

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 10-0432

In re: J. D. Phillips,

Petitioner

Decision and Order

This matter is before the Administrative Law Judge upon the request of J. D. Phillips for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On September 27, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on December 16, 2010.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on November 9, 2010. On November 29 and 30, 2010, the Petitioner submitted a Response and supporting documentation. The Respondent submitted a Revised Narrative and additional documentation on December 23, 2010. At the request of the Petitioner, the December hearing was postponed and a telephonic hearing was ultimately held on February 8, 2011. At the February 8, 2011 hearing, the Petitioner participated, represented by his counsel, Landon Lambert, Esquire of Clarendon, Texas. Appearing for the Respondent was Mary E. Kimball, Accountant for

the New Program Initiatives Branch of USDA Rural Development, St. Louis, Missouri. Sworn testimony was received from the Petitioner and Ms. Kimball.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On June 25, 1981, J. D. Phillips and Patsy Phillips (then his wife) received a home mortgage loan in the amount of \$37,650.00 from Farmers Home Administration (FmHA) now Rural Development (RD), United States Department of Agriculture (USDA), for property located in Childers, Texas. RX-1, 2.
2. In 1998, subsequent to the purchase of the residence, the Petitioner and his wife divorced and as part of the division of property in the divorce, possession of the residence was awarded to the Petitioner's ex-wife, the property was to be listed for sale; however, if the residence was not sold within three months, the wife was to assume responsibility for any house payments after that period.
3. In 1999, while in sole possession of Patsy Phillips, the mortgage loan was defaulted upon. As part of the non-judicial eviction proceedings, notice of the default and a notice of acceleration were sent to the borrowers at the property address. RX-4, 5.
4. Although the record reflects two PS Form 3811s (Domestic Return Receipts), credible testimony indicates that the Petitioner was not at the property address and an individual other than the Petitioner signed the receipts. RX-9.
5. The Petitioner never received notice of the default and acceleration of the loan, and was not provided an opportunity to cure the default,

6. While the Deed of Trust executed by the Petitioner contains a provision waiving any state law provision establishing a statute of limitations for bringing an action for a deficiency judgment, the record contains no evidence that any deficiency judgment was sought or taken against him.

7. The Deed by Substitute Trustee recorded in Deed Book 394, Page 228, *et seq.* in the Childress County/District Clerk's Office falsely recites that written notice of the proposed sale was served on the Petitioner by certified mail.

8. Treasury offsets totaling \$2,708.34 exclusive of Treasury fees have been received.
RX-6.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. USDA Rural Development failed in its burden of proof of establishing that the Petitioner was given actual notice of the default, the acceleration of the loan or was given an opportunity to cure any default.

3. The Petitioner is not indebted to USDA Rural Development for the balance of the indebtedness stemming from the mortgage loan extended to him.

4. Any amounts collected by Treasury prior to the entry of this Decision and Order may be retained and need not be returned.

5. As personal liability for the debt has not been established and no deficiency judgment was sought, the wages of J. D. Phillips may **NOT** be subjected to garnishment.

Order

For the foregoing reasons, these proceedings are terminated and the wages of J. D. Phillips shall **NOT** be subjected to administrative wage garnishment and the debt shall be recalled from Treasury.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

February 9, 2011

Peter M. Davenport
Chief Administrative Law Judge

Copies to: Landon Lambert, Esquire
 Mary Kimball
 Dale Theurer

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