Ltr."), filed June 28, 2010.)

According to the employer's letter, Petitioner's monthly gross pay totals $2,000. (*Id.*) The Secretary is authorized to garnish "up to 15% of the debtor's disposable pay," which is determined "after the deduction of health insurance premiums and any amounts required by law to be withheld [including] amounts for deductions such as social security taxes and withholding taxes . . . ." 31 C.F.R. §§ 285.11(c) and (i)(2)(i)(A). The employer's letter provides that after subtracting allowable deductions for Social Security, Medicare and withholding taxes, Petitioner is left with a disposable income of $1,600 monthly. (Pet'r Ltr.)

Petitioner also submitted bills and records of payment for essential monthly household expenses which included rent $120; water, trash and sewer, $60; cellular phone, $59.75; automobile payment, $400; and automobile insurance, $192.95. Petitioner listed other monthly expenses, for which actual bills were not submitted, such as electricity for $300 and groceries for $400. (Pet'r Ltr.) Without documentary evidence, the listed expenses routinely would not be included. However, in *Elva and Gilbert Loera*, HUDBCA No. 03-A-CH-AWG28, p. 4 (July 30, 2004), it was determined that credit may be given to certain essential monthly living expenses in instances where the Petitioner's Statement lists monthly expenses but does not provide bills or other documentation. In the *Loera* case, the "financial information submitted by [the] Petitioner [was found to be] generally credible, although the averages of monthly living expenses appear to be somewhat overstated." *Elva and Gilbert Loera* at p.4. Similarly, in this case, this Office will consider allowances to pay for reasonable and necessary living expenses, such as utilities and food. These essential household expenses total $1,532.70.

Petitioner's assertions concerning satellite dish payments of $95 and phone and Internet payments of $60 will not be credited towards Petitioner's monthly expenses because they are not deemed to be essential living expense. Petitioner's cellular phone expenses were already credited towards Petitioner's essential monthly living expenses above.

Pursuant to 31 C.F.R. § 285.11(k)(3), this Office has the authority to order garnishment at a lesser rate based upon the record before it. Petitioner's monthly disposable income of $1,600 less her monthly bills and expenses of $1,532.70 leaves a remaining balance of $67.30 per month. A 15% garnishment rate of Petitioner's monthly disposable income would equal $240 and exceed Petitioner's disposable pay by $172.70. A wage garnishment of 10%, or $160, would still exceed Petitioner's disposable pay by $92.70. A garnishment rate of 5%, or $80, would leave Petitioner with a negative balance of $12.70 each month.

Therefore, Petitioner has demonstrated that the Secretary's proposed repayment schedule would cause her financial hardship. While the Secretary has successfully established that the debt that is the subject of this proceeding is legally enforceable against Petitioner in the amount claimed by the Secretary, a garnishment amount at any percentage of Petitioner's disposable pay would constitute a financial hardship sufficient to justify suspension of the collection action at the present time. Additionally, this Office also takes note of Petitioner's representation that she is currently her family's sole-provider. (Pet'r Ltr.; Pet'r Response, ¶ 5.)

Petitioner is advised that this Office is not authorized to consider any settlement offer or any waiver of interest request on behalf of HUD. However, Petitioner may wish to discuss this matter with Counsel for the Secretary or Lester J. West, Director, HUD Financial Operations Center, 52 Corporate Circle, Albany, NY 12203-5121, who may be reached at 1-800-669-5152.

ORDER

The Order imposing the stay of referral of this matter to the U.S. Department of Treasury for administrative wage garnishment shall remain in place indefinitely. For the reasons stated above, it is hereby

ORDERED that the Secretary shall not seek collection of this outstanding obligation by means of administrative wage garnishment at this time. The Secretary shall not be prejudiced from seeking administrative wage garnishment if, in the future, Petitioner's income increases or her essential household expenses are reduced.

H. Alexander Manuel
Administrative Judge

August 26, 2010