Comm'n on Human Rights v. Jenkins

OATH Index No. 2331/13, mem. dec. (Oct. 30, 2013)

Petitioner's motion to have respondents declared in default and precluded from participation in the trial is granted as against respondent Jenkins, who has failed to file an answer or have any meaningful interaction with the Commission, but denied as against respondent Romain, who, while unrepresented, filed a notarized letter in reply to petitioner's verified complaint, essentially denying the allegations.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COMMISSION ON HUMAN RIGHTS
Petitioner
-against-
MICHAEL JENKINS and WALCOTT ROMAIN
Respondents

MEMORANDUM DECISION

INGRID M. ADDISON, *Administrative Law Judge*

The New York City Commission on Human Rights ("Commission" or "petitioner") commenced this proceeding pursuant to section 8-109(c) of the Administrative Code and section 1-71(a) of the Commission's Rules. *See* Admin. Code § 8-109; 47 RCNY § 1-71 (Lexis 2013). On May 16, 2011, the Commission filed a verified complaint against respondent Michael Jenkins, a real estate broker, alleging that Mr. Jenkins engaged in unlawful discrimination in violation of section 8-107(5) of the Administrative Code, by advertising an apartment for rent on Craigslist.com, which curtailed the size of family to which the apartment would be rented, and by refusing to rent to a person on the bases of marital status, and because children may reside with that person (Pet. Motion, Ex. A).

The Commission amended its complaint on January 19, 2012, to add respondent Walcott Romain, owner of premises at 981 East 85th Street, Brooklyn, where the apartment listed in Mr. Jenkins' Craigslist advertisement was located (Pet. Motion, Ex. L). The allegations of discriminatory conduct remained unchanged. Respondent Romain mailed a sworn statement, dated May 17, 2012, to the Commission, in which he stated that he does not engage in bias in the rental of his apartments (Pet. Motion, Ex. N). On April 25, 2013, the Commission issued another probable cause determination with notice of its intention to proceed to hearing against both respondents (Pet. Motion, Ex. Q).

On June 5, 2013, the Commission referred the matter to this tribunal (Pet. Motion, Ex. R). In its notice of referral, the Commission informed respondents that they had not complied with the requirements of section 1-14 of title 47 of the Commission's rules. At a pre-trial conference on August 12, 2013, respondent Romain appeared with counsel. Respondent Jenkins, who had not filed an answer to the complaint, failed to appear. No resolution was achieved, and the conference judge set a discovery schedule. A hearing is scheduled for November 19, 2013.

On October 7, 2013, after initial discovery demands had been exchanged, petitioner filed this instant motion, alleging that respondents had failed to file an answer and/or otherwise failed to comply with the requirements of filing an answer in accordance with section 8-111 of the Administrative Code, section 1-14 of the Commission's rules, and section 2-27(a) of OATH's rules. Petitioner seeks to have respondents declared in default, the allegations in the amended complaint deemed true, and respondents precluded from participating in the hearing.

For the following reasons, petitioner's motion to have respondents declared in default and precluded from participation in the trial is granted as against respondent Jenkins, but denied as against respondent Romain.

ANALYSIS

Section 1-14(a) of the Commission's rules requires a respondent to file a verified answer within 30 days of service of the complaint or amended complaint. The Commission's rules also provide that in the verified answer, the respondent "shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge or information sufficient to form a belief, in which case the respondent shall so state, and such statement shall operate as a denial." 47 RCNY §§ 1-14(a), (b) (Lexis 2013).

In addition, this tribunal's rules of practice provide that if the Commission's 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 . . . ." 48 RCNY § 2-27(a) (Lexis 2013). If the respondent fails to file such an affidavit, "the Administrative Law Judge shall declare the respondent to be in default and shall preclude the respondent from further participation in the adjudication." *Id.*; *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.").

Respondent Jenkins

The Commission summarized its communication with respondent in its motion and accompanying affirmation which establish the following. It served respondent Jenkins with its verified complaint by first class mail on May 18, 2011, at the address of Fillmore Real Estate, where he worked when he posted the advertisement on Craigslist (Pet. Motion at 3, Ex. B). The complaint was accompanied by a notice that provided information to respondent regarding, among other things, the time for filing a verified answer, how the answer should be structured, including an articulation of any affirmative defenses, and the likely consequences of his failure to file a verified answer (Pet. Motion, Ex. C).

