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, CHARGING PARTY, ON BEHALF OF: PEGGY J. COUCH, COMPLAINANT, V. MAGNOLIA WALK APARTMENTS II, LTD. MAGNOLIA WALK APARTMENTS II, INC., JOTAR MANAGEMENT SERVICES, INC. ET AL., RESPONDENTS.	HUDALJ 11-F-083-FH-42 December 14, 2011

DECISION AND NOTICE OF ELECTION

Currently before this Court is Respondents' *Notice of Election*, dated October 25, 2011; *Charging Party's Brief Concerning Respondents' Election Request* (Charging Party's Brief), dated November 4, 2011; *Respondents' Brief on Service of Charge of Discrimination* (Respondents' Brief), dated November 4, 2011; and *Respondents' Response to Charging Party's Brief* (Respondents' Reply), dated November 14, 2011.

Respondents wish to have the claims asserted in the Charge of Discrimination (Charge) decided in a United States district court pursuant to 42 U.S.C. § 3612(o). As such, on October 25, 2011, Respondents filed an election to proceed in Federal District Court that appeared, on its face, to have been filed late. (Order Requiring Briefing, dated October 26, 2011; Notice of Election.) Respondents claim that their filing was timely because "counsel for Respondents has yet to be served with the Charge of Discrimination." (Resp't Br. ¶ 16.) Respondents, therefore, request for this Court to "find that the election to proceed in Federal District Court by counsel for Respondents was timely received." (Resp't Br. 4.)

The Charging Party, however, claims that Respondents were properly served and that "the deadline to file a notice of election for Respondents . . . was Monday, October 24, 2011." (Charging Party's Br. ¶¶ 9-10.) The Charging Party asks that the Court "consider the relevant rules, regulations, and case law in making its decision as to whether Respondents' election request was timely received." (Id.)

APPLICABLE LAW

Pursuant to the Fair Housing Act (Act), either party may elect to have the claims asserted in the Charge decided in a United States district court if said election is made "not later than 20 days after receipt by the electing person of service under section 3610(h)." 42 U.S.C. § 3612(a); 24 C.F.R. § 103.410(b). Section 3610(h) of the Act requires that the Charge, together with information regarding election procedures (collectively known as "Charge of Discrimination Package"), be served on each respondent and aggrieved person on whose behalf the complaint was filed. 42 U.S.C. § 3610(h)(1)-(2).

Title 24, Subtitle B of the Code of Federal Regulations implements the Act and requires the Charging Party to serve copies of the Charge of Discrimination Package on all respondents and aggrieved persons. 24 C.F.R. § 103.405(b)(3); 24 C.F.R. § 180.410(a). The term "Respondent" refers to "the person accused of violating one of the statutes covered by [part 180 of Title 24 of the Code of Federal Regulations]." 24 C.F.R. § 180.100(c).

THE PARTIES' POSITIONS

The Charging Party claims that it complied with service requirements under the Act and implementing regulations because it sent copies of the Charge of Discrimination Package to Respondents within three days after issuing the Charge. (Charging Party's Brief Concerning Respondents' Election Request, dated Nov. 4, 2011, at ¶ 4.) Copies of the Charge of Discrimination Package were sent to the named Respondents by both UPS overnight mail and first class mail on September 30, 2011.[1] (Id.) The Charging Party also claims that a "courtesy copy" of the Charge of Discrimination Package was mailed through first class mail on September 30, 2011 to Ian C. White, counsel for Respondents, at "2910 Kerry Forrest Parkway, Suite D4-357, Tallahassee, FL 32309." (Id.; Affidavit of Service by Shirley A. Green, ¶ g.) The Charging Party asserts that the deadline for Respondents to file a Notice of Election was October 24, 2011, and, therefore, Respondents' election filed on October 25, 2011 was untimely.

