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

In the Matter of: **PF Sunset Plaza LLC**, Respondent.	21-AF-0131-CM-006 October 7, 2021

ORDER OF DISMISSAL

This matter is before the Court upon a *Complaint for Civil Money Penalties* ("Complaint") filed by the U.S. Department of Housing and Urban Development ("HUD") seeking to impose $391,210 in civil money penalties against PF Sunset Plaza LLC ("Respondent") pursuant to 42 U.S.C. § 1437z-1 as implemented by 24 C.F.R part 30.

Respondent is the owner of record of Sunset Plaza, a multifamily property in Tulsa, Oklahoma, that receives project-based assistance from HUD under Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f, pursuant to two Housing Assistance Payments ("HAP") contracts. The *Complaint* accuses Respondent of violating its HAP contracts by failing to provide decent, safe, and sanitary housing at the project property, thereby subjecting Respondent to civil money penalties under 42 U.S.C. § 1437z-1(b)(2)(A) (added to the United States Housing Act of 1937 via Pub. L. 105-65, § 562, 111 Stat. 1344, 1416 (Oct. 27, 1997), and referred to hereinafter as "Section 29").[1]

HUD now asks the Court to enter default judgment in this matter and order Respondent to pay the proposed civil money penalties due to Respondent's failure to timely file a hearing request or an answer to the *Complaint*. Respondent, through counsel, has filed a belated *Answer and Affirmative Defenses* and opposes HUD's motion for default judgment.

After careful consideration of the parties' filings, the Court will dismiss this matter for lack of jurisdiction, for the reasons discussed below.

[1] The statute and implementing regulations specify that HUD may impose civil money penalties against a property owner receiving project-based Section 8 assistance who violates its HAP contract by failing to provide decent, safe, and sanitary housing in accordance with Section 8 and with HUD's Uniform Physical Conditions Standards, which are codified at 24 C.F.R. § 5.703. See 42 U.S.C. § 1437z-1(b)(2)(A); 24 C.F.R. § 30.68(b)(1). In this case, the *Complaint* alleges that, during an on-site review of the project property, Sunset Plaza, in December 2019, HUD found significant violations of the Uniform Physical Conditions Standards in ten different subsidized housing units. If established, these violations would show that Respondent, as the property owner, breached its HAP contracts with HUD by failing to maintain the project property in decent, safe, and sanitary condition.

I. APPLICABLE LAW

Section 29(b) of the United States Housing Act permits HUD to impose civil money penalties on any property owner receiving project-based Section 8 assistance who violates a HAP contract with HUD, which Respondent is accused of doing in this case. See 42 U.S.C. § 1437z-1(b). Before imposing such penalties, HUD must give the liable party notice and an opportunity for a hearing on the record. Id. § 1437z-1(c)(1)(B). Congress directed the Secretary of HUD to establish standards and procedures governing the imposition of civil money penalties and providing the opportunity for a hearing on the record. 42 U.S.C. § 1437z-1(c)(1). The Secretary has duly promulgated such regulations in Volume 24, part 30 of the Code of Federal Regulations. See 24 C.F.R. part 30.

HUD's regulations implementing Section 29 provide that, upon making a determination to seek a civil money penalty, HUD must issue a complaint notifying the respondent of HUD's determination and of the respondent's "right to submit a response in writing, within 15 days of receipt of the complaint, requesting a hearing on any material fact in the complaint, or on the appropriateness of the penalty sought." 24 C.F.R. § 30.85(b)(4). The hearing request must be submitted to this Court. Id. § 30.90(a). The regulations characterize the 15-day deadline to request a hearing as mandatory, stating that the deadline is "required by statute" and "cannot be extended." Id. Indeed, Section 29(c) mandates:

> If a hearing is not requested before the expiration of the 15-day period beginning on the date on which the notice of opportunity for hearing is received, the imposition of a penalty under subsection (b) shall constitute a final and unappealable determination.

42 U.S.C. § 1437z-1(c)(2)(A).

II. PROCEDURAL HISTORY

On April 26, 2021, HUD served the *Complaint* in this matter on Respondent via email and simultaneously filed it with this Court. A hard copy of the *Complaint* was also delivered to Respondent by UPS on April 27, 2021. The *Complaint* notified Respondent of its right to request a hearing no later than 15 days following receipt of the *Complaint*, i.e., by May 11, 2021, and to file an answer to the *Complaint* within 30 days, i.e., by May 26, 2021, in accordance with 24 C.F.R. § 30.90. The *Complaint* also warned Respondent that failure to respond would result in HUD moving for default judgment under the applicable procedural regulations.

