

Comm’n on Human Rights v. Xio Lounge

OATH Index No. 2150/13, mem. dec. (Oct. 28, 2013)

Petitioner’s motion to declare respondents in default granted. Respondents’ motion to vacate the default is granted, while their motion to dismiss the complaint against the individual respondent is denied. Respondents’ motion to dismiss on jurisdictional grounds is reserved for fact finding at trial.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COMMISSION ON HUMAN RIGHTS
Petitioner
- against -
XIO LOUNGE and ELVIS PADRON
Respondents

MEMORANDUM DECISION

ALESSANDRA F. ZORNIOTTI, *Administrative Law Judge*

This proceeding was referred by petitioner New York City Commission on Human Rights (“Commission” or “petitioner”), pursuant to section 1-71 of the Commission’s Rules. 47 RCNY § 1-71 (Lexis 2013). The verified amended complaint alleges that respondents Xio Lounge and its owner, Elvis Padron engaged in gender discrimination in violation of sections 8-107(1)(a) and (d) of the Administrative Code of the City of New York (“Human Rights Law” or “HRL”). Specifically, petitioner alleges that in January 2012 respondents posted an employment advertisement on Craigslist.org which sought a female bartender and that in February 2012 respondents refused to consider male applicants for the position.

The instant motions arise out of respondents’ failure to timely submit a verified answer to the complaint. By its motion, petitioner seeks an order declaring respondents in default, precluding respondents from submitting an answer and participating in any further litigation, and deeming the allegations in the complaint admitted. Respondents’ motion seeks to vacate any default judgment granted and to dismiss the complaint for lack of jurisdiction based on the number of employees employed by respondents, and/or, to dismiss the action against the individual respondent.

For the reasons below, I find respondents in default and grant their motion to vacate the default. Respondents' motion to dismiss the action against Mr. Padron is denied, and the motion to dismiss for lack of jurisdiction is held in abeyance pending a fact-finding hearing on the number of employees employed by respondents.

BACKGROUND

In support of petitioner's motion to declare respondents in default, petitioner's counsel submitted an affidavit with exhibits summarizing communications between the parties.

On April 11, 2012, petitioner served Xio Lounge with a verified complaint along with explanatory documents indicating that an answer was required within 30 days and that the failure to file an answer could result in preclusion at a hearing (Pet. Aff. ¶ 2; Pet. Ex. A).

After petitioner did not receive an answer, it called Xio Lounge on May 12, 2012, and spoke with a woman who identified herself as Jean Bonilla, the manager of the lounge (Pet. Aff. ¶ 4). Ms. Bonilla identified Elvis Padron as the owner. Petitioner asked her to have Mr. Padron contact the Commission regarding Xio Lounge's overdue answer. Petitioner also informed Ms. Bonilla that the failure to submit an answer could result in the allegations being deemed admitted and lead to a default. On May 22, petitioner left voicemail messages for Mr. Padron at two different phone numbers, asking him to call (Pet. Aff. ¶ 5).

On May 24, 2012, petitioner served Mr. Padron with an amended complaint, naming him individually as a respondent (Pet. Aff. ¶ 7; Pet. Ex. B). According to the exhibit provided, the complaint did not contain any instructions regarding Mr. Padron's need to file an answer or the consequences for his failure to do so.

There were no further communications between the parties until April 26, 2013, when petitioner served respondents with notice of its probable cause determination (Pet. Aff. ¶ 9; Pet. Ex. C).

On May 2 and 3, 2013, petitioner left voicemail messages at three telephone numbers in an attempt to discuss the case with Mr. Padron (Pet. Aff. ¶ 10). On May 6, a man identifying himself as Mr. Padron left a voicemail with petitioner stating, "I do not know why I have to come to court." Later that day, petitioner left a message for Mr. Padron to return its phone call.

On May 7, 2013, petitioner served respondents with notice that it had referred the matter to this tribunal (Pet. Aff. ¶ 11; Pet. Ex. D). In the notice, petitioner indicated that respondents had not complied with the requirements of 47 RCNY §1-14. On May 10, petitioner served a notice of conference which noted that the Administrative Law Judge may enter a default judgment against respondents for failing to submit an answer (Pet. Aff. ¶ 12; Pet. Ex. E). Respondents did not appear for the conference on June 25, 2013.

On July 2, 2013, petitioner served notice that the trial was scheduled for August 7, 2013 (Pet. Aff. ¶ 14; Pet. Ex. F). In a letter dated July 17 petitioner informed respondents that since they had failed to submit an answer it would seek to have them found in default and the complaint allegations deemed admitted (Pet. Aff. ¶ 15; Pet. Ex. G).

By letter dated August 1, 2013, Stephen Feder, Esq. informed this tribunal that he had been retained to represent respondents. Mr. Feder filed a notice of appearance and requested that the August 7 trial date be converted to a conference date, to which petitioner consented.

On August 7, 2013, the parties appeared for a conference and the case did not settle. Petitioner advised that it would seek an order precluding respondents from filing an answer and declaring them in default. Respondents advised that they would seek to vacate any default granted and that they would move to have the complaint dismissed. A briefing schedule for the parties to file their respective motions was agreed upon.

