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

In the Matter of: HERITAGE NURSING CENTER, LLC and AVIGDOR HOROWITZ, Respondents.	HUDALJ 11-M-048-CMP/9 September 29, 2011

RULING ON MOTION FOR DEFAULT JUDGMENT

This case arises from a Complaint by the United States Department of Housing and Urban Development ("HUD") seeking civil money penalties from Heritage Nursing Center, LLC and Avigdor Horowitz ("Respondents") pursuant to 12 U.S.C. § 1735-15 and 24 C.F.R. Part 30. The Government alleges that Respondents failed to submit, within the time specified by HUD, the appropriate financial reports for Heritage Nursing Center ("HNC") for fiscal years 2006, 2007, and 2008.

Procedural History

HUD provided Respondents with a Pre-Penalty Notice, dated March 5, 2008, pursuant to 24 C.F.R. § 30.70, for failure to timely file the foregoing financial reports. Respondents received the Pre-Penalty Notice on December 22, 2008, but did not provide a written response to the Notice within the required 30 day period. However, on February 19, 2009, HNC electronically submitted—and HUD accepted—the 2006 financial report. On September 17, 2009, HUD issued a second Pre-Penalty Notice to Respondents, again for failure to timely file the foregoing financial reports. Again, Respondents did not respond to the Notice, but on March 25, 2010 HNC did electronically submit—and HUD accepted—the 2007 financial report. Further, on March 26, 2010 HNC electronically submitted—and HUD accepted—the 2008 financial report.

The Director of HUD's Departmental Enforcement Center reviewed the matter, considering the factors in 24 C.F.R. § 30.80. Pursuant to 24 C.F.R. § 30.85, HUD issued a Complaint for Civil Money Penalties ("Complaint") against Respondents on July 19, 2011, for HNC's alleged failure to timely submit the Project's audited annual financial reports for fiscal years 2006, 2007, and 2008. The Complaint sought civil money penalties in the amount of $40,000. HUD sent two copies of the Complaint—one to the same address as the prior Pre-Penalty Notices—and another to Kenneth Ashman, counsel for Respondents, at Ashman Law Offices, LLC, 55 West Monroe Street, Suite 2650, Chicago, Illinois 60603. The copy of the

Complaint sent to Kenneth Ashman was delivered on July 31, 2011. The copy sent c/o Mercy Healthcare Management, however, was returned undelivered on or about August 1, 2011.

Respondents had 15 days from the date of receipt of the Complaint to request a hearing before this Court and 30 days from that same date to answer said Complaint. 24 C.F.R. § 30.90(a) and (b). No request for hearing or answer was received in a timely manner. On August 26, 2011, a Motion for Default Judgment was filed by the Government. When nothing was received from Respondents, this Court issued an Order to Show Cause, dated September 9, 2011, requiring Respondents to show cause why the requested Default Judgment should not be granted. To this date, no request for hearing or answer has been received, and no response to the Motion for Default Judgment nor the Order to Show Cause has been received. As Respondents have failed to show cause pursuant to the Court's September 9, 2011, Show Cause Order, a ruling on the Motion for Default Judgment is ripe.

Legal Framework

HUD is authorized to impose civil money penalties against "any owner, any general partner of a partnership owner, or any agent employed to manage the property that has an identity of interest with the owner or the general partner of a partnership owner of a property receiving project-based assistance under section 8 of the United States Housing Act of 1937." 42 U.S.C. § 1437z-1(b)(1)(A-C); see 24 C.F.R. § 30.68(b). A penalty against such a liable party may be imposed for "knowingly and materially" breaching a housing assistance payments contract. 42 U.S.C. § 1437z-1(b)(2); see 24 C.F.R. § 30.68(b).

The term "knowingly" means "having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section." 42 U.S.C. § 1437z-1(h)(2); see 24 C.F.R. § 30.10. A violation is "material" if it has "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. The maximum penalty per violation may not exceed $25,000. 42 U.S.C. § 1437z-1(b)(3); 24 C.F.R. § 30.68(c).

