



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

In the Matter of:

Tony Deese,
Petitioner.

HUDOA No. 11-M-NY-AWG53
Claim No. 721005891

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Pro Se

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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 Administrative Judges of this Office are designated to determine whether the Secretary may collect the alleged debt in this case by means of administrative wage garnishment. 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 proving the existence and amount of debt in this case. 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 any repayment schedule proposed by the Secretary are unlawful, would cause 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. §284.11(f)(4), on October 20, 2010, this Office stayed the issuance of a wage withholding order until the issuance of this written decision.

Background

On December 11, 2003 Petitioner executed a Partial Claims Promissory Note, (“Note”) to prevent foreclosure on Petitioner’s primary mortgage loan. (Secretary’s Statement (“Sec’y Stat.”), filed March 2, 2011, ¶ 1.) The Note listed specific events that would bring the debt immediately due and payable, including payment in full of the primary note and cancellation of the FHA insurance. (Sec’y Stat., ¶ 3, Ex. B; Declaration of Kathleen M. Porter, Acting Director, Asset Recovery Division, HUD Financial Operations Center (“Porter Decl.”), dated March 2, 2011, ¶ 4.) On or about February 8, 2005, the FHA insurance on Petitioner’s primary note was terminated when the lender informed the Secretary that the note was paid in full. (Sec’y Stat., ¶ 4, Porter Decl., ¶ 4.) The Secretary now claims that the debt is due but Petitioner has failed to make payments. (Sec’y Stat., ¶ 3, Porter Decl., ¶ 7.)

The Secretary has filed a Statement with documentary evidence in support of his position that Petitioner is indebted to HUD. The Secretary has made efforts to collect from Petitioner but has been unsuccessful. (Sec’y Stat., ¶ 7, Porter Decl., ¶ 7.) The Secretary has also made attempts to obtain a copy of Petitioner’s pay statement but has been unsuccessful. (Sec’y Stat., ¶ 10, Porter Decl., ¶ 8.) The Secretary alleges that Petitioner is now indebted to HUD in the following amounts:

- (a) \$12,600.48 as the unpaid principal balance as of February 28, 2011;
- (b) \$31.50 as the unpaid interest on the principal balanced at 3% per annum through February 28, 2011; and
- (c) interest on said principal balance from March 1, 2011 at 3% per annum until paid.

(Sec’y Stat., ¶ 7, Porter Decl., ¶ 5.)

On or about January 26, 2011, a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings was sent to Petitioner. (Sec’y Stat., ¶ 8.) Petitioner was afforded the opportunity to enter into a written repayment agreement under terms agreeable to HUD, but has not agreed to enter into a written repayment plan in response to the Notice. (Sec’y Stat., ¶ 9.) The Secretary’s proposed repayment schedule is 15% of Petitioner’s disposable income, or \$350.88 per month. (Sec’y Stat., ¶ 10; Porter Decl., ¶ 8.)

Discussion

Petitioner does not dispute the existence of the debt that is the subject of this proceeding. Rather, Petitioner disputes that it is due now (Petitioner’s Documentary Evidence, (“Pet’r Evid.”) dated February 28, 2011.) In the alternative, Petitioner asserts that the debt that is the subject of this proceeding may not be collected at this time due to financial hardship. (*Id.*)

Petitioner states that he does not currently owe the debt because he is still paying off his mortgage and still lives at the property that is the subject of this debt. (*Id.*) Petitioner states, “The reason I’m appealing is because a Certificate of Discharge was to transfer our loan to Saxon Mortgage Company. This was done without our knowledge and without notice. Once the loan

was discharge[d], we received a new loan number for the same loan amount. I understand that once we were discharge[d] it seemed like we paid off the loan. This is not true we did not pay off the loan nor did we sell our home.” (*Id.*) Petitioner then listed the provisions of the Note regarding payment due dates, and stated “This is the promissory note we signed; there is no mention of the mortgage company name. So I don’t think transferring a loan to another company is a reason to pay on the debt now.” (Pet’r Evid.)

Section 3(A) of the Note lists certain circumstances that cause payment to become due and payable immediately. These terms are set forth below:

On June 1, 2032 or if earlier, when the first of the following events occurs

- i.) Borrower has paid in full amounts due under the primary Note and related mortgage, deed of trust or similar Security Instruments insured by the Secretary, or
- ii.) The maturity date of the primary Note has been accelerated, or
- iii.) The primary Note and related mortgage, deed of trust or similar Security Instrument are no longer insured by; or
- iv.) The property is not occupied by the purchaser as his or her principal residence.

(Pet’r Evid., Sec’y Stat., Ex. A; Partial Claims Promissory Note (“Note”), dated December 11, 2003.)

The Secretary claims that a triggering event under ¶ (3)(A)(i) occurred because the primary mortgage was paid in full. (Sec’y Stat., ¶ 4.) Although Petitioner denies that a triggering event has occurred, he admits that the debt to America Moneyline was paid in full. (Pet’r Evid.) In ¶ (3)(A)(iii), the Note clearly states that payment in full under the Primary note or mortgage triggers payment to become due immediately. Petitioner’s documentary evidence, including the Certificate of Discharge, also indicates that the primary mortgage was paid in full in order to effectuate the transfer and assignment of the mortgage. Banker’s Trust acknowledged that it “has received full payment” of the primary mortgage from Saxon Mortgage, Inc. This was the triggering event under ¶ (3)(A)(iii). Although Petitioner is making payments to another company, the primary mortgage was discharged at the time Saxon Mortgage, Inc. became a successor in interest.

