

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

Lord Commons Apartments, LLC,
Louis D. Lawson, Sr.,
and
Louis D. Lawson, Jr.,

Respondents.

HUDALJ 09-F-025-CMP-5

May 13, 2009

Appearances

Brendan Power, Attorney
United States Department of Housing and Urban Development
For the Complainant

Brian J. Ladouceur, Jr., Attorney
For the Respondents

**RULING GRANTING GOVERNMENT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

BEFORE: Alexander FERNÁNDEZ, Administrative Law Judge

On February 5, 2009, the Secretary of the United States Department of Housing and Urban Development ("HUD," the "Secretary" or the "Government") filed a Complaint against Lord Commons Apartments, LLC, Louis D. Lawson, Sr., and Louis D. Lawson, Jr. (collectively, "Respondents") seeking civil money penalties in the amount of \$107,500 for three counts of violations of 12 U.S.C. § 1735f-15 and its implementing regulations at 24 C.F.R. Part 30. The Secretary alleged that Respondents failed to file annual financial reports for fiscal years 2005, 2006 and 2007. Respondents requested a hearing and filed their *Response to Complaint* on February 20, 2009.

On April 6, 2009, the Secretary filed his *Government's Motion for Partial Summary Judgment* ("Government's Motion"), supported by a *Memorandum of Points and Authorities* and 13 exhibits. In response, on April 17, 2009, Respondents filed *Respondents['] Objection to Government's Motion for Partial Summary Judgment* ("Respondents' Objection") along with a supporting a Memorandum and 3 exhibits (including affidavits from Louis D. Lawson Sr., and Jr.). The Secretary subsequently filed his *Government's Reply in Support of its Motion for Partial Summary Judgment* ("Government's Reply") on April 20, 2009, and Respondents filed

their *Sur Reply to Government's Reply in Support of its Motion for Partial Summary Judgment* ("Respondents' Sur Reply") thereto on April 21, 2009. Accordingly, the matter is ripe for decision. For the reasons that follow, the Government's Motion is **GRANTED**.

Applicable Law

Standard of Review. "A party claiming relief or a party against whom relief is sought may timely move, with or without supporting affidavits, for summary judgment on all or part of the claim." 24 C.F.R. § 26.40(f). Pursuant to 24 C.F.R. § 26.32(l), this Court may "decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact[.]" Summary judgment will be granted where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Summary judgment is a "drastic device" because, when exercised, it cuts-off a party's right to present its case. Nationwide Life Ins. Co. v. Bankers Leasing Ass'n. Inc., 182 F.3d 157, 160 (2d Cir. 1999). "Accordingly, the moving party bears a heavy burden of demonstrating the absence of any material issues of fact." Id. In reviewing a motion for summary judgment, the reviewing court must "resolve all ambiguities and draw all reasonable inferences in favor of the party defending against the motion." Id.

Civil Money Penalties. The Secretary is authorized to impose civil money penalties against a mortgagor or any member of a limited liability company that is the mortgagor of a property that includes 5 or more living units and that has a mortgage insured, coinsured, or held by HUD. 12 U.S.C. § 1735f-15(c)(1)(A). A civil money penalty may be imposed for the knowing and material:

- (x) Failure to furnish the Secretary, by the expiration of the 90-day period beginning on the first day after the completion of each fiscal year (unless the Secretary has approved an extension of the 90-day period in writing), with a complete annual financial report, in accordance with requirements prescribed by the Secretary, including requirements that the report be—
 - (I) based upon an examination of the books and records of the mortgagor;
 - (II) prepared and certified to by an independent public accountant or a certified public accountant (unless the Secretary has waived this requirement in writing); and
 - (III) certified to by the mortgagor or an authorized representative of the mortgagor.

12 U.S.C. §1735f-15(c)(1)(B)(x).¹

HUD may impose a maximum penalty of \$32,500 for violations of 12 U.S.C. §§1735f-15(c) occurring on or after April 16, 2003, and \$37,500 for violations occurring on or after March 8, 2007. 24 C.F.R. § 30.45(g) (2007).

