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

The Secretary, United States Department of Housing and Urban Development, on behalf of Ronald Davis, Charging Party, v. Anthony Ucci, Respondent.	HUDALJ 02-94-0016-8 Decided: March 17, 1995

Thomas J. Gabriel, Esquire
For the Respondent

Nicole Chappell, Esquire
For the Complainant

Before: Thomas C. Heinz
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arises out of a complaint filed by Ronald Davis ("Complainant") alleging that Anthony Ucci ("Respondent") violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (sometimes "the Act"), by refusing to rent or negotiate to rent an apartment because of Complainant's race, and by representing that an apartment was unavailable for rent when it was in fact available for rent. The Department of Housing and Urban Development ("HUD," "the Charging Party," or "the Secretary") investigated the complaint, and after deciding that there was reasonable cause to believe that discriminatory acts had taken place, issued a Charge of Discrimination against Respondent on August 24,

1994. The Charge alleged that Respondent had violated Sections 804(a) and (d) of the Fair Housing Act (42 U.S.C. §§ 3604(a) and (d)), and §§ 100.50(b)(1), 100.60(a), 100.60(b)(1), 100.60(b)(2), and 100.80 of the regulations promulgated thereunder (24 C.F.R. §§ 100.50(b)(1), 100.60(a), (b)(1), (b)(2), and 100.80).

Respondent failed to file an Answer to the Charge of Discrimination. Pursuant to motion by the Charging Party, a Default Judgment was entered against Respondent on October 18, 1994. On November 9, 1994, a hearing was held in Albany, New York, for the limited purpose of taking evidence on the appropriate relief to be awarded to the Charging Party. Respondent appeared with counsel at the hearing, at the close of which the parties were directed to file post-hearing briefs. The last brief was received on January 20, 1995. Because Respondent failed to file an Answer to the Charge of Discrimination, the allegations of the Charge are deemed admitted pursuant to section 104.420 of the Rules of Practice governing this proceeding. 24 C.F.R. § 104.420.

Findings of Fact

1. Complainant is an adult Black male residing in Rensselaer, New York. Charge, ¶ 4; Transcript (hereinafter "TR.") 6,30.

2. Respondent owns a six-unit, multi-family residence at 52/54 Pine Street, Rensselaer, New York. Respondent does not reside in any of the units. Charge, ¶ 5.

3. On September 11, 1993, the *Albany Times Union* newspaper advertised a two-bedroom unit in Respondent's building at 52/54 Pine Street. On or about that date, Complainant left a message by telephone with Respondent's son, Anthony Ucci, Jr., expressing interest in the apartment. Charge, ¶¶ 6,7; TR. 14,29.

4. On September 12, 1993, Respondent returned Complainant's call and spoke with Complainant's wife, Sherry Davis. During that conversation they arranged for Complainant to view the apartment at 5:30 p.m. on September 13, 1993. Charge, ¶¶ 7,8; TR. 15.

5. On September 13, 1993, Complainant arrived at the subject property at about 5:20 p.m. He remained outside the building until 5:50 p.m., but Respondent failed to meet him for the appointment. Charge, ¶ 9; TR. 15.

6. While Complainant was waiting for Respondent to arrive, he observed a dark blue or black pick-up truck driven by a White male circle the block several times. Charge, ¶ 10; TR. 15.

7. Later that evening, Complainant telephoned Respondent and left a message on his answering machine, identifying himself as Ron Davis who had had an appointment with Mr. Anthony Ucci at 5:30 that evening. Complainant inquired about the missed appointment, left a telephone number where he could be reached, and requested that Mr. Ucci contact him to arrange another appointment. Charge, ¶ 11; TR. 16.

8. On September 14, 1993, Complainant again telephoned Respondent, who told him that the apartment had been rented and was no longer available. Charge, ¶ 12; TR. 16.

9. Later that day, Complainant's mother-in-law, Kathleen Smith, telephoned Respondent and stated that she was interested in renting the two-bedroom apartment advertised in the *Albany Times Union.* During this telephone conversation, Respondent informed Ms. Smith that the apartment might still be available, depending upon who would be renting it. Charge, ¶ 13; TR. 17-18.

10. The subject apartment remained available for rent until October 24, 1993, when it was rented by Respondent to a White couple. Charge, ¶ 14; TR. 18.

11. Records of the New York State Department of Motor Vehicles indicate that a 1986 blue Chevrolet "commercial" vehicle is registered in the name of the Respondent. Charge, ¶ 15.

12. By refusing to rent or negotiate to rent an apartment to Complainant, Respondent discriminated against Complainant on the basis of race. Charge, ¶ 16.

13. As a result of Respondent's actions, Complainant suffered damages including, but not limited to, economic loss, emotional distress, inconvenience, and loss of housing opportunity. Charge, ¶ 17.

14. By letter dated December 2, 1993, Loretta D. Burkich, Esq., informed HUD that she represented Respondent regarding the complaint filed by Ronald Davis on September 22, 1993. (Exhibit C, Secretary's Answer in Opposition to Respondent's Motion to Vacate Default Judgment)

15. On August 24, 1994, a copy of the Charge of Discrimination that initiated this proceeding was sent by both regular and certified mail to Respondent and to Ms. Burkich. Five days later, on August 29, 1994, Ms. Burkich notified Respondent that:

> I was served papers in the above-referenced matter [HUD v. Ucci (HUDALJ 02-94-0016-8)] as your attorney as both you and the complaintant [*sic*] were.
>
> Because I rarely go to Albany now, I will not be continuing to represent you in this matter. Be sure to find an attorney at once and have him/her send me a Consent to Change Attorney statement. You definitely do not want to default. [Exhibit A to Affidavit of November 2, 1994]

16. Sometime between August 29, 1994, and October 5, 1994, Respondent retained Ms. Burkich's sometime law partner, Frank J. Williams, Jr., to represent him in this matter.

