

***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)

Respondents who failed to timely submit a verified answer to the complaint granted leave to file a late answer on stated conditions and petitioner’s cross-motion to preclude the answer, declare respondents in default and to preclude their participation in the hearing is denied.

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

In the Matter of
**COMMISSION ON HUMAN RIGHTS EX REL.
HELIODORO HIDALGO**

Petitioner

- against -

**DITMAS PARK REHABILITATION AND CARE CENTER, LLC;
JUAN ROMERO, and SAM “DOE”**

Respondent

MEMORANDUM DECISION

ASTRID B. GLOADE, *Administrative Law Judge*

By this proceeding, petitioner Commission on Human Rights (the “Commission”) alleges that respondents, Ditmas Park Rehabilitation and Care Center, LLC, Juan Romero, and Sam Doe, discriminated against complainant Heliodoro Hidalgo. The Commission served a verified complaint in this matter in August 2010. The instant motions, respondents’ motion for permission to answer and petitioner’s cross-motion to preclude the answer, declare respondents in default, and preclude their participation in these proceedings, arise out of respondents’ failure to file a verified answer to the complaint.

The Commission served a verified complaint in this matter on August 17, 2010 (Pet. Exs. A, B). On October 27, 2010, Gregory Begg, counsel for respondents, requested that the parties engage in settlement discussions and sought an extension of the time to answer (Pet. Ex. C; Resp. Ex. D). On December 1, 2010, Commission attorney Joan Faulkner, in an e-mail to respondents’ counsel, requested documents from respondents and noted that they had not yet

filed an answer. Ms. Faulkner advised respondents' counsel that their failure to answer could result in all the allegations in the complaint being deemed true (Pet. Ex. D). In a follow-up e-mail, dated January 20, 2011, Ms. Faulkner informed respondents that they had until January 28th to respond to the Commission's request (Pet. Ex. E). That same day, Mr. Begg e-mailed documents to Ms. Faulkner and indicated that she should advise him if she needed anything else (Resp. Ex. E). Respondents' submission to the Commission did not include a verified answer.

It appears that there was no further communication between the parties until November 16, 2011, when Commission attorney Paul Labossiere informed Mr. Begg by e-mail that he had assumed responsibility for the matter and reminded respondents that they had failed to submit an answer. Mr. Labossiere also noted that respondents had failed to provide all the documents requested by Ms. Faulkner and had not explained those documents they had already submitted to the Commission (Pet. Ex. G). The next day, Mr. Begg, in an e-mail to Mr. Labossiere, forwarded a copy of his January 2011 e-mail correspondence with Ms. Faulkner and asserted that the respondents had complied with the Commission's information request. Mr. Begg noted that the complainant had been made whole and that he understood the complainant to be satisfied. He concluded the e-mail by asking: "Why is this case not closed?" (Resp. Ex. E).

On November 22, 2011, Mr. Labossiere e-mailed Mr. Begg, informing him that "this case is not closed due to Respondents' repeated failure to reply to the Complaint." Mr. Labossiere also noted that Mr. Begg's "failure to make substantive contact on this matter may result in an unfavorable decision" for respondents. Mr. Labossiere advised Mr. Begg that he would be out of the office for several days and would call him upon his return (Pet. Ex. I). That same day, Mr. Begg responded by e-mail and explained that he had provided information to Ms. Faulkner and that the matter should be concluded, given that the complainant was made whole. He explained that based on his conversations with Ms. Faulkner, he understood that the matter would be resolved without need for a position statement if the complainant was made whole. Mr. Begg requested that Mr. Labossiere call him and indicated respondents "would appreciate the opportunity of resolving this without further expense and inconvenience of continued litigation." In concluding his e-mail, Mr. Begg asked, "What else does the Commission require to bring this to a close?" (Resp. Ex. F).