Petitioner re-served the verified complaint by first class mail on respondent Jenkins at his office address on July 19 and September 14, 2011 (Pet. Motion, Exs. D, E). In a cover letter attached to its September mailing, Sera Hwang, one of petitioner's former attorneys, informed respondent that it had served him on two prior occasions, that the time to answer had expired thirty days after service, but that he should file a verified answer by September 30, 2011. Petitioner also notified respondent of the consequences of his failure to answer. On October 7, 2011, petitioner served respondent with notice of its probable cause determination (Pet. Motion, Ex. F).

On December 16, 2011, the Commission attempted to serve upon respondent by personal service at his last known place of business, the verified complaint and its probable cause determination, with notice that it intended to proceed to hearing. Petitioner discovered that respondent no longer worked at Fillmore, but was provided with respondent's cell phone number and his new business location (Pet. Motion, Exs. G, H). Ms. Hwang documented that she spoke with respondent by telephone on at least two occasions, and informed him that a default may be entered against him for failure to answer the complaint (Pet. Motion, Exs. I, K). During their conversations, respondent disclaimed receipt of the complaint and any knowledge of the allegations contained therein. On December 21, 2011, Ms. Hwang learned that respondent had been released from his new job at RE/MAX Realty in the Bronx. In a telephone conversation with him on the same day, respondent provided petitioner with his home address in New Jersey (Pet. Motion, Ex. K).

After it amended its complaint in January 2012 to include respondent Romain, petitioner served the amended complaint on respondent Jenkins on January 23, 2012, at the New Jersey address that he had provided Ms. Hwang (Pet. Motion, Ex. L). The Commission next mailed the amended complaint to respondent Jenkins with a cover letter dated May 10, 2012, in which it extended respondent's time to answer until May 22, 2012, and informed him that his failure to answer could result in a default judgment (Pet. Motion, Ex. M). During March and April 2013, Ms. Hwang contacted respondent Jenkins by telephone to inform him that his refusal to participate in the proceeding would have negative consequences (Pet. Motion, Exs. O, P). Ms. Hwang documented that respondent again denied knowledge of the complaint, repeatedly hung up on her, and even challenged her to prove the charges. The Commission served its second notice of a probable cause determination, notice of referral to this tribunal, and notices of the first conference on respondent Jenkins at four different addresses, including the New Jersey address he provided as his home address (Pet. Motion, Exs. R, S, T). To date, respondent Jenkins has not filed an answer, and failed to appear for the conference before this tribunal.

The Commission's summary establishes that it made enormous efforts to get respondent Jenkins to participate by at least filing a verified answer. He was properly served on numerous occasions, was contacted several times by the Commission's attorney, and was apprised of the consequences of his failure to answer the complaint. Not only did he feign ignorance of the complaint each time he was contacted, but he opted to play a cat and mouse game with petitioner. In fact, if anything, he deliberately thwarted the Commission's many attempts at meaningful engagement in the process and challenged its authority.

Thus, I find respondent Jenkins in default because he failed to comply with the requirements of section 1-14 of the Commission's rules and section 2-27 of OATH's rules. Accordingly, I find it appropriate to preclude him from participation at trial. *See Comm'n on Human Rights v. Crazy Asylum, LLC.*, OATH Index Nos. 2262/13, 2263/13 & 2264/13, mem. dec. at 3-4 (Oct. 1, 2013) (respondents found in default for failing to file an answer after repeatedly being warned of the consequences of its failure to do so, and precluded from participation in the hearing).

If he so chooses, respondent Jenkins may file a motion to vacate the default, as provided in section 2-27(b) of OATH's rules. Such a motion must include a showing of "good cause" for the delay and a meritorious defense to the complaint. *See* 48 RCNY § 2-27(b) (Lexis 2013).

Respondent Romain

The Commission served respondent Romain with the amended verified complaint on January 23, 2012, but there is no indication that the complaint was accompanied by a notice similar to that with which it provided respondent Jenkins, apprising him of the time for filing a verified answer and/or the likely consequences of his failure to do so (Pet. Motion, Ex. L). By letter dated May 10, petitioner notified respondent Romain of its prior mailing of the amended complaint in January 2012. At that time, petitioner also notified respondent that he was required to submit a verified answer within 30 days and that his time to do so had expired on February 22, 2012. It nevertheless extended until May 22, 2012, for respondent to submit a verified answer, and noted that "any allegation in the [c]omplaint not specifically denied or explained shall be deemed admitted . . . ." (Pet. Motion, Ex. M). Petitioner further informed respondent that his failure to answer could ultimately result in a default judgment.

