

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

Casey Jones,

Petitioner.

16-VH-0003-AG-001

721008016-0A

July 25, 2016

DECISION AND ORDER

This case is before the Office of Hearings and Appeals upon a *Request for Hearing* ("Hearing Request") filed by Petitioner, Casey Jones, on October 6, 2015 concerning the existence, amount, or enforceability of a debt allegedly owed to the U.S. Department of Housing and Urban Development ("HUD" or "the Secretary").

Pursuant to 31 C.F.R. § 285.11(f)(4), on October 7, 2015, the Court 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"), filed October 7, 2015. On October 16, 2015, the Secretary filed his *Statement* along with documentation in support of his position. The Court granted in part and denied in part Petitioner's *Request for Extension of Time*, and on February 23, 2016, Petitioner filed *Documentary Evidence* in support of his claim of financial hardship. This case is now ripe for review.

JURISDICTION

The administrative judges of this Court have been designated to adjudicate contested cases where the Secretary seeks to collect an alleged debt 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. § 17.81.

BACKGROUND

This is a debt collection action brought pursuant to Title 31 of the United States Code, section 3720D, as a result of a defaulted loan that was insured against non-payment by the Secretary. 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 allegedly owed to the United States government.

On or about September 12, 2012, Petitioner executed and delivered to the Secretary a Subordinate Note ("Note") in the amount of \$38,699.11, in exchange for foreclosure relief. *Secretary's Statement* ("Sec'y Stat.") ¶ 4; *Declaration of Gary Sautter* ("Sautter Decl.") ¶ 4;

Note. The Note secured a Subordinate Mortgage held by the Secretary. *Id.* The Note specified events that would make the debt immediately due and payable. *Sec'y Stat.*, ¶ 5; *Sautter Decl.* ¶ 4; *Note.* One of these events was the full payment of all amounts due under the primary note and related mortgage insured by the Secretary. *Id.*

On or about November 21, 2014 the Petitioner's first mortgage was paid in full and the FHA mortgage insurance was terminated. *Sec'y Stat.*, ¶ 6; *Sautter Decl.* ¶ 4. The Secretary has made efforts to collect this debt from Petitioner, but has been unsuccessful. *Sec'y Stat.*, ¶ 9; *Sautter Decl.* ¶ 5. As a result, Petitioner remains in default on the Note and is indebted to the Secretary in the following amounts:

- (a) \$38,699.11 as the unpaid principal balance as of September 30, 2015;
- (b) \$96.72 as the unpaid interest on the principal balance at 1% per annum through September 30, 2015; and
- (c) interest on said principal balance from October 1, 2015, at 1% per annum until paid.

Id.

Pursuant to 31 C.F.R. § 285.11(e), a Notice of Intent to Initiate Administrative Wage Garnishment Proceedings ("Notice of Intent"), dated September 14, 2015, was sent to Petitioner. *Sec'y Stat.*, ¶ 10; *Sautter Decl.* ¶ 6. In accordance with 31 C.F.R. § 285.11(e)(2)(ii), Petitioner was afforded an opportunity to enter into a written repayment agreement. *Dillon Decl.* ¶ 7. Petitioner did not enter into a written repayment agreement or pay the debt in full in response to the Notice of Intent. *Sec'y Stat.*, ¶ 11; *Sautter Decl.* ¶ 7.

The Secretary proposed a garnishment repayment schedule in the amount of \$1,077.00 per month, which the Secretary states will liquidate the debt in approximately three years, as recommended by the Federal Claims Collection Standards. *Sec'y Stat.* ¶ 12; *Sautter Decl.* ¶ 8. Alternatively, the Secretary requests a repayment schedule in an amount equal to 15% of Petitioner's disposable pay. *Id.*

DISCUSSION

On appeal, Petitioner alleges that the debt is unenforceable because of economic duress. *Petitioner's Hearing Request ("Hearing Request")*, filed October 6, 2015. Petitioner contends that he was "forced into this short notice note by Bank of America when they took over our mortgage from Taylor Whitaker & Bean." *Id.* Petitioner also claims to have "signed [the] modification under duress, after 3 years of missing paperwork, transfers in and out of programs, and little contact from [Bank of America] except to send past due notices [and] notices of intent to foreclose..." *Petitioner's Documentary Evidence ("Pet'r's Doc. Evid.")*, filed February 23, 2016. As support, Petitioner submitted documentary evidence including mortgage statements, mortgage payment records, correspondence with Bank of America, and intent to foreclose notices. *Id.*

In response, the Secretary contends that “upon payment in full of the primary note, Petitioner was to make payment to HUD on the Subordinate Note... Petitioner failed to make payment on the Subordinate Note... Consequently, Petitioner’s debt to HUD is delinquent.” As support, the Secretary introduced documentary evidence that included the Subordinate Note signed by Petitioner in which Petitioner agreed to pay the principal sum of the alleged debt, and the sworn declaration of Gary Sautter¹ that substantiated the alleged debt became due when Petitioner paid in full the primary note. *Sec’y Stat.; Sautter Decl.; Note.*