There is no record of further communication between the parties until June 2013, when the Commission served on respondents a notice of probable cause determination and a notice of referral to this tribunal (Pet. Exs. J, K). The notice of referral alleged that respondents had failed to comply with the requirements of 47 RCNY § 1-14, which requires that respondents file a verified answer with the Commission. On June 24, 2013, the Commission served notice that a conference was scheduled for August 8, 2013 (Pet. Ex L). On the day of the conference, attorney Robert Benacchio, Mr. Begg's associate, submitted a letter to the Commission. Mr. Benacchio stated that he would appear at the conference on respondents' behalf, even though they believed that there was no need to file an answer since they thought the matter settled and the case closed. He further indicated that he would advise the judge that the only reason respondents did not file an answer was because of this "misunderstanding," which would amount to sufficient good cause to re-open the matter. In his letter, Mr. Benacchio stated that he offered to provide an answer to the Commission the day before the scheduled conference, but the Commission attorney advised that he would not accept it (Resp. Ex. G).

The conference judge established briefing and discovery schedules and the parties timely filed their motions: respondents' filed a motion for permission to answer together with a proposed answer, and the Commission cross-moved to preclude the answer, declare respondents in default, and preclude their participation in these proceedings. During a conference call with counsel on September 9, 2013, I granted permission for respondents to supplement their motion with an affirmation from Mr. Begg and for the Commission to submit a response to that affirmation. I suspended the discovery schedule, under which the parties had not yet served demands, pending resolution of these motions. On September 11, 2013, respondents submitted Mr. Begg's affirmation in support of respondents' motion to file an answer. Mr. Begg asserted that there was sufficient good cause to permit respondents to file an answer, as he believed that he had reached an agreement in principle with Ms. Faulkner, that the matter was settled, and that the Commission had closed the case. On September 13, 2013, the Commission submitted its opposition to Mr. Begg's affirmation, noting that the Commission had advised respondents several times of the need to submit an answer.

ANALYSIS

Section 1-14(a) of the Commission's rules provides that a respondent shall file a verified answer with the Commission's Law Enforcement Bureau within 30 days of having been served with a complaint. 47 RCNY § 1-14 (Lexis 2013). Pursuant to section 2-27(a) of OATH's Rules of Practice, if the Commission, in its notice of referral to this tribunal, alleges that a respondent has failed to comply with section 1-14 of the Commission's rules, the respondent "shall serve and file an affidavit . . . asserting reasons constituting good cause for its failure to comply." Such an affidavit must be served and filed at or before the first conference in the case. 48 RCNY § 2-27(a) (Lexis 2013). Upon the respondent's failure 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." 48 RCNY §2-27(a).¹ Application of OATH rule 2-27(a) under the circumstances here is a matter of first impression for this tribunal.

In its notice of referral, dated June 20, 2013, the Commission informed respondents of their failure to comply with its rules for submitting an answer. On August 8, 2013, six weeks after the Commission served the notice of probable cause and the scheduled date of the first conference in this case, respondents sent a letter to the Commission regarding their failure to comply with the Commission's rules. In that letter, respondents stated the reasons for their failure to answer. Respondents did not file the letter with this tribunal on August 8, 2013. It was not until respondents filed their motion for permission to answer on August 16, 2013, that this tribunal received the August 8th letter and an affirmation from respondents' counsel.

Respondents' letter is not in exact compliance with the requirements of OATH rule 2-27(a), which requires that respondents serve and file an affidavit at or before the first conference in the case. The rule provides that upon its failure to serve and file an affidavit, a respondent shall be declared in default and precluded from further participation in the adjudication. Therefore, under a strict construction of OATH rule 2-27(a), respondents are in default and

¹ In their moving papers, respondents rely on Administrative Code section 8-119(e) without reference to the applicable OATH rule. The Code provides that if respondent fails to answer the complaint, the ALJ "may enter a default and the hearing shall proceed to determine the evidence in support of the complaint." NYC Admin. Code § 8-119(e) (Lexis 2013). This provision is not inconsistent with the OATH rules of practice. The Code, like the OATH rules, vests in the ALJ the authority to declare a party in default. The rules specify the circumstances under which the ALJ shall do so, and provides that he or she may deny the default if the moving party meets its burden as set forth in section 2-27(a).

precluded from further participation in the matter, and there is no need to consider their reasons for their failure to file an answer.

