No. 00-1925

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, on behalf of George White and Theresia White,

Petitioner

v.

CHRISTOPHER KOCERKA and MARIA KOCERKA,

Respondents

ON APPLICATION FOR ENFORCEMENT OF ORDER OF DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT OFFICE OF ADMINISTRATIVE LAW JUDGE

RESPONSE OF THE UNITED STATES TO PETITION FOR REHEARING

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB
950 Pennsylvania Ave., NW
Room 5010
Washington, D.C. 20530
(202) 305-4584

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RESPONSE OF THE UNITED STATES TO PETITION FOR REHEARING

Respondents ask this Court to reconsider the default judgment entered against them when they failed to respond to this Court's most recent show cause order. Respondents do not contest that they received this order from a United States Marshal. Their only excuse for not obeying the order is that they did not bother to find out what it said. Respondents also failed to respond to *three* other attempts by this Court to solicit a response that was due more than 18 months ago. They filed this petition for rehearing on the last day permitted by the Rules and more than six weeks after receiving notice of the default judgment. This Court's orders "must be obeyed if the business of the federal courts is to be conducted with appropriate dispatch, and we take violations of such orders seriously." *Stotler & Co.* v. *Able*, 837 F.3d 1425, 1427 (7th Cir. 1988). Respondents have

declined repeated invitations to participate in this case over the past three and a half years. Their last-minute request to start the entire process over again should be denied.

STATEMENT OF THE CASE

1. Complaint and Investigation. The complainants, George and Theresia White, are an interracial couple who were looking for housing for their family when they saw a sign advertising an apartment in a desirable neighborhood. R16-3-4 (Initial Decision).[1] Respondents Christopher and Maria Kocerka owned and managed the building. *Id.* at 3. When Theresia White called to inquire about the apartment, Mr. Kocerka made an appointment for her to see it. *Ibid.* When Ms. White and her husband arrived to view the apartment, Mr. Kocerka observed them approach the building, then sent a third party to tell the Whites that the apartment had been rented. *Ibid.* An hour later, Ms. White called to inquire about the apartment again and spoke with Mr. Kocerka. He asked if she was white. *Ibid.* When she told him that she was, he told her the apartment was available but that he did not want any blacks in the building. *Ibid.* The apartment remained available until it was rented to a white person three months later. *Ibid.*

The Whites filed a complaint with the Department of Housing and Urban Development (HUD) in February 1994. R1-1. Respondents hired Attorney Anthony Peraica to represent them during the investigation and filed an answer to

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[1] "R_-_-_" refers to the docket number in the administrative proceeding and the page or pages of that document in the record.

the complaint five months later. See R14-1. After initially referring the complaint to a local agency for investigation, HUD was eventually required to take the case back and conduct the investigation itself. *Id*. at 1-4.

2. Issuance of Charge. After a number of delays, the investigation was completed and HUD issued a charge of discrimination against the Kocerkas on August 25, 1998. See Initial Decision at 2. Along with the charge, Respondents were given notice that they were required to file an answer within 30 days. *Ibid*. Consistent with HUD regulations, the charge and the notice were served on Respondents by certified and regular mail at the Kocerkas' home at 5308 Kedzie Ave. See 24 C.F.R. 180.410; Initial Decision at 2; R1-5 (Charge); R3-1 (Default Motion). Maria Kocerka signed for the certified letter containing the charge. See Default Motion at Exhibit B. Although Christopher Kocerka was sent the same package to the same address, the letter was returned without his signature. Default Motion at 1. The copies of the charge sent via regular mail were not returned. *Id*. at Exhibit A. Out of professional courtesy, HUD fair housing attorneys generally send a copy of the charge to any attorney who may have been involved during the investigation. However, in this case HUD did not send a copy of the charge to Attorney Peraica.

3. Administrative Hearing. Respondents never filed an answer to the charge, nor did Attorney Peraica file an appearance before the ALJ. See Initial Decision 2. On October 1, 1998, HUD moved for a default judgment, serving Respondents by mail at their home address. See R3. On October 14, 1998, the

ALJ issued a show cause order to Respondents, warning them that failure to respond would result in a default judgment. Initial Decision 2. When Respondents still filed no response, the ALJ entered a default judgement, held hearings to establish damages, and issued an initial decision on May 4, 1999. *Ibid.* The clerk's office served the default judgment and the initial decision on Respondents at their home address. See R5-3; R16-17.