Findings Of Fact

1. Lord Commons Apartments, FHA No. 017-11058, is a property that includes 5 or more living units located in Hartford, Connecticut (the “Project”). (Government’s Motion, Ex. 2; Complaint, ¶ 2; Response to Complaint, ¶ 2.) The Project was financed with the proceeds of a loan insured against default under section 207 pursuant to Section 223(f) of the National Housing Act, 12 U.S.C. §§ 1713 and 1715n(f). (Id.)
2. Respondent Lord Commons Apartments, LLC (“LCA”), is the owner and mortgagor of the Project. (Government’s Motion, Ex. 2.) Respondent Louis D. Lawson, Sr., is a managing member of LCA. Respondent Louis D. Lawson, Jr., is a member of LCA. (Government’s Motion, Ex. 2, p.1; Respondents’ Objection, Ex. A, Affidavit of Louis D. Lawson, Sr., ¶ 3 and Ex. B, Affidavit of Louis D. Lawson, Jr., ¶ 3.)
3. On behalf of LCA, Respondent Lawson, Sr., executed a Regulatory Agreement with HUD on August 15, 2000, in exchange for receiving the benefits of a HUD-insured loan. (Government’s Motion, Ex. 2.)
4. Paragraph 9(e) of the August 15, 2000, Regulatory Agreement states:

within sixty (60) days following the end of each fiscal year the Secretary shall be furnished with a complete annual financial report based upon an examination of the books and records of mortgagor prepared in accordance with the requirements of the Secretary, prepared and certified to by an officer or responsible Owner and, when required by the Secretary, prepared and certified by a Certified Public Accountant, or other person acceptable to the Secretary. (Government’s Motion, Ex. 2, ¶ 9(e).)
5. On October 10, 2003, Respondent Lawson, Sr., entered in to a Settlement Agreement with HUD on behalf of the Project, acknowledging the Project’s failure to file financial reports for fiscal years ending (“FYE”) 2000, 2001, and 2002. (Government’s Motion, Ex. 4.)
6. The fiscal year for the Project ends on December 31 of each year. (Government’s Motion Ex. 3.)

¹ This section of the statute was amended effective December 8, 2004. Prior to the amendment, the time period to file an annual financial report was 60 days from the completion of the fiscal year. 12 U.S.C. §1735f-15(c)(1)(B)(x) (1997). The Government’s Motion for Partial Summary Judgment as well as its Complaint in this matter incorrectly cite the language of the statute prior to the 2004 amendment. (Government’s Motion, p.2; Complaint, ¶ 10.)

7. The annual financial report for FYE 2005 was due March 31, 2006. (Id.)
8. Respondents' financial report for FYE 2005 was filed with HUD on January 22, 2009. (Id.)
9. The annual financial report for FYE 2006 was due March 31, 2007. (Id.)
10. Respondents' financial report for FYE 2006 was filed with HUD on January 31, 2009. (Id.)
11. The annual financial report for FYE 2007 was originally due March 31, 2008, but was extended to April 30, 2008. (Id.)
12. Respondents' financial report for FYE 2007 was filed with HUD on February 1, 2009. (Id.)
13. Respondents made "a number of attempts in 2003 to file financial statements with HUD..." (Respondents' Objection, Ex. A, Affidavit of Louis D. Lawson, Sr., ¶ 10 and Ex. B, Affidavit of Louis D. Lawson, Jr., ¶ 10.)

Discussion

As discussed supra, in granting a motion for summary judgment, the Court must determine that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Anderson, 477 U.S. 242. At bar, the Secretary's Motion argues that HUD is entitled to summary judgment *on liability* because there are no material facts in dispute with regard to whether or not Respondents knowingly and materially failed to furnish the Secretary, by certain deadlines following each fiscal year, "a complete annual financial report, in accordance with requirements prescribed by the Secretary." 12 U.S.C. § 1735f-15(c)(1)(B)(x).

The Secretary seeks civil money penalties "based upon the Respondents' failure to submit annual financial reports . . . for fiscal years ended ("FYE") 2005, 2006, 2007 for Lord Commons Apartments." (Government's Motion, p.1.) The Secretary specifically maintains that Respondents had failed to submit *audited* financial statements.² (Government's Motion, p.1 (emphasis added).) Indeed, Respondents had failed to file any financial statements at all by requisite deadlines.