17. On September 30, 1994, the Charging Party served Respondent and Ms. Burkich by regular and certified mail with copies of a request for entry of a default judgment based on Respondent's failure to file an Answer to the Charge by the September 23, 1994, deadline. On October 5, 1994, Ms. Burkich informed counsel for the Charging Party for the first time that she no longer represented Respondent but would forward HUD's correspondence to her former law firm. (Exhibit A to Respondent's Affidavit of November 2, 1994; Exhibit F, Secretary's Opposition to Respondent's Motion to Vacate Default Judgment)

18. On October 11, 1994, Frank J. Williams, Jr., Esq., wrote to Thomas J. Gabriels, Esq., under the letterhead "Williams, DuBrin & Burkich." In that letter, Mr. Williams referred to a telephone conversation with Mr. Gabriels on October 11, 1994, in which Mr. Gabriels indicated a willingness to represent Respondent in this proceeding. Enclosed in the letter to Mr. Gabriels were copies of the Charge of Discrimination that had been issued against Respondent, a Notice and Order dated September 20, 1994, and the outstanding request by the Charging Party for entry of a default judgment dated September 30, 1994. (Enclosure to Notice of Motion dated October 25, 1994, filed on Respondent's behalf)

19. No response to the Charging Party's request of September 30, 1994, for entry of default judgment had been received by the Chief Docket Clerk of this court by October 18, 1994, when the request was granted and a Default Judgment was served on the parties.

20. On October 25, 1994, 62 days after issuance of the Charge of Discrimination, Respondent made his first appearance in this proceeding when Mr. Gabriels filed a motion on his behalf to set aside the Default Judgment. The motion was denied on November 4, 1994.

Subsidiary Findings and Discussion

Defaults are disfavored by the law. Courts should resolve all doubts in favor of a determination on the merits. *See, e.g., In re Martin-Trigona*, 763 F.2d 503 (2d Cir. 1985); *Meehan v. Snow*, 652 F.2d 274, 277 (2d Cir. 1981). However, the Default Judgment issued on October 18, 1994, against the Respondent in this case resulted from inexcusable negligence by two if not all three of the lawyers retained by Respondent. Respondent's arguments to the contrary notwithstanding, the Default Judgment cannot be vacated, for the reasons discussed below.

Conduct of Loretta D. Burkich, Esq.

Mr. Gabriels, the third of Respondent's attorneys, submitted a sworn affidavit dated October 18, 1994, and signed by Respondent's first attorney, Ms. Burkich, in support of a motion to vacate the Default Judgment. The motion cited only one reason why the Default Judgment should be vacated: improper service of the Charge. Toward that end, the affidavit states, *inter alia:*

> 4. When the allegations of this complaint were first made informally by Ronald Davis, I had several telephone conferences with a Donald Matzner and Jim Bullock at HUD regarding these allegations. *However, I never appeared in this action as the attorney of record.*
>
> 4. [*sic*] When I left the Albany firm, I informed Mr. Ucci that I could no longer represent him in this matter *or any other matters in the future* because of the distance. I recommended that he engage counsel closer to Albany.
>
> 5. Thereafter, the charge was served on me by certified mail, and I reasonably assumed that Mr. Ucci would also be served. *Accordingly, I did not notify Mr. Ucci of my service* nor did I respond to the charge on his behalf. [Emphasis supplied]

All three of the emphasized portions of this affidavit have been contradicted either by Ms. Burkich herself or by the Respondent. By letter dated December 2, 1993, addressed to the Director of HUD's New York City office, Ms. Burkich stated: "I represent Mr. Ucci in the above-referenced matter [the complaint filed by Complainant Davis]. He denies all allegations set forth in Mr. Davis' statement dated 9/22/93." Because Ms. Burkich had represented to HUD that she was Respondent's attorney regarding the Ronald Davis complaint, she was obligated to inform the court and opposing counsel upon receipt of the Charge issued on August 24, 1994, that she no longer represented him. *See N.Y. Civ. Prac. L. & R.* § 1200.15 (McKinney Supp. 1994). But Ms. Burkich did not withdraw her representation until October 5, 1994, when she contacted counsel for the Charging Party after receiving service of the Charging Party's request for

entry of a default judgment. She therefore neglected her professional duty, even though she appears to have been aware of that duty on August 29, 1994, when she wrote to Respondent urging him to be "sure to find an attorney at once and have him/her send me a Consent to Change Attorney statement."

The second paragraph 4 in Ms. Burkich's affidavit of October 18, 1994, alleges that she had entirely severed her professional relationship with Respondent on some unspecified earlier date. However, Mr. Ucci submitted a sworn affidavit signed on November 2, 1994, in support of his motion to vacate the default, in which he states that Ms. Burkich and her former law partner, Frank Williams, "had been and still are working on a matrimonial action on my behalf." In short, Ms. Burkich and Respondent apparently continue to have a professional relationship.

Finally, contrary to the claim in Ms. Burkich's affidavit of October 18, 1994, that she did not notify Respondent that the Charge had been served upon her, Ms. Burkich's letter of August 29, 1994, informed Respondent that she had been served "as your attorney" with the Charge that initiated this proceeding, "as both you and the complaintant [*sic*] were."