In support of respondents' motion to vacate a determination of default, Mr. Padron submitted an affidavit asserting the reasons for respondents' failure to file an answer.

Mr. Padron stated that Xio Lounge has never earned a profit and has been running on a marginal status since it opened. When Mr. Padron received the complaint, he did not have the funds to retain an attorney because his resources were spent on resolving a rent dispute with the landlord (Padron Aff. ¶¶ 8-10).

Mr. Padron also stated that because he had to handle this case on his own, he researched the matter online and found that the Human Rights Law does not apply to businesses with fewer than four employees (Padron Aff. ¶¶ 12-13). He concluded that because respondents employed fewer than four employees during the time in question, the HRL was inapplicable (Padron Aff. ¶ 14). His attempts to contact the Commission were unsuccessful and this matter got pushed aside because he was too busy trying to keep his business afloat (Padron Aff. ¶¶ 15-16).

In addition, Mr. Padron stated that Hurricane Sandy (which hit on October 29, 2012) and his “business went totally dead.” After he did not hear from petitioner following the hurricane, he hoped that the matter had resolved itself (Padron Aff. ¶¶ 17-18). When the paperwork from petitioner started “flowing again,” Mr. Padron retained an attorney so that the matter could be handled properly (Padron Aff. ¶ 20).

ANALYSIS

Petitioner’s motion to find respondents in default is granted

Pursuant to section 1-14(a) of the Commission’s rules, a respondent shall file a verified answer with the Commission within 30 days of service of a complaint or any amended complaint. 47 RCNY § 1-14(a) (Lexis 2013). Section 2-27(a) of this tribunal’s rules provides that if the Commission, in its notice of referral to this tribunal, alleges that a respondent has failed to comply with section 1-14 of its rules, the respondent “shall serve and file an affidavit asserting that the respondent has complied with those requirements, or asserting reasons constituting good cause for its failure to comply with those requirements. Such affidavit shall be served and filed at or before the first conference in the case. If the respondent fails to timely file this affidavit, “the Administrative Law Judge shall declare the respondent to be in default and shall preclude the respondent from further participation in the adjudication.” 48 RCNY § 2-27(a) (Lexis 2013). *See also* Admin. Code § 8-119(e) (Lexis 2013) (“If the respondent has failed to answer the complaint within the time period prescribed in section 8-111 of this chapter, the administrative law judge may enter a default and the hearing shall proceed to determine the evidence in support of the complaint.”).

Petitioner served the initial complaint on respondent Xio Lounge on April 11, 2012, and the amended complaint on Mr. Padron on May 24, 2012. Moreover, petitioner made various attempts to inform respondents of their obligation to file an answer and of the possible consequences for failing to do so. To date, respondents have not submitted an answer. Moreover, respondents failed to file an affidavit at or before the first conference asserting “good cause” for not complying with the requirements of section 1-14. I therefore find respondents in default pursuant to section 2-27(a) of this tribunal’s rules. *See Comm’n on Human Rights v.*

Crazy Asylum, LLC., OATH Index Nos. 2262/13, 2263/13, & 2264/13, mem. dec. at 3 (Oct. 1, 2013) (finding respondents in default for failure to submit an answer for two years, “even after being repeatedly reminded and admonished for not doing so by Commission staff”).

Respondents’ motion is granted in part and denied in part

Section 2-27(b) provides that “[a] respondent against whom a default has been entered pursuant to paragraph (a) of this section may move at any time before issuance of the report and recommendation to open the default.” In making such a motion, a respondent “must include a showing of good cause for the conduct constituting the default, a showing of good cause for the failure to oppose entry of the default in accordance with paragraph (a) of this section, and a meritorious defense to the petition, in whole or in part.” 48 RCNY § 2-27(b) (Lexis 2013).

In order to establish good cause, a respondent must provide a reasonable excuse. *Comm’n on Human Rights v. Hudson Overlook, LLC*, OATH Index No. 2094/04 at 3 (Jan. 20, 2005) (a respondent that has defaulted on the answer may move to vacate the default by “a showing of excusable neglect”); *see also Krieger v. Cohan*, 18 A.D.3d 823, 824 (2d Dep’t 2005) (“A defendant seeking to vacate its default in appearing or answering the complaint must provide a reasonable excuse for the default . . .”).

While Mr. Padron should not have ignored the Commission with the hope that the complaint would disappear, his credible claims that he lacked funds to retain an attorney due to an unprofitable business and related legal expenses, his belief that the HRL does not apply because respondents allegedly employ less than four employees, and the disruption caused by Hurricane Sandy provide a reasonable excuse for the default. “[I]t is traditional in our legal system to afford greater procedural leeway to litigants who are unrepresented by attorneys.” *Comm’n on Human Rights v. Rent The Bronx, Inc.*, OATH Index No. 1619/11 at 18 (July 27, 2011), *adopted*, Comm’n Dec. & Order (Oct. 27, 2011) (quoting *Matter of Seyfried*, OATH Index No. 127/97 at 54 (Jan. 3, 1997), *adopted in part*, Loft Bd. Order No. 2083 (Mar. 20, 1997)). After the Commission contacted Mr. Padron after an almost one-year hiatus, he sought counsel to defend against the complaint.