Respondents oppose summary judgment on the grounds that they "did not knowingly violate the regulations," and they "did not materially violate the regulations." (Respondents'

² The Secretary makes liberal use of the word "audited" throughout his various documents as filed in this matter. Although it may be possible to *infer* that the statute does indeed call for *audited* financial statements, no such reading of the statute is necessary and none is made today. This Court, in order to properly track the language of the statute and to avoid any misunderstanding, will confine its interpretation to the words of the statute.

Objection, pp. 3-9.) Respondents further argue that there is a material fact at issue as to the requirements of the financial report.³ (Id., at pp. 2-3.)

Financial Reports. As a matter of law, Respondents are required to submit annual financial reports. 12 U.S.C. § 1735f-15(c)(1)(B)(x). The requirements are explicitly spelled out in the statutory language which states in part that all submitted financial reports shall be:

- (I) based upon an examination of the books and records of the mortgagor;
- (II) prepared and certified to by an independent public accountant or a certified public accountant (unless the Secretary has waived this requirement in writing); and
- (III) certified to by the mortgagor or an authorized representative of the mortgagor.

12 U.S.C. § 1735f-15(c)(1)(B)(x).

Respondents have not even alleged that they filed or attempted to file annual financial reports that complied with the statute for fiscal years ending 2005, 2006, and 2007 by their respective deadlines.⁴ Indeed, the required reports were not filed until 2009. (Findings of Fact (“FF”), ¶¶ 7-12.) Therefore, there is no genuine issue of material fact as to Respondents’ failure to file annual reports for FYEs 2005, 2006, and 2007 by their respective deadlines.

Knowledge. The statute imposes liability upon a respondent who *knowingly* violates the requirement of filing annual financial reports. 12 U.S.C. § 1735f-15(c)(1)(B)(x). “Knowingly” is defined as “having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions” of the civil money penalty statute at issue. 12 U.S.C. § 1735f-15(h); see also 24 C.F.R. § 30.10. The Secretary has presented sufficient evidence showing that Respondents had actual knowledge of the requirement to file annual financial statements in accordance with the requirements set forth in 12 U.S.C. § 1735f-15(c)(1)(B)(x).

In the Regulatory Agreement signed by Respondent Lawson, Sr., on behalf of the Project, Respondents agreed to file “a complete annual financial report based upon an examination of the books and records of mortgagor prepared in accordance with the requirements of the Secretary, prepared and certified to by an officer or responsible Owner and, when required by the Secretary, prepared and certified by a Certified Public Accountant, or other person acceptable to the Secretary.” (FF, ¶¶ 3-4.) This language effectively communicates the statutory requirement for

³ Respondents assert inability to pay as an affirmative defense in their Response to the Complaint, as permitted under 24 CFR § 30.80(c). (Response to Complaint, filed February 20, 2009, pp. 7-8.) Respondents, however, do not raise this specific defense in their objection to summary judgment.

⁴ Respondents’ general denial in ¶ 26 of their Response to the Complaint does not suffice. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986) (Once the movant has made a prima facie case for summary judgment, the non-movant cannot rely on general denials but must demonstrate with evidence that is ‘significantly probative’ or more than ‘merely colorable’ that a genuine issue of material fact exists for trial.)

Respondents to file “a complete annual financial report, in accordance with requirements prescribed by the Secretary.” 12 U.S.C. § 1735f-15(c)(1)(B)(x). Respondent’s signature on the Regulatory Agreement establishes that they had actual knowledge thereof. See Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144, 149 (2nd Cir. 2004) (In the absence of fraud or other wrongful act on the part of another contracting party, a party who signs or accepts a written contract is conclusively presumed to know its contents and assent to them.). Moreover, the Regulatory Agreement makes reference to “the requirements of the National Housing Act, as amended, and the regulations adopted by the Secretary pursuant thereto.” (FF, ¶ 3.)

