

***Comm'n on Human Rights ex rel.
Hollinger v. Dep't of Education***

OATH Index No. 486/05, mem. dec. (Jan. 26, 2005)

Commission failed to show that individual respondents were served or otherwise received notice of proceeding. Department's request for a finding that future service would be precluded due to statute of limitations was denied. Complainant's cross-motions to declare respondents in default and to dismiss defenses for lack of verification denied; request for sanctions denied.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**COMMISSION ON HUMAN RIGHTS
EX REL ROBERT HOLLINGER**
Complainant
- against -
**DEPARTMENT OF EDUCATION,
MARCIA GALIANO, AND CYNTHIA SUMAY-EATON**
Respondents

MEMORANDUM DECISION

TYNIA D. RICHARD, *Administrative Law Judge*

By this proceeding, petitioner Commission on Human Rights (the "Commission") alleges various acts of employment discrimination by respondent Department of Education (the "Department") and individually-named respondents Marcia Galiano and Cynthia Sumay-Eaton, former and current employees of the Department.

On this motion, the Department seeks a finding that service upon Ms. Galiano and Ms. Sumay-Eaton is now precluded by the statute of limitations. Such a finding would necessarily include a finding that these individual respondents were not served, which is also alleged, and that this proceeding should be dismissed as against them.¹ The papers on their behalf were submitted by counsel to the Department, Elisa Baldwin, Esq. In its answer, filed in June 2004, the Department

¹Under OATH's rules of practice, motions addressed to the sufficiency of the petition in Human Rights cases are to be reserved until closing statements. See 48 RCNY §§ 1-50 & 2-26. However, since this case would in any event proceed against the Department, resolution of this issue was required to facilitate the conduct of discovery.

first asserted a jurisdictional defense on behalf of the individual respondents for failure of service. The answer, which claims to be asserted on behalf of the Department solely, states in a footnote that “Upon information and belief, respondents Marcia Galliano and Cynthia Sumay-Eaton have not been served. Ms. Galliano retired from employment with the Department . . . before this case was filed. Ms. Sumay-Eaton has never been served at her home or place of business.” Ms. Galliano and Ms. Sumay-Eaton have filed no answers of their own, which the complainant, Robert Hollinger, contends requires entry of a default. OATH Rules of Practice govern the entry of a default which is preconditioned upon the Commission declaring that default in its referral to OATH, which did not occur here. *See* 48 RCNY § 2-27 (notice of referral to OATH may advise of respondent’s failure to file answer pursuant to Commission’s rules, 47 RCNY §1-14).

Next, Hollinger asserts that the Department lacks standing to assert defenses on behalf of the individual respondents who have filed no answers of their own, and therefore their contention that they were not served is not properly asserted. While there is technical merit to the argument, it is unpersuasive as a practical matter.

By seeking to appear in the Department’s answer and not filing their own answers, the individual respondents (and/or the Department) are apparently maintaining the position that the individuals were never served while also seeking to avoid making an appearance that would subject them to the jurisdiction of the Commission. For example, under the Civil Practice Law and Rules (“CPLR”), to preserve its defenses, a putative defendant is allowed to file an answer that asserts a defense of personal jurisdiction without submitting itself to the jurisdiction of the court. *See* CPLR 320(b) (“an appearance of the defendant is equivalent to personal service of the summons upon him, unless [he makes] an objection to jurisdiction”); *Powsner v. Mills*, 56 Misc.2d 411, 288 N.Y.S.2d 846 (Sup. Ct. Nassau Co. 1968); *Colbert v. Int’l Security Bureau Inc.*, 79 A.D.2d 448, 461-63, 437 N.Y.S.2d 360, 368-69 (2d Dep’t), *appeal denied*, 53 N.Y.2d 608, 442 N.Y.S.2d 1025 (1981). Though filing their own answers would have averted these issues, I find nothing fatal about this method, whose obvious intention was to preserve a claim that service was defective and notice was not given. I decline to find respondents in default. Moreover, the Commission is in no position to claim prejudice here where the Department’s answer served up notice seven months ago that should have prompted it either to declare the individual respondents in default, if service had been effected, or to re-serve them. I have no information that it did anything at all.

