

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

In the Matter of:

BROADWAY TOWER APARTMENT
ASSOCIATES, A UTAH LIMITED
PARTNERSHIP, AND KENNETH T.
HOLMAN, GENERAL PARTNER,

Respondents.

HUDALJ No. 05-015-PF

Luc A. Odabashien, Esquire
For the Government

Broadway Tower Apartment Associates,
A Utah Limited Partnership,
Respondent

Kenneth T. Holman, General Partner,
Respondent

Before Arthur A. Liberty,
Chief Administrative Law Judge

DEFAULT DECISION AND ORDER

On August 20, 2004, the U.S. Department of Housing and Urban Development ("the Government" or "HUD") served letters on Broadway Tower Apartment Associates, a Utah Limited Partnership, and Kenneth T. Holman, General Partner of Broadway Tower Apartment Associates ("Respondents"), notifying them of the Government's intent to seek civil money penalties, and including copies of the Complaint for Civil Money Penalties the Government intended to file. Although the notice letters stated, "You must submit a written response to the Complaint within 15 days of its receipt" (pursuant to 24 CFR 30.90(a)) and "If you do not respond within 15 days, the Complaint will be filed . . . along with a Motion for a Default Judgment against you . . ." (pursuant to 24 CFR 26.39 and 30.90), Respondents did not respond to the Government, and still have not responded.

Therefore, on December 14, 2004, the Government filed with this Court the Complaint

for Civil Money Penalties against Respondents, seeking civil money penalties in the amount of \$48,000 for 1) the unauthorized distribution of funds in 2002 and 2003, and for 2) failure to timely and properly submit audited financial reports for Broadway Tower ("the Project") in 2002 and 2003. The Government stated that these actions by Respondents violated requirements set forth in the Project's Regulatory Agreement, 24 CFR 5.801, and the applicable regulations at 24 CFR Part 30. At the same time, the Government also filed a Motion for Default Judgment (pursuant to 24 CFR 30.85(b) and 30.90(b)), based on Respondents' failure to respond to the Complaint.

In the 24 days since the Government filed the Complaint and Motion, Respondents have also not filed any sort of response to either document with this Court. Therefore, the Motion for Default Judgment is ripe for decision.

FINDINGS OF FACT

1. Respondents are the owner and general partner, respectively, of Broadway Tower ("the Project"), with a registered office in Salt Lake City, Utah. Respondent Broadway Tower Apartment Associates, a Utah Limited Partnership ("Respondent Broadway"), owns the Project and Respondent Kenneth T. Holman ("Respondent Holman") is its General Partner. The Project is a multi-family housing project financed with a loan insured against default by HUD under Section 207, pursuant to Section 223(a)(7) of the National Housing Act, 12 U.S.C. §§ 1701 *et seq.*
2. In exchange for receiving benefits of a loan insured by HUD, Respondent Holman, as General Partner of Respondent Broadway, executed a Regulatory Agreement with the Government on February 1, 1996. Complaint ¶ 12. In the Regulatory Agreement, Respondents agreed to certain controls over the management and operation of the Project.
3. Paragraph 9(e) of the Regulatory Agreement requires Respondents to provide HUD with an audited financial statement, prepared in accordance with the requirements of HUD, within 60 days after the completion of the fiscal year. Complaint ¶ 13. Title 24 CFR 5.801(c)(2) extends the time to file an audited financial statement to 90 days after the completion of the fiscal year.
4. The Project's fiscal year ends on December 31. Complaint ¶ 15. The Project's audited financial statement is therefore due on March 31 -- 90 days after the end of the fiscal year. The Project's 2002 audited financial statement was due by March 31, 2003, and its 2003 audited financial statement was due by March 31, 2004.
5. However, the Project's audited financial statement for 2002 was filed on July 3, 2003 (Complaint ¶ 17), a little more than three months late. The Project's audited financial statement for 2003 was filed on July 12, 2004 (Complaint ¶ 18), again a little more than three months late.
6. Respondents' failure to provide the audited financial statements for fiscal years 2002

and 2003 to HUD in a timely manner violates paragraph 9(e) of the Regulatory Agreement, as modified by 24 CFR 5.801(c)(2). Complaint ¶ 19.

7. On June 24, 2003 the Government provided written notice to Respondents that it was considering seeking a civil money penalty against them for their failure to properly file the required annual financial report for fiscal year 2002. Complaint ¶20. The notice provided Respondents 30 days in which to submit a written response. Complaint ¶21. Respondents did not provide a written response to the notice. Complaint ¶22.