The same holds true for the Settlement Agreement signed by Respondent Lawson, Sr., on behalf of the Project in 2003.⁵ The Settlement Agreement states that “the Project’s Regulatory Agreement and HUD’s Rules and Regulations require the Owner to timely submit to HUD annual audited financial statements in the form and manner prescribed by HUD.” (FF, ¶ 6.) While the “auditing” requirement is not at issue, Respondents nonetheless plainly knew of the requirement to file financial statements annually through the Settlement Agreement they signed.

Finally, Respondents knew of the requirement to file annual financial reports no later than the issuance of the Administrative Law Judge’s decision against Respondents in July 2007 for failing to file annual financial reports for FYEs 2000, 2001, 2002, 2003 and 2004, and from the Complaint issued to Respondents to initiate that action in July 2005. *Order Granting Government’s Motion for Summary Judgment, In the Matter of Lord Commons Apartments, LLC, et al.*, HUDALJ No. 05-060-CMP (July 20, 2007), p.5.

Despite this actual knowledge, Respondents argue that because they did not have any legal training and were unrepresented by counsel when they signed the Regulatory Agreement and the Settlement Agreement, they did not understand the requirement to file annual financial reports stated therein. (Response to Complaint, ¶¶ 9-10; Respondents’ Sur Reply, pp. 2-3.) Even if true, Respondents not only agreed to terms they did not understand despite having had the opportunity to review the contracts, but also entirely failed to make any effort to apprise themselves of the publicly available filing requirements in the statute and regulations. The

⁵ Respondents object to the introduction of the Settlement Agreement as evidence in this proceeding. (Respondents’ Objection, pp. 1-2; Respondents’ Sur Reply, pp. 1-3.) Respondents argue that because the Settlement Agreement states “This Agreement is for the purpose of settling this administrative action only, and shall be used for no other purpose by either party hereto,” (FF, ¶ 5 at ¶ 10.) the Secretary cannot introduce the Settlement Agreement at Bar. In short, Respondents object to the Settlement Agreement’s use in establishing “knowledge.” (Respondents’ Objection, pp. 1-2.)

The plain meaning of the quoted sentence limits the agreement to settle only the facts and case contemplated in the agreement itself at that time of execution. Such language is commonly used in settlements between litigants to limit the applicability of the settlement’s terms to that particular resolution. Although it is true that the language precludes the parties from using that Settlement Agreement from directly settling other issues, it is not being used for settlement purposes at bar – nor is it being used to establish a violation of that Agreement itself.

Moreover, Respondents argue that a breach of the Settlement Agreement limits HUD to a single action for civil money penalties. (Respondents’ Sur Reply, pp. 1-2.) This interpretation would give the document little meaning, as it would grant Respondents a perpetual waiver to comply with the statute following any one civil money penalty action by the Government.

The Court finds Respondents’ first argument unpersuasive based on a plain reading of the agreement. Respondents’ second argument would render the agreement void as against public policy. As such, Respondents’ objection is overruled.

Respondents' stated failure to exercise the least amount of care with respect to their execution of either contract would constitute deliberate ignorance of and reckless disregard for the requirements of the loan, including the requirement to file annual financial reports. Consequently, even if Respondents did not have actual knowledge, they demonstrated deliberate ignorance of and reckless disregard for the requirement to file annual financial reports with HUD.

Respondents argue, nonetheless, that a genuine issue exists as to knowledge because "the plain language stated in the Regulatory Agreement terms and cited statutes are unclear that an annual financial report must be audited." (Respondents' Objection, p.3.) As the Court noted supra, the word "audited" does not appear in the statute. Respondents fail to explain, however, how they failed to file *any* financial statements at all.⁶ There is sufficient evidence to show that Respondents knowingly failed to file financial reports as required by and as defined in the statute that subjects them to liability. Therefore, there is no genuine issue of material fact as to Respondents' knowledge of their requirement to file a complete annual financial report with HUD following each fiscal year.

Based on the foregoing, this Court holds that Respondents' violations were knowing.