In sum, it appears that Ms. Burkich has deliberately and willfully misrepresented facts to this court for the purpose of advancing the cause of a party to this litigation with whom she has an attorney-client relationship. That conduct is inexcusable and constitutes evidence of an attempted fraud on this court.[1]

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[1]Notwithstanding Ms. Burkich's apparently fraudulent affidavit, the record shows that the Charge was properly served on Respondent, not only because service upon her constituted service upon him, but also because, more likely than not, Respondent personally received the Charge.

Upon receipt of Respondent's motion supported by Ms. Burkich's affidavit, and in light of the claim of improper service, I held a telephone conference on November 1, 1994, with counsel for the parties during which I directed counsel for Respondent to submit an affidavit from Respondent swearing that he did not personally receive the Charge. The affidavit submitted by Respondent did not comply with my directive. It reads in part:

> 11. My correct mailing address is P.O. Box 348 West Sand Lake, New York 12196. It is not Best Road, West Sand Lake, New York 12196 [the address used by HUD to serve the Charge and the request for entry of default judgment].
>
> * * *
>
> 13. I never received either the "Secretary's Request to Enter Default Judgement" or the "Determination of Reasonable Cause and Charge of Discrimination" directly. I was notified much later of both by Ms. Burkich who declined to represent me in order to conclude this matter.

In his affidavit Respondent does not swear that he did not personally receive the Charge, nor does he say that he does not reside or own property on Best Road or that he cannot and has not received mail directed to that address. Respondent instead submitted an affidavit whose ambiguous language leaves open the possibility that he *indirectly* received the materials that HUD mailed to the Best Road address. That Respondent has a Post Office mailing address where he prefers to receive mail does not necessarily mean that he cannot receive mail sent to the Best Road address.

Other evidence in the record tends to show that Respondent personally received the Charge sent by HUD through regular mail to the Best Road address. The Charge was sent to that address on August 24, 1994, by both certified and regular mail. The regular-mail copy was not returned to HUD, but the certified-mail copy was returned marked "Unclaimed" after the Postal Service had sent two notices to that address advising the addressee to claim certified mail. The Postal Service did not check "Returned," "Attempted-Not Known," "Insufficient Address" or "No such street___number___" on the Postal Service form as the reason for returning the certified-mail copy of the Charge to HUD. These facts argue that the address was correct, that Respondent received notice that certified mail was being held for him at the Post Office, that he refused to claim it, but that he received a copy of the Charge via regular mail.

In sum, Respondent's affidavit fails to demonstrate that he did not receive personal service of the Charge through regular mail.

Conduct of Frank J. Williams, Jr., Esq.

Sometime between August 29, 1994, the date of Ms. Burkich's letter, and October 5, 1994, when she told HUD she would forward HUD's correspondence to her former law firm, Respondent retained Ms. Burkich's sometime law partner, Frank J. Williams, Jr., to represent him in this matter. Inasmuch as Ms. Burkich's letter urged Respondent to find another lawyer "at once," more likely than not Respondent contacted Mr. Williams within a few days of August 29, 1994. If so, Mr. Williams neglected his professional duties to Respondent and this court for more than a month in the face of information that an Answer to the Charge was due by September 23, 1994, and that trial was scheduled to begin November 8, 1994. He apparently took no action on Respondent's behalf until October 11, 1994, when he contacted Mr. Gabriels to hand off the case.

At hearing, Respondent claimed to have retained Mr. Williams sometime before the September 23, 1994, deadline for filing an Answer to the Charge. TR. 55. If he in fact retained Mr. Williams before September 23, 1994, as appears likely, then Mr. Williams not only neglected to file an Answer or otherwise respond to the Charge, but he also continued to neglect the case even after learning that the Charging Party had requested entry of a default judgment. Ms. Burkich mailed a copy of the Charging Party's request to Mr. Williams on or about October 5, 1994. After receiving that material, he still made no effort to contact this court to forestall entry of the requested default. Instead, he passed the case on to Mr. Gabriels. In short, Mr. Williams neglected this case over an extended period.

Respondent did not submit an affidavit from Mr. Williams explaining Mr. Williams' failure to file on Respondent's behalf an Answer or a response to the Secretary's request for entry of a default judgment. In the absence of any explanation for Mr. Williams' conduct, the record compels the conclusion that he was willfully and inexcusably negligent.

Conduct of Thomas J. Gabriels, Esq.

Although Mr. Gabriels was contacted by Mr. Williams on October 11, 1994, regarding this case, Mr. Gabriels did not contact this court until two weeks later, on October 25, 1994, 62 days after issuance of the Charge, when he filed a notice of motion to vacate the Default Judgment of October 18, 1994. Mr. Gabriels thereafter filed an affidavit dated November 2, 1994, in which he states:

> 1) That on October 11, 1994 I received a phone call from Attorney Frank Williams who briefly explained what he understood of the case against Anthony Ucci and asked if I would be interested in speaking with Mr. Ucci.

> 2) That on either October 12 or 13 I received by mail all pertinent information from Attorney Frank Williams.
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> 3) That on [*sic*] October 17, 1994 was the first I had to review those documants. [*sic*] After doing so I contacted Mr. Ucci to arrange for a meeting.
>
> 4) That Mr. Ucci and I met for the first time on October 19, 1994 at which time I was formally retained.

This affidavit implies that Mr. Gabriels took no action on Respondent's behalf before October 25, 1994, because he did not have time and because he was not empowered to act before the default was issued. However, analysis of the record tends to undermine that implication. Mr. Gabriels knew on October 11, 1994, that a request for entry of default judgment dated September 30, 1994, was pending before this court. (*See* Williams letter of October 11, 1994.) By October 12 or 13 he had received the Charge, including notices that: (1) discovery was to be concluded by October 24, 1994; (2) a hearing was scheduled to begin November 8, 1994; and (3) this proceeding is governed by regulations codified at 24 C.F.R. Part 104. (*See* 24 C.F.R. § 104.450, which provides that responses to motions must be filed within five days of service.) A simple, five-minute telephone call to the Chief Docket Clerk of this court requesting an extension of time in which to file an opposition to the Charging Party's request would have at least delayed if not averted issuance of the Default Judgment.