8. On May 24, 2004, the Government provided written notice to Respondents that it was considering seeking a civil money penalty against them for their failure to properly file the required annual financial report for fiscal year 2003. Complaint ¶23. The notice provided Respondents 30 days in which to submit a written response. Complaint ¶24. Respondents did not provide a written response to the notice. Complaint ¶25.

9. Paragraph 6(b) of the Regulatory Agreement prohibits the Mortgagor, without the prior written approval of the Secretary of HUD, from assigning, transferring, disposing of, or encumbering any personal property of the Project, including rents, or paying out any funds except from surplus cash, except for reasonable operating expenses and necessary repairs. Complaint ¶ 26.

10. Paragraph 6(e) of the Regulatory Agreement prohibits the Mortgagor, without the prior written approval of the Secretary of HUD, from making, or receiving and retaining, any distribution of assets or any income of any kind of the Project's, except surplus cash. Complaint ¶ 27.

11. The Respondents took unauthorized distributions of \$118,807 during fiscal year 2002, and unauthorized distributions of \$6,500 during fiscal year 2003. Complaint ¶ 30.

12. On October 10, 2003, the Government provided written notice to Respondents that it was considering seeking a civil money penalty against Respondents for paying out funds except from surplus cash and for making, receiving, or retaining a distribution of income without prior written approval of the Secretary. Complaint ¶28. The notice provided Respondents 30 days in which to submit a written response. Complaint ¶29.

13. Respondents provided a written response on November 28, 2003. Complaint ¶30. Respondents admitted that \$118,807 was the amount of unauthorized distributions taken by December 31, 2002, and that another \$6,500 of unauthorized distributions had been taken by November 28, 2003. Complaint ¶30. Respondents offered to return the \$6,500 and to refrain from taking further distributions until the Project accumulated surplus cash. Complaint ¶30.

14. On February 2, 2004, the Government informed Respondents that it rejected Respondents' November 28, 2003 offer to return only \$6,500 to the Project and refrain from

taking further distributions until the Project accumulated surplus cash. Complaint ¶ 30.

15. Respondents have not returned any of the above unauthorized distributions. Complaint ¶ 30.

16. On August 18, 2004, the Government provided Respondents with final written notice that it had decided to seek civil money penalties against the Respondents for the failure to timely submit acceptable annual financial reports for fiscal years 2002 and 2003, and for the unauthorized distribution of project funds in the amount of \$118,807 in 2002 and in the amount of \$6,500 in 2003. Attached to the letter was a copy of the Complaint filed in the instant case. Respondents signed for receipt of these notices on August 20, 2004.

17. Respondents were notified that they had 15 days in which to submit a written response to the Complaint, pursuant to 24 CFR 30.90(a), and that such response would be considered a request for a hearing before an ALJ. Respondents were also notified that if they did not respond within the 15 days, the Complaint would be filed before this office, along with a Motion for Default Judgment, pursuant to 24 CFR 26.39 and 30.90.

18. Respondents did not submit a written response within the 15 days. The Government duly filed its Complaint and Motion for Default Judgment with this office on December 14, 2004. Respondents still have not submitted a written response to the Complaint, either to the Government or to this office.

DISCUSSION

The regulations governing the imposition of civil money penalties are found at 24 CFR Parts 26 and 30 (2004). Upon the filing of a complaint for civil money penalties, the Office of Administrative Law Judges ("OALJ") has jurisdiction over the matter pursuant to 24 CFR 26.29, 26.37, and 30.90(b).

The civil money penalty process is commenced when the Government submits a pre-penalty notice to the respondents, informing the respondents that the Government is considering seeking a civil money penalty, the specific violations alleged, the maximum civil money penalty that may be imposed, the opportunity to reply in writing within 30 days after receipt of the notice, and, that failure to respond within the 30-day period may cause the Government to issue a complaint under 24 CFR 30.85 without consideration of any information that the respondent may wish to provide. 24 CFR 30.70. The respondents are also informed that their written response will constitute a request for a hearing before the OALJ.

In the instant case, the Government submitted final pre-penalty notices to the Respondents in August 2004. The letters themselves set forth all the required information above except the amount of the civil money penalty being sought, or the maximum available.

However, the Complaint for Civil Money Penalties attached to the pre-penalty notices did set forth the maximum civil money penalties involved. The Respondents therefore did have full pre-penalty notice and full notice of the contents of the Complaint.

