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

In the Matter of: **Termekia (Collins) Thomas,** Petitioner	HUDOA No. 11-M-NY-AWG38 Claim No. 7059611 First Ben 9248

Wm. Thurmond Bishop, Esq.
200 E. Pinckney Street
Abbeville, SC 29620

Counsel for Petitioner

Julia M. Murray, Esq.
U.S. Department of Housing and
Urban Development
Office of Assistant General Counsel
for New York/New Jersey Field Offices
26 Federal Plaza, Room 3237
New York, NY 10278

For the Secretary

RULING AND ORDER UPON RECONSIDERATION

On May 4, 2011, Petitioner filed a letter with this Office. This letter is deemed to be a Motion for Reconsideration ("Petitioner's Motion") of the Decision and Order in *In re Termekia Thomas*, HUDOA No. 11-M-NY-AWG38 (April 21, 2011) ("Decision and Order"). In the Decision and Order, the Court found that the debt in this case was past due and legally enforceable in the amount claimed by the Secretary. Petitioner objects to the Decision and Order on five grounds: (1) fraud between the mobile home seller and lender; (2) expiration of South Carolina's statute of limitations; (3) lack of notice to Petitioner of HUD's collection action, (4) prior surrender and sale of the mobile home in satisfaction of Petitioner's debt to HUD; and (5) financial hardship to Petitioner. The Secretary in his Secretary's Memorandum in Opposition to Petitioner's Motion for Reconsideration only considered Petitioner's fourth argument. We therefore address the remainder of Petitioner's arguments directly.

Reconsideration of a prior decision is within the discretion of the administrative judge and will not be granted "in the absence of compelling reasons, e.g., newly discovered material evidence or clear error of fact or law." *See Paul Dolman*, HUDBCA No. 99-A-NY-Y41 (November 4, 1999); *Anthony Mesker*, HUDBCA No. 94-C-CH-S379 (May 10, 1995); *William G. Grammer*, HUDBCA No. 88-3092-H607 (March 7, 1988). Further, "it is not the purpose of

reconsiderations to afford a party the opportunity to reassert contentions that have been fully considered and determined." *See Seyedahma Mirhosseini*, HUDBCA No. 95-A-SE-2615 (January 13, 1995); *Charles Waltman*, HUDBCA No. 97-A-NY-W196 (September 21, 1999).

In this case, Petitioner alleges that fraud was committed between the mobile home seller, Accent Mobile Homes, and the lender, First Beneficial Mortgage Corporation ("First Beneficial"). (Pet'r's Respon., filed March 10, 2011, at 2, ¶ 3.) After being informed of the alleged fraud by "[a]n agency of the Federal Government," both personally and through mail, Petitioner states that she was advised not to make any more installment payments until she was contacted to do so. (*Id.* at 2, ¶ 4.) In a letter from Petitioner, dated March 7, 2011, Petitioner stated:

> . . . I received a letter stating that Accent and First Beneficial had committed fraud and was advised to call the number if anyone contacted me. I never heard from anyone after that and in December 2005 not knowing the outcome of my home I moved into another home.

(Pet'r's Letter, dated March 7, 2011.) Similarly, in Petitioner's Response to Order Dated February 23, 2011, Petitioner stated:

> An agency of the Federal Government contacted [me] by mail and in person, the specific date of which is unknown, but sometime in 2000 to advise [me] that fraud had been committed between the seller of the mobile home, Accent Mobile Homes, and the lender, First Beneficial Mortgage Corporation, and [I] was advised [sic] her not to make any more installment payments until [I] was contacted to do so.

(Pet'r's Respon., filed March 10, 2011, at 2, ¶ 3.)

To establish a cause of action for fraud in South Carolina, the following causal elements must be proven by clear and convincing evidence: (1) representation of a fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *E.g.*, *M.B. Kahn Const. Co., v. S.C. Nat'l Bank*, 275 S.C. 381, 384 (1980). Failure to prove any element of fraud or misrepresentation is fatal to the claim. *Id.*

Here, Petitioner has presented no proof to support any of the causal elements set forth above. Indeed, Petitioner asserts that some unspecified fraudulent act occurred vis-à-vis Accent Mobile Homes and First Beneficial, without specifying how the alleged fraud was visited upon her or how she may have suffered damages, as a result. (*See* Pet'r's Respon., at 2, ¶ 3.) The heightened pleading standard for fraud in South Carolina requires the "circumstances constituting fraud or mistake" to be "stated with particularity." S.C. R. Civ. P. 9(b); *Gentry v. Yonce*, 337 S.C. 1, 6 (1999). Since Petitioner fails to meet any of the nine required elements for

stating a claim of fraud in South Carolina, this Court finds that Petitioner's conclusory allegations against First Beneficial are without merit.