Furthermore, Ms. Burkich's affidavit is dated October 18, 1994, the day before Mr. Gabriels says he was formally retained by Respondent. Ms. Burkich would not have prepared the affidavit *sua sponte;* she must have been requested to do so by Mr. Gabriels on that date or earlier, perhaps on October 17, 1994, the day Mr. Gabriels says he first talked with Respondent on the telephone.[2] In other words, it appears that Mr. Gabriels took action on Respondent's behalf before he was formally retained and before the Default Judgment was issued. If Mr. Gabriels had the authority to solicit an affidavit from Ms. Burkich, he certainly had the authority to telephone the Chief Docket Clerk of this court and attempt to forestall entry of a default judgment. In any case, Mr. Gabriels has not explained why he did not contact the court immediately after Respondent formally retained him on October 19, 1994, and before he learned that a Default Judgment had been entered against his client.[3]

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[2]Ms. Burkich could not have prepared the affidavit upon learning that the Default Judgment had been issued, because the Default Judgment was mailed to her by the Chief Docket Clerk on the same day she signed her affidavit. Records in this office do not show that she was served by fax on that date or that this office was even aware of her fax number on that date.

[3]Further, the record suggests Mr. Gabriels may also have violated his ethical obligations to the court. Ms. Burkich's affidavit of October 18, 1994, was submitted to the court on October 25, 1994, by Mr.

In sum, the record shows that Ms. Burkich and Mr. Williams willfully and inexcusably neglected their professional duties in connection with this case, and that

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Gabriels. Ms. Burkich's letter of August 29, 1994, was submitted to the court on November 2, 1994, by Mr. Gabriels. The letter contradicts the affidavit and shows that Respondent was served with the Charge by virtue of service upon his attorney. The record does not show when the letter came into Mr. Gabriels' possession, but if he had it on October 25, 1994, then apparently Mr. Gabriels initially withheld evidence contradicting the argument he made to the court on October 25, 1994.

Mr. Gabriels may have been negligent as well. Negligence caused the issuance of the Default Judgment against Respondent.

Respondent Responsible for Negligence of Attorneys

Respondent argued in testimony at hearing that he thought entry of the Default Judgment unfair and in violation of his due process rights because it will make him pay for the mistakes of his attorney. TR. 47-56. This argument echoes arguments made in Federal district courts by litigants seeking to vacate default judgments pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") rule 60(b)(1). However, the Federal Rules do not apply to this proceeding.[4] Administrative proceedings under the Fair Housing Act are governed by procedural rules found in the Act and in regulations codified at 24 C.F.R. Part 104. Neither the statute nor the regulations address default judgments. But even if the Federal Rules applied to this case, Respondent's argument could not be credited.

In order for a party in the Second Circuit to vacate a default judgment pursuant to Fed. R. Civ. P. 60(b)(1) for "reasons [of] mistake, inadvertence, surprise, or excusable neglect," the movant must satisfy three criteria: (1) the default was not willful; (2) the party has a meritorious case; and (3) the nondefaulting party will not suffer significant prejudice if relief is granted. *Davis v. Musler*, 713 F.2d 907, 915 (2d Cir. 1983). Respondent's complaint of unfairness lodged at hearing speaks to the first of these three criteria. He argues, in effect, that the default should not be deemed willful because he did not personally cause it. However, the Second Circuit court has stated that the Circuit:

> has rather consistently refused to relieve a client of the burdens of a final judgment entered against him due to the mistake or omission of his attorney by reason of the latter's ignorance of the law or of the rules of the court, or his inability to efficiently manage his caseload. *United States v. Erdoss*, 440 F.2d 1221 (2d Cir.), *cert. denied*, 404 U.S. 849, 92 S. Ct. 83,30 L.Ed.2d 88 (1971); *Schwarz v. United States*, [384 F.2d 833, 835 (2d Cir. 1967)]; *Dal International Trading Co. v. Sword line, Inc.*, 286 F.2d 523 (2nd Cir. 1961); *Benton v. Vinson, Elkins, Weems & Searls*, 255 F.2d 299 (2d Cir.), *cert. denied*, 358 U.S. 885, 79 S. Ct. 123, 3 L.Ed.2d 113 (1958).

United States v. Cirami, 535 F.2d 736, 739 (2d Cir. 1976).

[4]Nor has counsel for Respondent cited the Fed. R. Civ. P. to support any argument posed in Respondent's behalf.

The United States Supreme Court addressed a protest similar to Respondent's in *Link v. Wabash R.R.,* 370 U.S. 626 (1962) at 633-34:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." [Citation omitted]

Although *Link* did not involve a motion to vacate a default judgment caused by attorney negligence, in *United States v. Cirami* the Second Circuit Court of Appeals endorsed the reasoning in *Link* while upholding a default judgment caused by attorney misconduct. 535 F.2d at 740. In short, the Second Circuit has upheld default judgments caused, as here, by unexcused attorney misconduct.[5] As stated by the Supreme Court in *Link,* if the "attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634, note 10. When attorney negligence causes a default judgment, the remedy generally is a malpractice suit against the attorney, not a motion to vacate the judgment. This is true even where the defaulting party has a meritorious case. *Schwarz v. United States,* 384 F.2d 833, 834-35 (2d Cir. 1967).

