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

OATH Index Nos. 2262/13, 2263/13, & 2264/13, mem. dec. (Nov. 6, 2013)

Respondents moved to vacate default judgment, but failed to show "good cause" for the default or a "meritorious defense" to the complaint. Administrative law judge denied respondents' motion and precluded respondents from participating at trial.

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, alleging respondents discriminated based on gender by posting an advertisement on Craigslist.org seeking "waitresses" for employment.

On September 6, 2013, the Commission filed a motion to declare respondents in default pursuant to section 2-27(a) of the OATH rules. On October 1, 2013, I granted the Commission's motion, finding respondents in default and precluding them from participating in the hearing previously scheduled for October 10. *See Comm'n on Human Rights v. Crazy Asylum, LLC.*, OATH Index Nos. 2262/13, 2263/13, & 2264/13, mem. dec. (Oct. 1, 2013). In granting the Commission's motion, I indicated that respondents could choose to file a motion to open the default, as provided in section 2-27(b) of the OATH rules, by no later than October 7, 2013. Without seeking an extension, two days beyond the deadline on October 9, respondents' attorney filed a motion to vacate the default and to deem the answer dated September 6, 2013 as submitted. In support of their motion, respondents also submitted an affirmation from Joel Zweig, Esq., who appeared at the July 19 conference, and an affidavit from Anya Thompson, respondents' Chief Administrative Officer. On October 21, the Commission filed its papers in opposition to respondents' motion to vacate, which included an affirmation from Cecilia Loving, a Commission staff attorney.

For the reasons provided below, I find that the respondents' motion to vacate the default judgment should be denied and that respondents should be precluded from further participation in this proceeding, as provided in OATH's Rules of Practice.

ANALYSIS

Section 2-27(b) of the OATH rules provides that, if a respondent has been found in default pursuant to section 2-27(a), a respondent may move to open the default. "Such a motion 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). A respondent declared in default is precluded from "further participation in the adjudication," pursuant to section 2-27(a) of the OATH rules.

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"); *Transit Auth. v. O'Connell*, OATH Index No. 1076/91, mem. dec. at 3 (Nov. 8, 1991); *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 . . . .").

Respondents' arguments as to good cause for the default suggest both a lack of notice and assurances that filing an answer was unnecessary. Mr. Zweig stated in his affirmation that at the July 19 conference, the Commission never informed him that respondents were in default for failing to file an answer, and the parties scheduled a trial date (Zweig Aff. ¶¶ 1, 2). Ms. Thompson stated the following in her affidavit: she has been "involved in continuous settlement discussions with Cecilia Loving, Esq. of the Complainant over the telephone and through emails" since the proceeding began in 2011; from the time the complaint was filed until the settlement conference was scheduled, Ms. Loving never indicated "that there was any urgency for Respondents to file an Answer;" Ms. Loving informed her that "because the parties were engaged in settlement discussions, Respondents did not have to incur the expense of hiring an attorney and the filing of an Answer was not necessary;" and Ms. Loving "repeatedly" told her that an answer could be filed anytime before trial (Thompson Aff. ¶ 2).

The Commission alleges that Ms. Thompson's statements regarding discussions and communications with Ms. Loving since 2011 are false given that Ms. Loving did not become a Commission employee until 2013 (Loving Aff. ¶¶ 4, 8). Ms. Loving asserts that the only time she communicated with Ms. Thompson was by e-mail on April 15, 2013 (Loving Aff. ¶ 10; Pet. Ex. D). The Commission has also shown that it repeatedly informed respondents of their obligation to file an answer and of the consequences for failure to do so, including a possible default judgment. *See Crazy Asylum*, OATH 2262/13 at 2-3.

This tribunal has recognized reliance on a mistaken belief in settlement as an excuse for failing to file an answer. *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. 6-8 (Sept. 25, 2013). However, such an excuse only constitutes good cause if the underlying facts are substantiated and reasonable. *Id*. at 6; *see also Armstrong Trading, Ltd. v. MBM Enterprises*, 29 A.D.3d 835, 836 (2d Dep't 2006) ("A good faith belief in settlement, supported by substantial evidence, constitutes a reasonable excuse for default.") (citations omitted). In *Hidalgo*, Judge Astrid Gloade found that the respondents' mistaken belief that the issue had been resolved was supported by evidence of communications, which were submitted with the parties' motions, indicating that the parties had attempted to resolve the matter over the course of a year. *Hidalgo*, 2415/13 at 6.

Here, respondents have not submitted any documentary evidence that they engaged in continuous settlement discussions with the Commission or that respondents were informed that they could file an answer anytime before the trial, as alleged in Ms. Thompson's affidavit. The opposition papers by the Commission cast considerable doubt as to the accuracy of Ms. Thompson's alleged communications with Ms. Loving, who was not employed at the Commission at the times Ms. Thompson insists Ms. Loving spoke with and e-mailed her. Even assuming that Ms. Thompson communicated with a Commission staff member other than Ms.

Loving who assured her that the filing of the answer could be delayed, I find that respondents have made a weak showing of good cause for their failure to submit an answer.

The issues and defenses raised in respondents' motion and in their proposed answer fail to establish a "meritorious defense" to the petition. Respondents' first defense, that the advertisement at issue is protected by the First Amendment of the United States Constitution, is not legally viable as the First Amendment does not protect speech used in advertisements that violate anti-discrimination statutes. *See Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 389 (1973) ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.").

Respondents' second defense, that the failure to use gender-neutral language in an advertisement is not a violation of any of the statutes cited by the Commission, is contrary to the express language of section 8-107(1)(d) of the Administrative Code. This section provides that it is an unlawful discriminatory practice for an employer to "print or circulate or cause to be declared, printed or circulated any statement, *advertisement* or publication . . . which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, *gender*, disability, marital status, partnership status, sexual orientation or alienage or citizenship status . . ." (emphasis added). This tribunal has found employers liable for using non-gender-neutral language in an advertisement under section 8-107. *Comm'n on Human Rights v. Frambiose Pastry, Inc.*, OATH Index Nos. 727/13 & 728/13 (May 3, 2013), *adopted*, Comm'n Dec. & Order (Sept. 25, 2013) (respondents liable under section 8-107 for discriminating based on gender by posting an advertisement on Craigslist.org for a "counter girl" and refusing to hire an applicant based on race); *Comm'n on Human Rights v. Vudu Lounge*, OATH Index No. 233/12 (Dec. 16, 2011), *adopted*, Comm'n Dec. & Order (Mar. 22, 2012) (respondents discriminated based on gender under section 8-107 by posting an advertisement on Craigslist.org for a "door hostess" and refusing to accept an application from a male).

Thus, I find that respondents' motion must be denied for failing to raise a "meritorious defense" to the complaint.

Petitioner's counsel has indicated that, following a ruling on respondents' motion, she intends to file a motion for summary judgment contending that the web advertisement establishes a *prima facie* case of discrimination. Due to respondents' default, section 2-27(a) of OATH's Rules of Practice provides that respondents are prohibited from "further participation" by filing papers in reply to the Commission's summary judgment motion, without the consent of the Commission.[1]

John B. Spooner
Administrative Law Judge

November 6, 2013

APPEARANCES:

CECILIA B. LOVING, ESQ.
Attorney for Petitioner

GABRIEL J. FISCHBARG, ESQ.
Attorney for Respondents

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[1] If a summary judgment motion is filed, respondents remain parties to the action and must be served with the motion papers.