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

In the Matter of: **DAVID ERNO,** Petitioner.	HUDOA No. 11-H-CH-AWG05 Claim No. 721006496

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For the Secretary

DECISION AND ORDER

On October 4, 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 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 October 5, 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, dated October 5, 2010.)

Background

On February 27, 2003, Petitioner executed and delivered to the Secretary a Partial Claims Promissory Note ("Subordinate Note") and Security Instrument to secure a partial claim paid on his behalf by the Secretary to pay the arrearages on his primary FHA-insured mortgage and avoid the foreclosure of his home. (Secretary's Statement ("Sec'y. Stat."), filed Oct. 20, 2010, ¶ 1; Sec'y. Stat., ¶ 2 Ex. 1, Note.) The original amount to be repaid under the Subordinate Note was $9,970.36. (Sec'y. Stat., ¶ 2.) By the terms and conditions of the Subordinate Note, it becomes due and payable when the original FHA mortgage matures; when the borrower pays the primary [n]ote in full; when the maturity date of the primary [n]ote has been accelerated; when the Subordinate Note or related security instrument is no longer insured by the Secretary; or when the property is no longer occupied by the purchaser as his principal residence. (*Id.*) On or around February 1, 2005, the FHA mortgage insurance on the original Note and Security Instrument was terminated as the mortgagee indicated the mortgage was paid in full. (Sec'y. Stat., ¶ 3; Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center of the United States Department of Housing and Urban Development ("Dillon Decl."), dated October 20, 2010, ¶ 4.)

The Secretary has filed a Statement alleging that, pursuant to the terms and conditions of the Subordinate Note, the debt is now past due and legally enforceable. (Sec'y. Stat., ¶ 4.) HUD has attempted to collect the amounts alleged to be due under the Subordinate Note, but has been unsuccessful and claims that Petitioner is indebted to HUD in the following amounts:

(a) $9,970.36 as the unpaid principal balance as of September 30, 2010;
(b) $74.79 as the unpaid interest on the principal balance at 1% per annum through September 30, 2010; and
(c) interest on said principal balance from October 1, 2010, at 1% per annum until paid.

(Sec'y. Stat., ¶ 6; Dillon Decl., ¶ 5.)

A Notice of Intent to Collect by Wage Garnishment, dated September 3, 2010, was mailed to Petitioner. (Sec'y. Stat., ¶ 7; Ex. 2, Dillon Decl., ¶ 6.) Petitioner was afforded the opportunity to enter into a repayment agreement but declined to do so. (Sec'y. Stat., ¶ 8; Dillon Decl., ¶ 7.) After reviewing Petitioner's earnings statement, the Secretary proposes a repayment schedule of $184.27 per week or 15% of Petitioner's disposable income. (Dillon Decl., ¶ 12.)

Discussion

Petitioner initially claimed that the alleged debt was not past due and enforceable because when he sold his home the debt was "cleared by payment from the First American Title

Company." (Petitioner's Hearing Request, "Pet'r's Hr'g Req.", filed October 4, 2010.) As proof, Petitioner submitted as evidence: (1) a payoff quote in the amount of $2,048.48 issued by HUD for "HUD claim number 78-046303-7"; and (2) a copy of the HUD-1 settlement statement from the transaction listing HUD loan number 78-046303-7 as a $2,050.10 loan to be paid off with the proceeds of the sale. (Sec'y. Stat., Exs. A and B, Attached Pet'r's Hr'g Req.)[1] In response, the Secretary stated that, "a review of the Settlement Statement only documents that a Title 1 home improvement loan, in the amount of $2,050.10 was satisfied. No evidence has been provided that the [Subordinate] Note Petitioner executed documenting his promise to repay the Partial Claim has been satisfied." (Sec'y. Stat., ¶¶ 9 and 10.)

Upon reviewing the record, no evidence exists that shows payment in full of the debt alleged in this proceeding, HUD Claim Number 721006496. By Petitioner's own admission he acknowledges that, "[o]n the date of the sale, there was a valid lien in existence against the property for the FHA Partial Claim Promissory Note and Subordinate Mortgage." (Petitioner's Petition and Statement that Alleged Debt is Unenforceable ("Pet'r's Stat."), filed January 21, 2011, ¶ 1.)

Next, while Petitioner acknowledges the existence of the Subordinate Note, Petitioner still maintains that the debt is unenforceable on the basis of equitable estoppels. Usually, a party seeking to assert a claim of equitable estoppel must establish the following elements: "(1) the party to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former's repudiation of its prior conduct." *City of Tucson v. Whiteco Metrocom, Inc.*, 938 P.2d 759, 765 (Ariz.App.Div.2, 1999). Petitioner contends that: (1) HUD failed to disclose the existence of this debt that arose from the Subordinate Note when it gave payoff information to Help-U-Sell. (Pet'r's Stat. ¶ 3; Affidavit of David Erno ("Pet'r's Aff."), filed January 21, 2011, ¶¶ 3-7.); and, (2) Guaranty Title Agency ("the title company") failed to uncover the existence of the debt to HUD and satisfy it with the proceeds from the sale of Petitioner's home.

Petitioner first claims, in regards to the estoppels claim, that HUD should be estopped from enforcing this debt because HUD informed Help-U-Sell that the payoff figure with HUD was $2,050.10 and that:

> ...it was HUD's responsibility to communicate with Help-U-Sell all claims that were in my name and that were to be paid off from the sale of the residence. I believe that HUD was negligent in noncommunicating [sic] all claims to Help-U-Sell in order to make sure that all HUD claims were paid off.

