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

In the Matter of:	)	
	)	
Central City Housing Development Corporation,	)	**HUDALJ: 10-F-020-CMP-7**
	)	**OGC Case Number: 09-053-CMF**
Respondent.	)	

DEFAULT JUDGMENT AND ORDER

I. Procedural Background

The Secretary of the United States Department of Housing and Urban Development ("HUD") instituted this action by filing a Complaint for Civil Money Penalties ("Complaint" and "Compl."), dated January 25, 2010, against Central City Housing Development Corporation ("Respondent"), in its capacity as the mortgagor and owner of Satchmo Plaza, a 34-unit elderly housing development ("the Project"). The Complaint alleges that Respondent failed to submit timely complete audited annual financial reports ("AFRs") concerning the Project for the fiscal years ending on June 30, 2007, and June 30, 2008, resulting in two counts of violation of Section 202a of the Housing Act of 1959, 12 U.S.C. § 1701q-1 ("Housing Act"), and seeks to impose a civil money penalty of $75,000 therefor.

Further, the Complaint states in pertinent part in Paragraphs 43, 44 and 47 that --

> 43. Respondent may request a hearing before an administrative law judge. The request must be in writing and submitted to HUD and the Office of Administrative Law Judges no later than fifteen (15) days following the receipt of this Complaint. 24 CFR § 30.90(a).
>
> 44. If Respondent timely requests a hearing, Respondent shall file a written answer to this Complaint, if any, with the Docket Clerk within thirty (30) days of receipt of this Complaint. *See* 24 CFR §§ 26.38 and 30.90(b).
>
> [addresses and service instructions omitted]
>
> 47. If no written answer is submitted by the Respondent, the

> Secretary or designee will file a Motion for Default Judgment pursuant to 24 CFR §§ 26.41 and 30.90(c). If the default judgment is issued, the Respondent waives any right to a hearing on the allegations in the Complaint and the civil money penalties shall be immediately due and payable. 24 CFR § 26.41(c).

HUD's Office of Administrative Law Judges ("OALJ") notified Respondent, in a letter dated January 27, 2010, that if it wanted to contest the imposition of the penalties, it "must submit a request for a hearing no later than 15 days following [] receipt of the Complaint," that if it has requested a hearing on time it has "a total of 30 days from [] receipt of the Complaint to file a written answer" and that it "may also submit to this Office a request for an extension of time beyond this 30-day period . . . ."

Respondent submitted a letter, dated February 11, 2010, and filed on February 23, 2010, wherein it made a "formal request for a formal hearing."

On February 24, 2010, HUD Administrative Law Judge Alexander Fernandez sent the parties a Notice of Disqualification, to which HUD responded with a request that the case be reassigned. In a letter dated March 10, 2010, the Director of the HUD OALJ reassigned the case to the United States Environmental Protection Agency's Office of Administrative Law Judges.[1] The undersigned was officially designated to preside over this case on March 11, 2010.

On April 7, 2010, HUD served on Respondent a Motion for Default Judgment ("Motion" and "Mot."), pursuant to 24 C.F.R. §§ 26.41 and 30.90(c), on grounds that Respondent failed to submit timely a response to the Complaint. The Motion requests that a default decision be issued against Respondent for civil money penalties in the amount of $75,000.

To date, no answer to the Complaint or response to the Motion has been filed.

II. Applicable Procedural Rules

The rules governing proceedings on complaints issued by HUD for civil money penalties are 30 C.F.R. Parts 26 and 30 ("Rules"). The Rules at Part 30 provide in pertinent part that "[i]f the respondent desires a hearing before an administrative law judge, the respondent shall submit a request for hearing to HUD and the Office of Administrative Law Judges no later than 15 days following receipt of the complaint, as required by statute." 24 C.F.R. § 30.90(a). The Rules provide further that "[i]n any case in which respondent has requested a hearing, the respondent

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[1] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the United States Department of Housing and Urban Development pursuant to an Interagency Agreement effective for a period beginning March 4, 2010.

shall serve upon HUD and file with the Office of Administrative Law Judges a written answer to the complaint within 30 days of receipt of the complaint, unless such time is extended by the administrative law judge for good cause." 24 C.F.R. § 30.90(b). The Rules also provide that "[i]f no response is submitted, then HUD may file a motion for default judgment, together with a copy of the complaint, in accordance with [the Rules at Part 26]. 24 C.F.R. § 30.90(c).

