UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of:	
EGAE, LLC, and MARLOW FAMILY EXEMPT PERPETUAL TRUST,	18-AF-0227-CM-002
	June 28, 2019
Respondents.	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Currently before this Court is the *United States Department of Housing and Urban Development's Motion for Summary Judgment* ("Motion") filed on November 7, 2018. In the *Motion*, the United States Department of Housing and Urban Development ("HUD") requests that the Court make a finding that EGAE, LLC and Marlow Family Exempt Perpetual Trust (collectively "Respondents") are jointly and severally liable for a civil penalty of $ 222,954 for failing to file audited, annual financial reports for the years 2013, 2014, 2015, 2016, and 2017.

On November 29, 2019, Respondents filed a *Cross-Motion for Summary Judgment* ("Cross-Motion"). In addition, on December 14, 2019, Respondents filed their *Opposition to the U.S. Department of Housing and Urban Development's Motion for Summary Judgment* ("Opposition"). HUD filed a timely response to the *Cross-Motion* on December 13, 2019.

Applicable Law

Standard of Review. Pursuant to 24 C.F.R. § 26.32(l), this Court is authorized to "decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact." The Court may exercise its discretion in application of Rule 56 of the Federal Rules of Civil Procedure. 24 C.F.R. § 26.40(f)(2).

Summary judgment is proper 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, 248 (1986); Fed. R. Civ. P. 56(a). A "genuine" issue exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 249. Additionally, a fact is not "material" unless it affects the outcome of the suit. Id.

Summary judgment is a "drastic device" because, when exercised, it diminishes a party's ability to present its case. Selva & Sons, Inc. v. Nina Footwear, Inc., 705 F.2d 1316, 1323 (Fed. Cir. 1983). Accordingly, the moving party bears the burden of demonstrating the absence of any material issues of fact. See Anderson, 477 U.S. at 256. Rule 56 provides that when a party asserts that a fact cannot be genuinely disputed, that party must: (i) cite to materials in the record; or (ii) show the cited materials do not establish the presence of a genuine dispute. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, the Court's function is not to resolve any questions of material fact, but to ascertain whether any such questions exist. *In re* Beta Dev. Co., HUDBCA No. 01-D-100-D1, at *12 (February 21, 2002). Therefore, when the moving party has carried its burden under Rule 56(c), the nonmoving party may not rest upon mere allegations or denials, but must come forward with "specific facts showing that there is a *genuine* issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (emphasis added) (citing Fed. R. Civ. P. 56(e)).

Civil Money Penalties. The Civil Money Penalty statute, 12 U.S.C. § 1735f-15, authorizes HUD to impose civil penalties against mortgagors who "knowingly and materially" commit certain enumerated violations. Id. at § 1735f-15(b)(1). One such violation is the failure to provide HUD with annual financial statements. Id. at § 1735f-15(c)(1)(B)(x); 24 C.F.R. § 30.45(c). Each such violation may result in a maximum civil money penalty of $ 42,500. 24 C.F.R § 30.55(g). The Secretary, however, may approve an extension to submit financial statements where the mortgagor demonstrates that failure to comply is due to events beyond the control of the mortgagor. Id. at § 17.35f-15(c)

Undisputed Material Facts

Respondent EGAE, LLC is a "for profit" company formed under the laws of Alaska. Respondent EGAE, LLC owns the project known as McKinley Tower Apartments. McKinley Tower Apartments ("the Property") consists of 100 units in a building located in Anchorage, Alaska. Respondent Marlow Family Exempt Perpetual Trust is the sole member of EGAE, LLC, and Mark Marlow is the manager of EGAE, LLC.

In 2005, Respondent EGAE, LLC took out a loan from CW Capital, LLC in the original principal amount of $8,067,000, which was secured by the Property.[1] Repayment of the loan was insured by HUD pursuant to Section 221(d)(4) of the National Housing Act, 12 U.S.C. § 1715(d)(4). In exchange for receiving the benefits of the loan insured by the Secretary, on March 8, 2005, Respondent EGAE entered into a Regulatory Agreement for Multifamily Housing Projects ("Regulatory Agreement") with HUD. The Regulatory Agreement requires, in pertinent part, that Respondent EGAE, LLC submit annual financial reports to HUD at the end of each fiscal year. For fiscal years 2013, 2014, 2015, 2016, and 2017, the annual financial statements for McKinley Tower Apartments were due

[1] The loan is currently held by Walker and Dunlap, LLC. The outstanding principal balance on the loan as of October 21, 2018 was $6,929,475.86.

by the end of March the following year.[2] To date, Respondent EGAE, LLC have failed to file the requisite annual financial statements for fiscal years 2013 through 2017. And, as of October 21, 2018, the HUD-insured loan for the Property has a past due amount of $ 482,806.35.