(Pet'r's Aff., ¶ 7.)

The Supreme Court has stated that when a party is claiming equitable estoppel against the United States government, "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Comty. Health Serv. of Crawford County, Inc.*, 467 U.S.

[1] Petitioner submitted his Hearing Request, and supporting evidence, to the Secretary who thereafter forwarded Petitioner's documentary evidence to this Office.

51, 60 (1984). When asserting equitable estoppel against the government, "at a minimum, [Petitioner] must show some *affirmative misconduct* by the government in addition to establishing the other elements of estoppel." (emphasis added, internal quotation marks omitted.) *Premo v. United States,* 599 F.3d 540, 547 (6th Cir. 2010) (citing *Mich. Express Inc. v. United States*, 374 F.3d 424, 427 (6th Cir. 2004)). "Affirmative conduct is more than mere negligence. It is an act by the government that either intentionally or recklessly misleads the claimant." (internal quotations omitted) *Premo v. United States,* 599 F.3d 540, 547 (quoting *Mich. Express Inc. v. United States*, 374 F.3d 424, 427). In addition to "affirmative misconduct going beyond mere negligence," Petitioners must show that "the government's act will cause a serious injustice and the imposition of estoppel will not unduly harm the public interest." *Pauly v. U.S. Dep't of Agric.*, 348 F.3d 1143, 1149 (9th Cir. 2003) (quoting *S & M Inv. Co. v. Tahoe Reg'l. Planning Agency*, 911 F.2d 324, 329 (9th Cir. 1990)).

The only conduct by HUD, on which Petitioner bases his equitable estoppel claim, is HUD's failure to inform Help-U-Sell of the existence of the Subordinate Note. Petitioner proffers no evidence of affirmative misconduct on the part of HUD. Instead, Petitioner argues that HUD's negligence should bar the Secretary from collecting this debt. As the law is well settled that mere negligence is insufficient to prove affirmative conduct, Petitioner has not established in this case the elements necessary for a claim of estoppel against HUD.

Further, this Office must note that, "to analyze the nature of a private party's detrimental change in position, we must identify the manner in which reliance on the government's misconduct has caused the private citizen to change his position for the worse." *Heckler v. Comty. Health Serv. of Crawford County, Inc.,* 467 U.S. 51, at 61. In *Heckler*, the U.S. Supreme Court found that "the consequences of the Government's misconduct was [sic] not entirely adverse," and that "Respondent did receive an immediate benefit as a result of the double reimbursement. Its detriment is the inability to retain money that it should never have received in the first place." *Id.* In this case, Petitioner received $78,307.07 in proceeds from the sale of his property. (Sec'y. Stat., Ex. A, HUD-1 Settlement Statement.) By Petitioner's own admission, the debt in this case should have been satisfied using a portion of the proceeds from the transaction. (Pet'r's Aff., ¶ 8; Pet'r's Stat., ¶ 3.) Giving that money to Petitioner when it should have been paid to HUD can hardly be considered detrimental to Petitioner. *See Pauly v. U.S. Department of Agriculture*, 348 F.3d 1143, at 1150 (finding that estoppel was unnecessary to prevent a serious injustice because the Paulys were only required to repay a debt that they had already incurred).

Petitioner finally claims that Guaranty failed to uncover the existence of the debt to HUD and to satisfy it with the proceeds from the sale of the home. Petitioner states that, "Guaranty Title Agency was negligent in that it had a duty to conform to a particular standard of care and the breach of that standard of care is a causal connection for the claim initiated by HUD against Plaintiff, cuasing [sic] Plaintiff injury, and actual damages." (Pet'r's Stat., ¶ 4.) With regard to a negligence claim Petitioner cites to *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz., 2007) as support. In *Casey* the Court stated that, "a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz., 2007).

Even though Plaintiff claims that all the elements of negligence identified in *Kasey* are met in this case, Petitioner has only demonstrated that he may have a negligence cause of action against the title company, not against HUD. Petitioner has failed to demonstrate how his potential claim against the title company would bar the Secretary from collecting, by means of administrative wage garnishment, the debt alleged to be owed by Petitioner. The debt that is the subject of this proceeding is the result of Petitioner paying in full all the amounts due under the primary note and the subsequent termination of the FHA Insurance on the first mortgage. (See Sec'y. Stat., Ex.1, ¶ 4(A); Ex. #2, Dillon Decl., ¶ 4). The evidence of record is insufficient to support Petitioner's claim that the negligent act of the title company, as alleged by Petitioner, bars collection of the debt in this proceeding, by administrative wage garnishment.

Petitioner may wish to pursue this claim against the title company in a state or local court in order to recover any monies paid by Petitioner to HUD in satisfaction of this obligation. However, this Office has no jurisdiction to decide whether or not the title company was negligent in failing satisfy the alleged debt with the proceeds from the sale of the home. [2] (*See* 24 C.F.R. § 17.170(b)).

ORDER

For the reasons set forth above, 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 seek collection of this outstanding obligation by means of administrative wage garnishment in the amount of 15% of Petitioner's disposable income.

Vanessa Hall
Administrative Judge

April 25, 2011

[2] The Office of Appeals only has jurisdiction to determine whether Petitioner's debt is past due and legally enforceable. (24 C.F.R. § 17.170(b)).