

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

In the Matter of:)	
)	
COASTAL APARTMENTS, LLC,)	
)	
and)	HUDALJ 10-E-076-CMP/16
)	
ROBERT W. KIMBALL,)	
)	
Respondents.)	
)	

DEFAULT JUDGMENT AND ORDER

I. Procedural History

On March 26, 2010, 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”) against Coastal Apartments, LLC, and Robert W. Kimball (“Respondents”), alleging Respondents failed to submit for five consecutive fiscal years (2004-2008) audited financial reports for The Lodge Apartments, in violation of Section 537 of the National Housing Act of 1934, as amended (“NHA”), 12 U.S.C. § 1735f-15. The Complaint includes a prayer for relief for civil money penalties in the aggregate amount of \$172,500, as authorized by 12 U.S.C. § 1735f-15(c)(2) and 24 C.F.R. § 30.45(g). The regulations governing this administrative proceeding can be found at 24 C.F.R. Parts 26 and 30 (“Rules”).

The Complaint informed Respondents, *inter alia*, that --

V. NOTICE OF PROCEDURE

27. Respondents may submit a written request for a hearing before an administrative law judge to HUD and the Office of Administrative Law Judges no later than fifteen (15) days following receipt of the complaint. This mandated period cannot be extended. 24 C.F.R. §30.90(a).

28. If the Respondents have requested a hearing before an administrative law judge, the Respondents must also file an Answer to the Complaint within 30 days of receipt of the Complaint unless the time is extended by the Administrative Law Judge for good cause. 24 C.F.R. § 30.90(b).

* * * *

30. If both a request for hearing and answer are not submitted by Respondents by the dates required, then Petitioner will file a Motion for Default Judgment, pursuant to 24 C.F.R. §§ 26.41 and 30.90(c). If the default judgment is issued, Respondents waive any right to a hearing on the allegations in the Complaint and the civil money penalties shall be immediately due and payable. See 24 C.F.R. § 26.41(c). If a default order is issued, it shall constitute final agency action.

Compl. ¶¶ 27-28, 30.

On May 12, 2010, HUD filed a Motion for Default Judgment (“Motion”), pursuant to 24 C.F.R. § 30.90(c), requesting that a default decision be issued against Respondents and that relief be ordered in accordance with the prayer for relief set forth in the Complaint.

To date, neither Respondent has filed a request for a hearing, an answer to the Complaint, or a response to HUD’s Motion.

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 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

In its Motion for Default, HUD states that Respondents received the Complaint on March 30, 2010, via Federal Express service, and presents in support thereof its cover letters dated March 26, 2010 addressed to each Respondent (Mot. Ex. 1) and two Federal Express Tracking Orders and Results, evidencing delivery of the Complaints to Respondents on March 30, 2010 (Mot. Ex. 2). Also attached to the Motion is the Declaration of L.P. Cooper, Jr. ("Declaration"), Attorney for the Government, dated May 11, 2010. Mot. Ex. 3. In the Declaration, Mr. Cooper states that he is familiar with the facts in the case, that the Complaint was issued to Respondents at "the last known address," and that he has not received "any response or any pleading" from Respondents. *Id.*

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). Federal Express, the method employed by the Government to serve Respondents with the Complaint, qualifies as "other means." *Id.*; Mot. Ex. 1, 2, 3. The Rules at Part 30 do not require proof of service of a complaint, however, Rule 26.30, one of the procedural rules for Part 30 hearings, provides that "[s]ervice is complete when handed to the person or delivered to the person's office or residence and deposited in a conspicuous place." 24 C.F.R. §§ 30.1, 30.95, 26.30(b). The documents of record show that Respondents were properly served with the Complaint in accordance with the Rules on March 30, 2010. The record also evidences that, to date, neither this Tribunal nor HUD has received any response to the Complaint or Motion from either Respondent.

The undersigned has discretion as to decide whether to grant or deny a request for default judgment as the Rules state that a respondent who fails to file a timely response "*may* be found in default" (24 C.F.R. § 26.41(a) (emphasis added)), and it has been held that default judgment is disfavored by law, and that all doubts should be resolved in favor of determination on the merits. *Sec'y o/b/o Davis v. Ucci*, HUDALJ 02-94-0016-8 (HUD ALJ March 17, 1995). However, in the present case, given the evidence of service and Respondents' complete failure to respond to the Complaint and the Motion, a finding of default is deemed warranted.

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

Accordingly, the Motion for Default is **GRANTED**, based upon the entire record and the following Findings of Fact and Conclusions of Law.

