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

In the Matter of:

Andrea Black,

Petitioner

HUDOA No. 11-M-NY-AWG82
Claim No. 780407026-OB

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Pro se

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For the Secretary

DECISION AND ORDER

On April 7, 2011, 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 April 7, 2011, 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, unless a wage withholding order had previously been issued against Petitioner. (Notice of Docketing, Order, and Stay of Referral, dated April 7, 2011.)

Background

On June 12, 1996, Petitioner executed and delivered a Note to U.S. Mortgage Depot, Corporation in the amount of $20,000, which was insured against nonpayment by the Secretary pursuant to the National Housing Act, 12 U.S.C. § 1721(g). (Secretary's Statement ("Sec'y Stat."), filed April 27, 2011, ¶ 2, Ex. A.) On June 21, 1996, U.S. Mortgage Depot, Corporation assigned the Note to Statewide Mortgage Company. (Sec'y Stat., ¶ 3.) Petitioner failed to make payment on the Note as agreed. (*Id.* ¶ 4.) Consequently, in accordance with 24 C.F.R. § 201.54, on August 22, 2001, Norwest Home Improvement, Inc., (aka Statewide Mortgage Company) assigned the Note to the United States of America. (*Id.* ¶ 4, Ex. B; Declaration of Brian Dillon, Director, Asset Recovery Division, Financial Operations Center of the United States Department of HUD ("Dillon Decl."), dated April 21, 2011, ¶ 3.)

On January 31, 2001, the co-borrower on the Note, Alberto Barnett ("Barnett"), filed a Chapter 13 bankruptcy proceeding in the U.S. Bankruptcy Court for the Southern District of Florida. (Sec'y Stat., ¶ 9; Dillon Decl., ¶ 7.) Throughout the duration of the Bankruptcy plan, HUD complied with the bankruptcy stay and did not pursue collections against Petitioner. (Sec'y Stat., ¶ 10; Dillon Decl., 7.) While the Trustee remitted payments to the U.S. Bankruptcy Trustee, totaling $148.00, the debt was not paid in full through the bankruptcy plan. (Sec'y Stat., ¶¶ 11-12; Dillon Decl., ¶ 7.) Although HUD's mortgage lien was ultimately stripped away from the Note by the Bankruptcy's Judge's Order recorded on May 16, 2006, (Sec'y Stat., ¶ 14; Dillon Decl., ¶ 8), Petitioner's liability on the Note, itself, remained unaffected by the Order of the Bankruptcy Judge.

Petitioner is currently in default on the Note. (Sec'y Stat., ¶ 4; Dillon Decl., ¶ 3.) The Secretary has made efforts to collect this debt from Petitioner, but has been unsuccessful. (Sec'y Stat., ¶ 5; Dillon Decl., ¶ 4.) The Secretary alleges that Petitioner is indebted in the following amounts:

(a) $17,394.62 as the unpaid principal balance as of March 31, 2011;
(b) $1,622.93 as the unpaid interest on the principal balance at 6.0% per annum through March 31, 2011; and
(c) interest on said principal balance from April 1, 2011 at 6.0% per annum until paid.

(Sec'y Stat., ¶ 5; Dillon Decl., ¶ 4.) Pursuant to 31 C.F.R. § 285.11(e), a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings, dated March 9, 2011, 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 afforded the opportunity to enter into a written repayment agreement under terms agreeable to HUD. (Sec'y Stat., ¶ 7; Dillon Decl., ¶ 6.) As of April 21, 2011, Petitioner has not entered into a written repayment agreement in response to the March 9, 2011 Notice. (Sec'y Stat., ¶ 7; Dillon Decl., ¶ 6.)

Discussion

Petitioner states that she "believe[s] this debt is no longer valid." (Pet'r's Statement That This Debt Is Inaccurate ("Pet'r's Statement"), filed June 27, 2011, at 1.) Specifically, Petitioner objects to the debt's enforceability on four grounds: (1) expiration of the statute of limitations, (2) HUD's failure to attempt collection, (3) lack of notice of the automatic stay of bankruptcy, and (4) HUD's failure to send invoices to Petitioner regarding the debt. (*Id.* at 1-2.) While not related to this current administrative wage garnishment proceeding, Petitioner also states that HUD failed to provide her proper notification before commencing administrative offset in 2008. (*Id.* at 1.) Pursuant to 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 or that the terms of the proposed repayment schedule would cause her financial hardship.

