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

In the Matter of:

Sherrie L. Wilborn (Rios),

Petitioner.

HUDOA No. 11-H -CH-AWG47
Claim No. 5448911 SAMCO 9243

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

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 February 1, 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 ("Notice of Docketing"), dated Feb. 1, 2011.)

Background

On October 7, 1992, Petitioner signed and entered into a Manufactured Home Retail Installment Sales Contract and Security Agreement ("Contract") with A-1 Mobile Homes. (Secretary's Statement ("Sec'y Stat."), filed March 2, 2011, ¶ 2, Ex. B.) The Contract was assigned to SAMCO Mortgage Corporation ("SAMCO"). (*Id.*, Ex. C., Assignment of Security Agreement and Power of Attorney.) SAMCO was defaulted by the Government National Mortgage Association ("Ginnie Mae" or "GNMA") as an insurer of Mortgage-Backed Securities ("MBS") due to its failure to comply with Ginnie Mae MBS program requirements. (*Id.* at ¶ 3; Ex. D, Declaration of Christopher C. Haspel, Director, MBS Monitoring Division, Ginnie Mae ("Haspel Decl."), dated March 2, 2011, ¶ 4.) Therefore, all of SAMCO's rights and interests in Petitioner's loan were assigned to Ginnie Mae by virtue of the assignment contained in the Guaranty Agreement entered into between SAMCO and Ginnie Mae. (Sec'y Stat., ¶ 3; Ex. C.) As Ginnie Mae (a division of HUD) is the rightful holder of Petitioner's loan, the Secretary asserts he is entitled to pursue repayment from Petitioner.

The Secretary has made efforts to collect from Petitioner, but Petitioner remains delinquent. (Sec'y Stat., ¶ 5, Haspel Decl., ¶ 6.) The Secretary has filed a Statement in support of his position that Petitioner is indebted to the Secretary in the following amounts:

(a) $18,410.12 as the unpaid principal balance;
(b) $5,332.50 as the unpaid interest on the principal balance at 11.75% per annum through February 2, 2011; and
(c) interest on the principal balance from February 26, 2011 until paid; and
(d) $6,519.22 in administrative costs

(Sec'y Stat., ¶ 7, Haspel Decl., ¶ 6.)

A Notice of Intent to Initiate Administrative Wage Garnishment Proceedings ("Notice of Intent"), dated November 30, 2010, was sent to Petitioner. (Sec'y Stat., ¶ 6; Haspel Decl., ¶ 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, but has not entered into such an agreement. (Sec'y Stat., ¶ 6; Haspel Decl., ¶ 7.) The Secretary proposes a repayment schedule of 10% of Petitioner's disposable pay, instead of the Federal Agency allowed amount of 15%. (Sec'y Stat., ¶ 11, Haspel Decl., ¶ 8.)

Discussion

Petitioner, through counsel, challenges the enforceability of the debt because: (1) Petitioner received no advance notice of the wage garnishment proceeding; (2) Ginnie Mae, as assignee of SAMCO, is limited only to those rights and remedies that SAMCO could assert; (3)

the collection of the alleged debt is barred by the four-year statute of limitations in Texas; (4) Petitioner is not liable for any administrative costs; and, (5) the proposed wage garnishment will create a financial hardship for Petitioner.

First, Petitioner asserts that "she received no advance[d] notice of the planned garnishment," in violation of 31 C.F.R. § 285.11(e). (Letter from Counsel for Petitioner ("Pet'r's Hr'g Req."), filed January 27, 2011.) She further asserts that the Notice of Intent, sent by certified mail to 210 Meadow Lane, Red Oak, TX 75154, is ineffective because "[N]either Petitioner nor [Petitioner's ex-husband] has resided at the address on said notice since February, 2000."[1] (Petitioner's Statement ("Pet'r's Stat.) ¶ 13, filed March 21, 2011; Ex. C, Declaration of Sherrie L. Wilborn Rios ("Wilborn Rios Decl.") ¶ 12.) Beyond Petitioner's assertions, she has failed to provide sufficient evidence in support of her position.