Further, the Secretary claims that the debt that is the subject of this proceeding is no longer insured by HUD because the primary mortgage was paid in full, triggering the ¶ (3)(A)(iii) provision of the Note. (Sec’y Stat., ¶ 4.) The Secretary claims that the FHA insurance was terminated upon notice that the primary note had been paid in full. (Sec’y Stat., ¶4.) Although Petitioner claims that the original loan is being paid off, he offers no proof to rebut the Secretary’s claim that the primary mortgage is no longer being insured by HUD. Nothing obligates HUD to transfer insurance, and there is no evidence that the insurance contract was transferred or assigned in this case. 12 U.S.C. 1703(d). Therefore the debt that is the subject of this proceeding became immediately due and payable.

For these reasons, I find that the debt that is the subject of this proceeding was triggered by the pay-off of the primary mortgage and has become immediately payable and due. I further find that Petitioner is indebted to HUD in the full amount claimed by the Secretary.

Petitioner argues, in the alternative, that imposition of administrative wage garnishment would cause financial hardship for him.

Petitioner states, "I am asking for your consideration because I have very little money to pay a 13,000 debt right now...I am the only one working in the house. It is hard and I'm as you can see behind badly in my bills. I know another bill will just put us deeper in debt." (Pet'r Evid.)

Under 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, that the amount of the debt is incorrect, or that the terms of the repayment schedule are unlawful or would cause a financial hardship. On March 10, 2011, Petitioner filed a letter and financial statements that included copies of Petitioner's bills and payments, receipts, and bi-weekly pay statements. (Pet'r Evid.)

Petitioner submitted his bi-weekly pay statements for the pay periods ending January 29, 2011 and February 12, 2011, indicating that his average bi-weekly gross pay was \$1718.61, and his average monthly gross pay was \$3,437.22. (Pet'r Evid.) 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)(i)(2)(i)(A)). After subtracting allowable deductions for: Federal Tax, \$532.46; Social Security, \$144.37; Medicare, \$49.84; and Health Insurance, \$261.36, Petitioner is left with a disposable income of \$1,224.60 bi-weekly or \$2,449.19 monthly for the purposes of wage garnishment. (Pet'r Evid.)

Petitioner does not claim "fixed monthly expenses," but rather lists some monthly expenses, and some overdue expenses, which are largely substantiated by his receipts and bills. (Pet'r Evid.)

Petitioner also lists monthly bills for which actual bills or proper receipts of payment were not submitted. They include: "Food", \$500.00. This Office has determined that credit may be given for certain essential household expenses, such as rent and food, where Petitioner has not provided bills or other documentation, yet the "financial information submitted by Petitioner...[was found to be] generally credible..." *David Herring*, HUDOA No. 07-H-NY-AWG53 (July 28, 2008) (citing *Elva and Gilbert Loera*, HUDBCA No. 03-A-CH-AWG28 (July 30, 2004)). Certain expenses are not "deemed by this Office to be basic subsidies for living expenses and thus would require Petitioner to submit documentary evidence to substantiate said expenses." *Manuel J. Simental*, HUDOA No. 08-H-CH-AWG53 (November 26, 2008) (citing *Brenda Husband*, HUDOA No. 07-L-CH-AWG31 (February 14, 2008)).

In accordance with the holding in *Herring* and *Loera*, this Office will credit Petitioner with the following monthly expenses: food, \$500.00.

Petitioner submitted bills and receipts showing acceptable household expenses for: mortgage, \$1,497.95; electric, \$159.82, water, \$44.25, and sewer, \$70.35. Petitioner also submitted a Verizon bill, totaling \$120.31. This Office does not give credit for non-basic household expenses such as cable. Therefore, this Office will credit Petitioner with \$75.00 for phone expenses. Accordingly, this Office finds that Petitioner's monthly household expenses total \$2,347.37.

Petitioner's monthly disposable income of \$2,449.19 less his household expenses of \$1,570.00 leaves petitioner with a balance of \$2,347.37. A 15% garnishment rate of Petitioner's monthly disposable income would result in a garnishment amount of approximately \$367.38 per month and would leave Petitioner with a negative balance of \$-265.56. A 10% garnishment rate would lower Petitioner's garnishment amount to approximately \$244.92 per month but would leave Petitioner with a negative balance of \$-143.10. A 5% garnishment rate would lower Petitioner's payments to \$122.46 per month but would leave a balance of \$-20.64.

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, particularly in cases where financial hardship is found. Upon consideration, this Office finds that Petitioner has submitted sufficient documentary evidence to substantiate his claim that the administrative wage garnishment of his disposable income, in the amount sought by the secretary, would cause 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 financial hardship sufficient to justify suspension of collection action at this time.

ORDER

For the reasons set forth above, I find that Petitioner has submitted sufficient documentary evidence to substantiate his claim that administrative wage garnishment of his disposable pay, in the amount sought by the Secretary, would cause financial hardship. The Secretary shall not seek collection of this outstanding obligation by means of administrative wage garnishment because of Petitioner's financial circumstances at this time. Therefore, it is

ORDERED that the Order imposing the stay of the referral of this matter to the U.S. Department of the Treasury for administrative wage garnishment shall remain indefinitely.

The Secretary shall not be prejudiced from seeking administrative wage garnishment in this case, in the future, should Petitioner's income increase or his expenses mitigate.



H. Alexander Manuel
Administrative Judge

March 30, 2011