

Comm'n on Human Rights ex rel. Jordan v. Raza

OATH Index No. 716/15, mem. dec. (Feb. 11, 2015)

In discrimination case, petitioner's motion to have respondents declared in default and to preclude their participation in the hearing is denied against respondents who were notified of their failure to comply with the requirements for an answer after the first pre-hearing conference.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
**COMMISSION ON HUMAN RIGHTS EX REL.
CYNTHIA JORDAN**
Petitioner
- against -
BAQIR RAZA AND JAFAR RAZA
Respondents

MEMORANDUM DECISION

ASTRID B. GLOADE, *Administrative Law Judge*

By this proceeding, the New York City Commission on Human Rights ("Commission" or "petitioner") alleges that respondents, Baqir Raza and Jafar Raza, discriminated against complainant Cynthia Jordan in violation of section 8-107(4)(a) of the Administrative Code of the City of New York. Before me is petitioner's motion to declare respondents in default and preclude their participation in the hearing in this matter because of respondents' failure to comply with the requirements for filing an answer set forth in section 1-14 of the Commission's rules. 47 RCNY § 1-14 (Lexis 2014).

In support of petitioner's motion to declare respondents in default, petitioner's counsel submitted an affidavit ("Pet. Aff.") and a memorandum of law ("Pet. Mem."), with exhibits, summarizing communications between the parties.

On December 6, 2013, the Commission filed a verified complaint alleging that on October 19, 2013, Baqir Raza, owner and/or operator of a taxicab, discriminated against the complainant based on her race and color by refusing to pick her up in his taxicab (Pet. Ex. A). Petitioner served a notice of probable cause determination on Baqir Raza on April 2, 2014 (Pet.

Aff. ¶ 4; Pet. Ex. C). The Commission amended its complaint on April 21, 2014, to add respondent Jafar Raza (Pet. Aff. ¶ 2; Pet. Ex. B). In its verified amended complaint, petitioner alleges that Jafar Raza owns a taxicab and Baqir Raza, who leases the taxicab, refused to pick up the complainant.¹

Commission staff spoke with Baqir Raza on June 24, 2014, and gave him until July 1, 2014, to submit his response, which he failed to do.² According to petitioner, staff also spoke with Jafar Raza on June 24, 2014, at which time Jafar Raza stated he wished to consult his attorney and would contact petitioner after doing so. Jafar Raza did not contact Commission staff after that date (Pet. Mem. at 3).

The case was referred to this tribunal and a pre-trial conference was scheduled for November 10, 2014. Petitioner served a notice of the conference on the respondents by mail on September 25, 2014 (Pet. Ex. D). Upon respondents' failure to appear for the conference, a hearing was scheduled and a notice of trial was served on November 13, 2014. The notice of trial advised respondents of their failure to comply with the requirements of section 1-14 of title 47 of the Commission's rules and section 8-111 of the Administrative Code (Pet. Aff. ¶ 7; Pet. Ex. G). On November 20, 2014, petitioner mailed to respondents a copy of the discovery schedule I established, which communication notified respondents of their right to representation in this proceeding (Pet. Exs. F, G).

On January 5, 2015, Baqir Raza telephoned petitioner, asserting that he had been out of the country during the preceding six months and that he had already submitted an answer (Pet. Mem. 3-4). It appears that on that same date a letter signed by Baqir Raza was faxed to petitioner. The letter, although dated June 25, 2014, bears a notary stamp dated January 5, 2015 (Pet. Aff. ¶ 9; Pet. Ex. I). Baqir Raza's notarized statement informed petitioner that the evening of October 19, 2013, as soon as he dropped off one passenger another passenger entered his cab. Both were Caucasian. As he prepared to drive off, an African-American woman approached his window and stated that she had been waiting for the cab before the passenger who was already

¹ Petitioner states in its moving papers that it served a notice of probable cause determination on the respondents (Pet. Aff. ¶ 4; Pet. Mem. at 2). However, the only notice of probable cause submitted with this motion is dated before the complaint was amended to add Jafar Raza as a respondent and does not reflect service on him (Pet. Ex. C).