Discussion

HUD moves for summary judgment in its favor and requests a civil penalty assessment of $ 222,954 against Respondents. In support, HUD claims there is no dispute that Respondents failed to file annual financial reports for fiscal years 2013-2017, or that undisputed facts support a maximum assessment.

In response, Respondents claim that a material fact remains in dispute. Specifically, Respondents allege in their *Opposition* and *Cross-Motion* that HUD erred in the handling of the project by not allowing a Historic Tax Credit investor to affiliate with the project, resulting in an over $ 400,000 loss to Respondents.

I. HUD's Motion for Summary Judgment

HUD claims the standard for summary judgment is met and it is entitled to judgment as a matter of law because the undisputed facts in this case show that Respondents are liable for the knowing and material breach of the Regulatory Agreement.

"The moving party has the initial burden of identifying for the court the portions of the record that it believes demonstrate the absence of any genuine issue of material fact." Cooper v. N. Am. Philips Corp., No. J87-027 Civil, 1989 U.S. Dist. LEXIS 14104, at *7 (D. Alaska Nov. 17, 1989) (citing T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)). As noted *supra*, a mortgagor may be liable for a civil money penalty for knowingly and materially committing a violation enumerated by the Civil Money Penalty statute. 12 U.S.C. § 1735f-15. A violation of the statute includes the failure to provide HUD with audited, annual financial statements. Id. at § 1735f-15(c)(1)(B)(x); 24 C.F.R. § 30.45(c).

The basis for the civil money penalties being sought is Respondents' failure to file audited, annual financial reports to HUD for fiscal years 2013-2017. There is no dispute that Respondents failed to file the financial reports at issue. Respondents stated in their *Answer* to the *Complaint*, "Respondent admits that the audits are late and denies liability associated with the late audits." Accordingly, the Court finds that Respondents failed to file the financial reports, which constitute violations under the Civil Money Penalty statute.

HUD claims Respondents are subject to a civil money penalty for each violation, because Respondents knowingly committed the violations. A mortgagor acts "knowingly" if it has actual knowledge of, acts with deliberate ignorance of, or acts with "reckless disregard for" the prohibited conduct. 12 U.S.C. § 1735f-15(h); see also OLA Props., Inc.

[2] The financial statements were due on March 31, 2014, March 31, 2015, March 30, 2016, March 31, 2017, and March 31, 2018, respectively.

v. United States HUD, 336 F. App'x 419, 422 (5th Cir. 2009) (noting that a mortgagor's failure to familiarize itself with its obligations does not excuse its failure to meet them).

In both the *Complaint* and its *Motion*, HUD notes that the annual financial statement requirement is stated in the Regulatory Agreement that Marc Marlow executed on behalf of Respondent EGAE. In the *Motion*, HUD claims that it repeatedly advised Respondents that they were required to submit the financial reports. In a sworn affidavit submitted with the *Motion*, a HUD employee stated that "multiple efforts were made by my office to obtain compliance from EGAE, LLC and Marlow Family Exempt Perpetual Trust . . . During the last five years, my staff has had numerous telephone conversations with Mr. Marlow, the representative of Respondents, in an effort to achieve compliance with the requirement to file annual audited financial statements." HUD also submitted a letter from Mr. Marlow, written on behalf of EGAE, LLC acknowledging that HUD advised him to perform the audits as soon as possible. Moreover, there is evidence that EGAE last submitted an audited annual financial report for fiscal year 2012 demonstrating that Respondents understood the requirement set forth in the Regulatory Agreement. Accordingly, the Court finds that there is no dispute that Respondents knowingly failed to file financial reports for fiscal years 2013-2017.