Respondents did not petition the Secretary for review of the initial order, which became final on June 3, 1999. See 42 U.S.C. 3612(h)(1). Nor did Respondents petition for judicial review of the final order within the 30 days permitted by statute. See 42 U.S.C. 3612(i)(2).

4. Application for Enforcement. On April 12, 2000, the Government filed in this Court an application for enforcement of the ALJ order. See Order 1 (Apr. 12, 2000).[2] The Clerk of this Court served a copy of the petition on Respondents at their home address on the same day, along with notice that Respondents were required to file an answer in 20 days. See *ibid.*. The notice also warned that "[i]f the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed." *Ibid.* Respondents did not file any response to this order.

On June 5, 2000, this Court issued its first show cause order, requiring Respondents to submit a response by June 19, 2000. Respondents filed no response. This Court subsequently noted that although Respondents had been

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[2] Cites to "Order" are to orders issued by this Court on the date in parentheses.

served by regular and certified mail, "there is no record of delivery of the letter to the Kocerkas." Order (July 3, 2001). In response, the Clerk's Office apparently called Ms. Kocerka to inquire whether she had received the order. Ms. Kocerka said that she had not. *Ibid.* As a result, this Court issued a second show cause order, giving Respondents an additional 21 days to respond to the Government's application. *Ibid.* This order was sent to Respondents by regular mail and Federal Express. *Ibid.* Respondents filed no response. On August 19, 2001, observing that a "J. Fearon" had signed for the Federal Express package containing the second order, this Court issued a third show cause order and had it served by the United States Marshal Service.

On August 24, 2001, a Deputy U.S. Marshal served Christopher Kocerka with the third show cause order. Respondents still filed no response. On November 29, 2001, this Court issued an order of enforcement. Order (Nov. 29, 2001). On January 14, 2002, Respondents filed the pending petition for rehearing.

ARGUMENT

The only question presented by the petition for rehearing is whether this Court should set aside the order of enforcement it issued after Respondents failed to answer the third show cause order.

The Government is unaware of any particular rules or standards for granting rehearing in the event of a default in this Court, but the standards developed for setting aside similar defaults in the district courts provide some guidance. Under Fed. R. Civ. P. 55(c) and 60(b), "a specialized three-part standard has evolved

which squarely places the burden on the moving party to show: (1) 'good cause' for the default; (2) quick action to correct the default; (3) the existence of a meritorious defense to the original complaint." *Jones* v. *Phipps*, 39 F.3d 158, 162 (7th Cir. 1994). Respondents have met none of these criteria in this case.

1. Good Cause. "A defaulted party must show a good faith reason for failing to appear, meaning that we will grant relief only where the actions leading to the default were not willful, careless, or negligent." *Swaim* v. *Moltan Co.*, 73 F.3d 711, 721 (7th Cir. 1996) (citation and quotation marks omitted). In this case, Respondents present three causes for their default, none of them good.

a. Lack of Service. Respondents claim that they had never "been served or received papers concerning any court proceedings in this matter" until just prior to entry of the default judgment by this Court. See Br. Ex. Affidavit of Christopher Kocerka ¶ 13 (C. Aff.); Affidavit of Maria Kocerka ¶ 10 (M. Aff.). This assertion is belied by the record. Moreover, even if Respondents failed to receive some papers, this is no excuse for not responding to the order they clearly did receive.

Deputy U.S. Marshal John Ambrose has represented to this Court that he served Christopher Kocerka with the third show cause order on August 24, 2001, a claim Respondents do not deny. See C. Aff. ¶ 13. Nor do Respondents deny that Ms. Kocerka spoke with the Clerk's office about the first show cause order. See Order 2 (July 3, 2001). Even if this were all the notice the Kocerkas received, they had a clear obligation to obey this Court's most recent order and file a response.

Respondents suggest (M. Aff. ¶ 9; C. Aff. ¶ 8) that because they moved residences around May, 2000, they did not receive some of this Court's orders. But even if this is true, it is no excuse for not responding to the order they did receive. In any event, prior to the move, this Court served the Kocerkas with the initial application at their prior address (where Respondents admit they were living at the time). See Order (June 5, 2000); M. Aff. ¶ 9; C. Aff. ¶ 8. Respondents' subsequent failure to inform this Court of their new address is no excuse for their default.

