

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

In the Matter of:

EF 94, LLC, AND
MENDEL KAFF,

Respondents.

24-AF-0036-CM-002

January 11, 2024

ORDER OF DISMISSAL

This matter arose from a *Complaint* filed by the U.S. Department of Housing and Urban Development (“HUD” or “the Secretary”) against EF 94, LLC (“EF 94”) and Mendel Kaff (collectively, “Respondents”) seeking civil money penalties pursuant to 12 U.S.C. § 1735f-15(c) and 24 C.F.R. part 30. HUD claims Respondents knowingly failed to timely file audited financial statements for fiscal years December 31, 2021, and December 31, 2022. As a result, HUD seeks a civil money penalty of \$118,632.00 (\$59,316.00 for each year).

Respondent EF 94 is a New York Limited Liability Company and the owner of 945-947 East 94 Street, a forty (40) unit multifamily property located in Brooklyn, New York (the “Property”). Respondent Kaff is the managing member of EF 94. The Property was financed with the proceeds of a loan insured against default by HUD pursuant to Sections 207 and 223(f) of the National Housing Act (“NHA”). See 12 U.S.C. §§ 1713 and 1715n(f).

HUD now moves for default judgment against Respondents. However, after careful consideration, the Tribunal will dismiss this matter for lack of jurisdiction for the reasons discussed below.

I. APPLICABLE LAW

HUD may impose a civil money penalty on the mortgagor of a property that includes five or more living units and that has a mortgage insured, coinsured, or held pursuant to the NHA. See 12 U.S.C. § 1735f-15(c)(1)(A)(i). HUD may also impose a civil money penalty on any officer or director of a corporate mortgagor of such property. See 12 U.S.C. § 1735f-15(c)(1)(A)(iv).

A civil money penalty may be imposed upon a party liable under the statute that knowingly and materially take the following action:

Failure to furnish the Secretary, by the expiration of the 90-day period beginning on the first day after completion of each fiscal year (unless the Secretary has

approved an extension of the 90-day period in writing), with a complete annual financial report, in accordance with requirements prescribed by the Secretary, including requirements that the report be –

- (I) based upon an examination of the books and records of the mortgagor;
- (II) prepared and certified to by an independent public accountant or a certified public accountant (unless the Secretary has waived this requirement in writing); and
- (III) certified to by the mortgagor or an authorized representative of the mortgagor.

See 12 U.S.C. § 1735f-15(c)(1)(B)(x).

HUD may impose a civil money penalty of up to \$59,316.00 for each violation. See 12 U.S.C. § 1735f-15(c). See also 24 C.F.R. § 30.45(g) (as amended by 88 FR 9748, Feb. 15, 2023).

Before imposing such penalties, Congress directed the Secretary to establish standards and procedures governing the imposition of civil money penalties and providing the opportunity for a hearing on the record. See § 1735f-15(d)(1). The Secretary has duly promulgated such regulations in part 30 of title 24 of the Code of Federal Regulations.

HUD’s regulations provide that, upon determining to seek a civil money penalty, HUD must issue a complaint notifying the respondent of HUD’s decision 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 regulations characterize the 15-day deadline to request a hearing as mandatory, stating that the deadline is “required by statute” and “cannot be extended.” See § 30.90(a)(1). Indeed, Congress mandates:

If no hearing is requested within 15 days of receipt of the notice of opportunity for hearing, the imposition of the penalty shall constitute a final and unappealable determination.

12 U.S.C. § 1735f-15(d)(2). The hearing request must be submitted to this Tribunal. See 24 C.F.R. § 30.90(a).

II. PROCEDURAL HISTORY

On November 17, 2023, HUD served the *Complaint* on Respondents via email and simultaneously filed it with the Tribunal.¹ See 24 C.F.R. § 30.85. A hard copy of the *Complaint* was also served on Respondents by USPS Certified Mail, USPS First Class Mail, and FedEx 2Day on the same day. See 24 C.F.R. § 26.30(b). The *Complaint* notified Respondents of the right to request a hearing no later than 15 days following receipt of the *Complaint*, *i.e.*, by

¹ Respondent EF 94 was served via email to Respondent Kaff.

Saturday, December 2, 2023. The *Complaint* also warned Respondents that the 15-day deadline was not extendable and failure to respond might result in the imposition of the penalty amount sought by HUD. The 15-day deadline elapsed without this Tribunal receiving any hearing request from Respondents.

On January 5, 2024, HUD filed its *Secretary's Motion for a Default Judgment Against Respondents* ("Motion") with the Tribunal via electronic mail and served both Respondents via electronic mail at Respondent Kaff's email address. On that day, HUD also mailed the Motion to Respondents via USPS Certified Mail and FedEx 2Day.

HUD now moves to impose civil money penalties jointly and severally totaling \$118,632.00 against Respondents for failing to timely file the audited annual financial reports for years 2021 and 2022. Respondents did not file a response to HUD's Motion.

III. DISCUSSION

Pursuant to the NHA and HUD's implementing regulations, the deadline for Respondents to request a hearing in this matter was December 2, 2023, fifteen (15) days after receiving the *Complaint* providing notice of opportunity for a hearing. See 12 U.S.C. § 1735f-15(d)(2); see also 24 C.F.R. § 30.90(a). Respondents did not submit such a request.

This Tribunal no longer has jurisdiction over this matter at all under the NHA, given that Respondents failed to request a hearing before the expiration of the 15-day statutory deadline. Thus, the validity and basis of the penalty are not in dispute before the undersigned, whose only role now is to dismiss any commenced action. This is consistent with the applicable regulation, subsection (a) of § 30.90:

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).

The appropriate course of action when a respondent misses the 15-day deadline in a civil money penalty case is to dismiss any proceedings before the Tribunal because the penalty proposed in the *Complaint* has already become final by operation of the governing statute and the Tribunal lacks authority to adjudicate the matter. See Adams House of Tampa, Inc., HUDOHA No. 23-AF-0092-CM-002 (Sept. 21, 2023); Sunset Plaza, LLC v. United States HUD, 60 F.4th 692, 697 (D.C. Cir. 2023) (affirming Ralston GA LLC and PF Holdings LLC, HUDOHA No. 21-JM-0180-CM-007 (Oct. 25, 2021) and PF Sunset Plaza LLC, HUDOHA No. 21-AF-0131-CM-006 (Oct. 7, 2021)).

Here, each Respondent was presented with notice of the opportunity for a hearing but failed to comply with the statutory deadline to request the same. As such, the penalty proposed in the *Complaint* has become final under 12 U.S.C. § 1735f-15(d)(2) and 42 U.S.C. § 1437z-1(c)(2)(A) as to both Respondents.

CONCLUSION AND ORDER

For the foregoing reasons, the Tribunal concludes that the penalty proposed in the *Complaint* has already become final under 12 U.S.C. § 1735f-15(d)(2) and that the Tribunal lacks authority to adjudicate this matter. Accordingly, the *Secretary's Motion for a Default Judgment Against Respondents* is **DENIED** as moot. 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
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Development, Office of the Secretary
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Alexander Fernández-Pons
United States Administrative Law Judge

Notice of appeal rights. This Order constitutes the final agency action under 12 U.S.C. § 1735f-15(d)(2). This matter may be appealed within 20 days to the appropriate United States court of appeals in accordance with 12 U.S.C. § 1735f-15(e)(1).