HUD also claims Respondents' violations for failing to file financial statements were material. "Material or Materiality" is "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. A determination of "materiality" of a violation "requires a consideration of the eight regulatory factors found in 24 C.F.R. § 30.80." Premier Investments, I, Inc., & Reed, HUDALJ 06-022-CMP, at 5 (H.U.D.A.L.J. June 29, 2007), *available at* https://www.hud.gov/sites/documents/DOC_ 20279.pdf. And, although some factors, such as ability to pay, are not logically related to materiality, others, such as injury to the public and economic benefit to the mortgagor, are logically related to materiality of failure to provide audited annual financial statements. *In re* Parkside Dev. Corp., et al., 2012 HUD ALJ LEXIS 16, at *33 (citing Yetiv v. HUD, 503 F.3d 1087, 1090-91 (9th Cir. 2007)). However, not every factor must be present. Rather, the existence of one factor is sufficient to find materiality. Id.

HUD has demonstrated that Respondents' failure to file is a grave offense. See 24 C.F.R. § 30.80 (listing "gravity of the offense" as a factor to be considered). Respondents' failure to file its financial reports deprived HUD of its ability to monitor the project's financial status. See HUD Handbook 4370.1, Rev-2, Section 1-4B (explaining that audited annual financial statements are important to protect the FHA Insurance Fund.).[3] Respondents admitted repeatedly that the project has experienced financial harm and

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[3] HUD Handbook 4370.1, Rev-2, Section 1-4B further explains that:

> Specifically, when projects with HUD-insured loans fail to make their payments, the mortgagee may decide to assign the mortgage to the Secretary of HUD resulting in the use of Federal funds to pay the mortgagee the balance due on the FHA-insured loan. By monitoring a project's physical and financial status and providing solutions to current and anticipated physical and financial problems, HUD can help protect the FHA insurance fund.

damage. This fact further underscores the importance of HUD's access to audited annual financial reports in order to provide solutions to current financial problems. Therefore, Respondents' failure to provide HUD with five years' worth of financial reports is a grave offense and constitutes a material violation.

Although Respondents oppose the *Motion* and claim there exists an issue of material fact, Respondents do not dispute HUD's assertion that Respondents' failures to file the financial reports were "knowing and material." Accordingly, the Court finds that HUD has demonstrated that there is no dispute that Respondents knowingly and materially failed to file their annual, audited financial statements for fiscal years 2013-2017. See United States v. CNA Fin. Corp., 381 F. Supp. 2d 1088, 1091 (D. Alaska 2005) ("In response to a properly supported motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue for trial.").

II. Respondent's Opposition and Cross-Motion for Summary Judgment

In the *Opposition*, Respondents claim summary judgment in HUD's favor is not appropriate because there exists an issue of material fact. The fact Respondents claim is in dispute is the alleged error by HUD employees to not allow Respondent to "fully leverage its mortgage funds by not allowing its Historic Tax Credit investor to affiliate with the project via a 'Master Lease,' sometimes know [sic] as a 'Synthetic Lease.'" Respondents allege this error "caused the project financial harm and has led to the circumstances that have frustrated the Respondents [sic] ability to perform under the Regulatory Agreement." This argument is also the basis for Respondents' *Cross-Motion*.[4]

Once the moving party carries its burden, the responding party may not rely on the allegations in the pleadings to preclude summary judgment. Cooper v. N. Am. Philips Corp., No. J87-027 Civil, 1989 U.S. Dist. LEXIS 14104, at *7 (D. Alaska Nov. 17, 1989). Instead, Fed. R. Civ. P. 56(e) requires the responding party to set forth, by affidavit or as otherwise provided, "specific facts showing that there is a genuine issue for trial." Id. (quoting T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)). And, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. at 248.

Respondents' argument that HUD's error resulted in the circumstances that led to its failure to file financial reports is not material. Assuming, *arguendo*, that this fact was proven, Respondents still could not escape liability under the Civil Money Penalty statute. The statute provides that the Secretary may impose a civil money penalty for knowingly and materially failing to submit annual financial reports. 12 U.S.C. § 1735f-15(c)(1)(B)(x). That HUD may have caused the project financial harm resulting in

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[4] Respondents' *Cross-Motion* seeks a remedy that is not available in this proceeding. Namely, Respondents request that the Court "order an A7 streamline refinance be immediately implemented for EGAE, LLC . . . that the A7 loan be set back to the original loan amount of $ 8,067,000." Respondents further request that the Court order "the excess funds be set aside as a rent reserve with the servicer." The Court's purview in this case is limited to a determination of whether a violation of the Civil Money Penalty statute occurred and, if so, the amount of any civil money penalty to be imposed.