IV. Findings of Fact and Conclusions of Law as to Liability

1. The Secretary of the Department of Housing and Urban Development (“HUD”) has authority under the National Housing Act (“NHA”), 12 U.S.C. § 1735f-15, to impose a civil money penalty on any multifamily property mortgagor and/or member of such mortgagor with a mortgage insured by HUD pursuant to the NHA, who violates the NHA by knowingly and materially failing to furnish HUD with a complete annual financial report within ninety (90) days following the completion of each fiscal year, “in accordance with requirements prescribed by the Secretary.” Compl. ¶ 5; 12 U.S.C. §§ 1735f-15(c)(1)(A), (c)(1)(B)(x).
2. Respondent Coastal Apartments, LLC (“Respondent Mortgagor”) was the owner and mortgagor of The Lodge Apartments, a multifamily property located in Pascagoula, Mississippi (the “Property” or “Project”), financed with the proceeds of a \$4,800,000.00 loan (FHA No. 065-11026-PM) insured by HUD under Section 223(f) of the NHA, 12 U.S.C. § 1715n(f) (“the loan”). Compl. ¶ 2; *see also* Regulatory Agreement dated February 14, 2003, attached to Complaint. Respondent Mortgagor is a “[l]iable party” that may be subject to civil money penalties pursuant to 12 U.S.C. § 1735f-15(c)(1)(A)(i) and 24 C.F.R. § 30.45(c)(1).
3. Respondent Robert W. Kimball, was the Operating Manager and a “Member” of Respondent Mortgagor when the loan was made to Respondent Mortgagor. Compl. ¶ 3. As such, Robert W. Kimball (“Respondent Member”) is a “[l]iable party” who may be subject to civil money penalties pursuant to 12 U.S.C. § 1735f-15(c)(1)(A)(v) and 24 C.F.R. § 30.45(c)(5).
4. On February 14, 2003, Respondent Member, on behalf of Respondent Mortgagor, as the “Owner” of the Property, entered into a Regulatory Agreement with HUD, in consideration of HUD’s insurance endorsement of the loan. Compl. ¶ 12; *see* Regulatory Agreement (preamble) and Signature Riders.
5. Pursuant to authority under 12 U.S.C. § 1735f-15(c)(1)(B)(x), the Secretary prescribed requirements for filing annual financial reports in Paragraph 9(e) of the Regulatory Agreement, which provides, in part:

Within sixty (60) days following the end of each fiscal year the Secretary [of 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 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.

Compl. ¶ 13; Regulatory Agreement at 5.

6. Pursuant to 24 C.F.R. §§ 5.801(a)(4) and (c)(2), the time period within which Respondents are required to file such audited financial reports was extended to ninety (90) days following the end of each fiscal year. Compl. ¶ 13.
7. The fiscal year for the Mortgagor/Project ends on December 31st of each year; therefore, each annual financial report required to be filed with HUD under the Regulatory Agreement and pursuant to the authority in 12 U.S.C. § 1735f-15(c)(1)(B)(x), is due on or before March 31st of the following year. Compl. ¶¶ 14-15.
8. Pursuant to 24 C.F.R. § 5.801(b)(1), each annual financial report for the Mortgagor/Project is required to be prepared in accordance with Generally Accepted Accounting Principles defined by HUD in supplementary guidance. Compl. ¶ 16. Pursuant to 24 C.F.R. § 5.801(b)(2), each financial report for the Project is required to be filed electronically. Compl. ¶ 17.
9. Respondents never filed with HUD the annual financial reports for the fiscal years 2004, 2005, 2006, 2007 and 2008, as required by the Regulatory Agreement and pursuant to 12 U.S.C. § 1735f-15(c)(1)(B)(x). Compl. ¶¶ 18-19.
10. HUD notified each Respondent by letter dated June 1, 2009 (“Pre-Penalty Notices”), that it was considering seeking civil money penalties based on the failure to submit annual financial reports in a appropriate and timely manner for the Project’s fiscal years 2004 through 2008. Compl. ¶¶ 20-22; *see* Pre-Penalty Notices attached to Complaint. The Notices informed Respondents of the opportunity to respond to the allegations in the Notices within thirty (30) days after receipt of the Notices, which occurred on June 3, 2009. Compl. ¶ 22; *see* Federal Express receipts attached to Complaint.
11. Respondents did not respond to the Notices. Compl. ¶ 23.
12. Because Respondents were notified, both in the Regulatory Agreement they executed in 2003, and in the Pre-Penalty Notices dated June 1, 2009, of their legal responsibility to annually file annual financial reports in accordance with the requirements set forth by

HUD, Respondents “knowingly” failed to file annual financial reports for the five consecutive fiscal years 2004 through 2008, in violation of the Regulatory Agreement and 12 U.S.C. § 1735f-15(c)(1)(B)(x). *See*, 12 U.S.C. § 1735f-15(h); 24 C.F.R. § 30.10; Regulatory Agreement; Pre-Penalty Notices.

13. Because Respondents failed to file *any* annual financial reports for the Project for the five consecutive fiscal years, Respondents “materially” failed to file annual financial reports in violation of the Regulatory Agreement and 12 U.S.C. § 1735f-15(c)(1)(B)(x). *See*, 24 C.F.R. § 30.10.
14. Respondents’ knowing and material failures to file financial reports for the Project’s fiscal years 2004, 2005, 2006, 2007 and 2008, constitute five (5) violations of the Regulatory Agreement and 12 U.S.C. § 1735f-15(c)(1)(B)(x) and provides grounds for imposing civil money penalties therefor pursuant to that section and 24 C.F.R. § 30.45(c)(1) and (5).