Moreover, it is well established that judgments by default are disfavored where a respondent is present and seeks to defend. *Arias v. Sanchez*, 227 A.D.2d 284, 285 (1st Dep’t

1996) (“disposition on the merits is favored”); *Comm’n on Human Rights ex rel. Hidalgo v. Ditmas Park Rehabilitation and Care Ctr., LLC*, OATH Index Nos. 2415/13, 2416/13, & 2417/13, mem. dec. at 7 (Sept. 25, 2013). Precluding respondents from participating in a hearing would prevent this tribunal and the Commission from gathering a complete record upon which to base a decision. *Hidalgo*, OATH 2415/13 at 7. Under these circumstances, respondents have established good cause for failing to file an answer.

“The ‘meritorious defense’ requirement is not a requirement of a fully proved defense, but only of a legally viable, factually substantial defense.” *Transit Auth. v. O’Connell*, OATH Index No. 1076/91, mem. dec. at 6 (Nov. 8, 1991). A respondent must specify facts that underlie the proffered defense. *Id.* See also *Peacock v. Kalikow*, 239 A.D.2d 188, 190 (1st Dep’t 1997) (“The affidavit submitted from such individual must make sufficient factual allegations; it must do more than merely make conclusory allegations or ‘vague assertion[s].’” (citations omitted)).

Respondents assert that they are not an employer under the Human Rights Law as they did not employ four or more employees during the time in question. See Admin Code. § 8-102(5) (Lexis 2013) (“the term ‘employer’ does not include any employer with fewer than four persons in his or her employ”). Mr. Padron alleges that although respondents intended to run a large scale operation, including food service and drinks, the business never succeeded as planned (Padron Aff. ¶¶ 28-29). From the time it opened to the time the advertisement was placed, the staff at Xio Lounge included Mr. Padron and Ms. Bonilla only (Padron Aff. ¶ 35). If a large crowd was expected, Mr. Padron would hire a security guard as required by law (Padron Aff. ¶ 45). On one occasion, he hired an extra bartender for a few hours (Padron Aff. ¶ 44).

Respondents further allege that even if the extra bartender and security guard are considered employees, respondents never employed four or more individuals since Mr. Padron, a principal, is not an employee. “[W]hether principals of a corporation should be considered employees under the City’s Human Rights Law is ‘not well-settled.’” *Comm’n on Human Rights v. Frambiose Pastry, Inc.*, OATH Index Nos. 727/13 & 728/13 at 8 (May 3, 2013), *adopted*, Comm’n Dec. & Order (Sept. 25, 2013). Since the *Frambiose* respondents failed to offer any documentary proof at the hearing that they employed fewer than four employees this defense was dismissed. Here, respondents have raised a legally viable defense that they are not an

“employer” under the Human Rights Law. Therefore, they should be given an opportunity to put forth credible proof on this question.

Petitioner asserts that respondents’ defense would cause prejudice because the Commission was deprived of the opportunity to investigate the matter closer to when the alleged discrimination occurred. This contention is without merit. First, petitioner waited almost one year from the time it served the amended complaint to issue the notice of probable cause and refer this matter for adjudication. Thus, delay in resolving this matter is due in part to petitioner. Second, there has been no showing that the filing of a timely answer asserting a jurisdictional defense would prejudice petitioner. Now that respondents have appeared and have hired an attorney, any potential disadvantage will be alleviated by granting leave to seek discovery on this question before trial. See *Hidalgo*, OATH 2415/13 at 7 (where discovery had not been commenced, degree of prejudice to Commission limited).

However, respondents’ self-serving claims in Mr. Padron’s affidavit that respondents employed fewer than four people are insufficient to sustain a motion to dismiss. Whether respondents employed fewer than four employees requires fact finding. Accordingly, respondents’ motion to dismiss the complaint for lack of jurisdiction will be held in abeyance until completion of the fact-finding hearing. See 48 RCNY § 1-50 (Lexis 2013).

Mr. Padron’s defense that he is not individually liable for placing the advertisement is without merit. See *Frambiose Pastry*, OATH 727/13 at 9 (respondent, co-owner and chief executive officer of the corporation, was found individually responsible for posting a discriminatory advertisement). Thus, respondents’ motion to dismiss the complaint as to Mr. Padron is denied.

Based on the foregoing, the November 7 and 8, 2013, trial dates are vacated. Respondents shall serve and file a verified answer by November 1, 2013. The following discovery schedule that was previously proposed by the parties shall be followed: discovery demands should be exchanged by November 8, 2013; and responses to those demands are due by November 22, 2013.

If the parties need additional time or wish to take depositions they should confer and propose a new schedule. The parties should also confer and propose new trial dates for

December 2013 or January 2014. If the parties wish to have another settlement conference, they should contact the conference judge to arrange a mutually convenient time.

Alessandra F. Zorgniotti
Administrative Law Judge

October 28, 2013

APPEARANCES:

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