I find, however, that under the circumstances here, where there has been substantial compliance with OATH rule 2-27(a), respondents' failure to adhere to the specific requirements of the rule does not bar consideration of their letter. *Cf. Comm'n on Human Rights ex rel. Canty v. Magnamart Cleaners & Launderers*, OATH Index No. 2659/08 at 2 (Aug. 7, 2008), *adopted*, Comm'n Dec. & Order (Feb. 19, 2009) (petitioner's failure to follow its own rules requiring service and filing of a notice of referral not fatal to petitioner's case). Respondents did not serve and file an affidavit, but timely submitted to the Commission a letter in which they stated an explanation for their failure to answer. Respondents subsequently filed that letter, together with an affirmation from respondents' counsel and a proposed answer, with this tribunal as part of their motion. Having determined that respondents' submission is in substantial compliance with the requirements of OATH rule 2-27(a), I will consider respondents' explanation for their failure to answer.

OATH rule 2-27(a) provides that the ALJ shall "decide the question 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 equitable." The question presented is whether respondents have asserted reasons constituting good cause for their failure to timely answer the complaint.

In their letter and motion papers, respondents claim that they did not answer the complaint because they "were of the impression that this matter had been resolved via negotiations." They argue that their "good faith mistaken belief presents sufficient good cause to permit filing of an Answer" (Benacchio Aff. at ¶ 1; *see also* Resp. Ex. G; Begg Aff. at ¶¶ 14-16).

There is no material dispute about the sequence of events in this case: the parties agree that after communications that spanned several months, respondents failed to submit an answer to the complaint. The evidence establishes that respondents and the Commission engaged in settlement negotiations beginning in October 2010, when respondents' counsel requested that the parties engage in settlement discussions and that the Commission grant an extension of time to

answer the complaint. In subsequent e-mails between the parties, the Commission reminded respondents' counsel that they had not yet filed an answer to the complaint. It is also evident that the parties continued to try to settle this case: to that end, the Commission requested and respondents provided documents in January 2011 and again in November 2011.

The Commission points out that on several occasions it reminded respondents of the obligation to submit an answer. Indeed, in his last e-mail to respondents' counsel, dated November 22, 2011, Mr. Labossiere, the Commission's attorney, stated: "this case is not closed due to Respondents' repeated failure to reply to the complaint . . . Your failure to make substantive contact on this matter may result in an unfavorable decision for your clients going forward." Mr. Labossiere seems to have left the door open to further settlement discussions, however, by indicating that he would call respondents' counsel at a future date. Respondents' counsel replied to that communication the same day by providing information to the Commission and requesting that Mr. Labossiere contact him to discuss what the Commission required to close the matter. There is no evidence that the Commission replied to that e-mail, despite Mr. Labossiere's representation that he would call respondents' counsel when he returned to the office.

To the extent respondents' assertion of good cause is premised on their belief that the parties' settlement discussions obviated the need to answer the complaint, there is some support for vacating a default based on such a belief. Indeed, reliance on a mistaken belief in settlement as an excuse for failing to take action in litigation may constitute a good cause if the facts underlying the excuse are substantiated and reasonable. See *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); *Comm'n on Human Rights v. Rent The Bronx, Inc.*, OATH Index No. 1619/11 at 8 (July 27, 2011), *adopted*, Comm'n Dec. & Order (Oct. 27, 2011) (although self-represented respondent failed to answer, respondent's belief that the case had been settled constituted good cause for declining to deem allegation in the complaint admitted).

The communications between the parties indicate that they attempted to resolve this matter over the course of a year. Respondents note that after November 22, 2011, when respondents' counsel asked the Commission's attorney what else the Commission would require

to conclude the matter, the Commission did not contact respondents until June 2013, when it served its notice of probable cause. This is despite the Commission having indicated, in November 2011, it would contact respondents' attorney. According to respondents, the Commission attorney attributed some of the lapse in communication to the Commission's displacement from its offices for several months in the wake of tropical storm Sandy (Resp. Aff. at ¶ 14). This storm, which occurred in the fall of 2012, does not fully account for the lapse in communication and it is unclear why the parties did not communicate in the year preceding the storm.

