

Comm'n on Human Rights v. Crazy Asylum, LLC.

OATH Index Nos. 2262/13, 2263/13, & 2264/13, mem. dec. (Oct. 1, 2013)

In discrimination case, Commission on Human Rights moved to find respondents in default for failure to submit answer to complaint despite being notified several times of their obligation to do so. Administrative law judge granted motion and found respondents in default due to their failure to show “good cause” for the two-year delay in filing an answer.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COMMISSION ON HUMAN RIGHTS

Petitioner

- against -

**CRAZY ASYLUM, LLC., CROWN GROUP HOSPITALITY, LLC.,
and THE WINDSOR**

Respondents

MEMORANDUM DECISION

JOHN B. SPOONER, *Administrative Law Judge*

Petitioner, the New York City Commission on Human Rights (“Commission”), brought this action against respondents, Crazy Asylum, LLC., Crown Group Hospitality, LLC., and The Windsor, under section 8-109(c) of the New York City Administrative Code. By a verified complaint dated July 29, 2011, the Commission charged respondents with violating section 8-107 of the New York City Administrative Code, as respondents discriminated based on gender by posting an advertisement on Craigslist.org seeking “waitresses” for employment.

The case was originally scheduled for trial on September 10, 2013. On September 5, 2013, counsel for the Commission initiated a conference call and requested an adjournment in order to submit a motion to preclude respondents from filing an answer. During the call, counsel indicated that respondents and their attorney had been notified repeatedly of their obligation to file an answer and of the consequences for not doing so, most recently at a conference held on June 19, 2013, at OATH. Respondents’ attorney, Mr. Fischbarg, insisted that he was unaware of his client’s failure to file an answer. He stated that the associate who attended the June

conference had not mentioned to him any problem concerning a failure to answer. Counsel for the Commission referred respondents' attorney to section 2-27 of the OATH rules regarding defaults in Human Rights cases. The case was adjourned to October 10, 2013.

On the following day, September 6, 2013, the Commission filed the instant motion. The motion, accompanied by an affirmation from the Commission attorney, seeks an order that respondents be declared in default due to their failure to file an answer, that the allegations in the verified complaint be deemed true, and that respondents be precluded from answering the complaint and from participating in any further proceedings. Also on September 6, respondents' attorney filed a letter opposing the Commission's motion and arguing that no prejudice would result from allowing respondents to answer and defend themselves at trial. Enclosed with the letter was a verified answer with a general denial of virtually all of the facts in the complaint and affirmative defenses based upon the First Amendment and an assertion that the complaint failed to allege discrimination.

For the reasons provided below, I find that the Commission's motion to declare respondents in default should be granted, but that respondents should be afforded an opportunity to file a motion to vacate the default by establishing "good cause" as provided in the applicable rule.

ANALYSIS

In the instant case, respondents were served by first class mail with the complaint on August 8, 2011. Pursuant to section 1-14(a) of the Commission's rules, respondents were required to file a verified answer within 30 days, 47 RCNY § 1-14 (Lexis 2013), or by September 7, 2011. Respondents failed to submit an answer until September 6, 2013.

The communications between the Commission and respondents from 2011 to date are summarized by counsel for the Commission in her affirmation accompanying the motion. These communications indicate that, although the original complaint did not indicate that an answer was required, Commission staff have subsequently notified respondents at least five times of their obligation to file an answer. Counsel indicates that, following the service by mail of the complaint, a Commission staff member called respondents' representative on September 1, 2011, and notified her that respondents were required to submit a verified answer. There were no further communications between the parties until February 7, 2013, when the Commission sent a

letter to respondents (Pet. Ex. B). The letter indicated that respondents had failed to submit a verified answer, and that failure to do so could result in the admission of the allegations made in the complaint, a finding of probable cause, and a default judgment. The Commission extended respondents' time to file a verified answer until 5:00 p.m. on March 8, 2013. The Commission e-mailed respondents' representative on April 25, 2013, and noted that it had also called to inform respondents they had not filed an answer (Pet. Ex. C).