V. Findings of Fact and Conclusions of Law as to Penalty

1. For each violation of 12 U.S.C. § 1735f-15(c) occurring on or after April 16, 2003, the maximum penalty the Secretary may impose is \$32,500. Compl. ¶ 7; 24 C.F.R. § 30.45(g) (2003), 68 Fed. Reg. 12,786, 12,788 (March 17, 2003). For each such violation occurring on or after March 8, 2007, the maximum penalty the Secretary may impose is \$37,500. Compl. ¶ 8; 24 C.F.R. § 30.45(g) (2007), 72 Fed. Reg. 5588 (February 6, 2007).
2. The filing deadlines for Respondents’ annual financial reports for fiscal years 2004 and 2005 were March 31st of 2005 and 2006, respectively, and thus each of the two violations relating to their failure to file such reports are subject to a maximum penalty of \$32,500. The filing deadlines for Respondents’ annual financial reports for fiscal years 2006, 2007 and 2008 were March 31st of 2007, 2008 and 2009, respectively, and thus each of the three violations relating to their failure to file such reports are subject to a maximum penalty of \$37,500.
3. In determining the amount of penalty to be imposed under 12 U.S.C. § 1735f-15(c), consideration is given to such factors as the gravity of the offense, any history of prior offenses, the ability to pay the penalty, injury to the public, any benefits received by the violator, extent of potential benefit to other persons, deterrence of future violations, the degree of the violator’s culpability, any injury to tenants, and such other factors as justice may require. 12 U.S.C. § 1735f-15(d)(3); 24 C.F.R. § 30.80; Compl. ¶ 16.
4. The Complaint at paragraph 24 sets forth HUD’s consideration of the foregoing factors as they relate to the violations and facts alleged in this action. Among the facts considered by HUD in determining the appropriate penalty to seek for the violations was that the

mortgage loan for the Property/Project went into financial default in April 2007, that HUD paid \$3,494,868 in insurance claims to the mortgagee as a result, and that the property was sold at foreclosure for \$2,430,000, resulting in a net loss to HUD of \$1,038,017. HUD also considered that Respondents financially benefitted from the violations by avoiding incurring the costs associated with preparing the annual audited financial reports. Compl. ¶ 16.

5. Upon consideration of the factors as applicable to the violations alleged in this case, HUD seeks in the Complaint an order imposing civil money penalties against Respondent Mortgagor and Respondent Member, jointly and severally, totaling \$172,500, representing a penalty of \$32,500 for the *three* violations for years 2004, 2005 *and* 2006, and a penalty of \$37,500 for each of the two violations for the years 2007 and 2008. Compl. ¶¶ 25-26, 32.
6. The Rules provide that 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. Accordingly, the \$172,500 penalty proposed by the Government in the Complaint is imposed herein on Respondents, jointly and severally, pursuant to 12 U.S.C. § 1735f-15(c)(1)(B)(x) and 24 C.F.R. § 30.45(c).

ORDER

1. HUD's Motion for Default Judgment is hereby **GRANTED**, and Respondents are hereby found in **DEFAULT**, and are deemed to have admitted all the allegations in the Complaint and waived their right to a hearing thereon;
2. Civil money penalties in the aggregate amount of **One Hundred Seventy Two Thousand Five Hundred Dollars (\$172,500)** are hereby assessed, jointly and severally, against Respondents Coastal Apartments, LLC, and Robert W. Kimball, for the five violations of 12 U.S.C. § 1735f-15(c)(1)(B)(x) for which they were found liable in this action. **Such amount is due and payable immediately without further proceedings.** 24 C.F.R. § 26.41(c).
3. This Order shall constitute the **final agency action** in accordance with 24 C.F.R. § 26.41(b).



Susan L. Biro
Chief Administrative Law Judge
United States Environmental Protection Agency¹

Dated: June 7, 2010
Washington, D.C.

In accordance with 12 U.S.C. § 1735f-15(d)(2), “the imposition of the penalty shall constitute a final and unappealable determination,” except that review of the imposition of penalties may had by filing, within twenty (20) days after of this Order, a petition with the appropriate United States Court of Appeals. 12 U.S.C. § 1735f-15(e). Further, if Respondents fail to comply with this Order, the Secretary may request the Attorney General of the United States to bring an action against them in an appropriate United States district court to obtain a monetary judgment. The monetary judgment may, in the court's discretion, include the attorneys fees and other expenses incurred by the United States in connection with the action. 12 U.S.C. § 1735f-15(f).

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.

**In the Matter of Coastal Apartments, LLC, and Robert W. Kimball, Respondents.
Docket No. HUDALJ-10-E-076-CMP/16**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Default Judgment and Order**, dated June 7, 2010, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original By Hand Delivery to:

HUD Chief Docket Clerk
c/o The Honorable Susan L. Biro
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Dated: June 7, 2010
Washington, DC