The law favors disposition of matters on the merits. This is especially so where, as in this case, the defendant is actively participating in the proceedings and putting forth a defense. See *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); *Matter of Halaby*, Index No. 1520/96 (Nov. 4, 1996), *adopted*, Loft Bd. Order No. 2057 (Jan. 30, 1997 ("judgments by default are disfavored in any event, and all the more so when the respondent is present and actively seeking to defend").

Precluding respondents from further participation in these proceedings would deprive this tribunal and the Commission of a complete record upon which to base a decision. This result seems unwarranted in view of the protracted communications between the parties and respondents' vigorous, albeit delayed, efforts to submit an answer. Moreover, since the commencement of this case by the filing of the complaint in 2010, respondents have communicated with the Commission and have provided documents in an effort to resolve this matter: this is not a case in which the respondents simply ignored the Commission after it served the complaint.

The Commission asserts it would be prejudiced by granting relief from the default because it has been unable to conduct its investigation into respondents' position and defenses. The Commission argues that "submission of discovery at this stage would greatly prejudice the Commission" (Pet. Mem. at 7). I am persuaded that since discovery has not yet commenced, the degree of prejudice to the Commission would be limited.

I have no reason to doubt that the parties acted in good faith in their dealings with each other. Further, there appears to be no willfulness in respondents' failure to file an answer: they

did not disregard the complaint or the Commission, but engaged in settlement discussions. It would have been better practice, however, for respondents' counsel to contact the Commission after November 2011, when it became clear that the Commission's attorney had not called respondents' counsel, as he indicated he would. Indeed, nothing prevented respondents' counsel from filing an answer and simultaneously pursuing settlement. Rather than taking affirmative steps to confirm that the matter was resolved, such as calling the Commission's attorney and reducing their understanding to writing, respondents' counsel chose to rely on silence and the lapse of time as confirmation of a settlement.

Respondents' assumption that the matter was resolved and the case closed, while inaccurate, was not without basis given that the Commission's attorney, in his last communication with respondents' counsel, indicated that he would contact them at a later date, and the subsequent lapse in communication. Respondents should not bear a penalty as draconian as a finding of default and preclusion from participation in these proceedings due to the mistaken belief of their counsel. *Cf. Transit Auth. v. O'Connell*, OATH Index No. 1076/91, mem. dec. at 3 (Nov. 8, 1991) (in granting motion to vacate default after respondent's failure to appear for a hearing, ALJ noted that respondent's non-appearance was not her fault, but due solely to her reliance on information from her attorney).

Accordingly, respondents' motion for leave to file an answer is granted. Leave to answer is conditioned on respondents filing and serving a verified answer on or before Tuesday, October 1, 2013. Counsel are advised that adherence to the rules applicable to these proceedings is expected. In that vein, counsel are directed to familiarize themselves with the provisions of the OATH rules of practice, found at Title 48 of the Rules of the City of New York, particularly the Additional Rules for Human Rights Cases (Title 48, Chapter 2, Subchapter C), and any other laws that are applicable to these proceedings. *See Dep't of Transportation v. Jones*, OATH Index No. 1517/07, mem. dec. at 9 (May 10, 2007) ("It is incumbent upon attorneys appearing at this tribunal not only to be familiar with OATH's rules of practice, but to fully understand all that they entail").

In light of the foregoing, the Commission's motion to preclude the answer, declare respondents in default, and preclude them from further participation in these proceedings is

denied without prejudice to the Commission renewing its motion should respondents fail to comply with the conditions set forth above.

The discovery schedule in this matter, which was suspended pending the resolution of these motions, is modified as follows: discovery demands are to be exchanged on or before Monday, October 7, 2013; responses to those demands are due by Monday, October 28, 2013; depositions, if any, are to be completed by Monday, November 4, 2013; and witness lists are to be exchanged by Tuesday, November 12, 2013. The hearing in this matter will take place as scheduled, on Tuesday, November 19, 2013.

Astrid B. Gloade
Administrative Law Judge

September 25, 2013

APPEARANCES:

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BY: ROBERT H. BENACCHIO, ESQ.