² Petitioner states that Commission staff sent the amended complaint to Baqir Raza via e-mail, with instructions on how to respond by the July 1, 2014 deadline (Pet. Mem. at 3). A copy of that e-mail was not submitted as an exhibit.

seated there. Baqir Raza said he spoke to the African-American woman, who screamed at him and the passenger, called him a racist, and used inappropriate language. The woman said she would file a complaint against him. Baqir Raza wrote that he had no control over the situation as he was focused on the passenger who had just exited his cab. Baqir Raza stated that “it is unfair that I am in this current situation because of something I personally had no control over” and that he expects “to be treated fairly in this situation” (Pet. Ex. I).

Petitioner filed and served the instant motion on January 20, 2015. By e-mail to petitioner and respondent Baqir Raza, dated January 21, 2015, I established a briefing schedule that required respondents to submit their opposition to petitioner’s motion by 5:00 p.m. on Monday February 2, 2015. See 48 RCNY § 1-34 (Lexis 2014). I vacated the February 4, 2015, hearing date in light of the pending motion and advised the parties that, absent timely objection, the hearing would go forward on February 25, 2015. Respondents were reminded of their right to representation and were advised that they could contact this tribunal to arrange a conference call with me regarding this matter. Petitioner was directed to mail a copy of my e-mail to the respondents because petitioner does not possess an e-mail address for Jafar Raza. As of the date of this decision, none of the respondents have submitted any opposition to petitioner’s motion, nor have they contacted this tribunal.

ANALYSIS

Section 1-14 of the Commission’s rules requires that a respondent file a verified answer with the Commission’s Law Enforcement Bureau within 30 days of having been served with a complaint and that he or she “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 2014).

In addition, section 2-27(a) of this tribunal’s rules of practice 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 the Commission’s rules, the respondent must serve and file an affidavit stating reasons constituting good cause for his or her failure to comply at or before the first conference in the case. 48 RCNY § 2-27(a) (Lexis 2014). A respondent who fails to file such an affidavit shall be declared to be in default and precluded from participating in the

hearing. 48 RCNY § 2-27(a); *See also* Admin. Code § 8-119(e) (Lexis 2014) (“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 Baqir Raza

Petitioner urges that Baqir Raza be declared in default and precluded from participating in the hearing because he has “continually refused to participate in the judicial process” by failing to timely file a verified answer, failing to attend the settlement conference, and refusing to respond to communications and discovery demands (Pet. Mem. at 5).

Baqir Raza’s January 5, 2015 signed, notarized submission to the Commission was untimely because it was submitted long after the July 1, 2014, extension of time to answer that petitioner granted to him. According to petitioner’s motion, Baqir Raza claimed in a telephone call on January 5, 2015, that he had already filed an answer. He also claimed that he had been out of the country for six months, which period would have encompassed the settlement conference and much of the discovery schedule. However, Baqir Raza submitted no opposition to petitioner’s motion and therefore provided no evidence to refute petitioner’s contention that his answer was untimely. Accordingly, I find that Baqir Raza’s answer was untimely.

Baqir Raza’s submission is also not in technical compliance with the form dictated by section 1-14(b) of the Commission’s rules, which require specific admissions, denials, or explanations. However, the answer, which he submitted as a self-represented respondent, sufficiently addressed the allegations so that he should not be declared in default and precluded from these proceedings on that basis. *See Comm’n on Human Rights v. Jenkins*, OATH Index No. 2331/13, mem. dec. at 7 (Oct. 30, 2013) (where sworn statement submitted by a self-represented respondent sufficiently addressed and denied allegations in an amended complaint, this tribunal declined to declare him in default and preclude him from participating in the hearing because it did not comply with the format specified in the Commission’s rules); *see also 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).

Petitioner further contends Baqir Raza should be found in default and precluded from participating in the hearing because after it notified him of his failure to timely answer the complaint, Baqir Raza failed to submit an affidavit asserting compliance with the requirements for filing an answer or stating good cause for its failure to do so (Pet. Mem. at 6-7).

Section 2-27(a) of OATH's rules provides that this tribunal "shall declare the respondent to be in default and shall preclude the respondent from further participation in the adjudication" upon his or her failure to file an affidavit at or before the first conference stating good cause for its non-compliance with the requirements for an answer. This provision contemplates that petitioner has notified the respondent of his or her non-compliance in its notice of referral of the case to this tribunal. 48 RCNY § 2-27(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. . . ."). Thus, declaring a respondent in default under this provision is conditioned upon notice to him or her of non-compliance with the requirements for answering the complaint in a notice of referral served before the first conference.