On June 2, 2021, after Respondent had failed to timely request a hearing or file an answer to the *Complaint*, HUD filed a *Motion for Default Judgment* pursuant to 24 C.F.R. §§ 30.90(c) and 26.41. The procedural rules required Respondent to file a response to the motion within ten days, i.e., by Monday, June 14, 2021. See 24 C.F.R. § 26.41(a). However, Respondent did not file any response by June 14.

On June 3, 2021, the Court issued an *Order to Show Cause* directing Respondent to submit, on or before June 14, 2021, a written explanation as to why it had not timely answered

the *Complaint*, as well as a response to the *Complaint* that comported with the requirements of 24 C.F.R. § 30.90(b). However, as of June 14, Respondent had not filed an answer to the *Complaint*, responded to the *Order to Show Cause*, or otherwise communicated with or appeared before this Court.

On June 24, 2021, as the Court was poised to enter default judgment against it, Respondent, through counsel, submitted a filing styled *Notice of Appearance of Counsel and Respondent's Unopposed Motion for Extension of Time to Respond to Complaint*. In response to HUD's *Motion for Default Judgment*, Respondent requested an extension of time until July 5, 2021, to file an answer to the *Complaint* on grounds that it had not formally retained counsel until after HUD filed the motion. Respondent also argued that default judgment is generally disfavored, especially when the party responding is prepared to present meritorious defenses.

Notwithstanding Respondent's characterization of its extension request as "unopposed," HUD counsel immediately notified the Court that HUD did not consent to the request. Shortly thereafter, on June 25, 2021, Respondent filed an *Amended and Clarified Motion for Extension of Time to Respond to Complaint* ("Motion for Extension") maintaining that HUD would not be prejudiced by giving Respondent until July 5 to file its answer to the *Complaint* because HUD counsel had previously consented to a similar extension request. (Emails submitted by HUD counsel show that, on June 7, 2021, she agreed to a 7-day extension of time to respond to the *Order to Show Cause*.)

On July 2, 2021, HUD filed an *Opposition to Respondent's Amended and Clarified Motion for Extension of Time to Respond to Complaint* ("Opposition"). HUD first argued that Respondent's *Motion for Extension* should be denied as procedurally moot and default judgment should be entered against Respondent due to Respondent's failure to request a hearing within 15 days of receipt of the *Complaint*, as required under 42 U.S.C. § 1437z-1(c)(2)(A). HUD next asserted that the motion should be denied as inexcusably untimely and unsupported by good cause. In support, HUD claimed that counsel for Respondent has been involved in this matter, even if not formally retained, since at least March 2020, and argued that failure to timely retain counsel is not an excuse for missing litigation deadlines. Finally, HUD also argued that Respondent had not established good cause to set aside default because the default in this case was willful and Respondent—as of HUD's filing—had raised no defenses to the *Complaint*.

On July 2, 2021, several hours after HUD filed the *Opposition*, Respondent filed an *Answer and Affirmative Defenses* ("Answer") responding to the *Complaint* in this matter.

On July 6, 2021, Respondent filed a *Reply in Support of Its Amended and Clarified Motion for Extension of Time* ("Reply") arguing that (1) its failure to respond to the *Order to Show Cause* was inadvertent, as the order was not promptly served upon Respondent, and was not prejudicial to HUD; (2) its failure to meet the 15-day deadline to request a hearing under 42 U.S.C. § 1437z-1(c)(2)(A) does not render the *Motion for Extension* procedurally moot; (3) its request for an extension of time to file an answer is supported by good cause; and (4) its request to set aside default is supported by good cause.

On July 7, 2021, HUD filed a *Motion to Strike or Exclude Respondent's Improper Reply Brief* ("Motion to Strike") asking the Court to strike or exclude the *Reply* due to Respondent's failure to seek or obtain the Court's permission to file it. HUD continues to argue that the Court should render default judgment against Respondent.

III. DISCUSSION

Pursuant to Section 29 of the United States Housing Act and HUD's implementing regulations, the deadline for Respondent to request a hearing in this matter was May 11, 2021, fifteen days after receiving the *Complaint* providing notice of opportunity for a hearing. See 42 U.S.C. § 1437z-1(c)(2)(A); 24 C.F.R. § 30.90(a). However, Respondent did not request a hearing, or otherwise communicate with or appear before the Court, until June 24, 2021, more than six weeks past the May 11 deadline, when it moved for an extension of time to file its answer to the *Complaint*.

The parties now dispute whether HUD is entitled to default judgment or whether Respondent should have an opportunity to be heard on the merits. But their arguments, particularly HUD's argument that Respondent's *Motion for Extension* is "procedurally moot" due to Respondent's failure to request a hearing by May 11, 2021, raise a more fundamental question: whether the Court has jurisdiction over this matter at all under Section 29, given that Respondent failed to request a hearing before the expiration of the 15-day statutory deadline set forth in Section 29(c). See 42 U.S.C. § 1437z-1(c)(2)(A).