As a threshold matter, Petitioner's statements *in toto* amount to a tacit admission that she owes the debt at issue in this case. Petitioner states that "[h]ad [she] known that this debt was still valid [she] would have taken care of it." (Pet'r's Statement, 1.) Further, Petitioner states that she is "willing to take responsibility of the fact that [she] was a co-borrower and . . . did not file Bankruptcy." (*Id.*) Additionally, Petitioner states that she is "responsible for the balance **except** the Interest that HUD has placed on this account since 2001." (*Id.* at 2.) Petitioner therefore admits that she was a co-borrower on the Note and that the debt was, at one time, enforceable.

Petitioner first objects to the enforceability of the debt based on the expiration of the statute of limitations. (Pet'r's Statement, 1.) In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), 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 any state statute of limitations. 31 U.S.C. § 3720D does not contain a statute of limitations for filing a wage garnishment action, and instead provides:

> **(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.

See also BP America Prod. Co. v. Burton, 549 U.S. 84, 91-95 (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). 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.

Second, Petitioner states that HUD failed to attempt collection by "fail[ing] to appear in court" after "[t]he Bankruptcy Judge court-ordered" HUD to appear. (Pet'r's Statement, 1.) Petitioner states that when the "[c]reditor failed to appear . . . the Judge stripped HUD's lien on the property." (*Id.*) Petitioner further states that had HUD appeared, "the debt would have been paid in full with the Bankruptcy." (*Id.*) Petitioner appears to assert an estoppel defense by stating that HUD should be precluded from collecting the debt because it did not represent its interests as a creditor in Barnett's bankruptcy proceeding.

In contrast to Petitioner's assertions, the bankruptcy Order, dated May 16, 2006, states that HUD's lien was stripped away due to the homestead exemption. (Dillon Decl., Ex. B.) There is no evidence that the lien was stripped away due to HUD's alleged failure to follow the Bankruptcy Judge's order to appear. In fact, it appears that the HUD debt was represented on the Trustee's Final Report of Estate. (Dillon Decl., ¶ 7, Ex. A.) Further, Petitioner fails to offer any evidence of the Bankruptcy Judge's alleged order to HUD or of HUD's alleged failure to appear at the bankruptcy proceeding.

Even assuming, *arguendo*, that Petitioner is correct as to HUD's alleged failure to appear, HUD's involvement in Barnett's bankruptcy has no bearing on Petitioner's remaining liability to repay the Note. Petitioner, as co-debtor, is jointly and severally liable for the debt and retains the obligation to "make the creditor whole." *Hedieh Rezai*, HUDBCA No. 04-A-NY-EE016 (May 10, 2004); 9B AM. JUR. 2d Bankruptcy § 1816 (2011). "Liability is characterized as joint and several when a creditor may sue the parties to an obligation separately or together." *Mary Jane Lyons Hardy*, HUDBCA No. 87-1982-G314, at 3 (July 15, 1987). The Note states:

> If more than one person signs this Note, each of us is fully and personally obligated to pay the full amount owed and to keep all of the promises made in this Note. . . . The Note Holder may enforce its rights under this Note against each of us individually or against all of us together. This means that any one of us may be required to pay all of the amount owed under this Note.

(Sec'y Stat., Ex. A.) "It is well-established law that where several parties are co-signers of a promissory note, the creditor may proceed against any co-signer for repayment of the full amount of the debt." *Edgar Joyner, Sr.*, HUDBCA No.04-A-CH-EE052, at 16 (June 15, 2005). Petitioner incorrectly assumes that HUD should be estopped from collecting against her because it failed to pursue an opportunity to collect against her co-debtor. Petitioner's joint and several liability for the debt binds Petitioner regardless of HUD's attempts to collect against her co-debtor. Petitioner's estoppel argument is therefore without merit. Without a valid estoppel defense, Petitioner is likewise responsible for all interest accumulated since 2001, or "the period since which the creditor never attempted to collect the debt." (Pet'r's Statement, 2.)

Petitioner also speculates that "the debt would have been paid in full" had HUD appeared in Barnett's bankruptcy proceeding. Creditors in a bankruptcy proceeding are paid based on priority and on whether the claim is secured or unsecured. *E.g.*, *Bland v. Farmworker Creditors*, 308 B.R. 109, 111-12 (S.D. Ga. 2003) (*citing* 11 U.S.C. § 507(a)). As a result, not all creditors who appear are paid in full. *Id.* Accordingly, HUD was not guaranteed to receive full payment of the debt by Barnett simply by appearing in his bankruptcy proceeding.