Petitioner concedes that its notice of referral does not allege that respondent failed to comply with section 1-14 of the Commission's rules, but maintains that notice of non-compliance was included in the notice of trial and, therefore, "[r]espondents should be deemed to have sufficient warning of their failure to submit an answer that would place them in default for their refusal to comply." (Pet. Mem. at 7, n. 2). This inference is not warranted.

After failing to notify Baqir Raza of his failure to comply with section 1-14 in the notice of referral, petitioner first advised him of his failure to answer in its notice of trial dated November 13, 2014, three days after the conference in this matter. Petitioner's failure to advise Baqir Raza of his non-compliance with the requirements of section 1-14 in the notice of referral deprived him of the opportunity to submit an affidavit stating the reasons for his failure to comply before the first conference as provided for in the rule.

Moreover, this case is unlike those relied upon by petitioner in support of the instant motion in a significant respect: petitioner in those cases established that it made repeated efforts to have respondent participate in the process. In *Comm'n on Human Rights v. Jenkins*, OATH Index No. 2331/13, mem. dec. at 4 (Oct. 30, 2013), this tribunal declared a respondent in default

and precluded his participation in the hearing after petitioner established that it made “enormous efforts” to get him to participate in the case, but he “deliberately thwarted” the petitioner’s efforts and challenged its authority. Similarly, in *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) Administrative Law Judge John B. Spooner found respondents to be in default pursuant to section 2-27(a) after they failed to submit an answer for two years, despite repeated reminders to do so and warnings of the consequences of their failure to answer the complaint. Here, petitioner sent a single notice that did afford Baqir Raza an opportunity to address his failure to comply with section 1-14 at or before the first conference.

It is well-settled that judgments by default are disfavored where a respondent is present and seeks to defend. See *Comm’n on Human Rights ex rel. Hidalgo v. Ditmas Part Rehabilitation and Care Center, LLC*, OATH Index Nos. 2415/13, 2416/13, & 2417/13, mem. dec. at 7 (Sept. 25, 2013) (“The law favors disposition of matters on the merits. This is especially so where . . . the defendant is actively participating in the proceedings and putting forth a defense.”); see also *Jenkins*, OATH 2331/13, mem. dec. at 6 (“the courts and this tribunal have expressed a strong preference for deciding cases on the merits.”).

Baqir Raza has sent mixed signals regarding whether he is seeking to participate in this proceeding. On the one hand, his failure to submit a response to the instant motion is troubling. On the other hand, his recent response to the complaint is some indication that he seeks to assert a defense in this matter. Respondent’s submission of his answer as a self-represented party, coupled with this tribunal’s strong preference for deciding cases on the merits, militate against declaring him in default.

Petitioner asserts that it is prejudiced by Baqir Raza’s untimely answer because it depends on a prompt and detailed response to conduct its investigation and adequately prepare for trial (Pet. Mem. at 7). However, I am unpersuaded that given petitioner’s belated notice to respondent of his failure to comply with section 1-14, a declaration of default and preclusion is appropriate at this juncture.

Therefore, petitioner’s motion to declare Baqir Raza in default and to preclude him from participation in the hearing is denied.

Respondent Jafar Raza

Petitioner seeks to have Jafar Raza declared in default and precluded from participating in the hearing in this matter. Petitioner established that Jafar Raza failed to submit an answer to the verified complaint, did not attend the pre-hearing conference, and has not responded to petitioner's discovery demands.

Unlike Baqir Raza, Jafar Raza did not submit an answer to the complaint. Like Baqir Raza, however, Jafar Raza was never notified of his failure to comply with section 1-14 in a notice of referral and was first advised of his failure in the notice of trial dated November 13, 2014, after the date of the pre-hearing conference. Petitioner's late notice deprived Jafar Raza an opportunity to submit an affidavit stating good cause for his failure to answer the verified amended complaint as provided for in section 2-27(a) at or before the conference. Moreover, there is little evidence of repeated efforts to get the Jafar Raza to participate in this matter akin to efforts established in cases where respondents were declared in default and precluded from participating in the hearing.

Accordingly, petitioner's motion to declare Jafar Raza in default and to preclude him from participating in these proceedings is denied.

The hearing in this matter will take place as scheduled, on Wednesday, February 25, 2015, commencing at 9:30 a.m. All parties are directed to appear.

Astrid B. Gloade
Administrative Law Judge

February 11, 2015

APPEARANCES:

LAURA FLYER, ESQ.
Attorney for the Petitioner

No appearance by or for Respondents