As discussed above, Section 29(c) permits imposition of a penalty "only after the liable party has received notice and the opportunity for a hearing on the record." Id. § 1437z-1(c)(1)(B). But if the liable party does not request a hearing within 15 days of receiving such notice, "the imposition of a penalty under subsection (b) shall constitute a final and unappealable determination." Id. § 1437z-1(c)(2)(A). The plain language of this provision signals that, absent a timely hearing request, HUD's proposed penalty is imposed automatically—the "imposition" of the penalty becomes "final and unappealable"—upon the expiration of the 15-day deadline. Id. Thus, the statute seems to contemplate that the penalty becomes a *fait accompli* once the 15-day deadline has elapsed, meaning that the hearing official's jurisdiction never attaches because there is no issue to be decided. If so, all the parties' filings in the instant case, not just Respondent's *Motion for Extension*, would be moot due to Respondent's failure to timely request a hearing by May 11, 2021.

Respondent asserts that the Court's and HUD's own actions in this matter belie any mootness argument. If "the game was over" on May 11, Respondent argues, the Court would not have issued an *Order to Show Cause* on June 3 giving Respondent until June 14 to file an answer to the *Complaint*, and HUD would not have consented to allowing Respondent an extension of time to respond to the *Order to Show Cause*.

It is true that all parties involved in this matter, including the undersigned judge, have proceeded as if the Court had jurisdiction despite Respondent's failure to timely request a hearing. Upon issuing the *Complaint* to Respondent, HUD simultaneously filed the *Complaint* with this Court without waiting 15 days to see whether Respondent would request a hearing.

Then, instead of immediately moving for dismissal after the 15-day deadline had expired, HUD filed a *Motion for Default Judgment*, seemingly undercutting its own position that Respondent's failure to meet the deadline rendered subsequent filings procedurally moot. And in response to the *Motion for Default Judgment*, the undersigned issued a show cause order.

However, HUD's civil money penalty regulations required HUD counsel to file the *Complaint* with this Court before waiting to see whether Respondent requested a hearing, and indicated counsel should move for default judgment when no response was received. See 24 C.F.R. § 30.85(b) (stating that the complaint, which serves as the notice of opportunity for hearing, "shall be served upon respondent and simultaneously filed with the Office of Administrative Law Judges"); id. § 30.90(c) ("If no response is submitted, then HUD may file a motion for default judgment, together with a copy of the complaint, in accordance with § 26.41 of this title."). Based on the statute, it would have made more sense for HUD to first notify Respondent of the opportunity for a hearing, then wait to see whether Respondent requested such a hearing. Instead, HUD's regulations, as they stand, compelled HUD to initiate proceedings in front of an Administrative Law Judge ("ALJ") before it was clear whether the ALJ's review function would actually be needed.

On reflection, the Court believes the procedure spelled out in the civil money penalty regulations in 24 C.F.R. part 30—specifically, the option to pursue an ALJ ruling by filing a complaint and motion for default judgment despite the absence of a timely hearing request—is flawed, for several reasons.

First, this procedure conflicts with the plain language of the controlling statute. As discussed above, Section 29(c) indicates there is no issue for the ALJ to review in the absence of a timely hearing request because the penalty becomes final and unappealable as soon as the respondent misses the 15-day deadline. 42 U.S.C. § 1437z-1(c)(2)(A). If the respondent misses the deadline, the ALJ has no basis to render judgment and should simply dismiss the matter.

Second, the regulations in 24 C.F.R. part 30 are internally inconsistent. One provision requires HUD to file the complaint with an ALJ immediately upon issuance to the respondent, without waiting for a response. 24 C.F.R. § 30.85(b). But the very next provision states that "HUD shall file the complaint *and response* with the Docket Clerk, Office of Administrative Law Judges, in accordance with § 26.38 [which explains how proceedings are commenced before a HUD ALJ]." Id. § 30.90(c) (emphasis added); see id. § 26.38. This suggests that the proceeding before the ALJ is commenced by HUD's filing of a complaint *and* response at the same time, meaning that HUD must wait to hear from the respondent before filing anything with the Court. The regulation goes on to state that, "[i]f no response is submitted, HUD may file a motion for default judgment, *together with a copy of the complaint*, in accordance with § 26.41 of this title." Id. § 30.90(c) (emphasis added). Again, this language seems to contemplate that the complaint has not yet been filed. The inconsistency between § 30.85(b) and § 30.90(c) creates confusion over when and how the proceeding before the ALJ commences and when the ALJ's jurisdiction attaches.