In determining the amount of a civil money penalty, the following factors should be taken into account by the Secretary: "the gravity of the offense, any history of prior offenses . . . the ability of the violator to pay the penalty, any injury to tenants, any injury to the public, any benefits received by the violator as a result of the violation, deterrence of future violations, and such other factors as the Secretary may establish by regulation." 42 U.S.C. § 1437z-1(c)(3); see 24 C.F.R. § 30.80.

Prior to determining whether to file a complaint against an alleged liable party, HUD must issue a prepenalty notice pursuant to 24 C.F.R. § 30.70, allowing a respondent 30 days to present any argument in opposition to the imposition of a civil money penalty. 24 C.F.R. § 30.75(a). If a determination is then made to seek a civil money penalty, the Government shall serve a complaint upon a respondent and file the complaint with the Office of Administrative Law Judges. 24 C.F.R. § 30.85(b).

If no hearing is requested in fifteen days from receipt of the Complaint, "the imposition of a penalty . . . shall constitute a final and unappealable determination." 42 U.S.C. § 1437z-1(c)(2)(A). Moreover, a respondent may be found in default, upon motion, for failure to file a timely response to the Government's Complaint. 24 C.F.R. § 26.41(a). If a default order is issued, it shall constitute an admission by Respondent of all facts alleged in the Complaint and a waiver of its right to a hearing on the allegations contained in the Complaint. 24 C.F.R. § 26.41(c). The penalty proposed in the Complaint shall be set forth in the default order and shall be immediately due and payable without further proceedings. Id. A default order by this Court constitutes the final agency action. 24 C.F.R. § 26.41(b).

Findings of Fact and Conclusions of Law

1. The factual findings stated in the Procedural History, supra, are incorporated here by reference.

2. HUD is an executive department of the United States Government, established pursuant to 42 U.S.C. § 3531 et seq.

3. HUD operates a program under Title II of the National Housing Act whereby mortgage insurance is provided for eligible multifamily and healthcare projects. 12 U.S.C. § 1707 et seq.

4. In return for the mortgage insurance provided by HUD, the mortgagor is required to execute a Regulatory Agreement placing certain restrictions and conditions on the project.

5. Under 12 U.S.C. § 1735f-15(c)(1)(B)(x), the knowing and material failure of a mortgagor to timely submit the annual financial report, which is required by the Regulatory Agreement, may result in the imposition of such a civil money penalty.

6. HUD may impose civil money penalties against a mortgagor receiving mortgage insurance. 12 U.S.C. § 1735f-15(c)(1)(B). Civil money penalties may also be imposed against any member of a limited liability company that is the mortgagor of such a property. 12 U.S.C. § 1735f-15(c)(1)(A)(v).

7. HNC, an Illinois limited liability company, is the owner and mortgagor of the Project, which has a mortgage insured against default by HUD under Section 223(f) of the National Housing Act, 12 U.S.C. § 1715n(f). The original mortgage amount was for $1,615,000.

8. Respondent Horowitz, an individual resident of Illinois, is a member of HNC.

9. On or about August 6, 2002, HNC executed a Regulatory Agreement applicable for projects receiving mortgage insurance under Section 223(f) of the National Housing Act.

10. Paragraph 9(e) of the Regulatory Agreement requires that within 60 days following the end of each fiscal year, HUD must be furnished with a complete annual financial report based upon an examination of the books and records of HNC.

11. The annual financial report for the Project's fiscal year 2006 was due on March 31, 2007. HNC submitted the 2006 financial report on February 19, 2009, almost two years after its due date.

12. Following a 30-day extension provided by HUD to all HUD-assisted properties with fiscal years ending December 31, the annual financial report for the Project's fiscal year 2007 was due on April 30, 2008. HNC submitted the 2007 financial report on March 25, 2010, almost two years after its due date.

13. Follow a second, similar extension, the annual financial report for the Project's fiscal year 2008 was due on April 30, 2009. The 2008 report was submitted by HNC on March 26, 2010, almost one year after its due date.