In turn, Part 26 provides as follows:

> § 26.41 Default.
>
> (a) General. The respondent may be found in default, upon motion, for failure to file a timely response to the Government's complaint. The motion shall include a copy of the complaint and a proposed default order, and shall be served upon all parties. The respondent shall have 10 days from such service to respond to the motion.
>
> (b) Default order. The ALJ shall issue a decision on the motion within 15 days after the expiration of the time for filing a response to the default motion. If a default order is issued, it shall constitute the final agency action.
>
> (c) Effect of default. A default shall constitute an admission of all facts alleged in the Government's complaint and a waiver of respondent's right to a hearing on such allegations. The 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.

III. Motion for Default

Attached to the Motion is the Declaration of Nilda Gallegos (records custodian for filings in civil money penalties cases brought by HUD), dated April 6, 2010 ("Decl."). Ms. Gallegos states that the Complaint was mailed, via certified mail, return receipt requested, to Respondent on January 25, 2010, and was delivered on February 10, 2010, as evidenced by the USPS Track and Confirm results page attached to the Motion as Exhibit ("Ex.") B. Mot. Ex. B; Decl. ¶¶ 3-4.

Pursuant to Section 30.85(d) of the Rules, a complaint "shall be served on the respondent by first class mail, personal delivery, or other means." 24 C.F.R. § 30.85(d). Certified mail, return receipt requested, qualifies as "other means." *Id.* The Rules at Part 30 do not include requirements as to proof of service of the complaint. However, the procedural rules at Part 26 (for hearings under Part 30) provide that "[s]ervice may be made by delivery, first-class mail, overnight delivery, facsimile transmission or electronic means," and that "[d]ocuments shall be served upon a party's address of residence or principal place of business." 24 C.F.R. §§

26.30(b), 30.1, 30.95. The Rule provides further that "[i]f service is by . . . overnight delivery . . . or electronic means, service is complete upon deposit in the mail or upon electronic transmission." 24 C.F.R. § 26.30(b).

In its letter requesting a hearing, dated February 11, 2010, Respondent acknowledges receipt of the HUD OALJ's letter dated January 27, 2010, which was sent to "Mr. Harry Cantrell, President, Central City Development Corporation, 2020 Jackson Avenue, New Orleans, LA 70113." The Complaint and the Motion were mailed to this same address. The documents of record show that Respondent was properly served with the Complaint and the Motion in accordance with the Rules.

Thirty days after February 10, 2010, when Respondent received the Complaint, was Friday, March 12, 2010. To date, no answer to the Complaint has been filed, and Ms. Gallegos asserts that besides Respondent's letter requesting a hearing, she has not received a response to the Complaint or any other pleading or correspondence from Respondent. Decl. ¶ 7.

A question arises as to whether a request for a hearing constitutes a "response" within the meaning of 24 C.F.R. §§ 30.90(c) and 26.41, which authorizes a motion for default and finding of default when no "response" is filed. The term "response" is defined in 24 C.F.R. § 26.29 as "the written response to a complaint, admitting or denying the allegations in the complaint and setting forth any affirmative defenses and mitigating factors or extenuating circumstances." If a request for hearing without any subsequent answer constituted such a response, then HUD would be precluded indefinitely from filing a motion for default where a request for hearing is filed but no answer is filed, which is an absurd result. Therefore, it is concluded that a failure to file a timely "answer" under 24 C.F.R. § 30.90(b), even where a request for hearing is filed, is a sufficient basis for a finding of default. To find Respondent in default where so much time has elapsed since the answer to the Complaint was due is particularly appropriate.

It is concluded that Respondent is in default for its failure to file an answer to the Complaint within the time limits set out in 24 C.F.R. § 30.90(b). Respondent's default constitutes an admission of all facts alleged in the Complaint and a waiver of its right to a hearing on such allegations. 24 C.F.R. § 26.41.

Accordingly, HUD's Motion for Default Judgment is granted, based upon the entire record and the following findings and conclusions.

