

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 11-0185

In re: David Farkas,

Petitioner

Hearing Date: August 16, 2011

Judge Jill S. Clifton

**PETITIONER'S BRIEF OPPOSING VALIDITY OF DEBT AFTER WAGE
GARNISHMENT HEARING**

Petitioner David Farkas hereby opposes the garnishment of his wages and existence of any debt owed by him to the USDA Rural Development Agency identified as Federal Debt ID 2010250066A and requests that the debt be cancelled accordingly. This opposition is based on the fact that the payment of the loss claim by the USDA to Wells Fargo was improper.

The reasons the payment of the loss claim was improper that will be discussed below are as follows: 1. The Lender with whom Petitioner contracted with (Mountain Mortgage) was not an approved Lender pursuant to RD Instruction 1980-D; 2. Wells Fargo altered the loan guarantee without consent or knowledge of the borrower; 3. Wells Fargo who collected on the loss claim was negligent in processing the original loan and violated RD Instruction Sections 1980.308, 1980.309(f)&(g); 4. Wells Fargo did not comply with RD 1980.345; and 5. Guaranteeing the Loan as to Wells Fargo violates the Statute of Frauds and California Law.

Petitioner argues that the loss should have been denied by the USDA and collection in any fashion as against Mr. Farkas is unlawful and inequitable.

NARRATIVE

In July 2004 Petitioner David Farkas and Kim Farkas obtained a home loan mortgage for property located at 9932 Putter Court, California City, CA 93505, through a mortgage broker named Lawrence Law who worked for Mountain Mortgage in Tehachapi, California. Wells Fargo funded the loan in the amount of \$167,999.00. Wells Fargo did not act as the mortgage broker and never had contact with Petitioner prior to funding the loan. Prior to receiving the loan, Petitioner signed RD Form 1980-21 (Exhibit RX-2 filed by USDA) personally guaranteeing the loan if the USDA paid a loss claim on the loan to Mountain Mortgage. The Farkas' were first time home buyers and were not counseled on the implications of RD Form 1980-21 or the USDA Rural Home Loan program.

Petitioners went into default on their Wells Fargo mortgage in July 2008. The home was sold at a loss in a Trustees sale and Wells Fargo submitted a loss claim pursuant to RD Instruction 1980-D and the Rural Housing Loan program overseen by the USDA. The first time the Petitioners were aware a loss claim was paid to Wells Fargo on this loan was in October 2010 when they received a notice of the debt from the U.S. Treasury. The wage garnishment hearing and this inquiry into the loan guarantee's validity followed.

ARGUMENT

1. MOUNTAIN MORTGAGE IS NOT AN APPROVED USDA LENDER

The claim loss should not have been paid by the USDA because Mountain Mortgage, to whom Petitioner actually signed the loan guarantee, was not an approved Lender as required by the Rural Development Instruction on Rural Housing Loans (RD Instruction 1980). Mountain Mortgage represented itself as the Lender when the loan guarantee was negotiated and signed by

Petitioner. Wells Fargo later altered the document to its benefit without knowledge of the Petitioner. As such, Mountain Mortgage would have been the Lender from the standpoint of the Farkas' and Mountain Mortgage was neither approved under the USDA RD loan program nor has made a claim under the loss guarantee to warrant collection by the USDA.

2. WELLS FARGO NEGLIGENTLY ALTERED THE LOAN GUARANTEE TO ITS BENEFIT WITHOUT NOTIFYING THE BORROWER

Exhibit RX-2 as provided by the USDA is the Request for Single Family Housing Loan Guarantee, Form RD 1980-21, required for a USDA home loan under the program, signed by David and Kim Farkas on June 17, 2004. The document was also signed by Lawrence Law, on behalf of Mountain Mortgage on June 17, 2004 (page 2, Exhibit RX-2).

On page 1 of Exhibit RX-2 in the upper right side it appears the Lender information was changed from Mountain Mortgage to Wells Fargo and the contact information changed from "Becca" to Diane Williams. To the right of Mr. Law's signature on page two of the exhibit is a signature that appears to read D. Williams that is dated July 29, 2004.

At the August 16, 2011 hearing on wage garnishment before this court, Mr. Farkas testified he never spoke to anyone at Wells Fargo and no one explained to him that the USDA loan program was a personal guarantee to the Lender. He also testified he had no knowledge that the Loan Guarantee had been altered or assigned after he executed it in June 2004 and did not know who Diane Williams is.

The loan note guarantee constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which the Lender has actual knowledge at the time it becomes such Lender or which the Lender participates in or condones... The loan note guarantee will be unenforceable to the extent any loss is occasioned by violation of usury laws, negligent servicing, or failure to obtain the required

security regardless of the time at which RHCDS acquires knowledge of the foregoing... - RD Instruction 1980.308 – Full Faith and Credit

An agent of Wells Fargo altered the very document upon which the loss claim is based. There was no attempt to contact the borrower and correct the information. When David Farkas signed the guarantee, he signed it as to Mountain Mortgage. There is no assignment provision in the guarantee. Wells Fargo was at best negligent in its servicing of this loan at worst intentionally committed a fraud. Wells Fargo was in the fiduciary position and utilized that position to the detriment of the Farkas' when unlawfully altering the loan guarantee in violation of RD Instruction 1980.308.