In a notarized statement dated May 17, 2012, just prior to the new deadline set by the petitioner, respondent Romain informed petitioner that he did not recall having contact with respondent Jenkins and denied discriminatory behavior in the rental of his apartments, stating that he has tenants with children and grandchildren on the premises (Pet. Motion, Ex. N). Petitioner and respondent Romain had no further communication until April 2013, when petitioner served respondent by first class mail, its notice of probable cause determination and its intention to proceed to hearing (Pet. Motion, Ex. Q). Then on June 5, 2013, it served respondent with its notice of referral to this tribunal. The notice apprised respondent that he had not complied with section 1-14 of the Commission's rules and that accordingly, the administrative law judge may enter a default against him (Pet. Motion, Ex. R ¶ 9).

On July 17, 2013, Athanasios Tommy Sgouras, Esq. filed a notice to appear before this tribunal for respondent Romain. A pre-trial conference was held on August 12, before Administrative Law Judge Joan Salzman. After no resolution was reached, Judge Salzman established a discovery schedule, which she confirmed by e-mail later the same day. On October 7, after exchanging timely discovery demands as established in Judge Salzman's schedule, the Commission filed the instant motion seeking to preclude respondent Romain from participation in the hearing on the basis that: 1) his sworn statement dated May 17, 2012 was submitted well beyond 30 days after he was served with the amended complaint in January 2012, pursuant to section 1-14(a) of petitioner's rules; 2) the statement does not constitute an answer in that respondent did not specifically admit, deny, or explain the facts alleged in the amended complaint, and that accordingly, respondent Romain should also be deemed in default and precluded from participation in the trial.

The Commission's allegation that respondent Romain's sworn statement dated May 12, 2012 was untimely is inconsistent with its letter to him on May 10, 2012.

Respondent submitted his sworn statement after receiving that letter in which the Commission advised him about the timelines for filing a verified answer and the consequences of failing to file one, and notified him that it had extended the time for him to file an answer to May 22, 2012. As previously mentioned, there was no indication that the Commission's earlier service of the verified complaint in January 2012 included such a notice. Given that respondent replied to the Commission's May 10, 2012 letter within the new deadline set by the Commission, I find that his response was timely.

There is no doubt, however, that the response lacked the form dictated by section 1-14(b) of the Commission's rules, which required respondent to specifically admit, deny, explain, or state that he was without sufficient knowledge to form a belief as to each of the facts alleged in the Commission's complaint. Instead, respondent Romain simply stated that he could not recall speaking to respondent Jenkins, and acknowledged that it was possible that they had been in contact at the time that he listed the apartment. He also generally denied any discriminatory behavior, stating that the rentals of his apartments were not biased since there were tenants with children and grandchildren on the premises and that the marital status of his tenants did not matter. Notably, at the time that he submitted his response, respondent Romain was unrepresented by counsel.

The courts and this tribunal have expressed a strong preference for deciding cases on the merits. Accordingly, technical defects in pleadings have not been deemed fatal unless there is demonstrable prejudice. *See Morillo v. River Park Assocs. L.P.*, 6 Misc. 3d 1020(A) (Civ. Ct. Bronx Co. 2005) ("It is strong policy of the Courts that, in the absence of real prejudice, a matter should be disposed of on its merits.") (citing *Noreiga v. Presbyterian Hospital*, 305 A.D. 2d 220 (1st Dep't 2003)); *Matter of Prince*, OATH Index No. 1506/95 at 11 (May 21, 1997), *adopted*, Loft Bd. Order No. 2131 (Aug. 28, 1997) ("Ordinarily, dismissal of a complaint in a civil action is not to be granted on the basis of technical defects in the pleadings. '[T]here is a strong preference in our law that matters be decided on the merits in the absence of demonstrable prejudice.'") (citing *Neighborhood Supermarket Chain, Inc. v. Epic Security Corp.*, 162 Misc. 2d 218, 219 (Civ. Ct. N.Y. Co. 1994), (quoting *Elemery Corporation v. 773 Associates*, 168 A.D.2d 246, 247 (1st Dep't 1990)). Thus, we have opted to elevate substance over form. *Fire Dep't v. Durkin*, OATH Index No. 309/90 at 12 (Mar. 28, 1991) ("As already alluded to, however, in administrative pleading practice, substance should be elevated over form."); *Fire Dep't v. Stegman*, OATH Index No. 765/80 at 7 (July 13, 1982) ("Substance should be preferred over form and mere technical defects in pleadings should not defeat otherwise meritorious claims."). This is particularly true where a respondent is unrepresented. *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) ("it is traditional in our legal system to afford greater procedural leeway to litigants who are unrepresented by attorneys.") (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)).