The Department contends that the Commission failed to comply with the rules requiring that “each respondent” be served, and that the “complaint was never mailed to or served in any other manner upon Ms. Galiano or Ms. Sumay-Eaton.” *See* Baldwin letter, dated January 19, 2005. According to its rules of practice, the Commission “shall . . . serve by mail a copy of the filed complaint upon each respondent and necessary party and shall advise the respondent of his or her procedural rights and obligations.” 47 RCNY § 1-11(e). The Department asserts that a single copy of the complaint was mailed to the Department. That copy was mailed “c/o Robin Greenfield, Esq. at 52 Chambers Street, New York” and was received in the Department’s Office of Legal Services on March 30, 2004. A copy of an envelope that confirms this description was attached. The Department asserts that the complaint was accompanied by a cover addressed to “Dear Employer.”

The Commission submitted no response to the Department’s contentions and made no statement as to the manner or sufficiency of its service, despite the request of this tribunal and despite its burden to prove service and demonstrate notice.² The Commission’s only statement regarding service is the affidavit of service attached to the complaint.³ The Commission’s silence of course provides no confirmation that service was effected, but – more importantly – it does not refute respondent’s contention that service failed. The “burden of proving facts sufficient to establish timely service and/or notice is fully on the [Commission],” and its failure to do so will result in dismissal of the complaint. *Comm’n on Human Rights ex rel Mercado v. Equitable Life Assurance Society* (“Mercado”), CHR Amended Compl. No. GA-08232254-EP, Rec. Dec. and Order, at 6 (Sept. 30, 1992), *remanded*, Decision and Order (Feb. 24, 1993). The effect of the Commission’s silence is to fail to meet its burden of proof.

Beyond the affidavit of service, the Commission put on no evidence that copies of the petition were in fact mailed to Ms. Galiano and Ms. Sumay-Eaton. *See Nassau Insurance Co. v.*

²In fact, the Commission refused to submit a response. In a letter to counsel, dated January 14, 2005, I responded to a telephone message left by the Commission advising me that it would not make a submission on this matter as was discussed and agreed to by the parties on January 13. In that letter, I indicated that, because service is “the province of the Commission,” its input was being sought on the issues of “which rules apply, how service is effected, when it must be effected, and whether it was effected in this case.” To date, no response has been received.

³The affidavit of service states that the Commission served all three respondents by regular mail. Specifically, it claims to have served the Department at 52 Chambers Street in care of (“c/o”) Ms. Greenfield, which is consistent with Ms. Baldwin’s evidence. It further states that Ms. Galiano and Ms. Sumay-Eaton were served at that same address, though not in care of anyone.

Murray, 46 N.Y.2d 828, 830, 414 N.Y.S.2d 117, 118 (1978) (citing the need for evidence of office procedures “geared so as to ensure the likelihood that a notice . . . is always properly addressed and mailed”). Nor did the Commission give proof of actual notice. *See Mercado, supra*, at 5 (in the absence of proof of proper service, it is the Commission’s burden to prove actual notice). The assertion by the Department’s counsel that respondents Galiano and Sumay-Eaton were not served does not prove that they received actual notice, as complainant contends, since Ms. Baldwin’s information could have been obtained elsewhere, *i.e.*, at the Department’s headquarters.

Additionally, it remains unclear whether service by mailing to the Department’s headquarters could have been effected upon Ms. Galiano, who had retired more than a year earlier, and upon Ms. Sumay-Eaton whose “actual place of business” is P.S. 52 in Jamaica, Queens. Under the circumstances, these issues were not necessary to address here.

In the absence of any showing by the Commission that notice was effected, there is an insufficient basis upon which to find that the individually-named respondents, Galiano and Sumay-Eaton, were served or otherwise received notice of this proceeding. The arguments made herein raise sufficient good reason to believe that service was not reasonably calculated to give notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950); *DelBello v. New York City Transit Auth.*, 151 A.D.2d 479, 542 N.Y.S.2d 270 (2d Dep’t 1989); 48 RCNY § 1-23(b). Because all parties concerned are entitled to prompt resolution of the question of who will be a party to this proceeding so that discovery and trial can proceed apace, and in light of the Commission’s derelictions in giving attention to these issues – both after receipt of the answer seven months ago and in refusing to participate in the current applications – I am directing the Commission to apprise me by January 30, 2005, of its intentions either to prosecute this case without Ms. Galiano and Ms. Sumay-Eaton as parties, or to make them parties to this case.

Remaining open is the question of whether, in the absence of prior service or actual notice, the Commission may still timely serve these respondents on a complaint filed almost a year ago. *See, e.g., Mercado, supra*, at 6 (finding laches by virtue of prejudice to respondents who received no notice of complaint until three years after it was filed, because during that time files had been destroyed and witnesses lost). Though the Human Rights Law establishes a one-year limitation in which to file a complaint, neither the law nor the Commission’s rules provide a firm deadline by which service must be effected. *See* NYC Admin. Code § 8-109 (d) & (e). There is no question that

the complaint was timely filed. The Department asserts that the Commission can no longer timely serve the respondents, but proving laches is a difficult hurdle to clear and I found this record too limited to make that finding.

