

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

In the Matter of:

**THE HAWAII PUBLIC HOUSING
AUTHORITY,**

Respondent.

HUDALJ : 09-F-033-CMP-9

April 15, 2009

RULING ON MOTION FOR DEFAULT JUDGMENT

This case arises from a Complaint by the United States Department of Housing and Urban Development (“HUD” or the “Government”) for civil money penalties against the Hawaii Public Housing Authority (“Respondent” or “HPHA”) for two alleged violations of the National Housing Act.

Legal Framework

The Secretary of HUD is authorized to impose civil money penalties against a mortgagor of HUD-insured property that includes five or more living units pursuant to 12 U.S.C. § 1735f-15(c)(1)(A)(i). A penalty against such a liable party may be imposed for “knowingly and materially” failing to:

furnish the Secretary, by the expiration of the 90-day period beginning on 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); see 24 C.F.R. § 30.45(c).

The term “knowingly” means “having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section.” 12 U.S.C. §1735f-15(h); 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 for each violation is \$37,500. 24 C.F.R. § 30.45(g).

In determining the amount of a civil money 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. §1735f-15(d)(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 the penalty shall constitute a final and unappealable determination.” 12 U.S.C. § 1735f-15(d)(2). Specifically, 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 shall constitute the final agency action. 24 C.F.R. § 26.41(b).

Procedural History

HUD provided Respondent with a Prepenalty Notice, dated August 29, 2008, pursuant to 24 C.F.R. § 30.70. Respondent received the Prepenalty Notice on September 8, 2008, but failed to file a response within 30 days.

On January 22, 2009, the Government mailed a Complaint for Civil Money Penalties to Chad Yaniguchi, Executive Director, Hawaii Public Housing Authority at 1002 N. School Street, Honolulu, Hawaii 96817. The Complaint was mailed via United Parcel Service Next Day Air, and was delivered to and received by Respondent on January 23, 2009. HUD filed a copy of the Complaint with this Court on March 6, 2009.

Under 12 U.S.C. § 1735f-15(d)(2), Respondent 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). Respondent requested neither hearing nor filed an answer in the allotted time.

Because Respondent failed to comply with 12 U.S.C. § 1735f-15(d)(2) and its implementing regulations, HUD filed a motion for default judgment (“Motion for Default”) on March 6, 2009, pursuant to 24 C.F.R. §§ 26.41(a) and 30.90(b). The Motion for Default was also mailed via United Parcel Service to Chad Yaniguchi at the same address as the Complaint. Pursuant to 24 C.F.R. § 26.41(a), Respondent had ten days from service of the Motion for Default to respond. Respondent again failed to submit a response to either the Complaint or HUD’s Motion for Default.

On March 18, 2009, this Court ordered Respondent to Show Cause as to why the Government’s Motion for Default should not be granted (“Show Cause Order”). In that Show Cause Order, the Court instructed Respondent to specifically address why “a Response to HUD’s Complaint has not been received and ... [why] a Response to HUD’s Motion for Default Judgment has not been received.” On April 2, 2009, Respondent timely filed its response to the Court’s Show Cause Order.

On April 15, 2009, this Court ruled that HPHA had failed to show cause as to why it failed to respond to the Complaint and the Motion for Default Judgment. Therefore, a ruling on the Motion for Default Judgment is ripe.

Findings of Fact

1. The factual findings stated in the Procedural History *supra* are incorporated here by reference.
2. Respondent is the mortgagor/owner of Banyan Street Manor (FHA Project No. 140-35073), a multifamily housing project in Honolulu, Hawaii. (Complaint, ¶¶ 1-2.)
3. On November 16, 1990, Respondent signed a Regulatory Agreement for Insured Multi-family Housing Projects (“Regulatory Agreement”), whereby HUD agreed to insure the mortgage on Banyan Street Manor. (Complaint, ¶¶ 2, 7(a).)
4. As the mortgagor of a multifamily property whose mortgage is insured by HUD, Respondent is a party subject to liability under 12 U.S.C. § 1735f-15(c)(1)(A)(i). (Complaint, ¶ 2.)
5. Pursuant to the Regulatory Agreement, Respondent agreed in pertinent part:

In order to comply with the requirements of the National Housing Act, as amended, and the regulations adopted by the Secretary pursuant thereto, Owners agree for themselves, their successors, heirs, and assigns, that in connection with the mortgaged property and the project

operated thereon and so long as the contract of mortgage insurance continues in effect....

...

12(e) 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.

(Complaint, ¶ 7(a).)

6. The annual financial report for Banyan Street Manor for the fiscal year ending June 30, 2006, was due to HUD on or before October 28, 2006. (Complaint, ¶ 14.)
7. Respondent did not submit the annual financial report for the fiscal year ending June 30, 2006, in a timely manner. (Complaint, ¶ 15.)
8. The annual financial report for Banyan Street Manor for the fiscal year ending June 30, 2007, was due to HUD on or before September 28, 2007. (Complaint, ¶ 17.)
9. Respondent did not submit the annual financial report for the fiscal year ending June 30, 2007, in a timely manner. (Complaint, ¶ 18.)
10. HUD made repeated attempts to obtain submission of these reports via email notices and the Prepenalty Notice. (Complaint, ¶ 7(a).)

Penalty

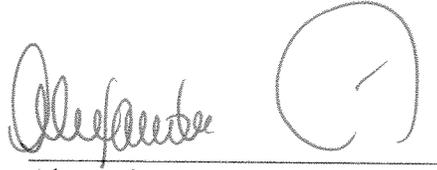
Based on HUD's analysis of the factors listed under 24 C.F.R. § 30.80, HUD proposed a penalty of \$25,000 for each violation, for a total of \$50,000. Therefore, pursuant to 12 U.S.C. § 1735f-15(d)(2) and 24 C.F.R. § 26.41(e), the penalty proposed in the Complaint must be imposed and shall constitute a final and unappealable determination.

Order

Accordingly, it is **ORDERED**:

1. Pursuant to the foregoing, the Government's **MOTION FOR DEFAULT JUDGMENT** is **GRANTED**, and Respondent is hereby found in **DEFAULT**.

2. Respondent **SHALL PAY** HUD a total of **\$50,000** in civil money penalties, such amount being due and payable immediately without further proceedings. 24 C.F.R. § 26.41(c).
3. This Order constitutes the **FINAL AGENCY ACTION**. 24 C.F.R. § 26.41(b); 12 U.S.C. § 1735f-15(d)(2).

The image shows a handwritten signature in cursive script, which appears to read "Alexander Fernandez". To the right of the signature is a circular stamp or mark, possibly a seal or a date stamp, though the details are not clearly legible. The signature and stamp are positioned above a horizontal line.

Alexander Fernández
Administrative Law Judge

Notice of Appeal Right. Judicial review of this decision may be sought pursuant to 12 U.S.C. § 1735f-15(e).

CERTIFICATE OF SERVICE

I hereby certify that copies of the above-entitled RULING ON MOTION FOR DEFAULT JUDGMENT issued by Alexander Fernández, Administrative Law Judge, were sent to the following parties on this 15th of April, 2009, in the manner indicated:


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