Finally, Respondents' assertion that they did not receive documents in the administrative proceeding provides no excuse for ignoring the orders of *this* Court. In any case, the claim is implausible. Although she fails to mention it in her affidavit, Maria Kocerka signed for the certified letter containing the initial charge of discrimination on August 25, 1998. See Motion for Default at Exhibit B. From the initiation of the administrative hearing to the date of Respondents' move, at least six pleadings and orders were sent to the same address, including the charge, the motion for default, the ALJ's show cause order, the default judgment, the initial decision of the ALJ, and the Government's application for an order of enforcement. See R1-5; R3-5; R4; R5-3; R16-17; Order 1 (Apr. 12, 2000).

b. Inability to Read English. Respondents say (Br. 11) that they did not respond to the orders they may have received because they cannot read English. But the Kocerkas' own affidavits show that they are able to get documents read or translated for them when they choose to do so. See M. Aff. ¶ 10; C. Aff. ¶ 9. In

fact, their counsel acknowledges (Br. 11) that Respondents could have had their mail reviewed and translated, but asserts that this "is not practical in this day and age of junk mail, some of which is intentionally made to look like official government documentation." This assertion is not only unsupported by Respondents' affidavits, it is clearly implausible. Respondents run a business and presumably, therefore, have developed a way of sorting out bills, tax documents, leases and other important English documents from their junk mail. It is also doubtful that they receive junk mail via certified letter, Federal Express package, or a U.S. Marshal.

But even if Respondents' "junk mail" excuse were plausible as a general matter, it does not explain why Respondents ignored this Court's third show cause order, which was served by a U.S. Marshal and which Christopher Kocerka admits he recognized as a legal document. See C. Aff. ¶13. His excuse for disregarding the order is not that he could not read it or have it read to him. Instead, he simply asserts that he ignored it because he presumed it related to some other litigation that was being settled. *Ibid*. This decision was inexcusably "careless, or negligent," at best. *Swaim*, 73 F.3d at 721.

c. Failure to Serve Attorney. Respondents' final excuse is that they did not respond because the attorney representing them during the HUD investigation was never served with any papers in this litigation. Even assuming that Respondents' failure to respond to orders personally served on them could be excused by failure

to conduct required service on their attorney, this excuse fails because neither this Court nor the Government was obligated to serve papers on Attorney Peraica.

Service of an application for enforcement of an agency order is governed by Fed. R. App. P. 15(c), which states that the "circuit clerk must serve a copy * * * on each respondent as prescribed by Rule 3(d)." Rule 3(d) requires the clerk to "mail[] a copy to each party's *counsel of record* * * * or, if a party is proceeding pro se, to the party's last known address." Fed. R. App. P. 3(d)(1) (emphasis added). Consistent with this rule, the Clerk of this Court properly mailed a copy of the Government's application to the Kocerkas' last known address since there was no "counsel of record" in the case, as Attorney Peraica had never filed an appearance in the matter before the ALJ. And because Attorney Peraica never filed an appearance in this Court, there was no obligation to serve him with any other filings or orders in the case. See Cir. R. 3(d).

Respondents argue that this Court's Standards of Professional Conduct provides a different rule in cases of default. Those standards provide that attorneys practicing before this Court should not "cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity." Standards for Professional Conduct Within the Seventh Federal Judicial Circuit, Lawyers' Duties to Other Counsel, Rule 18. The Preamble makes clear, however, that "[t]hese standards shall not be used as a basis for litigation or for sanctions or penalties." Respondents may not, therefore, use Rule 18 "as a basis for litigation" to excuse their default. In any case, the Government did not violate

Rule 18. By the time the Government filed its application in this Court, we had no reason to believe that Attorney Peraica was representing Respondents any longer in this matter. The Kocerkas had been served on numerous occasions during the administrative process. Only they knew whether or not Mr. Peraica would represent them in litigation. If he was going to represent them, Respondents easily could have communicated that information to the Court and the Government by having Mr. Peraica file an appearance in this Court or before the ALJ at any time. Their failure to do so led to the reasonable conclusion that Mr. Peraica was not Respondents' litigation counsel. Under these circumstances, the Government had no way to "know [the] identity" of Respondents' counsel in this case. Rule 18. And, in fact, had the Government guessed that Mr. Peraica was Respondents' litigation counsel, we would have been wrong. Mr. Peraica is not representing Respondents before this Court now and Respondents' affidavits make no assertion that they *ever* intended Attorney Peraica to represent them before HUD or in this Court. Instead, when they finally decided to participate in the case, Respondents immediately began a search for different counsel. See M. Aff. ¶ 11; C. Aff. ¶ 10.