Failure to Demonstrate a Meritorious Case

But Respondent has not demonstrated that he has a meritorious case. In response to a directive of the court, Respondent submitted an affidavit dated November 2, 1994, in which he set out his defense--a defense I do not find credible.

[5]It should be noted that there is authority in the Second Circuit for vacating the entry of a default for good cause shown under Fed. R. Civ. P. 55(c) upon a conclusion that the default was caused by inadvertent or non-willful attorney misconduct. *See, e.g., Lutwin v. City of New York,* 106 F.R.D. 502, 504 (S.D.N.Y. 1985), *aff'd without op.,* 795 F.2d 1004 (2d Cir. 1986). However, the good cause standard of Rule 55 is more lenient than the "excusable neglect" standard of Rule 60(b). *See Meehan v. Snow,* 652 F.2d 274, 276-77 (2d Cir. 1981). Furthermore, Rule 55(c) applies to a procedural situation in district courts for which there is no counterpart in administrative proceedings under the Fair Housing Act.

In that affidavit, Respondent argues that he could not have discriminated against the Complainant because he had never met him. Respondent claims that even though he wanted to rent to Complainant, he "Blew Off" his appointment to meet the Complainant on September 13, 1993, because he was dirty and tired after a hard day of work. Affidavit, ¶ 7. He contends that he did not contact Complainant to reschedule the appointment because he had lost Complainant's telephone number, and that when Complainant called him back and left a message on the answering machine, he left no number. Affidavit, ¶ 9.

Respondent does not flatly deny the allegation that Complainant's mother-in-law telephoned his home on September 14, 1993, to inquire about the apartment; rather, he contends that if she had called, she would have spoken with one of his sons, and "[i]f she had spoken with either of my sons I would have told them the unit was unavailable as I did wish to rent to Mr. Davis." Affidavit, ¶ 10. This is an unbelievable story. There is no evidence that Respondent had evaluated Complainant's credit or employment history, and he claims never to have even seen Complainant, yet he asserts that he was so anxious to rent to Complainant that he would have instructed his sons to misrepresent the facts and turn away other prospective tenants sight unseen. If Respondent was as anxious to rent to Complainant as he claims and Complainant had failed to leave a telephone number where he could be reached, Respondent would at least have searched for Complainant's number in the telephone book or sought the number through the information operator rather than simply waiting for Complainant to call him back. Finally, Complainant credibly testified that, as would be expected under the circumstances, he left a number where he could be reached on Respondent's answering machine when he called Respondent during the evening of September 13, 1993, in an effort to set up another appointment to view the apartment.[6] TR. 16. If Respondent had indeed wanted to rent to Complainant, he would have attempted to reach Complainant at that number. He did not. Respondent's explanation for his conduct is incredible.

Paragraph 12 of Respondent's affidavit further undermines his credibility. He states that the "first I heard of any problem with regard to Mr. Davis was when I received a letter from Ms. Loretta Burkich." Affidavit, p. 2. This statement must refer to Ms. Burkich's letter of August 29, 1994, written long after Respondent had been contacted by HUD concerning Complainant's complaint. In contrast to his affidavit, Respondent conceded at hearing that he became aware of Complainant's complaint during the fall of 1993 as a result of HUD's investigation. TR. 54.

In his post-hearing brief, Respondent argues that the Charging Party has not established a right to an award of damages because Respondent did not have the required

[6] All of Complainant's testimony at hearing appeared credible.

certificate of occupancy for the apartment and therefore could not lawfully have rented it.[7] This argument must be rejected for several reasons.

First, the argument is untimely posed. As an affirmative defense addressed to the merits of the Charging Party's substantive case, it should have been raised in an Answer or at the latest in Respondent's motion of October 25, 1994, to vacate the Default Judgment. Questions posed during cross-examination of the Complainant at hearing first alerted the Charging Party that counsel for Respondent intended to make this argument.

That notice was insufficient to give the Charging Party a full and fair opportunity to litigate the issue.

Furthermore, Respondent's argument rests on a document in Respondent's possession at hearing but improperly introduced into the record after the hearing as an exhibit to his post-hearing brief. That document appears to be a copy of a portion of notes made by an unidentified HUD investigator during the investigation of this case. The notes report statements purportedly made by Richard E. Van Vorst, Building & Zoning Administrator for the City of Rensselaer, New York, to the effect that as of December 21, 1993, Respondent did not have the certificate of occupancy for the property at 52/54 Pine Street which the landlord must have before renting the property.[8] These notes constitute undated, unauthenticated hearsay on hearsay, an unreliable and untrustworthy factual foundation for Respondent's argument.

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[7]This is the only argument posed on brief by Respondent. All other arguments were abandoned.

[8]By implication, Respondent likewise did not have the required certificate in September when Complainant attempted to rent and in October when an unidentified White couple rented the apartment. However, Complainant testified that some apartments at 52/54 Pine Street were occupied by tenants on September 23, 1993, when he attempted to view the apartment Respondent had advertised for rent. TR. 29.

In any event, even if the factual basis for the argument is sound, the argument must nevertheless fail as a matter of law. Respondent contends that the "offering of the unit in question unto Mr. Davis could not have legally occurred as to do so would have resulted in Mr. Ucci's [*sic*] and Mr. Davis been [*sic*] found guilty of a crime."[9] Brief, at 2. It is immaterial whether or not the apartment could have been lawfully rented in late September of 1993. Respondent offered the apartment for rent; Complainant, a Black person protected by the Act, unsuccessfully attempted to negotiate to rent it when it was in fact (although arguably not in law) "available" for rent; and Respondent rented it to someone other than Complainant (apparently without benefit of the required certificate).[10] These facts suffice to make out a prima facie case of housing discrimination in violation of section 804(a) of the Act (42 U.S.C. § 3604(a)). Section 804(a) makes it unlawful "to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race ...." *See Soules v. HUD*, 967 F.2d 817, 822 (2d Cir. 1992); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979). The Act makes no exceptions for cases where state or local law prohibits the sale or rental of the housing at issue.