The Secretary argues, on the other hand, that Petitioner did receive "advanced notice of the planned garnishment." (Sec'y Stat., Ex. D, Haspel Decl., ¶ 7; Ex. E.) As support, the Secretary presented a copy of a letter regarding Petitioner's property at 210 Meadow Lane, Red Oak, TX 75154 from Ofori Lender that was sent to the same address to which Petitioner's Notice of Intent was sent. (Id.) The Secretary also presented a copy of a return receipt request reflecting Petitioner's signature and the same address for the Notice of Intent, 210 Meadow Lane, Red Oak, Texas, 75154. (Id.) The signature of Petitioner's husband also confirmed receipt of the Ofori Lender letter on August 31, 2010 at the same address." (Id.)

According to 31 C.F.R. § 285.11(e), the notice requirements require the Secretary to send notice by first class mail to Petitioner's last known address at least 30 days before the initiation of garnishment proceedings. Additionally, to be valid the notice must identify the nature and amount of the debt, the intention of the agency to initiate garnishment proceedings, offer an explanation of the debtor's rights in relation to the proceeding, and afford the debtor the opportunity to enter into a repayment agreement under terms agreeable to the agency. 31 C.F.R. § 285(e)(1)(2).

In this case, the Secretary has provided sufficient evidence to prove that he has met the notice requirements under § 285(e) by showing that the Notice of Intent to Initiate Administrative Wage Garnishment for Petitioner was mailed to Petitioner's last known address. In addition to the Declaration of the Director of Mortgage-Backed Securities Monitoring Division of Ginnie Mae, the Secretary also submitted a copy of a return receipt request for another letter mailed to Petitioner that also was acknowledged as received by Petitioner at the same address as for Petitioner's Notice of Intent, 210 Meadow Lane, Red Oak, Texas, 75154. (Sec'y. Stat., Ex. E.)

But, even if notice was found to be insufficient, the governing terms of the original Contract entered into by Petitioner also provided an exception regarding notice in the event that the buyer defaults. The "Miscellaneous Provisions" section of the Contract states:

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[1] The February, 2000 date, however, appears to be incorrect. As Petitioner states in her Declaration, Petitioner's ex-husband was incarcerated in February, 2000. She, however, continued to reside at the stated address until on or about October, 2005. (Pet'r's Stat., ¶ 12.)

> "If BUYER defaults in performing any obligation herein, SELLER shall not be required to give BUYER the notice ... required by applicable statutes and regulation if BUYER has abandoned or voluntarily surrendered possession of the Manufacture Home."

(emphasis in original)(Sec'y Stat., Ex. B., p. 4., (Miscellaneous Provisions (b)).

Petitioner, the buyer in this case, admits that she abandoned the property "on or about October, 2005." (Pet'r's Stat., Ex. C., Wilborn Rios Decl., ¶ 14.) "It is long settled under Texas law that abandonment of a homestead occurs when the property holder discontinues living at the property and evinces an intention not to return." *Archibald v. Jacobs,* 6 S.W. 177, 178 (Tex. 1887)*; Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 808 (Tex.App.-Austin, 2004)(quoting *Robinson v. McGuire*, 203 S.W. 415, 417 (Tex.Civ.App.-Austin 1918, no writ)("in order to constitute an abandonment, it is not sufficient to show a mere discontinuance of the use of the property as a resident, but it must also be shown that discontinuance was accompanied by an intention never to resume its use as a homestead.").

Here, Petitioner acknowledges that she "ceased living in" and "vacated" the mobile home in October, 2005. (Wilborn Rios Decl., ¶ 13, 14.) After learning that her mother-in-law intended to have the mobile home removed, Petitioner pursued no further action and thereafter "assumed [the mobile home] was repossessed." (Wilborn Rios Decl., ¶ 14.) As a result, Petitioner's actions sufficiently constituted an abandonment of the property as proscribed under the Miscellaneous Provision, ¶ (b) of her contract, and thus, under the terms of the contract the Secretary then was released from his obligation to provide notice to Petitioner as the buyer. Therefore, I find that Petitioner's claim of insufficient notice lacks merit.