Similarly, without having satisfied all of the elements of fraud under South Carolina law, Petitioner cannot claim that First Beneficial's alleged fraud bars the Government National Mortgage Association ("Ginnie Mae") from asserting an action to collect the debt from Petitioner. (Pet'r's Respon., at 3, ¶ 1.) Petitioner states that First Beneficial was stripped of any garnishment rights due to its alleged fraudulent actions and that this bar to collection operates to prevent its successor in interest, Ginnie Mae, from collecting on the debt. (*Id.*) Although Ginnie Mae, as successor-in-interest to First Beneficial, would be estopped to deny liability for First Beneficial's actions in this case, *see* 31 C.J.S. Estoppel and Waiver § 219 (2011), Petitioner still has the burden of proving alleged fraudulent conduct by First Beneficial in connection with the loan in this case. Nowhere does Petitioner even attempt to allege, with specificity, First Beneficial's alleged fraudulent activity. Therefore, when Ginnie Mae "stepped into the shoes of First Beneficial," there was no liability for fraud by First Beneficial that would preclude Ginnie Mae from asserting this claim against Petitioner. (Pet'r's Respon., at 3, ¶ 1.)

Petitioner's second point is that South Carolina's statute of limitations bars Ginnie Mae from commencing a collection action against Petitioner. (Pet'r's Respon., P 3, ¶ 2.) While the South Carolina statute of limitations might have applied to First Beneficial, as the lender, *see* S.C. CODE ANN. § 36-3-118 (1976) (stating that an action on a promissory note is barred unless brought within six years from its maturity), no statute of limitations, however, bars enforcement action by means of administrative wage garnishment as against an agency of the U.S. Government. *See BP America Prod. Co. v. Burton*, 127 S. Ct. 638 (2006) (holding that the statute of limitations in 28 U.S.C. § 2415(a), barring federal contract actions for money damages after six years, only applied to court actions and not to administrative payment orders). The U.S. Supreme Court held that, "*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." (emphasis added). In this case, there exists an applicable act of Congress, 31 U.S.C. § 3720D, a federal statute that supersedes the application of South Carolina's statute of limitations. While 31 U.S.C. § 3720D does not contain a statute of limitations for filing a wage garnishment action, it does provide:

> **(a)** 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. Thus, it is well settled that the "United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416 (1940). Any delay in pursuing HUD's claim does not prevent the Secretary from enforcing the terms of the Note. Therefore, this Court finds that the Secretary is not barred by a statute of limitations from initiating wage garnishment proceedings against Petitioner for the debt that is the subject of this proceeding.

Third, Petitioner states that she did not receive notice of any collection action by HUD, making the accumulation of interest on her debt "grossly unfair." (Pet'r's Respon., at 3, ¶ 2.) However, the Note specifically states that Petitioner:

> promises to pay . . . $46,384.00 . . . with any interest on any remaining balance of principal at nine and one-half percent . . . per annum payable annually, commencing May 5th, 2000, and thereafter on the 5th day of [e]ach [m]onth, until the entire indebtedness has been paid.

(Sec'y Stat., Ex. A.) Petitioner's signature on the Note evidences the fact that she was put on notice as to the rate and the accrual of the interest on her debt. As a result, Petitioner cannot claim that she was denied proper notice in this case. Moreover, the Secretary provided proper notice to Petitioner regarding the administrative wage garnishment procedure. Pursuant to 31 C.F.R. § 285.11(e), Petitioner received a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings, dated December 2, 2010. I find that the Secretary has therefore fulfilled the notice requirements contained in 31 C.F.R. § 285.11(e).