Nonetheless, the Respondents have never submitted any response to the Complaint. Therefore, I find the Respondents in default. As a result, the Respondents are deemed to have admitted the facts as set forth above, and to have committed the violations as alleged therein.

Because the Respondents are deemed to have committed the violations as set forth in the facts, they may be subject to a civil money penalty. The Government 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 National Housing Act (*see* 12 U.S.C. §1735f-15(c)(1)(A)(I)), for the knowing and material:

(a) Assignment, transfer, disposition, or encumbrance of any personal property of the project, including rents, or paying out any funds, except for reasonable operating expenses and necessary repairs, without the prior written approval of the Secretary.

12 U.S.C. §§1735f-15(c)(1)(B)(ii); and

(b) Failure to furnish the Secretary, by the expiration of the 60-day period beginning on the 1st day after the completion of each fiscal year, with a complete annual financial report based upon an examination of the books and records of the mortgagor prepared and certified to by an independent public accountant or a certified public accountant and certified to by an officer or the mortgagor, unless the Secretary has approved an extension of the 60-day period in writing.

12 U.S.C. §§1735f-15(c)(1)(B)(x).

For violations occurring after January 7, 2002, the Government may also impose a civil money penalty against a general partner of a partnership mortgagor for failure of the mortgagor to furnish the Secretary with the required audited financial report and for the unauthorized distribution of funds. See 12 U.S.C. §§1735f-15(c)(1)(A)(ii), (B)(ii) and (B)(x); 24 CFR 20.45(c)(2) (2002).

Respondent Broadway is the mortgagor for the Project, which is a multi-family housing complex and which has a mortgage financed with a loan insured against default under the National Housing Act. Furthermore, Respondent Broadway knowingly and materially violated both 12 U.S.C. §§1735f-15(c)(1)(B)(ii) and 12 U.S.C. §§1735f-15(c)(1)(B)(x). Therefore, the Government may impose a civil money penalty against Respondent Broadway if the appropriate

factors for consideration are met, as set forth at 24 CFR 30.80.

The Secretary may also impose a civil money penalty against Respondent Holman, as the general partner of Respondent Broadway, a partnership mortgagor, for the same violations, as they occurred after January 7, 2002. Again, the appropriate factors for consideration must be met.

The amount of civil money penalty the Secretary may award varies by time period. For violations, or portions of continuing violations, that occur on or after January 7, 2002, the Secretary may impose a civil money penalty in the amount of \$30,000. For violations, or portions of continuing violations, that occur on or after April 16, 2003, the Secretary may impose a civil money penalty in the amount of \$32,500.

CIVIL MONEY PENALTY FACTORS

The following factors must be considered prior to determining whether to impose a civil money penalty against Respondents, and prior to determining the amount of any such civil money penalty: 1) the gravity of the violation; 2) Respondents' history of prior violations; 3) Respondents' ability to pay a penalty; 4) the injury to the public from the violation; 5) the benefits received by Respondents; 6) the extent of potential benefit to other persons; 7) deterrence of future violations; 8) the degree of Respondents' culpability; 9) any injury to tenants; and 10) other matters as justice may require. *See* 24 CFR 30.80.

The Government considers both types of violation to be extremely serious. In the case of late financial reports, the HUD insurance fund is potentially placed at risk because, without the financial reports, HUD is unable to determine if the project's funds are being used appropriately, whether the project is at risk of default (thus requiring the Government to pay a mortgage insurance claim), whether the tenants are having their tenant and habitation needs met, and other pertinent issues. The danger is increased in a case of a mortgagor who has made unauthorized disbursements in the past, as Respondents have apparently done.

In the case of unauthorized disbursements, the use of project funds for unauthorized purposes means that those funds are then not available for project requirements that might develop, including mortgage payments, repairs, and property upkeep, among others. This not only endangers the project itself, but also places the HUD insurance fund at greater risk due to the increased potential of default.

The potential injury to both the tenants and the public from these violations is clear. The tenants are injured if the project does not have the funds to be kept in good repair and operating appropriately, and if the Government is unable to exercise timely oversight or correction because it does not have the financial data in a timely manner. The public is injured if the Government has to expend funds to keep the project in good repair and operating appropriately, to ascertain the extent of the unauthorized disbursements or lack of funds for the project, or if the mortgagor

defaults and the Government must pay an insurance claim on the mortgage. In the instant case, the mortgage was two months delinquent in December 2004, indicating a clear risk of default.