This case is not a contract action or an action seeking specific performance of an unlawful contract. This is a civil rights action that sounds in tort where the statute must be liberally and broadly construed to further the Act's explicit goal "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.[11] Respondent therefore cannot be permitted to pose his violation of state or local

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[9]Respondent's argument does not persuade me that a tenant occupying a dwelling rented without a certificate of occupancy would necessarily be subject to sanction. The City Code provision cited by Respondent does not clearly impose liability upon the *tenant* as well as the landlord in this situation. Furthermore, it seems highly unlikely that a court would impose criminal penalties on a tenant who had innocently rented an apartment without knowledge that the landlord had not secured the required certificate.

[10]The notes purportedly made by the HUD investigator also show that Respondent knew that he did not have the required certificate when he advertised the apartment for rent and when he finally rented it in October.

Even though Respondent may not have been able lawfully to rent the apartment on September 23, 1993, nothing in the record indicates that he could not have lawfully negotiated a rental contract on that date permitting Complainant to occupy the premises upon Respondent's receipt of the required certificate on a later date.

[11]*See, e.g., Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972)("The language of the Act is broad and inclusive."); *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 936, 937 (2d Cir.) ("[T]he Supreme Court has held that [the Act] must be construed expansively to implement [the goal of ending discrimination in housing]"; "Congress intended that broad application of [the Act's] antidiscrimination provisions would ultimately result in residential integration."), *aff'd per*

law as a defense against a charge of housing discrimination in violation of the Act.

Finally, Respondent's affidavit does not deny the allegation in the Charge, reiterated at hearing, that Respondent untruthfully told Complainant over the telephone on September 14, 1993, that the apartment had been rented and was no longer available.

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curiam, 488 U.S. 15 (1988), *reh. denied*, 488 U.S. 1023 (1988); *United States v. Gilbert*, 813 F.2d 1523, 1526-27 (9th Cir. 1987) ("The Supreme Court has observed that [the] expansive approach [to construing the Act] is carried *throughout the Act*."), *cert. denied*, 484 U.S. 860 (1987).

TR. 16. Nor does the affidavit deny the allegation in the Charge that the apartment remained available for rent until October 24, 1993, when it was rented to a White couple. Because allegations in a Charge not answered are deemed admitted, the record makes out an unrebutted prima facie case of housing discrimination based on race in violation of section 804(d) of the Act (42 U.S.C. § 3604(d)), in addition to the violation of section 804(a) explained *supra*. Section 804(d) of the Act makes it unlawful to "represent to any person because of race ... that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." Inasmuch as Respondent rented the

apartment to someone else, he cannot be heard to argue that the apartment was not "available" to Complainant.

In sum, Respondent has not shown that he has a meritorious defense to the Charge.

Vacating Default Would Not Have Prejudiced Charging Party

As for the third of the three criteria that a defaulting party must satisfy when seeking to vacate a default judgment under Fed. R. Civ. P. 60(b), the record does not show that the Charging Party would have suffered any prejudice had the motion to vacate been granted. Assuming Complainant would have prevailed after a complete trial of the issues, his remedy would have been delayed only slightly, and there is no indication in the record that a slight delay in the proceeding would have jeopardized presentation of the Charging Party's case in any respect. Nevertheless, because the default was caused by unexcused willful negligence and Respondent has failed to demonstrate that he has a meritorious case, the Default Judgment finding that Respondent has violated the Act must stand.

Remedies

Section 812(g)(3) of the Act provides that upon a finding that a respondent has violated the Act, an administrative law judge shall order "such relief as may be appropriate, which may include actual damages suffered by the aggrieved person." 42 U.S.C. § 3612(g)(3). Respondent has violated the Act through conduct that has caused actual, compensable damages to Complainant.

Complainant's Damages

Out-of-Pocket Expenses

After Respondent turned him away from the apartment at 52/54 Pine Street, Complainant secured alternative housing at 15 John Street in Rensselaer, where he and his

family stayed for eight months, beginning in the fall of 1993. The apartment was heated by electricity, and Complainant incurred electric bills totalling $2,179.11. Of that amount, the Charging Party seeks an award of $650.00 as compensation for that portion of the electric bills allegedly attributable to poor insulation of the apartment. Complainant is entitled to compensation for his out-of-pocket expenses resulting from Respondent's discrimination, but the record contains no evidence to show that Complainant would not have incurred similar electric bills had he rented Respondent's apartment at 52/54 Pine Street. The Charging Party did not show that the apartment at 52/54 Pine Street is better insulated than the apartment at 15 John Street, or that Respondent's property is not heated with electricity, or that Complainant would not have had to pay for heat at the 52/54 Pine Street location. Further, I take judicial notice that the winter of 1993-1994 was extraordinarily cold throughout the northeastern United States, causing unusually high heating costs. In short, this portion of the Charging Party's claim is speculative, unsupported by the record, and must therefore be denied.

The Charging Party also seeks an award of $43.20 to compensate Complainant for the amount of overtime pay he could have earned if he had worked on his birthday, the day he had to spend with counsel preparing for trial. Victims of housing discrimination may recover lost wages associated with preparation and participation in the trial of the issues. *See, e.g., HUD v. Blackwell,* 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,001, 25,010 (HUDALJ Dec. 21, 1989) *aff'd* 908 F.2d 864 (11th Cir. 1990) hereinafter *"Blackwell I"; HUD v. Properties Unlimited*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,009, 25,150 (HUDALJ Aug. 5, 1991). The requested amount will be awarded.