Second, Petitioner argues that Ginnie Mae, as assignee of SAMCO, is limited only to those rights and remedies that SAMCO may assert. More specifically, Petitioner states that "SAMCO could not transfer to Ginnie Mae any greater rights than it had in the Contract." (Pet'r's Stat., ¶ 11.) Under Texas law, an assignee is limited to only those rights assertable by the assignor. *See Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 420 (Tex. 2000); *Equitable Recovery, L.P. v. Heath Ins. Brokers of Texas, L.P.*, 235 S.W.3d 376, 387 (Tex.App.-Dallas 2007)("Assignees stand in the shoes of their assignors and have no greater rights."). However, when the assignee is a federal government entity, the prevailing federal statute, 12 U.S.C. § 1721(g), controls. 12 U.S.C. § 1721(g) (Management and Liquidation Functions of Government National Mortgage Association) provides:

> No State or local law, and no Federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980), shall preclude or limit the exercise by the Association of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights ...

This means that no state or federal law can prevent GNMA from enforcing its ownership rights to collect the debt that is the subject of this proceeding. Additionally, 31 U.S.C. § 3720D(a)

grants wage garnishment authority to federal agencies "notwithstanding any provision of state law." Consistent with the provisions under 31 U.S.C. § 3720D(a) and 12 U.S.C. § 1721(g), I find in this case that Ginnie Mae, as a federal government entity, can enforce the alleged debt claimed against the Petitioner.

Third, Petitioner alleges that collection of the debt in this proceeding is barred by the four-year statute of limitations under Section 16.004(a)(3) of the Texas Civil Practices & Remedies Code. However, Petitioner's allegation is without merit because this Office has consistently maintained that there is no statute of limitations for administrative wage garnishment actions. *See In the Matter of Thomas A. Franzman*, HUDOA No. 09-H-CH-AWG156 (January 8, 2009).

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), which stated that "no statute of limitations exists in administrative proceedings without the inclusion of a clear, legislative time period by Congress." *See* also *In Re Karen T. Jackson* (Decision and Order), HUDOA No. 09-H-NY-AWG87 (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. Therefore, consistent with statutory regulations and case law precedent, I find that the collection of the alleged debt by means of administrative wage garnishment is not barred by the statute of limitations in this case.

Fourth, Petitioner denies that she is obligated to pay any administrative costs and also questions how the costs are computed. (Pet'r's Stat., ¶ 15, 16.)

31 C.F.R. § 901.9(c) provides: "Agencies shall assess administrative costs incurred for processing and handling delinquent debts. The calculation of administrative costs should be based on *actual costs incurred or upon estimated costs* as determined by the assessing agency." (emphasis added.) These administrative costs may include fees from private collection agencies ("PCAs"), which are recoverable from the debtor. 31 U.S.C. §§ 3717(e) and 3718(d), 31 C.F.R. § 285.12(j). *See Jonathan Carter*, HUDBCA No. 05-A-CH-AWG47 (May 24, 2006)(discussing collection of PCA fees from Petitioner.) Here, the record shows that Petitioner failed to enter into a repayment program, and as a result, the U.S. Department of Treasury referred the delinquent account to Ofori Lender Services for collection of the principal amount *plus interest at the rate at 11.75% per annum.* (emphasis added) (Sec'y Stat., Ex. E, p. 4.) The administrative costs up to 25% of the funds to be owed, were incorporated as debt to be collected from Petitioner. As a result, the overall administrative cost, $6,519.22, constitutes Ofori's costs for collection services, plus late charges and the costs incurred due to an overdrawn escrow balance. (*Id.*) As such, consistent with 31 C.F.R. § 901.9(c), Petitioner shall incur the costs associated with the processing and handling of the alleged debt.