As a preliminary matter, Petitioner’s claim of economic duress must be addressed. Economic duress exists only where there is a *wrongful* compulsion. (emphasis added) U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68, 81 (1974) (citing Thompson Crane & Trucking Co. v. Eyman, 123 Cal. App. 2d 904, 908-09 (1954)). A contract or agreement is void if a party’s assent was induced by an improper threat that leaves the victim with no reasonable alternative. Restatement (Second) of Contracts § 175(1) (2013). It is not duress to threaten nonperformance of a contract, to institute litigation, or “*otherwise do what one has a legal right to do.*” (emphasis added) U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68, 81 (1974) (citing London Homes, Inc. v. Korn, 234 Cal. App. 2d 233, 240 (1965)).

Petitioner’s claim of economic duress is futile in this case. Here, as the mortgage insurer, HUD’s claim of \$38,699.11 is specifically authorized by Section 2(c) of the National Housing Act (“ACT”). Under the Act, it is not wrongful compulsion for Bank of America to require Petitioner to execute a Note in return for the amount that HUD advanced to Petitioner to prevent Petitioner’s foreclosure. Petitioner alleges that he faced the threat of foreclosure. Foreclosure is not considered an improper threat by Bank of America but instead is considered a legal remedy afforded to financial institutions. There is no evidence in the record to refute that Petitioner stood to gain, personally, from the loan extended by HUD. It is untenable to argue that securing a Note in order to save Petitioner from foreclosure is, in any way, a wrongful compulsion when the amount that was advanced to Petitioner was the same exact amount of the debt owed on the Note.

After reviewing Petitioner’s documentation, it is evident that the documents that were provided primarily referred to the mortgage and not specifically to the subordinate loan that is the subject of this proceeding. This Court has held that if, according to state law², satisfaction of a senior deed of trust through a foreclosure sale prevents a junior trust holder from enforcing a junior trust deed on the same real property, that junior trust holder may collect the debt by initiating collection efforts based on the obligations in the loan note. *John Bilotta*, HUDBCA No. 99-A-CH-Y258 (December 29, 1999) citing *Kimberly S. (King) Thede*, HUDBCA No. 89-4587-L74 (April 23, 1990) citing *Alan Juel*, HUDBCA No. 87-2065-G396 (January 28, 1986). As a result, the Secretary is entitled to separately enforce the debt against Petitioner under the assigned note in this case.

¹ Gary Sautter is the Acting Director, Asset Recovery Division, Financial Operations Center of the United States Department of Housing and Urban Development, HUD.

² In the state of Pennsylvania, the general rule is that “a sheriff’s sale of property [i.e. foreclosure] divests all junior liens on that property” and “it’s right to execute [is] thereby discharged.” Unity Sav. Ass’n v. Am. Urban Sciences Found., 487 A.2d 356, 358-59 (Pa. Super. Ct. 1984).

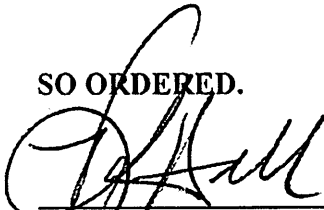
Moreover, the Secretary can enforce the alleged debt against Petitioner because Petitioner has failed to prove that the debt owed to HUD as a junior lender was fully satisfied by the proceeds from the subsequent sale. In order for Petitioner to be released from his contractual obligation under the Note, the proceeds from the sale must have been sufficient to satisfy both the senior and junior liens, plus any reasonable expenses associated with the foreclosure sale. Absent a showing that such proceeds equaled or exceeded the amount owed, Petitioner remains contractually obligated to pay the alleged debt. Because Petitioner has failed, to date, to introduce evidence to the Court that either proves he was released from his obligation or proves that the debt was satisfied, he has failed to meet his burden of proof. As such, the Court finds, accordingly, that Petitioner's debt remains past due and enforceable and is owed in the amount claimed by the Secretary. *Maura O'Keefe*, HUDBCA No. 86-1194- F202 (January 7, 1986); *Lawrence P. Pappau*, HUDBCA No. 87-2381- G701 (July 31, 1987).

ORDER

Based on the foregoing, the Order imposing the stay of referral of this matter to the U.S. Department of the Treasury for administrative wage garnishment is VACATED.

The Secretary is authorized to seek collection of this outstanding obligation by means of administrative wage garnishment in the amount of \$1,077.00, or alternatively, in an amount equal to 15% of Petitioner's disposable pay.

SO ORDERED.



Vanessa L. Hall
Administrative Judge

Review of determination by hearing officers. A motion for reconsideration of this Court's written decision specifically stating the grounds relied upon, may be filed with the undersigned Judge of this Court within 20 days of the date of the written decision, and shall be granted upon a showing of good cause.