2. Quick Action. Respondents failed to take quick action to correct their default in this Court. Respondents admit that they received notice of this Court's default order shortly after it was issued on November 29, 2001. See M. Aff. ¶¶ 10-13 (Respondents received judgment before speaking with new attorney "in late November and early December, 2001"). That order noted that the default

judgment was being entered because Respondents had not complied with the last show cause order which had required a response within 14 days. Order 2 (Nov. 29, 2001). Yet Respondents waited an additional 45 days, until the very last day of the time period for seeking rehearing, before making their first appearance in this Court. Respondents acknowledge that when they received this Court's judgment, they already had an appointment with their new counsel. See M. Aff. ¶ 12. They do not explain why they waited an additional six weeks before seeking to cure the default in this Court. In comparison, none of this Court's three show cause orders permitted more than 21 days to respond and the Federal Rules required an answer to an initial petition within 20 days. See Order (July 3, 2001); Order (June 5, 2000); Fed. R. App. P. 15(b)(2). Surely parties who know they are in default must act with at least as much dispatch as is required by the Rules for an initial answer, absent extraordinary circumstances not shown here. See also *Jones*, 39 F.3d at 165 (delay of "[n]early five weeks" too long).

3. Meritorious Defense. Defendants have no meritorious defense to the Government's application for enforcement or to the underlying charges. Even if Respondents' default in this Court were excused, their failure to seek judicial review of the ALJ order precludes review of that order on the merits.[3] And even if

[3] See 42 U.S.C. 3612(l) (if petition not filed within 45 days, "the administrative law judge's findings of fact and order shall be conclusive in connection with any petition for enforcement."); 42 U.S.C. 3612(n) (requiring, in such cases, that the "clerk of the court of appeals * * * shall forthwith enter a decree enforcing the order" upon filing of an application for enforcement).

Respondents had filed a timely petition for judicial review, their failure to file an answer in the ALJ proceedings precludes them from contesting the facts alleged in the charge. See 24 C.F.R. 180.420(b).[4]

Even if Respondents could surmount the effects of their repeated failure to participate in these proceedings, their purported defenses lack any merit. First, Respondents argue (Br. 9-12) that they were denied their "right to counsel" by HUD's failure to serve Mr. Peraica. But the Government was not required to serve Attorney Peraica with any of the documents in the administrative proceeding. Like the rules governing service in civil litigation before a district court, the HUD regulations require service of the initial pleading on the parties themselves and subsequent papers on counsel only if the attorney has filed an appearance before the ALJ.[5] See *HUD* v. *Sparks*, HUDALJ 05-92-1274-1 (Dec. 20, 1996), slip op. 2 (attached as Exhibit 1). Thus, the charge, like a civil complaint, must be served "on each respondent named in such charge." 42 U.S.C. 3610(h)(1). See also 24 C.F.R. 180.410(a) (same); Fed. R. Civ. P. 4 (summons and complaint served on party). Once the case is initiated by service and filing of the charge under 24 C.F.R. 180.410, service of all filings in the action is governed by 24 C.F.R.

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[4] The failure to answer or seek judicial review does not preclude a jurisdictional challenge based on inadequate service of process, see *Swaim*, 73 F.3d at 716, 719, but service was proper in this case. See pp. 9-10, *supra*; pp. 12-13, *infra*.

[5] Rule 18 of this Court's "Standards for Professional Conduct *Within* the Seventh Federal Judicial Circuit" (emphasis added) does not govern service in administrative proceedings, is not a basis for excusing a default, see Preamble, and was not violated in any case. See pp. 12-13, *supra*.

180.400, which requires, among other things, that "[s]ervice shall be made upon counsel if a party is represented by counsel." See also Fed. R. Civ. P. 5(a) (requiring in civil litigation that "every pleading subsequent to the original complaint" be served on counsel). A party is "represented by counsel" within the meaning of the regulations if the attorney has filed an appearance with the ALJ, identifying whom the lawyer represents and providing an address for service of filings. See 24 C.F.R. 180.305(b). See also *HUD* v. *Sparks*, slip op. at 2. Because Attorney Peraica never filed an appearance, the Government was entitled to conclude that he was no longer representing the Kocerkas. Notably, Respondents never actually assert that they arranged with Mr. Peraica to represent them before the ALJ and he clearly does not represent them now.