Here, respondent Romain's sworn statement sufficiently addressed and denied the allegations in the Commission's amended complaint. Therefore, I decline to discount it, or use it as a basis to find respondent in default and preclude him from participation in the trial, simply because it was not presented in the format outlined in the Commission's rule.

Finally, I turn to respondent Romain's failure to submit an affidavit before or at the first conference, asserting compliance with the requirements of filing an answer in accordance with section 2-27(a) of this tribunal's rules, once the Commission, in its referral of the matter to us, asserts that respondent failed to comply with section 1-14 of the Commission's rules. *See* 48 RCNY § 2-27(a) (Lexis 2013).

In *Commission 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 denied the Commission's motion to find respondents in default and to preclude under section 2-27(a) of our rules, in spite of respondents' failure to file a verified answer some three years after it had been served with the verified complaint. In permitting respondents to belatedly file its answer, Judge Gloade found that respondents had established "substantial compliance" with the rule because, after the Commission had referred *Ditmas Park* to this tribunal, respondents had mailed a letter to the Commission explaining why they had not filed a verified answer. The judge acknowledged that the letter was not sent to OATH and was not an affidavit, as required by section 2-27(a) of our rules. But, she found that “respondents’ failure to adhere to the specific requirements of the rule [did] not bar consideration of their letter.” *Id* at 5. In arriving at her decision, Judge Gloade also factored in the repeated communications between the parties towards settlement.

Petitioner argues that respondent Romain’s situation is distinguishable from *Ditmas Park*, because he proffered nothing in response to its referral notice, which alleged that he had not complied with section 1-14 of its rules. Concededly, respondent failed to file an affidavit before or at the conference, and rule 2-27(a) provides that where that happens, the administrative law judge “shall declare the respondent to be in default and shall preclude the respondent from further participation in the adjudication.” But it is well established that judgments by default are disfavored, especially where a respondent is actively seeking to defend against the allegations. *Arias v. Sanchez*, 227 A.D.2d 284, 285 (1st Dep’t 1996) (“disposition on the merits is favored”); *Ditmas Park,* OATH 2415/13 at 7; *Matter of 40 Hoyt Street Tenants Ass’n*, OATH Index No. 603/02, mem. dec. at 3 (Mar. 7, 2002) (“judgments by default are disfavored, and all the more so when the respondent is present and actively seeking to defend”).

Here, not only did respondent timely file an answer to petitioner’s verified complaint, but he retained counsel who represented him at the conference. The Commission’s papers do not indicate whether or not it challenged respondent’s right to participate in the conference, given its awareness at the time that respondent had not filed the required affidavit. In fact, Judge Salzman’s e-mail confirmation of the discovery schedule which she established at the conference, directed both parties to collaborate in the drafting of a subpoena for the records of Fillmore Real Estate, and submit it to the trial judge by August 23, 2013. And indeed, such a subpoena was submitted to this tribunal on August 19. Thereafter, both parties complied with the timelines established by Judge Salzman for service of discovery demands. Thus, the Commission’s motion for preclusion of respondent Romain seems inconsistent with its concurrence to participate in the exchange of discovery. By his actions, respondent demonstrated that he is actively seeking to defend against the allegations rather than ignore the Commission. *Ditmas Park*, OATH 2415/13 at 7 (“this is not a case in which the respondents simply ignored the Commission after it served the complaint”). Accordingly, to strictly apply rule 2-27(a) and preclude respondent Romain from participation would prevent this tribunal and the Commission from gathering a complete record upon which to base a decision.

The Commission argues that permitting respondent Romain to file a proper answer at this time would unduly prejudice the Commission since it has already exchanged discovery demands with respondent. Respondent made no request to file an answer, and my finding that his sworn statement was adequate given his pro se status renders the issue moot.

Thus, the Commission's motion to find respondent Romain in default and to preclude him from further participation in the process is denied.

The hearing in this matter will take place on Tuesday, November 19, 2013, as scheduled.

Ingrid M. Addison
Administrative Law Judge

October 30, 2013

APPEARANCES:

LAURA FLYER, ESQ.
Attorney for Petitioner

HELD & HINES, LLP.
Attorneys for Respondent
BY: A. TOMMY SGOURAS, ESQ.