In a cross-motion, Hollinger claims that the Department's answer was not verified at the time of filing, therefore the Department (indeed, all respondents) should be deemed in default and all defenses asserted therein waived. *See* Bohn letter, dated Jan 12, 2005. The applicable Commission rule of practice provides that "[t]he answer shall be verified as to the truth of the statements therein." 47 RCNY 1-14(b). Cases heard in this tribunal and before the Commission are consistent on this point: the failure to verify a pleading is not sufficient grounds for dismissing the pleading. *See Matter of Zabari*, OATH Index No. 419/96, at 3-4 (Oct. 16, 1995) ("drastic remedy" of striking unverified answer denied where defect could have been corrected prior to trial had petitioner raised it)⁴; *Comm'n on Human Rights ex rel Dash v. Wrubel*, CHR Compl. No. H-92-0596, Rec. Dec. and Order, at 4 (Apr. 29, 1994) (dismissal is inappropriate remedy where complainant did not swear to facts in the complaint before the notary, as indicated, but had not acted in bad faith); *Fire Dep't v. Durkin*, OATH Index No. 309/90 (Mar. 28, 1991) (failure to swear to a pleading, as required by agency rule, is a waivable defect that was cured by supplying affidavit at commencement of trial); *Fire Dep't v. Stegman*, OATH Index No. 765/80 (July 13, 1982) (dismissal unwarranted where no prejudice was shown to a substantial right of a party); *Comm'n on Human Rights ex rel Marans v. Oriental Blvd. Co.*, CHR Compl. No. 6260-3-T, at 6 (Dec. 31, 1975) (drastic measure of dismissal was unnecessary where unverified complaint was not frivolous in nature). Reviewing *Stegman*, this tribunal in *Fire Dep't v. Durkin* noted the relaxed pleading rules in state court practice which would require a showing of prejudice to justify such a drastic remedy and emphasized that the pleading rules in administrative proceedings are "even more pronounced." *Durkin*, OATH Index No. 309/90, at 8-9. Respondent's counsel asserts that the failure to provide a verification was "inadvertent," and she seeks permission to amend the Department's answer with the verification she supplies as an

⁴ *Aff'd*, Loft Board Order No. 1899, 16 Loft Bd. Rptr. 89B (Jan. 4, 1996), *application for recon. denied*, Loft Bd. Order No. 2169 (Oct. 30, 1997), *aff'd sub nom, Zabari v. New York City Loft Board*, Index No. 107964/96 (Sup. Ct. N.Y. Co. Part 22) (Collazo, J.) (Feb. 11, 1997), *aff'd in part, rev'd in part*, 245 A.D.2d 200, 666 N.Y.S.2d 598 (1st Dep't 1997).

attachment to her submission. *See* Baldwin letter, dated January 18, 2005. Permission is granted. There was no prejudice demonstrated here, and the cross-motion is denied.

In a submission made by the complainant's private attorney, Theodore Bohn, Esq., the complainant asserts that service was proper even though counsel also admits that he entered the case 10 months after the putative service was made, thus, he has no personal knowledge of it. In a misguided turn, he accuses the Department's counsel of engaging in calculation and bad faith that warrants a sanction for even raising the matter of service at this time, as it comes after settlement discussions have ended. Without citing rule or precedent, he repeatedly suggests that counsel has betrayed some duty to warn her adversaries over and above the notice pleading set forth in the answer. I find no support for such a duty. Hollinger's request for a sanction is without merit, and it is denied. I caution counsel that allegations of bad faith and requests for sanctions made in this tribunal should be taken as seriously as they are in any other court and should themselves be accompanied by sound legal reasoning and good faith.

At the pre-trial conference held on January 3, 2005, in consultation with the parties, this tribunal established a discovery schedule leading to four trial dates in April. As a result of the delay created by these and another pending motion, that schedule is revised as follows: interrogatories and discovery demands shall be served by February 4, 2005; responses to same shall be served by March 4, 2005. The deadline for the completion of all depositions remains March 18, 2005; trial will be conducted April 4, 5, 13, and 14, 2005, as previously scheduled.

January 26, 2005

TYNIA D. RICHARD
Administrative Law Judge

APPEARANCES:

No appearance by Commission

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