Material. The statute imposes liability upon a respondent who materially violates the requirement of filing annual financial reports. 12 U.S.C. § 1735f-15(c)(1)(B)(x). Materiality is defined as "in some significant respect or to some significant degree." 24 C.F.R. § 30.10.⁷ To determine whether a violation is significant, the Secretary has bound this Court to apply a "totality of the circumstances" standard, which is to be determined in turn by consideration of the regulatory factors listed in 24 C.F.R. § 30.80 used to determine the amount of a civil money penalty. *Order on Secretarial Review, In the Matter of Associate Trust Financial Services*, HUDALJ 96-008-CMP (September 15, 1997); *HUD v. Crestwood Terrace Partnership*, HUDALJ 00-002-CMP (January 30, 2001). To prove materiality, "the record need not contain sufficient evidence to satisfy all of the factors listed in the regulations – one will suffice." *In the Matter of Associate Trust Financial Services*, at 15; see also *Yetiv v. HUD*, 503 F.3d 1087 (9th Cir. 2007) (upholding finding of material when the ALJ based that decision on two factors that logically related to materiality).⁸

⁶ As Respondents did not file any financial statements, the Court need not consider what impact, if any, the Secretary's continued use of the word "audited" may have had on Respondents. This opinion is strictly limited to establishing liability due to Respondents failure to file.

⁷ This definition was in effect at the time of the issuance of the Complaint. An amendment became effective on February 15, 2009, changing the definition of materiality to "having the natural tendency or potential to influence, or when considering the totality of the circumstances, in some significant respect or to some significant degree." 24 C.F.R. § 30.10 (2009).

⁸ The Court acknowledges the nonsensical situation brought about by applying the same factors that determine an amount of the penalty towards a finding of liability. See *Yetiv v. HUD*, 503 F.3d at 1090-91 ("some of these factors (notably, the violator's ability to pay), while perhaps relevant to the determination of the amount of a penalty, have no logical relationship to the significance of the underlying violation. ... HUD's standard for determining materiality is certainly a candidate for revision, but we cannot say that the ALJ's decision to impose penalties in this case was arbitrary or capricious.").

Through the Settlement Agreement and the previous finding of liability by this Court in 2007, HUD has established a pattern of Respondents' failure to file annual financial reports. (FF, ¶ 5; *Order Granting Government's Motion for Summary Judgment, In the Matter of Lord Commons Apartments, LLC, et al.*, HUDALJ No. 05-060-CMP.) In fact, Respondents have not filed a timely financial report since they signed the Regulatory Agreement in 2000. 24 C.F.R. § 30.80(b). This constitutes five prior offenses by Respondents for the same violation, despite repeated attempts by HUD to resolve the matter.⁹

Moreover, Respondents' failure to file timely financial statements demonstrates a complete and utter indifference to HUD's rules and regulations. 24 C.F.R. 30.80(h). As noted supra, if Respondents' assertions regarding knowledge are accepted, Respondents "not only agreed to terms they did not understand despite having had the opportunity to review the contracts, but also entirely failed to make any effort to apprise themselves of the publicly available filing requirements in the statute and regulations." As such, their degree of culpability is high.

Also important is the impact this decision will have on deterring future violations and potential violators. 24 C.F.R. 30.80(g). Respondents are repeat violators consistently avoiding fulfilling their statutory duties by failing to file annual financial statements as required by 12 U.S.C. § 1735f-15(c)(1)(B)(x). Not only does this decision ensure that Respondents are, once again, aware of their duties, but it also ensures that the regulated community understands the consequences associated with a failure to file and/or repeated failures to file.

Based on the foregoing, this Court holds that Respondents' violations are material.

CONCLUSION AND ORDER

There is no genuine issue of material fact with regard to establishing Respondents' liability at bar. The Secretary is entitled to judgment as a matter of law. Therefore, it is **ORDERED**:

The Secretary's Motion for Partial Summary Judgment is **GRANTED**. Respondents are **LIABLE** for Counts I, II and III of the Complaint.

/s/

Alexander Fernández
Administrative Law Judge

⁹ Respondents argue that their violations were not material. Specifically, they argue that they were waiting for the decision from the ALJ and subsequently from the Secretarial designee on appeal, and were unrepresented by counsel in that action. (Respondents' Objection, pp. 5-6.) These arguments, however, do not relieve Respondents of the filing requirements that continued to occur at the end of every fiscal year. There is no evidence of a waiver or extension in the record to permit Respondents to wait idle until the resolution of their prior civil money penalty case.