IV. Findings of Fact

1. Respondent is the mortgagor and owner of the Project, Satchmo Plaza, a 34-unit elderly housing development located in New Orleans, Louisiana, and financed by a capital advance pursuant to Section 202 of the Housing Act, 12 U.S.C. § 1701q. Compl. ¶¶ 1, 3.

2. Pursuant to Section 202a of the Housing Act, as amended by 42 U.S.C. § 3531, Pub.L. 101-235 (Dec. 15, 1989), 12 U.S.C. § 1701q-1, the Secretary of HUD may impose a civil money penalty on a mortgagor or property that has a mortgage pursuant to Section 202 of the Housing Act for any "knowing and material violations of the regulatory agreement executed by the mortgagor, as follows:"

> . . . (J) Failure to furnish the Secretary, by the expiration of the 60-day period beginning on the 1st day after the completion of each fiscal year, with a complete annual financial report . . . unless the Secretary has approved an extension of the 60-day period . . .

12 U.S.C. § 1701q-1(c)(1)(J); Compl. ¶¶ 5-6.

3. Pursuant to 24 C.F.R. § 30.45(f), HUD may initiate a civil money penalty action against any mortgagor of a section 202 property who knowingly and materially takes any of the actions listed in 12 U.S.C. § 1701q-1(c)(1). Compl. ¶ 7.

4. On March 7, 1980, Respondent executed a Regulatory Agreement ("Agreement") with HUD in consideration for HUD's endorsement of a direct loan and mortgage for the Project under Section 202 of the Housing Act, 12 U.S.C. § 1701q. Compl. ¶ 12.

5. Paragraph 11(f) of the Agreement requires as follows:

> Within sixty (60) days following the end of each fiscal year HUD 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 HUD, prepared and certified to by an officer of the mortgagor and, when required by HUD, prepared and certified by a Certified Public Accountant, or other person acceptable to HUD.

Compl. ¶ 13.

6. HUD informed Respondent, as required by 24 C.F.R. § 30.70, in a Prepenalty Notice dated August 14, 2008, that HUD was considering seeking civil money penalties against Respondent based on its failure to submit an audited AFR to HUD for the fiscal year ending June 30, 2007. Compl. ¶ 20. Respondent responded on November 12, 2008. Compl. ¶ 21.

7. HUD informed Respondent, as required by 24 C.F.R. § 30.70, in a Superseding Prepenalty Notice dated August 27, 2009, that HUD was considering seeking civil money penalties against Respondent based on its failure to submit audited AFRs to HUD for the fiscal years ending June 30, 2007, and June 30, 2008. Compl. ¶ 22. Respondent responded on September 29, 2009. Compl. ¶ 23.

8. 31 U.S.C. § 7502(h)(2)(B) provides that non-Federal entities that expend a total amount of federal awards greater than $500,000 each year have nine (9) months to submit annual AFRs after the end of the period audited. Compl. ¶ 16; Circular No. A-133, Subpart B.

9. Respondent's fiscal year ends on June 30th of each year. Compl. ¶ 14. Therefore, Respondent was required to furnish audited AFRs to HUD on or before March 30, 2008, for the fiscal year ending June 30, 2007, and on or before March 30, 2009, for the fiscal year ending June 30, 2008. Compl. ¶ 16.

10. Respondent was required to file each audited AFR electronically in accordance with 24 C.F.R. § 5.801(b)(2). Compl. ¶ 17.

11. As of the date of the Complaint, Respondent had not filed audited AFRs concerning the Project for either the fiscal year ending June 30, 2007, or the fiscal year ending June 30, 2008. Compl. ¶ 18.

V. Conclusions of Law

1. Respondent is required, within nine (9) months after the end of the period audited, to submit annual AFRs for the Project. Compl. ¶ 16; 31 U.S.C. § 7502(h)(2)(B); Circular No. A-133.

2. Respondent's failure to timely furnish HUD with a complete audited AFR for the Project on or before March 30, 2008, for the fiscal year ending June 30, 2007, is a violation of Section 202a of the Housing Act, 12 U.S.C. § 1701q-1(c)(1)(J). Compl. ¶ 31.

3. Respondent's failure to timely furnish HUD with the with a complete audited AFR for the Project on or before March 30, 2009, for the fiscal year ending June 30, 2008, is a violation of Section 202a of the Housing Act, 12 U.S.C. § 1701q-1(c)(1)(J). Compl. ¶ 37.