No formal actions have been taken against Respondents in the past for any prior violations that may have occurred. However, in 2001, Respondent Broadway returned \$49,777 in unauthorized distributions, after intervention by HUD's Departmental Enforcement Center.

There is no evidence of Respondents' ability or inability to pay a penalty, or of the extent of potential benefit to other persons. The Respondents benefitted to the amount of more than \$124,000 in unauthorized disbursements, and benefitted from filing late financial reports by having a few more months in which the Government did not have financial data from which to exercise oversight of the project or track the unauthorized disbursements.

The only evidence of Respondents' culpability put forth by the Government is that the Respondents signed the Regulatory Agreement and thus knew of the requirements contained therein. However, the Government also indicates that Respondents failed to file timely financial reports in fiscal years 1999 and 2000 as well. There is no indication in the record that the Government notified Respondents that the late filing in those years was unacceptable, or that the Government took any other action against Respondents with regard to the late filing in 1999 or 2000. As a result, it appears that Respondents, while culpable for their own failure to abide by the rules in the Regulatory Agreement, are joined in culpability by the Government's failure to notify or enforce those rules in previous years, thus giving Respondents at least an impression that the timeliness requirement was not mandatory or important. As to the unauthorized disbursements, Respondents were clearly on notice that such actions were unacceptable, since they were required to return \$49,777 in fiscal year 2001. Furthermore, Respondents admitted to the unauthorized disbursements at issue in the instant case. They should have known such disbursements were not acceptable after the 2001 incident, and the fact that Respondents continued to take such disbursements in the years following indicates a high degree of culpability and knowledge.

The Respondents' actions in taking unauthorized disbursements were both knowing and material, as demonstrated by the level of culpability involved in taking such disbursements after previous incidents, and as demonstrated by the high risk such misuse of project funds places on both the project's viability and the mortgage for potential default. Respondents' actions in submitting untimely financial reports were also knowing and material. Respondents were aware of the Regulatory Agreement's requirement to submit timely financial reports, even if Respondents had submitted late reports in the past without any sanctions from the Government. Respondents did apparently manage to submit a financial report on time for fiscal year 2001. Since this was also the fiscal year in which the Government determined that Respondents had taken unauthorized disbursements and required Respondents to reimburse the project for those funds, the implication of Respondents' untimely filing in both 2002 and 2003 creates at least the appearance that Respondents hoped to avoid or delay discovery of the unauthorized disbursements by late filing of financial reports. Because the financial reports are so critical to the Government's ability to exercise oversight of HUD-insured projects, late filing of such

reports is a material violation.

The Government indicates that it believes the imposition of civil money penalties in this case will help deter both the Respondents and other insured mortgagors and general partners from engaging in either type of violation in the future, sending a message to mortgagors and general partners that neither untimely filing nor unauthorized disbursement of funds are acceptable practices, and that violators will be penalized financially.

CONCLUSION & ORDER

I find that Respondents knowingly and materially committed violations pursuant to 12 U.S.C § 1735f-15(c)(1)(B)(x) and 12 U.S.C. § 1735f-15(c)(1)(B)(ii) by failing to timely file audited financial statements for fiscal years 2002 and 2003, and by making unauthorized distributions in the amount of \$118,807 in fiscal year 2002 and \$6,500 in fiscal year 2003.

I find that the Government's request for civil money penalties against the Respondents, jointly and severally, in the amount of \$30,000 for Respondents' unauthorized distribution of \$118,307 in fiscal year 2002; in the amount of \$10,000 for Respondents' unauthorized distribution of \$6,500 in fiscal year 2003; in the amount of \$4,000 for Respondents' failure to timely file an audited financial report for fiscal year 2002; and in the amount of \$4,000 for Respondents' failure to file a timely audited financial report for fiscal year 2003, is appropriate.

The Government's Motion for Default Judgment is GRANTED. Respondents shall, jointly and severally, pay to the Secretary of HUD the total civil money penalty of \$48,000, which is immediately due and payable by Respondents without further proceedings.

This Order shall constitute the final agency action, pursuant to 24 CFR 26.39.

So ORDERED.

Arthur A. Liberty
Chief Administrative Law Judge

Dated: January 28, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of this ORDER issued by Arthur A. Liberty, Chief Administrative Law Judge, in HUDALJ No. 05-015-PF, were sent to the following parties on this 28th day of January, 2005, in the manner indicated: