

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Nos. 20-1511, 20-2036

JOHN GRAHAM,

Petitioner

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN  
DEVELOPMENT,

Respondent

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SECRETARY’S MOTION FOR ENFORCEMENT OF THE FINAL AGENCY  
ORDER AND DISMISSAL OF THE PETITION FOR REVIEW

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Pursuant to Federal Rule of Appellate Procedure 27, the Secretary of the United States Department of Housing and Urban Development (HUD) moves this Court to enforce the final agency order and dismiss John Graham’s petition for review in light of Graham’s procedural defaults: (1) failing to respond to the Secretary’s cross-application for enforcement of the final agency order, and (2) failing to pay the filing fee for the petition for review or to seek to proceed *in forma pauperis*. If the Court does not grant such relief, the Secretary requests that the Court order Graham either to seek a stay of the agency order or to comply with the order pending this Court’s review.

## BACKGROUND

1. On March 6, 2020, John Graham submitted a *pro se* petition for review of a February 5, 2020 final order of HUD. Doc. 1-1 (No. 20-1511).

2. HUD's final order found that Graham violated the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, by engaging in "highly egregious" discrimination on the basis of race in the course of renting a residential property. Doc. 1-1, at 3, 5-6, 13-23 (No. 20-2036). Specifically, Graham sent text messages declining to show an apartment to a prospective African-American tenant that used the phrases "n----r free zone," "white power," "slave," and "KKK." Doc. 1-1, at 7, 18 (No. 20-2036). The final order required Graham to pay \$70,000 in damages to his victims, Shon'tonette Leary and her son, Kerry Stevenson, and \$19,787 in civil penalties to the government. Doc. 1-1, at 5-6, 13-24 (No. 20-2036).

3. Graham did not pay the filing fee when he submitted the petition for review, nor did he seek to proceed *in forma pauperis*. The Clerk's Office advised in a March 9, 2020 docketing letter that Graham must do so within 14 days of the letter or else his petition would be dismissed without further notice. Doc. 1-3, at 1-2 (No. 20-1511).

4. As of the date of this motion, nearly five months after submission of the petition, Graham has not paid the filing fee or sought permission to proceed *in forma pauperis*, nor has the Clerk dismissed the petition.

5. On May 21, 2020, the Secretary submitted a cross-application for enforcement of the final agency order. Doc. 1-1 (No. 20-2036). The Secretary indicated that, pursuant to Federal Rule of Civil Procedure 15(c), the Clerk's Office should serve the cross-application on Graham and on attorney Robert J. Stack. Doc. 1-1, at 11 (No. 20-2036). Stack informed government attorneys representing the Secretary on May 1, 2020, that he is counsel for Graham, but Stack has not formally entered an appearance on Graham's behalf. See Doc. 7, at 1 (Nos. 20-1511, 20-2036).<sup>1</sup>

6. On the same day the Secretary submitted the cross-application to this Court, May 21, 2020, government attorneys also sent a courtesy copy of the cross-application to Stack by email. See Doc. 7, at 1 (Nos. 20-1511, 20-2036). Stack's legal assistant acknowledged receipt of this email on May 26, 2020.

7. The Clerk's Office docketed the cross-application on May 28, 2020. Doc. 1-1 (No. 20-2036).

8. On June 10, 2020, the Secretary submitted a letter notifying the Clerk of the Court of a discrepancy between Graham's mailing address on the Court's electronic docket and on his petition for review. Doc. 7 (Nos. 20-1511, 20-2036).

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<sup>1</sup> As of the date of this motion, the Third Circuit's online Attorney Admissions Checker indicates that Stack is an inactive member of the Third Circuit bar and that he is not an ECF Filing User, a requirement for "[a]ttorneys who intend to practice in this court." L.A.R. Misc. 113.2(a).

The letter supplied a corrected list of individuals on whom the Clerk should serve the Secretary's cross-application for enforcement that reflected the mailing address that Graham included on his petition for review and the same mailing address for Stack that appeared on the original service list, as this address was accurate. Doc. 7, at 13 (Nos. 20-1511, 20-2036).<sup>2</sup>

9. That same day, the Court's electronic dockets in Nos. 20-1511 and 20-2036 were updated to reflect that Graham was represented by Stack rather than proceeding *pro se*.

10. Pursuant to Federal Rule of Appellate Procedure 15(b)(2), Graham was required to answer the cross-application within 21 days of its filing.

11. As of the date of this motion, 71 days after the cross-application's submission and 64 days after its docketing, Graham has not filed an answer to the cross-application, or filed any other document in this Court in relation to his petition for review or the Secretary's cross-application for enforcement.

12. To date, Graham has not paid the damages to Leary and Stevenson or the civil penalty to the government that HUD awarded on February 5, 2020, nor has

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<sup>2</sup> The docket does not clearly reflect when or how the Clerk served the cross-application on Graham. Relatedly, the Clerk's March 9, 2020, docketing letter for Graham's petition for review appears to have used the same address for Graham that initially appeared on the electronic docket, which the government believes to be incorrect. The docket does not reflect when or how the docketing letter was delivered to Graham or to his counsel.

Graham sought a stay of HUD's order pending review from either HUD or this Court pursuant to Federal Rule of Appellate Procedure 18.

### **DISCUSSION**

A. *The Court Should Grant The Secretary's Cross-Application For Enforcement Of HUD's Order Because Graham Failed To Submit An Answer As Required By Federal Rule Of Appellate Procedure 15(b)(2)*

An answer to an application for enforcement of an agency order must be served on the applicant and submitted to the Clerk "[w]ithin 21 days after the application for enforcement is filed." Fed. R. App. P. 15(b)(2). In the absence of a timely answer, "the court *will* enter judgment for the relief requested." *Ibid.* (emphasis added).

Here, the Secretary submitted the cross-application for enforcement of HUD's final order on May 21, 2020, and the Court docketed it on May 28, 2020. Doc. 1-1 (No. 20-2036). Under Federal Rule of Appellate Procedure 15 (b)(2), Graham's answer was due at the earliest on June 11 (21 days after submission of the cross-application) and at the latest on June 18 (21 days after this Court docketed it). But as of the date of this motion, July 31, 2020, more than a month after the latest deadline to respond, Graham has not submitted an answer or any other filing in this matter.

Although *pro se* litigants may be afforded some special leniency, Graham has had counsel since at least May 1, 2020, as indicated in the Secretary's June 10,

2020 letter to the Clerk of the Court. Doc. 7 (Nos. 20-1511, 20-2036). Indeed, attorney Stack appeared on the list of individuals on whom the Clerk's Office should serve the cross-application, as provided by Federal Rule of Appellate Procedure 15(c), and government attorneys also emailed the cross-application to Stack on the same day that it was submitted. Doc. 1-1, at 11 (No. 20-2036); Doc. 7, at 1-2, 13 (Nos. 20-1511, 20-2036). And, on the same day that the Secretary's June 10 letter was submitted, the Court's electronic dockets for Graham's petition for review and the Secretary's cross-application both were updated to list Stack as Graham's counsel, even though Stack has not formally entered his appearance. See Nos. 20-1511, 20-2036.

Therefore, because Graham has not answered the Secretary's cross-application, the Court should "enter judgment for the relief requested," Fed. R. App. P. 15(b)(2)—specifically, enforcement of HUD's final order.

*B. The Court Should Dismiss Graham's Petition For Review For Failure To Pay The Required Filing Fee*

Federal Rule of Appellate Procedure 15(e) provides that a party who files a petition for review of an agency order "must pay the circuit clerk all required fees." Indeed, "[t]he payment of filing fees is a precondition to docketing or opening a case." *Barner v. Williamson*, 461 F. App'x 92, 95 (3d Cir. 2012) (citing *Porter v. Department of Treasury*, 564 F.3d 176, 179 (3d Cir. 2009)), cert. denied, 571 U.S. 829 (2013). This Court's local rules thus authorize the Clerk's Office to dismiss a

case if the party who initiates an action fails to pay the associated fee within 14 days of docketing. L.A.R. 3.3(a); L.A.R. Misc. 107.1(a). Accordingly, the March 9, 2020 docketing letter advised that the Clerk would dismiss Graham's petition unless he paid the filing fee or sought to proceed *in forma pauperis* within 14 days of the letter. Doc. 1-3, at 1-2 (No. 20-1511).