Further, although § 30.90(c) permits HUD to seek default judgment after a respondent misses the deadline to request a hearing, the same regulation incongruously emphasizes that the deadline is mandatory. Subsection (a) of § 30.90 states:

> If the respondent desires a hearing before an administrative law judge, the respondent shall submit a request for a hearing to HUD and the Office of Administrative Law Judges no later than 15 days following receipt of the complaint, as required by statute. **This mandated period cannot be extended.**

24 C.F.R. § 30.90(a) (emphasis added). By contrast, subsection (b) states that the 30-day deadline for the respondent to file an answer to the complaint may be "extended by the administrative law judge for good cause." Id. § 30.90(b). The omission of any similar language in subsection (a) supplying criteria under which the judge may extend the 15-day deadline reinforces the idea that the judge is not empowered to do so under any circumstances.

Thus, subsections (a) and (b) of § 30.90 make clear that the 15-day deadline cuts off the ALJ's adjudicatory capacity. This stands in tension with subsection (c)'s suggestion that HUD may seek a judgment even after the deadline has been missed. Even a default judgment requires the exercise of some judicial discretion, as the ALJ still must review the complaint and issue a decision affirming the legal sufficiency of its allegations. See 24 C.F.R. § 26.41(b) (requiring issuance of decision on default); e.g., Tripoli v. Welch, 810 F.3d 761, 765 (10th Cir. 2016) ("[E]ven in default … judgment must be supported by a sufficient basis in the pleadings."). It seems unfair to allow one party to forge ahead in pursuit of an ALJ judgment, as HUD seeks to do in this case, even when, as HUD argues in this case, the expiration of the 15-day deadline has procedurally mooted the opposing party's filings and effectively barred that party from appearing before the judge at all.

Nonetheless, HUD ALJs have rendered default judgments in past civil money penalty cases where HUD moved for default after the respondent failed to submit any filings. The outcome of such cases was harmless because, unlike in the instant case, the respondents did not mount any defenses.[2] However, in each such case, the ALJ's review of the complaint and issuance of a default judgment provided a layer of process that was unnecessary under Section 29(c) because the penalty proposed in the complaint had already become final and unappealable upon expiration of the 15-day deadline without a hearing request.

---

[2] To the knowledge of the undersigned, this Court has never had occasion to directly address whether default judgment is appropriate in a civil money penalty case where the respondent misses the 15-day deadline but later files an answer. In a 2009 case cited by HUD, the Court granted default judgment after the respondent missed the 15-day deadline but later responded to an order to show cause. See Hawaii Pub. Hous. Auth., No. 09-F-033-CMP-9 (HUDALJ Apr. 15, 2009). However, unlike in the instant case, the respondent in that case never filed an answer to the complaint. Id. The undersigned is also aware of one prior case where the respondents, apparently in confusion, submitted a timely answer within 30 days of receiving the complaint, despite having neglected to request a hearing within 15 days. See Mantua Gardens East, Inc., No. 12-F-043-CMP-3 (HUDALJ June 25, 2012) (order). HUD moved to strike the respondents' answer based on their failure to file a hearing request. Id. However, HUD later withdrew its motion to strike and allowed the case to proceed after the Court issued an order questioning whether HUD had given the respondents adequate notice of the 15-day rule. Id. The instant case does not involve any similar concerns about whether Respondent was given adequate notice of the 15-day deadline.

The different circumstances of the instant case have given the Court pause to consider whether entry of default judgment in the absence of a timely hearing request is not only unnecessary, but inappropriate in some circumstances. Default judgment is generally disfavored, especially where, as here, an answer has been submitted, because there is a strong public policy favoring resolution on the merits. See, e.g., Harvey v. United States, 685 F.3d 939, 946 (10th Cir. 2012); Pulliam v. Pulliam, 478 F.2d 935, 936 (D.C. Cir. 1977). The 15-day deadline does not provide good cause to go against that public policy. Instead, the appropriate course of action when a respondent misses the 15-day deadline in a civil money penalty case is to dismiss the proceedings before the ALJ because the penalty proposed in the complaint has already become final and unappealable.

CONCLUSION AND ORDER

For the foregoing reasons, the Court concludes that the penalty proposed in the *Complaint* has already become final under 42 U.S.C. § 1437z-1(c)(2)(A) and that the Court lacks authority to adjudicate this matter.[3] Accordingly, this proceeding is hereby **DISMISSED**.

So **ORDERED**,

ALEXANDER FERNANDEZ-PONS

Digitally signed by: ALEXANDER FERNANDEZ-PONS
DN: CN = ALEXANDER FERNANDEZ-PONS C = US O = U.S. Government OU = Department of Housing and Urban Development, Office of the Secretary
Date: 2021.10.07 16:00:15 -04'00'

Alexander Fernández-Pons
Administrative Law Judge

[3] As the penalty proposed in the *Complaint* has been declared the final agency action, this matter may be appealed within 20 days to the appropriate court of appeals of the United States in accordance with 12 U.S.C. § 1735f-15(e) as applied by 42 U.S.C. § 1437z-1(d).