Emotional Damages

Actual damages in housing discrimination cases are not limited to out-of-pocket losses, but may also include damages for intangible injuries such as embarrassment, humiliation, and emotional distress caused by the discrimination.[12] Damages for emotional distress may be based on inferences drawn from the circumstances of the case, as well as on testimonial proof.[13] Because emotional injuries are by nature qualitative and difficult to quantify, courts have awarded damages for emotional harm without requiring

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[12] *See, e.g., Blackwell I* at 25,011; *HUD v. Murphy,* Fair Housing-Fair Lending (P-H) ¶ 25,002 at 25,055 (HUDALJ July 13, 1990); *See also Smith v. Anchor Bldg. Corp.,* 536 F.2d 231 (8th Cir. 1976); *Steele v. Title Realty Co.,* 478 F.2d 380, 384 (10th Cir. 1973); *McNeil v. P N & S. Inc.,* 372 F. Supp. 658 (N.D. Ga. 1973).

[13] *HUD v. Blackwell,* 908 F.2d 864, 872 (11th Cir. 1990)(hereinafter *Blackwell II*); *Murphy* at 25,055; *See also Marable v. Walker,* 704 F.2d 1219, 1220 (11th Cir. 1983); *Gore v. Turner,* 563 F.2d 159, 164 (5th Cir. 1977).

proof of the actual dollar value of the injury.[14] The amount awarded should make the victim whole.[15]

The Charging Party requests an award of $15,000 to compensate Complainant for his emotional distress. He will be awarded $8,000.

Until he received his mother-in-law's report of a telephone conversation with Respondent on September 24, 1993, Complainant only suspected that Respondent had discriminated against him on the basis of race. During that conversation with Ms. Smith, Respondent revealed that the apartment was still available for rent, contradicting his earlier statement to Complainant. At this point, Complainant became convinced that he had been victimized by Respondent. He testified that his mother-in-law:

> told us that [Respondent] said the apartment might be available and it would depend on to who.[16] She hung up. When my wife spoke to her, she became very upset. She was livid to feel that, you know, we would be so blatantly treated. I was upset also. My wife was more so upset than I was because she felt that she had been denied an opportunity to look at an apartment .... [M]y wife then felt strongly enough to contact HUD. She called and spoke to an Ed DelGato and he then sent her some information and I filled out the packet and it led to where we are now .... [TR. 18]

Complainant also testified that:

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[14]*See, e.g., Block v. R.H. Macy & Co.,* 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.,* 478 F.2d at 384; *Blackwell I* at 25,011. *See also Blackwell II,* 908 F.2d at 872-73 (recovery for distress is not barred because amount of damages is incapable of exact measure).

[15]*See Murphy* at 25,056; *Blackwell I* at 25,013.

[16]This hearsay evidence merely corroborated an allegation of fact deemed admitted by Respondent's unexcused failure to answer the Charge. *See* Charge, ¶ 13.

> [The discrimination] made me very angry, the fact that I had been told that this apartment was no longer available and yet for another month they continued to have no one dwelling in it .... I personally felt that we had been wronged .... Well, it makes you feel that you are not viewed as a person when you look at an apartment, you are viewed more based on the color of your skin rather than the attributes that you might bring to an apartment or to a residence, you know, as to the [*sic*] being a good tenant or if your references are good, but how you look. And I don't think that is proper and I don't feel good about that. [TR. 19-20]

This evidence suffices to support a substantial emotional damages award. Racial discrimination strikes at the heart of a person's identity. Race and skin color are immutable characteristics irrelevant to whether or not someone is qualified to buy or rent housing. As racial discrimination has been unlawful in this country for many years, it is not at all surprising that a person of color would suffer deep frustration, anger, and humiliation upon experiencing housing discrimination. Moreover, Respondent not only discriminated on the basis of Complainant's race, he compounded the offense by lying to Complainant--telling him the apartment had been rented when it was in fact still available.

As a result of the discrimination, Complainant was also subjected to several months of unsatisfactory alternative housing at the 15 John Street location, a neighborhood noisier and less safe than the neighborhood of 52/54 Pine Street. TR. 19. Complainant's upstairs neighbors at 15 John Street were engaged in a loud and violently abusive relationship that frequently disturbed the peace. Complainant's damage award therefore includes compensation for having to endure repeated disturbances to the peaceful enjoyment of his housing. Nothing in the record suggests that he would have experienced similar disturbances had he been allowed to rent Respondent's apartment.

Although Complainant's testimony will support a substantial damage award, the evidence is not strong enough to justify the amount sought. Complainant apparently has suffered no harmful physical effects as a result of this episode in his life; he has not required intervention by medical or psychological experts; nor has the experience adversely affected his relationships with family, friends, neighbors, or co-workers. He does not claim to suffer from any continuing or permanent emotional scars as a result of Respondent's conduct. In short, upon leaving the alternative housing at 15 John Street, the overall quality of Complainant's personal and professional life apparently returned to normal.

Further, Complainant was prompted by his wife--rather than his own emotional injuries--to file a complaint with HUD. She clearly suffered more than Complainant and submitted the strongest evidence of damage. As an aggrieved person, she could have been

named as a party to this case, but she was not, and Complainant cannot be compensated for damages suffered by his wife. Inasmuch as Complainant did not testify regarding the impact of his wife's emotional distress on him personally, her testimony describing her emotional suffering is irrelevant to the determination of Complainant's damages.