Respondents argue that their counsel of record has never been served, and therefore, 42 U.S.C. 3612(a) does not apply. Specifically, Respondents argue that pursuant to 24 C.F.R. § 180.400(a)(2), service must be made upon counsel if a party is represented by counsel and that service may be made to the last known address.[2] (Resp't Br. 2-3.) Respondents claim that the address used to send the Charge of Discrimination Package to Respondents' counsel was not his last known address, but instead, was an address previously used by Respondents' counsel up until December 24, 2010. (Affidavit of Ian C. White, ¶ 4; Affidavit of Joe Merola, 3.) Respondents claim that the Charging Party had notice of Mr. White's current address as early as January 31, 2011 and as recent as September 27, 2011, which was less than one week before the Charge of Discrimination Package was issued to Respondents and their counsel. (Resp'ts Br. at

[1] With the exception of Respondent Jotar Management Services, Inc. and/or its successor entity Jotar Management Services, LLC, Respondents were all served with their copies of the Charge of Discrimination Package on Monday, October 3, 2011. Respondent Jotar Management Services, LLC was served on Tuesday, October 4, 2011. (Charging Party's Br. ¶ 5.)

[2] Although Respondents' counsel claims he was never served, he acknowledges receiving a copy of the Charge of Discrimination on October 6, 2011 from one of the named Respondents. (Id. at ¶ 13.)

¶¶ 9-11.) Respondents claim that service, if at all effected, did not occur until October 6, 2011 making the election deadline October 26, 2011. Therefore, Respondents claim, their election, received by the Docket Clerk on October 25, 2011, was timely.

DISCUSSION

Although the plain language of 24 C.F.R. § 180.410(a) states that copies of the Charge of Discrimination Package need only be served on all respondents and aggrieved persons, neither this regulation, nor 24 C.F.R. § 103.405(b)(3) define what "service" entails. Accordingly, the Court must look to § 180.400 which discusses the procedures for effecting service:

> (a) *Service—*
>
> (1) *Service by the Office of ALJs*…
>
> (2) *Service by others*. A copy of each filed document shall be served on each party and each amicus curiae. Service shall be made upon counsel if a party is represented by counsel. Service on counsel shall constitute service on the party. Service may be made to the last known address by first-class mail or other more expeditious means . . . ..

The provisions contained within § 180.400 require the Charging Party to serve Respondents' counsel if they are being represented by counsel.[3] Respondents have submitted several pieces of correspondence demonstrating that the Charging Party knew Respondents were being represented by Mr. White and knew of Mr. White's correct address. (Resp'ts Br., Exhs. C, F, G, H and I.) Accordingly, the Court finds that the Charging Party did not properly serve Respondents as required by 24 C.F.R. § 180.400(a)(2) when it failed to send the Charge of Discrimination Package to Mr. White's last known address.

Additionally, although Respondents claim that 42 U.S.C. § 3612(a) does not yet apply because "counsel for Respondents has yet to be served with the Charge of Discrimination," the Court disagrees. The Court finds that Respondents were served on October 6, 2011 when Respondents' counsel received a copy of the Charge of Discrimination Package from one of the named Respondents. Respondents' Notice of Election filed on October 25, 2011 was timely.[4]

[3] The Charging Party does not dispute Mr. White's representation of Respondents in this matter and, in fact, identified Mr. White as Respondents' Representative on the Certificate of Service attached to the Charge.

[4] The election must be made no later than 20 days *after the receipt by the electing person of service* under 3610(h). True, there was no certificate of service. But Respondent Counsel's acknowledgement that he received a copy of the documents, albeit in circuitous fashion, is sufficient to constitute "service." 24 C.F.R. § 180.400(a)(2)(i).

Therefore, take notice that the administrative proceeding in HUDALJ 11-F-083-FH-42, FHEO Case No. 04-10-0110-8, is terminated in order that the Secretary may proceed with a civil action pursuant to 42 U.S.C. § 3612(o).

So **ORDERED**.

Alexander Fernández
Alexander Fernández
Administrative Law Judge