Fourth, Petitioner states that prior to her bankruptcy filing, she surrendered the mobile home in satisfaction of the debt in this case. (Pet'r's Hr'g Req., filed December 22, 2010.) However, Petitioner provides no proof that HUD repossessed and sold her mobile home. Petitioner simply states:

> The mobile home of Petitioner was repossessed and sold but Petitioner has no knowledge of when and where it was sold and in what amount. It is unfair to place the burden on her to substantiate what it sold for and Petitioner is of the belief that this is information which HUD should have received from First Beneficial to mitigate the claim against Petitioner.

(Pet'r's Mot. for Recons., dated May 4, 2011.) While Petitioner's bankruptcy filings indicate that Petitioner was to "surrender [the] 1999 Redman Mobile Home," there is no documentary evidence indicating that the mobile home was surrendered to Ginnie Mae and subsequently sold in satisfaction of Petitioner's debt. (Pet'r's Respon., Ex. D.) Further, Petitioner fails to present any written surrender agreement containing the date Petitioner vacated the property, the terms under which HUD would receive possession of the property, and any other proof affirming Petitioner's relinquishment of her mobile home. *See Ms. Ingrid Witte*, HUDBCA No. 87-2534-H67 (June 16, 1988). It may have been Petitioner's "understanding" that her mobile home was surrendered in satisfaction of her debt to HUD, but this Court requires documentary evidence in order to determine whether Petitioner in fact satisfied any part of the debt. (Pet'r's Hr'g Req.) "Assertions without evidence are not sufficient to show that the debt claimed by the Secretary is not past due or enforceable." *Bonnie Walker*, HUDBCA No. 95-G-NY-7300 (July 3, 1996).

In contrast to Petitioner's lack of documentary evidence, the Secretary has filed a sworn declaration stating that Petitioner's mobile home was never sold and that the original lender decided against its sale because of the cost involved in transporting the home. (Secretary's

Mem. Opp'n to Pet'r's Mot. for Recons. ("Sec'y Mem."), filed June 22, 2011, ¶ 10; Supplemental Decision of Paul St. Laurent III, Director, Mortgage-Backed Securities Monitoring Division of Ginnie Mae ("Laurent Supplement"), dated June 21, 2011, ¶ 7.) Moreover, the Secretary presents evidence that Petitioner's name remains on the title to the mobile home (Sec'y Mem., ¶ 11, Ex. A.) Similarly, the Secretary states that on October 20, 2010, Ofori Lender Services sent Petitioner a debt collection letter with an attached, notarized document listing Petitioner as the owner of the mobile home. (*Id.*, Ex. B.) These facts militate against Petitioner's unsubstantiated allegation that HUD took possession of her mobile home and had it sold.

Assuming *arguendo* that Ginnie Mae repossessed and sold the mobile home, Petitioner would still remain obligated to pay any remaining balance on the loan. Repossession of the collateral by the lender does not relieve a debtor of liability. *Marie O. Gaylor*, HUDBCA No. 03-D-NY-AWG04 (February 7, 2003); *Theresa Russell*, HUDBCA No. 87-2776-H301 (March 24, 1988). In order for Petitioner to escape liability for the debt, there must either be a release, in writing, from the lender specifically discharging Petitioner's obligation, or valuable consideration accepted by the lender from Petitioner, which would indicate an intent to release. *Jo Dean Wilson*, HUDBCA No. 03-A-CH-AWG09 (January 30, 2003); *Cecil F. & Lucille Overby*, HUDBCA No. 87-1917-G250 (December 22, 1986); *Jesus E. & Rita de los Santos*, HUDBCA No. 86-1255-F262 (February 28, 1986). Petitioner has filed no evidence to establish the requirements of a valid release.

Finally, Petitioner asserts that wage garnishment, at this time, is inappropriate due to financial hardship. But this Court has already found, in its Decision and Order, that Petitioner submitted sufficient documentary evidence to substantiate her claim that administrative wage garnishment of her disposable income, in the amount sought by the Secretary, would cause a financial hardship. (Decision and Order, at 5.)

I find each of Petitioner's arguments and allegations to be unavailing. For the foregoing reasons, Petitioner's Motion for Reconsideration is DENIED. It is hereby

ORDERED that the administrative wage garnishment order authorized by the Decision and Order, *Termekia Thomas*, HUDOA No. 11-M-NY-AWG38, dated April 21, 2011, shall NOT be modified and shall remain in full force and effect.

H. Alexander Manuel
Administrative Judge

July 6, 2011