Respondents' inability to file the required reports does not negate the Court's finding that Respondents knew they were in violation of the Regulatory Agreement and that their violation was material. At best, Respondents' argument may be relevant to the Court's determination of the amount of a civil money penalty to be imposed. See 24 C.F.R. § 30.80 (requiring the Court to consider certain factors including the ability to pay the penalty and the degree of the violator's culpability). Accordingly, Respondents have not demonstrated that there exists an issue as to a material fact or that summary judgment in their favor is warranted. See Weston v. Noble, 19 F.R.D. 416, 420 (D. Alaska Oct. 10, 1956) ("A question of fact which is immaterial does not preclude summary judgment.").

Based on the foregoing, the Court concludes that there is no dispute as to the material facts that Respondents failed to file audited, annual financial statements to HUD for fiscal years 2013-2017, and that their failure was both knowing and material. Accordingly, Respondents are liable for violating the Civil Money Penalty statute for each fiscal year that an audited, annual financial statement was not submitted, and they are subject to penalties not to exceed $ 222,954.

III. Civil Money Penalties

HUD seeks total civil money penalties in the amount of $222,954 from Respondents, which is the maximum amount that can be assessed. The Court is required to consider the factors set forth in 24 C.F.R. § 30.80 when determining the amount of a penalty, if any. These factors include, but are not limited to, the ability to pay the penalty, the degree of a violator's culpability, and "such other matters as justice may require." 24 C.F.R. § 30.80(c), (h), and (j).

Here, Respondents have raised issues as to their ability to pay and whether HUD is also culpable. For instance, Respondents repeatedly state that the project has suffered financial harm due to the alleged error made by HUD. Specifically, Respondents allege HUD's error in not allowing Bank of America to buy Respondents' Historic Tax Credit cost Respondents over $ 400,000 in cash. Respondents claim they are unable to pay the penalty sought by HUD for this reason. In addition, Respondents claim HUD's actions resulted in the circumstances surrounding Respondents' failure to file their financial statements as required.

The ability to pay a penalty is presumed unless specifically raised by the respondent, who has the burden of proof. 24 C.F.R. § 30.80(c); Grier v. United States HUD, 797 F.3d 1049, 1055 (2015) (declining to disturb the Secretary's decision to impose a $ 1,260,000 penalty because Respondents failed to present evidence that they could not pay the penalty requested by HUD).

HUD filed evidence that EGAE's most recent financial report indicated a positive surplus cash of $ 91,643. HUD also provided documents demonstrating that in each of the last three financial statements provided by EGAE, the project had a profit before depreciation of at least $ 200,000. HUD claims this demonstrates that Respondents could have used project funds to pay for the expense of preparing audited annual financial reports

to comply with their obligation under the Regulatory Agreement. Moreover, HUD claims this proves Respondents have the ability to pay the penalty sought by HUD.

Respondents, however, present no evidence in support of their claim that they are unable to pay the penalty sought by HUD in this case. For this reason, the Court is inclined to grant summary judgment on this issue in HUD's favor. See Alaska State Snowmobile Ass'n, Inc. v. Babbitt, 79 F. Supp. 2d 1116, 1124 (D. Alaska 1999) ("[T]he non-moving party may not rest upon mere allegations or denials, but must show that there is *sufficient evidence* supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.") (emphasis added). However, the Court recognizes that Respondents are proceeding *pro se* and declines to take such action without being satisfied that Respondents understand their responsibility to demonstrate that sufficient evidence exists to prove their argument regarding this issue. Moreover, there may be other factors in dispute and the Court would benefit from a complete record concerning the amount of any civil money penalties to be imposed. Accordingly, summary judgment as to the amount of civil money penalties to be imposed is **DENIED**.

Conclusion

HUD met its burden to prove that there exists no issue of material fact and that Respondents are liable for violations of the Civil Money Penalty statute. However, questions of fact remain with regard to the appropriate amount of penalties based on the Court's consideration of the factors set forth in 24 C.F.R. § 30.80. Accordingly, HUD's *Summary Judgment Motion* is **GRANTED** as to liability, and **DENIED** as to the amount of civil penalties.

The Court's *Second Notice of Hearing and Order* dated February 8, 2019, remains in effect. A hearing limited to the issue of the amount of civil money penalties to be imposed shall proceed as scheduled. The parties will be permitted to present evidence relevant to *any* of the factors set forth in 24 C.F.R. § 30.80 for the Court's consideration.

So **ORDERED**,

Alexander Fernández
Administrative Law Judge