...Negligent servicing is defined as servicing that is inconsistent with this subpart and includes the failure to perform those services which a reasonably prudent Lender would perform in servicing its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act, but also not acting in a timely manner or acting contrary to the manner in which a reasonably prudent Lender would act up to the time of loan maturity or until a final loss is paid... RD Instruction 1980.308 – Full Faith and Credit

It would have taken very little effort for Wells Fargo to contact the Farkas' and properly prepare and execute the loan guarantee. Wells Fargo was the fiduciary and acted negligently. In seeing the loan guarantee had not been completed properly, Wells Fargo should have made some effort to verify the borrowers understood the implications of the loan guarantee and to legally correct the Lender information to protect its interest. Instead, Wells Fargo falsified the document to the detriment of Petitioner and in violation of RD 1980.308 and therefore the loss claim by Wells Fargo is improper and should have been denied. The loan guarantee from the Farkas' was to Mountain Mortgage and was not assigned to Wells Fargo. There is no provision in the guarantee signed by the Farkas' allowing for the assignment so Wells Fargo's claim is invalid and Petitioner is not liable for any loss claim paid to Wells Fargo under the altered loan guarantee.

3. WELLS FARGO DID NOT COMPLY WITH RD 1980.309(f) and (g)

RD Instruction 1980.309(f) allows the Lender to “utilize the services of a non-RHCDS approved Lender for originating residential loans...The agent may close the loan in its name provided the loan is immediately transferred to the approved lender to whom the guarantee will be issued”.

The instruction does not indicate the proper method for transferal of the guarantee but common sense would dictate a proper transfer could not be effectuated by alteration of documents by hand and without borrower knowledge.

The court may look to RD 1980.309(e) which instructs on the sale of guaranteed loans for guidance on such transfers: “The selling Lender shall provide the original loan note guarantee to the purchasing Lender. The selling Lender is responsible for reporting the sale of any loan to RHCDS within 30 days using Form RD 1980-11, ‘Guaranteed Rural Housing Lender Record Change’... Any necessary or convenient assignments or other instruments relating to the loan and any other actions necessary or convenient to perfect or record such transaction are the responsibility of the purchasing Lender.”

Based on this, it seems in lieu of altering the loan guarantee or even drafting a new one with correct Lender and Borrower information, Wells Fargo might have completed the Guaranteed Rural Housing Lender Record Change form, they did neither and the onus is on them.

RD Instruction 1980.309(f) also provides that “Lenders are fully responsible for their own actions and the actions of those acting on the Lender’s behalf.” Wells Fargo therefore shoulders the responsibility for the falsified document, negligent servicing and improper loan guarantee.

4. WELLS FARGO DID NOT COMPLY WITH RD 1980.345

The Lender may accept applications filed through its agents, correspondents, branches, or other institutions. The Lender must have at least one personal interview with the applicant to verify the information on the application and to obtain a complete picture of the applicant's financial situation. The interview may take place by telephone or face-to-face. –RD Instruction 1980.345

David Farkas testified in the August 16, 2011 telephonic hearing that he was never contacted by anyone from Wells Fargo prior to obtaining the loan. He also testified he was never told the loan was a personal guarantee. The Lender did not comply with the instruction.

Exhibit RX-2, page one, supports Mr. Farkas' testimony that the loan was improperly serviced from the outset. The document leaves key information unanswered. Items specifically required to be provided in the application pursuant to RD 1980.353(c)(7)&(9) are not complete on the form: item 3 regarding veteran status is blank, as is item 5 regarding credit history. Item 6 regarding family income has also been altered without confirmation by Farkas, which may violate some truth in lending laws on the part of Wells Fargo.

5. GUARANTEEING THE LOAN AS TO WELLS FARGO VIOLATES THE STATUTE OF FRAUDS AND CALIFORNIA LAW

The Uniform Commercial Code § 2-201 requires that a contract for the transfer of any interest in real property be in writing.

California Civil Code § 1624 reads in pertinent part as follows:

- (a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:
 - (3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless

the authority of the agent is in writing, subscribed by the party sought to be charged;

The personal guarantee enforced by the USDA on behalf of Wells Fargo in the present matter is neither in writing nor subscribed by the party to be charged and is therefore invalid under the Statute of Frauds and California law.

CONCLUSION

There is very little protection afforded the unsuspecting first-time homebuyer. Lenders are in a superior and fiduciary bargaining position in any such transaction. Add the severe consequences of borrower default effected by the USDA RD Home Loan's personal guarantee and it is a recipe for disaster if the Lender is not held accountable.

In the present case, Wells Fargo acted negligently. Had Wells Fargo completed its paperwork properly, particularly the simple, two-page home loan guarantee, Petitioner would have no argument. Wells Fargo did not do its job. Wells Fargo is not the Lender in this matter so far as Petitioner was informed and so no guarantee was made as to loss claims by Wells Fargo on this loan. What the USDA and Wells Fargo agreed to is of little consequence if the consumer is not informed and apprised of the consequences of signing a personal guarantee.

The record and the evidence show Wells Fargo was negligent in the servicing and processing of the Farkas loan and there was never an enforceable guarantee from the Farkas' to Wells Fargo. Wells Fargo should not have been able to collect a loss claim in this situation. The USDA should be reimbursed by Wells Fargo, not David and Kim Farkas.

Petitioner respectfully requests the wage garnishment denied, the debt declared invalid, and that he be reimbursed the \$9,379.00 already taken from him improperly.

Respectfully submitted this 30th day of August, 2011.

/Kassandra McQuillen/

Kassandra McQuillen,
Attorney for David and Kim Farkas