14. A civil money penalty may be assessed for each of these violations. See 12 U.S.C. § 1735f-15(c)(1)(B)(x).

15. On March 5, 2008, HUD issued a Pre-Penalty Notice to HNC for its failure to timely submit the Project's 2006 financial report. This notice was consistent with the requirements of 24 C.F.R. § 30.70 as it existed at the time of issuance.

16. The Pre-Penalty Notice was delivered on March 12, 2008. HNC did not provide a written response to the Pre-Penalty Notice.

17. On September 17, 2009, HUD issued a second Pre-Penalty Notice to Respondents for HNC's failure to submit the Project's 2006, 2007, and 2008 financial reports. This notice was also consistent with the requirements of 24 C.F.R. § 30.70.

18. The second Pre-Penalty Notice was delivered on September 21, 2009. Respondents did not provide a timely written response to this notice, either. (A purported response was provided on or about April 7, 2010, by a third party, representing a potential purchaser for the Project.)

19. The appropriate HUD authority reviewed the Pre-Penalty Notices and considered the factors listed in 24 C.F.R. § 30.80, and determined to seek a civil money penalty for each violation. 24 C.F.R. § 30.85(a).

20. HUD issued two copies of the Complaint to Respondents on July 19, 2011. One was sent to the mailing address in Skokie, Illinois, where the two Pre-Penalty Notices were successfully delivered. The second copy was sent to a Kenneth Ashman in Chicago, Illinois, asserted by HUD in its Motion to be counsel for Respondents.

21. The copy of the Complaint mailed to Skokie, Illinois was returned undelivered. The copy to Kenneth Ashman was successfully delivered on July 31, 2011.

22. On August 2, 2011, the same individual who submitted the late written response to the second Pre-Penalty Notice (see supra, No. 18) contacted Government Counsel via telephone and acknowledged receipt of the Complaint.

23. Respondents did not submit a hearing request within the mandated 15-day period, nor answer the Complaint within the mandated 30-day period, nor respond to the Court's Order to Show Cause.

Imposition of Civil Penalties

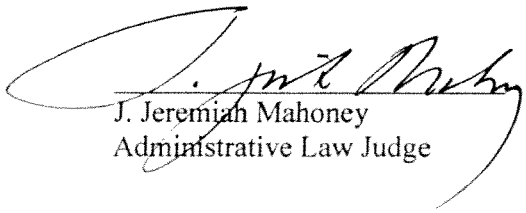
As Respondents have received but failed to timely respond to HUD's Complaint and to this Court's Order to Show Cause, they are in default. 24 C.F.R. § 26.41(a). The applicable regulation provides that upon default, "[t]he penalty proposed in the complaint shall be set forth in the default order and shall be immediately due and payable by respondent without further proceedings." 24 C.F.R. § 26.41(c).

The penalties proposed in the Complaint against Respondents for HNC's failure to timely submit the Project's financial reports are within the limits authorized by law.[1] The proposed penalties are: for fiscal year 2006, $15,000; for fiscal year 2007, $15,000; and for fiscal year 2008, $10,000, for a total of $40,000 in civil money penalties.

Accordingly, it is **ORDERED**:

1. Pursuant to the foregoing, Respondents are hereby found in **DEFAULT**, and the **GOVERNMENT'S MOTION FOR DEFAULT JUDGMENT** is **GRANTED**; and,

2. Respondents, jointly and severally, shall pay HUD a total of **$40,000** in civil money penalties, such amount being due and payable immediately, without further proceedings.



J. Jeremiah Mahoney
Administrative Law Judge

Notice of Appeal Rights. This Order constitutes final agency action. 24 C.F.R. § 26.41(b). Judicial review of this judgment may be sought pursuant to 12 U.S.C. § 1735f-15(e).

[1] Section 537 of the National Housing Act authorizes a civil money penalty of up to $25,000 for each failure to timely submit the required annual financial reports. 12 U.S.C. § 1735f-15(c)(2). Effective March 8, 2007, the maximum penalty became $37,500 per violation. 24 C.F.R. § 30.45(g) (2007); see also 72 Fed. Reg. 5586 (2007).