Finally, it must be noted that shortly after suffering discrimination at the hands of Respondent, when Complainant's emotional wounds presumably were fresh, Complainant made no money demands on Respondent and was willing to settle for an acknowledgement and an apology. TR. 54.[17] These facts militate against an award of the size sought by the Charging Party. Considering the record as a whole, I conclude that an award of $8,000 will adequately compensate Complainant for his intangible damages.

Civil Penalties

To vindicate the public interest, the Act authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. § 3612(g)(3)(A); 24 C.F.R. § 104.910(b)(3). Determining an appropriate penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) whether the respondent has previously been adjudged to have committed unlawful housing discrimination; (3) respondent's financial resources; (4) the degree of respondent's culpability; and (5) the goal of deterrence. *See Murphy* at 25,058; *Blackwell I* at 25,014-15; H. Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988).

Nature and Circumstances of the Violation

The nature and circumstances of the violation do not compel imposition of the maximum possible penalty. There is no evidence that Respondent's unlawful discrimination was motivated by malice toward Complainant individually. Further, the harm done to Complainant, although significant, was not extreme. He and his family did not suffer grievous harm, such as an eviction, public humiliation, or threats of physical injury.

Respondent's Record

[17] Although Rule 408 of the Federal Rules of Evidence and 42 U.S.C. § 3610(d)(1) prohibit introducing into evidence the content of settlement negotiations or the conduct of the parties during settlement negotiations, the Charging Party has waived its objection by failing to object to the introduction of this evidence at hearing and by citing it in connection with a different argument on brief. Brief, at 20.

There is no evidence that Respondent previously has been found to have committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed against Respondent is $10,000, pursuant to 42 U.S.C. § 3612(g)(3)(A) and 24 C.F.R. § 104.910(b)(3)(i)(A).

Respondent's Financial Resources

Evidence regarding Respondent's financial resources is peculiarly within his knowledge, so he had the burden of introducing such evidence into the record. If a respondent fails to produce credible evidence militating against assessment of a civil penalty, a penalty may be imposed without consideration of his financial resources. *See Campbell v. United States*, 365 U.S. 85, 96 (1961); *HUD v. Jerrard*, Fair Hous.-Fair Lend. (P-H) ¶ 25,005 at 25,092; *Blackwell I* at 25,015. Respondent has introduced no evidence concerning his financial resources and must therefore be considered capable of paying the maximum civil penalty without suffering undue hardship.

Culpability

Respondent's culpability rests not only on admissions made through his failure to answer the Charge, but also, as noted *supra* in the discussion regarding his affidavit, on his lack of credibility. Although Respondent apparently is not a full-time housing provider, he rents approximately 12 housing units. (Exhibit to Respondent's Brief.) He is a real estate professional with many years' experience who must be held to the highest standards of conduct. He cannot possibly have believed that he could lawfully discriminate against Complainant on the basis of race.

At hearing Respondent claimed that he did not discriminate against Complainant and that he has the names and addresses of a dozen Black people who have rented housing from him over the last 20 years. TR. 49-50. The putative notes of the unidentified HUD investigator submitted by Respondent after the hearing show that a Black tenant occupied one out of 10 units rented by Respondent at the time of the investigation. (Exhibit to Respondent's Brief.) Although tending to support Respondent's claim that he has not engaged in racial discrimination, this evidence does not preclude a finding of unlawful discrimination. *Asbury v. Brougham*, 866 F.2d 1276 (10th Cir. 1989); *Davis v. Mansards* 597 F. Supp. 334,345 (N.D.Ind. 1984). In any event, as a Default Judgment has been entered against Respondent, his argument that he is not culpable must be rejected.

Deterrence

Respondent and other housing providers need to be deterred from engaging in any form of discriminatory conduct based on race. Furthermore, Respondent, apparently with

the advice of counsel, refused to cooperate with HUD during HUD's investigation of Complainant's complaint. TR. 54. Imposition of a large civil penalty will send a message to housing providers that racial discrimination is expensive and that complaints of housing discrimination cannot be ignored with impunity. Respondent and other housing providers must come to understand that refusing to treat discrimination complaints seriously may have seriously adverse consequences.

* * *

The Charging Party seeks to impose a $10,000 civil penalty against Respondent, the maximum permissible in this case. Maximum penalties should be reserved for the most egregious cases, where willful conduct causes grievous harm--that is, where all factors argue for the maximum penalty. This case does not fall into that category. A civil penalty of $5,000 will vindicate the public interest.

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing. 42 U.S.C. § 3612(g)(3). The Charging Party in its brief requested injunctive relief as set out in an "attached proposed order." Brief, at 22. However, no order was attached to the Charging Party's brief. When injunctive relief is sought, it is the duty of the movant to specify in detail the nature of the relief sought. Absent that information, nothing more than a generally prohibitory order will be issued.

Conclusion

Unexcused willful negligence by Respondent's attorneys caused issuance of a Default Judgment against Respondent. The Default Judgment found that Respondent has violated sections 804(a) and 804(d) of the Fair Housing Act. 42 U.S.C. §§ 3604(a) and (d). As a result of Respondent's conduct, Complainant suffered actual damages for which he will receive a compensatory award. Further, to vindicate the public interest, an injunction will be ordered as well as a civil penalty against Respondent.

ORDER

It is hereby **ORDERED** that:

1. Respondent is permanently enjoined from discriminating against Complainant, any member of his family, or any tenant or prospective tenant, with respect to housing because of race.

2. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay actual damages to Complainant of $8,043.20.

3. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay a civil penalty of $5,000 to the Secretary of HUD.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R. § 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

/s/

THOMAS C. HEINZ
Administrative Law Judge

Dated: March 17, 1995