Further, Petitioner interprets "the Secretary's Statement Item #10" as an admission by HUD that it "did not attempt to collect the debt." (Pet'r's Statement, 1.) In paragraph ten of the Secretary's Statement, the Secretary states that:

> . . . [A]s a co-debtor on the Note, Petitioner was entitled to a stay on collection activity related to the subject debt during the pendency of Mr. Barnett's bankruptcy action. (*See* 11 U.S.C. § 1301(a)). Therefore, HUD honored the stay and did not attempt to collect the debt from Petitioner while the proceeding was pending.

(Sec'y Stat., ¶ 10.)

The Secretary's statement does not amount to an admission by HUD that it abandoned all efforts to collect the debt. Rather, the Secretary is referring to Petitioner's right to protection under the automatic stay, which vested when Barnett filed bankruptcy. 11 U.S.C. § 1301(a) states that:

> . . . after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless . . . the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

11 U.S.C. § 1301(a). Based on the automatic stay granted to co-debtors in 11 U.S.C. § 1301(a), HUD was precluded from collecting the debt from Petitioner from the time Barnett filed bankruptcy in January 2001 until the case was closed in March 2006. (Sec'y Stat., ¶ 9.) Therefore, the lack of collection attempts during the pending disposition of the bankruptcy proceeding does not indicate that HUD was sitting on its collection rights, but rather that it was complying with 11 U.S.C. § 1301(a).

Third, Petitioner's statement that she "should have had the right to be made aware of [the stay on collection]" is irrelevant because the automatic stay "arises irrespective of whether the parties stayed are aware that a petition has been filed or whether the debtor is aware that the stay halts a particular matter." *In re D'Alfonso*, 211 B.R. 508, 513-14 (Bankr. E.D. Pa. 1997). In fact, "[k]knowledge of the bankruptcy filing is the legal equivalent of knowledge of the stay." *In re Welch*, 296 B.R. 170, 172 (Bankr. C.D. Ill. 2003). Petitioner admitted she had knowledge of the bankruptcy, stating that she knew "this debt was being included in [Barnett's] Bankruptcy." (Pet'r's Statement, 2.) Accordingly, Petitioner had *de facto* notice of the automatic stay.

Fourth, Petitioner states that "[n]o evidence of billing was provided to me." (Pet'r's Statement, 1.) However, HUD is not required to send Petitioner invoices regarding the debt. The only notice that HUD is required to give Petitioner for purposes of this administrative wage garnishment action is set forth in 31 C.F.R. § 285.11(e). By mailing Petitioner a Notice of Intent to Initiate Administrative Wage Garnishment, dated March 9, 2011, the Secretary satisfied all notice requirements under 31 C.F.R. § 285.11(e). (Dillon Decl., ¶ 5.) Therefore, this Office finds that the Secretary provided adequate notice to Petitioner.

While unrelated to the administrative wage garnishment which is the subject of this proceeding, Petitioner states that "HUD unlawfully seized [her] Joint Income Tax Refund in April 2008 without any prior notification to [her]." (Pet'r's Statement, 1.) If Petitioner seeks to reopen or reconsider a previous offset adjudication, she must file sufficient evidence of the alleged improper offset, including a copy of the prior decision. Apart from an action to reopen or reconsider, this Office is without jurisdiction to hear any claim Petitioner may have against HUD for an alleged improper offset.

Finally, Petitioner states that she "would be willing to make payments on a new amount and avoid any wage garnishment." (Pet'r's Statement, 2.) However, this Office is not authorized to extend, recommend, or accept any payment or settlement offer on behalf of HUD. Petitioner may wish to discuss this matter with Counsel for the Secretary or Lester J. West, Director, HUD Albany Financial Operations Center, Corporate Circle, Albany, NY 12203-5121. His telephone number is 1-800-669-5152, extension 4206.

ORDER

For the reasons set forth above, I find that the debt which is the subject of this proceeding to be legally enforceable against Petitioner in the amount claimed by the Secretary.

The Order imposing stay of referral of this matter to the U.S. Department of Treasury for administrative wage garnishment is **VACATED**. It is hereby

ORDERED that the Secretary is authorized to refer this matter to the U.S. Department of the Treasury for administrative wage garnishment in the amount of 15% of Petitioner's disposable income.

H. Alexander Manuel
Administrative Judge

July 14, 2011