Graham has not complied with Clerk's Office's specific directives in the nearly five months that have passed since the March 9 docketing letter. Nor has Graham taken any steps to explain or excuse his failure to comply with the rules. As noted above, Graham has had counsel since at least May 1, 2020, and thus is not entitled to any leniency that might apply to a *pro se* litigant. Therefore, the petition should be dismissed.<sup>3</sup>

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<sup>3</sup> Dismissal of Graham's deficient petition is another basis on which this Court should enforce HUD's final order. In the absence of a petition for review within 45 days of the entry of a HUD administrative law judge's order, "the administrative law judge's findings of fact and order shall be conclusive in connection with any [application] for enforcement." 42 U.S.C. 3612(l). In such a case, where "[an application] for enforcement is filed under subsection (l)," the clerk of the court of appeals "shall forthwith enter a decree enforcing the order." 42 U.S.C. 3612(n); see also *Donovan v. Bassali*, 330 F. App'x 615, 615 (7th Cir. 2009) (granting application for enforcement and enforcing consent order in part because landlord-respondent failed to file petition for review). Dismissal of Graham's petition would render Sections 3612(l) and (n) applicable to this case. Thus, if the Court dismisses the petition, the Court also should consider HUD's final order to be conclusive pursuant to Section 3612(l) and enter a decree enforcing HUD's order pursuant to Section 3612(n).

*C. If The Court Allows Graham's Petition To Proceed, The Court Should Require Graham To Seek A Stay Of HUD's Order Or Otherwise To Comply With That Order Pending Review*

The filing of a petition for review of an agency order in a court of appeals does not automatically stay or suspend the agency order pending appellate review. 28 U.S.C. 2349(b). A petitioner who desires a stay of an agency order “ordinarily” must first seek a stay from the agency. Fed. R. App. P. 18(a)(1). Otherwise, the petitioner may seek this relief by motion in the court of appeals, which the court may grant in its discretion. 28 U.S.C. 2349(b); Fed. R. App. P. 18(a)(2). A petitioner’s motion for a stay in the court of appeals must contain certain components, including: (A) a statement that it would be either impracticable to seek a stay before the agency or that the petitioner sought and the agency denied the stay (including the reasons for denial); and (B) the reasons the court of appeals should grant the relief, including statements or affidavits supporting any disputed facts and relevant parts of the record. Fed. R. App. P. 18(a)(2). If the court grants a stay, it “may condition relief on the filing of a bond or other appropriate security.” Fed. R. App. P. 18(b).

Although Graham’s petition for review did not automatically effect a stay of HUD’s final order, Graham has not complied with the order’s requirement to pay damages to Leary and Stevenson, or to pay a civil penalty to the government. Nor has Graham sought a stay of that order from HUD or from this Court pursuant to



the requirements of Federal Rule of Appellate Procedure 18. Therefore, if this Court allows Graham's petition for review to proceed despite the procedural defaults discussed above, the Court should order Graham either to seek a stay pending review in the manner prescribed in Rule 18, or otherwise to comply with HUD's order.

### **CONCLUSION**

For the foregoing reasons, the Court should enforce HUD's final order of February 5, 2020, and dismiss the petition for review.

Respectfully submitted,

ERIC S. DREIBAND

Assistant Attorney General

s/ Katherine E. Lamm

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing SECRETARY’S MOTION FOR ENFORCEMENT OF THE FINAL AGENCY ORDER AND DISMISSAL OF THE PETITION FOR REVIEW:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2005 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

(3) complies with the requirement of Local Rule 31.1(c) that the document has been scanned with the most recent version of Windows Defender (Version 1.2.3412.0) and is virus-free according to that program.

s/ Katherine E. Lamm  
KATHERINE E. LAMM  
Attorney

Dated: July 31, 2020

## **CERTIFICATE OF SERVICE**

I hereby certify that on July 31, 2020, I electronically filed the foregoing SECRETARY'S MOTION FOR ENFORCEMENT OF THE FINAL AGENCY ORDER AND DISMISSAL OF THE PETITION FOR REVIEW with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. On July 31, 2020, the foregoing motion also was served on the following individuals by Federal Express at the following addresses:

John Graham  
148 Washington Avenue  
Maywood, NJ 07607

Robert J. Stack, Esq.  
11 Kiel Avenue, Suite C-3  
Kinnelon, NJ 07405

s/ Katherine E. Lamm  
KATHERINE E. LAMM  
Attorney