4. Because Respondent executed an Agreement with HUD that described, in paragraph 11(f), Respondent's obligation to file audited AFRs in the time and manner prescribed by the agency, and had received notice of its failure to file timely AFRs for the Project in the Prepenalty Notice and Superseding Prepenalty Notice, and because Respondent had general notice of this obligation through the publication of statutes, regulations, and HUD Handbooks, its failure to timely submit audited AFRs for the Project was a "knowing" violation of its Agreement and the Housing Act, 12 U.S.C. § 1701q-1(c)(1)(J). 24 C.F.R. § 30.10; Compl. ¶¶ 32-33, 38-39.

5. HUD relies on the timely submission of audited AFRs to monitor the fiscal health of Section 202 projects and to ensure that no unauthorized or improper expenditures have been made that could jeopardize the projects and the provision of decent, safe, and sanitary housing for their residents. The data supplied by audited AFRs can influence how HUD will manage the Project, including whether to issue a decision declaring a default under the Project's Agreement. Because

of these considerations, Respondent's failure to timely submit audited AFRs for the Project was a "material" violation of its Agreement and the Housing Act, 12 U.S.C. § 1701q-1(c)(1)(J). 24 C.F.R. § 30.10; Compl. ¶¶ 34, 40.

6. Respondent's knowing and material failure to submit audited AFRs for the Project for fiscal years ending June 30, 2007, and June 30, 2008, as mandated by the Agreement, the Housing Act, 12 U.S.C. § 1701q-1, and its implementing regulations, warrants the imposition of civil money penalties against Respondent, pursuant to 24 C.F.R. § 30.45(f) and 12 U.S.C. § 1701q-1(c)(1)(J). Compl. ¶¶ 35, 41.

VI. The Penalty

In determining the amount of penalty, "consideration shall be given to such factors as the gravity of the offense, any history of prior offenses . . ., ability to pay the penalty, injury to the tenants, injury to the public, benefits received, deterrence of future violations, and such other factors as the Secretary may determine in regulations to be appropriate." 12 U.S.C. § 1701q-1(d)(3); 24 C.F.R. § 30.80.[2] The maximum penalty for each violation is $37,500. 24 C.F.R. § 30.45(g); Compl. ¶¶ 8-9.

In the Complaint, HUD included an analysis of these factors as applied to the facts of this case, and proposed a maximum penalty of $37,500 for each count, for a total penalty of $75,000. Compl. ¶¶ 29, 35, 41.

Upon a finding of 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). Accordingly, the $75,000 penalty proposed by HUD in the Complaint is imposed herein on Respondent.

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[2] The Rules add the "degree of the violator's culpability" as a factor to consider. 24 C.F.R. § 30.80(h).

ORDER

1. For failing to respond to the Complaint in a timely manner as indicated above, and upon motion filed, Respondent is deemed to have admitted all the allegations in the Complaint, waived its right to a hearing on those allegations, and is hereby found in **DEFAULT**.

2. Pursuant to 12 U.S.C. § 1701q-1(c)(1)(J) and 24 C.F.R. § 30.45(f), Respondent is found to have knowingly and materially violated Section 202a of the Housing Act of 1959, 12 U.S.C. § 1701q-1, *et seq.*, and is subject to the imposition of civil money penalties.

3. Respondent shall pay to HUD a civil money penalty in the amount of $75,000, such amount due and payable immediately without further proceedings. 24 C.F.R. § 26.41(c).

4. This order shall constitute a final agency action in accordance with 24 C.F.R. § 26.41(b).

Susan L. Biro
Chief Administrative Law Judge
United States Environmental Protection Agency

Dated: April 27, 2010
Washington, D.C.

Pursuant to 24 C.F.R. § 26.41(b), this Default Order constitutes "the final agency action" and pursuant to 12 U.S.C. § 1701q-1(d)(4), "shall not be subject to review." However, in accordance with 12 U.S.C. § 1701q-1(e), Respondent may file, within 20 days after the entry of this Order, a written petition with the appropriate United States Court of Appeals requesting that the Order imposing civil money penalties be modified or set aside.