Finally, Petitioner asserts that the proposed garnishment of 10% of her disposable income would constitute a financial hardship. Petitioner states that "...[T]he earnings of myself and my current husband are not even sufficient to pay the day-to-day expenses of our family in a timely manner." (Pet'r's Stat., Wilborn Rios Decl., ¶ 18.) As support, Petitioner has provided

substantial documentation in support of her argument, including a Consumer Debtor Financial Statement, pay statements, and proofs of payment for consumer loans, utilities, credit cards, food purchase, and other miscellaneous household expenses.

Petitioner's disposable income 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). Relying on Petitioner's "Year to Date" figures from the pay period ending December 28, 2010, Petitioner's monthly disposable household income is $3,311.34. (Wilborn Rios Decl., Ex. 2.) Combined with Petitioner claim of a monthly income of $3,000 for her spouse, Petitioner's monthly household disposable income is $6,311.34. (Wilborn Rios Decl., Ex. 1, p. 4.)

Petitioner has provided evidence substantiating her monthly bills and expenses, consisting, in relevant part, of: $1,766.00 (Rent); $1,406.30 (Food); $717.89 (Car Payments); $600.00 (Gasoline and Auto Repairs); $350.00 (Electricity); $375.00 (Medical Expenses); $320.00 (Car Insurance); $300.00 (Clothing); $240.00 (Phone); $200.00 (Credit Card Payments); $90.00 (Trash, Water, Sewage); $36.30 (Homeowners Association). (Wilborn Rios Decl., Ex. 1, p. 4.) Petitioner also includes a contract and bill for orthodontic work, with 12 scheduled monthly payments of $142.00. (Id.) While Petitioner's financial information is generally credible, she appears to have overstated a certain expense for food, in the amount of $1406.30, without sufficient credible evidence. As such, of the estimated amount provided for food expenses, Petitioner will only be credited $1000.00. With this adjustment, Petitioner's total monthly household expenses are $6,279.19.

Petitioner has also provided evidence of a number of other monthly expenses that this Office will not credit towards her essential monthly household expenses. Such expenses include payments for Petitioner's cable television and internet service. This Office does not consider payments for cable television or internet service to be essential living expenses. *See Charles R. Chumley*, HUDOA No. 09-M-CH-AWG09 (April 6, 2009). Additionally, the $200.00 per month credit card payments will not be credited, as there is no documentary evidence to suggest purchases made with the credit card were for essential household items. *See Cynthia Ballard Rachall*, HUDOA No. 09-CH-AWG103 (August 6, 2009) (finding that the Petitioner's credit card bills would not be included in her monthly expenses calculation because the Petitioner failed to provide documentary evidence to show, *with specificity*, that the credit card charges were for essential household expenses).

Petitioner's disposable income of $6,311.34, less her essential monthly household expenses of $6279.19, leaves a remaining balance of $ 32.15 per month. A 10% garnishment rate of Petitioner's monthly disposable income, as proposed by the Secretary, would result in a negative balance (-$79.70). Therefore, 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, Petitioner has sufficiently proven that a garnishment amount at any percentage of Petitioner's disposable income, would constitute a financial hardship sufficient enough to forego collection, at this time.

ORDER

Based on the foregoing, I conclude that an administrative wage garnishment would create a financial hardship for the Petitioner at this time.

The Order imposing the stay of referral of this matter to the U.S. Department of Treasury for administrative wage garnishment shall remain indefinitely. Therefore, it is hereby

ORDERED that the Secretary shall not seek collection of this outstanding obligation by means of administrative wage garnishment due to of Petitioner's financial circumstances at this time.

However, the Secretary shall not be prejudiced from seeking an administrative wage garnishment if, in the future, Petitioner's income increases or his expenses for necessities are reduced.

Vanessa L. Hall
Administrative Judge

August 5, 2011