Second, Respondents argue (Br. 12-13) that HUD violated 42 U.S.C. 3610(a)(1)(B)(iv) by not completing its initial investigation within 100 days. But that provision requires that the Secretary "complete such investigation within 100 days after the filing of the complaint * * * *unless it is impracticable to do so*" (emphasis added). Before issuing the default judgment below, the ALJ made a specific inquiry into HUD's compliance with this rule and was provided evidence of the good cause for the delay and the impracticality of completing the investigation within 100 days. See R14-1-4. As HUD explained before the ALJ, the delay in the case was attributable to an unfortunate confluence of factors, including a search for an apparently non-existent tenant whom the Kocerkas had identified as having rented the apartment the Whites inquired about; a reluctant

witness living at the Kocerkas' building who refused to speak to HUD investigators for more than a year; considerable turnover of HUD's investigative staff at the time (including the replacement of three consecutive investigators in this case); and the decertification of the local housing enforcement agency to which the investigation had originally been assigned. See *id*. at 1-4. In any case, Respondents have not shown that they were prejudiced in any way by this delay. See *Baumgardner* v. *HUD*, 960 F.2d 572, 578 (6th Cir. 1992); *United States* v. *Beethoven Assoc. Ltd. P'ship*, 843 F. Supp. 1257 (N.D. Ill. 1994).

Third, Respondents suggest (Br. 8-9) that they are innocent because they do not own the property at the address set forth in the charge and because they never discriminate on the basis of race. Respondents appear to be asserting (Br. 5, 8) that there was a typographical error in the charge – they acknowledge that they own the apartments at *8150* W. 95th St. while the charge asserts that the apartment in question was at *8510* W. 95th St. Any typographical error in the charge is no defense. The statute forbids racial discrimination in the rental of housing, which is what the charge alleged. See 42 U.S.C. 3604(a), (c), (d).[6] In any case, any typographical error would be quickly cured by amendment if the default were set aside, see 24 C.F.R. 180.425, leaving Respondents with their bare denial of

[6] Moreover, nothing in the statute or regulation requires the charge to identify the specific address at which the illegal discrimination occurred. See 42 U.S.C. 3610(g)(2)(B)(i) (requiring only a "short and plain statement of the facts"); 24 C.F.R. 180.410(b) (list of required contents does not include address of the property).

liability supported by nothing more than their own affidavits, which is insufficient to show a meritorious defense. See *Pretzel & Stouffer* v. *Imperial Adjusters, Inc.*, 28 F.3d 42, 46 (7th Cir. 1994) ("We have also held that a meritorious defense requires more than a 'general denial' and 'bare legal conclusions.'").

Finally, even if Respondents had a meritorious defense, their lack of either good cause for the default or quick action to correct it would bar setting aside this Court's default order. See *Pretzel*, 28 F.3d at 46-47. The victims in this case should not be required to endure yet further delay because Respondents held their defenses in reserve, only to assert them in the wake of default judgments from two courts that have treated Respondents with more patience than they had any right to expect.

CONCLUSION

For the above reasons, this Court should deny the petition for rehearing.

Respectfully submitted,

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB
950 Pennsylvania Ave., NW
Room 5010
Washington, D.C. 20530
(202) 305-4584

Exhibit 1

***HUD* v. *Sparks*, HUDALJ 05-92-1274-1 (Dec. 20, 1996)**

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2002, a copy of United States' Response to Petition for Rehearing was served by overnight mail, postage pre-paid, on the following counsel of record:

Paul Weatherhead, Esq.
Fernholz & Ehrlich
10 S. LaSalle
Street, Suite 3450
Chicago, Illinois 60603

Michael Delany, Esq.
Ciardelli & Cumming
12416 S. Harlem, Suite 103
Palos Heights, IL 60463

John Jensen, Esq.
Acting Assistant General Counsel for Midwest
U.S. Dept. of Housing and Urban Development
Office of the Assistant General Counsel - Midwest
77 West Jackson Blvd., Room 2617
Chicago, IL 60604-3507

_____
Kevin K. Russell
Attorney