The Commission served respondents with a notice of referral to this tribunal on May 28, 2013, which indicated that respondents had failed to comply with the requirements of 47 RCNY § 1-14. On June 19, 2013, the parties appeared at this tribunal for a conference. Counsel for the Commission stated to respondents' attorney and to the conference judge that, due to their failure to answer, respondents should be precluded from serving an answer and from offering any defense to the allegations in the complaint.

Section 2-27(a) of OATH's Rules of Practice provides that the failure of a respondent in a Commission on Human Rights case to file an answer may result in default and preclusion from participation in a hearing:

Entry of and Relief from Default.

(a) If the notice of referral to OATH alleges that a respondent has not complied with the requirements of § 1-14 of the Commission's rules (47 RCNY § 1-14), 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, or, if no conference is held, before commencement of the hearing. If the respondent fails to serve and file such an affidavit within the time allowed by this paragraph, the administrative law judge shall declare the respondent to be in default and shall preclude the respondent from further participation in the adjudication. If the respondent timely serves and files such an affidavit, the administrative law judge shall decide the questions presented, and shall either declare the respondent to be in default and preclude the respondent from further participation in the adjudication, or shall deny the default in full or upon stated terms and conditions which may include such limitations on the respondent's participation in the adjudication as the administrative law judge deems to be equitable.

I agree with the Commission that respondents here must be found in default pursuant to section 2-27(a) because they failed to submit an answer for two years, even after being repeatedly reminded and admonished for not doing so by Commission staff. They also failed to

submit an affidavit demonstrating “good cause” or offering any explanation for failing to submit an answer.

The contention by respondents’ attorney that there would be no prejudice in permitting respondent to answer and defend against the complaint, even if true, is insufficient to establish the “good cause” necessary to prevent a finding of default. *Berardo v. Guillet*, 86 A.D.3d 459 (1st Dep’t 2011) (reversing denial of motion to vacate default where counsel’s grave illness rendered him unable to answer summary judgment motion and/or caused law office failure); *Papandrea v. Acevedo*, 54 A.D.3d 915, 916 (2d Dep’t 2008) (“The excuse of law office failure, which was corroborated by a notarized affidavit of service indicating that the answer was timely mailed to the wrong address, constituted a reasonable excuse for the default.”); *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 and demonstrate a meritorious defense to the action.”).

The appropriateness of finding respondents in default is further supported by a recent decision of this tribunal. In *Comm’n on Human Rights ex rel. Hidalgo v. Ditmas Park Rehabilitation and Care Center, LLC*, OATH Index Nos. 2415/13, 2416/13, & 2417/13, mem. dec. (Sept. 25, 2013), Judge Astrid Gloade ruled that three Commission respondents, who failed to timely file an answer for some three years, could nonetheless submit an answer. In so ruling, Judge Gloade denied the Commission’s motion to preclude under section 2-27(a) on the grounds that respondents had established “substantial compliance” with the rule. She further held that finding respondents in default was not appropriate, based upon the repeated communications between Commission staff and the respondents concerning settlement, the respondents “vigorous” efforts to submit an answer, and the Commission’s failure to comply with a promise to reply to respondents concerning the status of the case. Unlike the respondents in *Ditmas Park*, the respondents in the instant case have ignored repeated Commission warnings of the consequences of failing to answer the complaint. Their attendance at the June conference is not sufficient to demonstrate substantial compliance.

I therefore find that respondents are in default for failure to answer the complaint and that they should be precluded from participating in the hearing scheduled for October 10. If they choose, respondents may file, no later than October 7, 2013, a motion to open the default, as

provided in section 2-27(b). Such a motion must include a showing of “good cause” for the delay and a meritorious defense to the allegations in the complaint.

John B. Spooner
Administrative Law Judge

October 1, 2013

APPEARANCES:

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GABRIEL J. FISCHBARG, ESQ.
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