Dep't of Health & Mental Hygiene v. Abouomar

OATH Index No. 1157/17, mem. dec. (Apr. 14, 2017)

Mobile food vendor licensee's motion to vacate default in a license revocation proceeding granted.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HEALTH & MENTAL HYGIENE
Petitioner
- against -
ASHRAF ABOUOMAR
Respondent

MEMORANDUM DECISION

ASTRID B. GLOADE, *Administrative Law Judge*

This license revocation proceeding was referred by the Department of Health and Mental Hygiene ("Department") against respondent Ashraf Abouomar, a mobile food vendor licensee, pursuant to section 17-317 of the New York City Administrative Code, sections 5.17(a) and 89.33(c) of the New York City Health Code ("Health Code"), and section 6-10(c) of title 24 of the Rules of the City of New York (Lexis 2017). The Department seeks revocation of respondent's license for multiple violations of the Administrative Code and Health Code, failure to pay fines, failure to supervise vendors operating his mobile food unit, and failure to identify those vendors in his permit renewal applications (Pet. Ex. 1).

A default hearing was held on March 2, 2017. Respondent has now moved to vacate his default. For the reasons set forth below, respondent's motion to vacate the default is granted.

BACKGROUND

On December 12, 2016, the Department served respondent with a petition and notice of conference and trial. On February 2, 2017, one day before the scheduled conference, a Mr. Saleh

Salama[1] contacted this tribunal on respondent's behalf to request an adjournment. During a conference call with Judge Addison, the conference judge, and counsel for petitioner, Mr. Salama identified himself as respondent's friend and stated that he had been unable to contact respondent, whom he believed to be in Kentucky. The adjournment request was denied and the matter was scheduled for trial on March 2, 2017.

On February 14, 2017, the Department served respondent with notice of the March 2, 2017 trial.

Mr. Salama contacted this tribunal on March 1, 2017, to request an adjournment of the trial. During a conference call, Mr. Salama stated that he had a limited power of attorney to conduct certain transactions on respondent's behalf before a different tribunal. He further stated that he had not been in contact with respondent since before the conference scheduled for February 2, 2017, and was not authorized to act on respondent's behalf in this matter. I denied the adjournment request without prejudice and informed Mr. Salama that if respondent retained him as his representative in the pending matter before the scheduled trial date, he could renew the adjournment application. *See* 48 RCNY § 1-11(d).

On the day of trial, Mr. Salama appeared together with Mr. Jonathan Altschuler, Esq., purportedly as respondent's representative. Mr. Altschuler did not file a notice of appearance. Mr. Salama submitted a notice of appearance, but he and Mr. Altschuler stated that they had not communicated with respondent regarding this proceeding and were thus not authorized to represent him in this matter (Tr. 4-6). Finding that the Department had properly served respondent with the notice of trial and that respondent had not authorized Mr. Salama or Mr. Altschuler to appear on his behalf, respondent was declared in default and the matter proceeded in the form of an inquest (Tr. 10).

On March 9, 2017, Mr. Altchuler submitted a letter requesting that the proceeding be re-opened because respondent had returned to the country and was prepared to proceed. Upon submission of Mr. Altschuler's notice of appearance, a conference call was conducted on March 17, 2017, during which petitioner indicated that it would oppose an application to vacate the default. On March 21, 2017, prior to issuance of a report and recommendation, respondent filed

[1] In its motion papers, Mr. Altschuler identifies respondent's purported representative as "Dr. Salama Anwar." However, in his communications with this tribunal, including a notice of appearance dated March 2, 2017, that individual identified himself as "Saleh Salama" and is referred to as "Mr. Salama" in this decision.

a motion to vacate his default pursuant to section 1-52 of this tribunal's rules of practice. 48 RCNY § 1-52 (Lexis 2017). Petitioner submitted its opposition to the motion on April 24, 2017.

ANALYSIS

A motion to vacate a default must show both good cause for respondent's failure to appear and a meritorious defense to the petition. *See, e.g., Human Resources Admin. v. Rice*, OATH Index No. 455/93, mem. dec. at 3 (Apr. 7, 1993); Transit *Auth. v. O'Connell*, OATH Index No. 1076/91, mem. dec. at 3 (Nov. 8, 1991). This motion may be granted at the trial judge's discretion. *O'Connell*, OATH 1076/91 at 3.

Good Cause for Failing to Appear

To satisfy the good cause requirement, respondent must provide a reasonable excuse for his failure to appear. *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"); *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 . . . .") (citations omitted).

Here, respondent contends that at the time of the March 2017 trial, he was in Egypt for a family matter (Respondent's Motion ("Resp. Mot.") at ¶¶ 2, 3). In support, respondent submitted a copy of an "eTicket receipt" bearing his name on it from EgyptAir for travel from New York City to Cairo, Egypt on February 12, 2017 and returning on July 15, 2017 (Resp. Ex. A). On March 3, 2017, respondent bought a return ticket to the United States leaving Egypt on March 5, 2017 (Resp. Mot. at ¶ 6; Resp. Ex. A).

Petitioner argued that respondent has not substantiated the excuse for his absence because he did not describe the nature of the family matter in Egypt or explained why it prevented him from appearing in this matter (Petitioner's Opposition ("Pet. Opp.") at ¶¶ 6, 7). Petitioner further noted that respondent did not claim that he was unaware of the proceeding (Pet. Opp. at ¶¶ 5, 7).

Under the circumstances here, I find that respondent has stated a reasonable excuse for his failure to appear. Respondent alleges that he was out of the country for a family matter at the time of trial and produced airline ticket receipt to show that he flew to Egypt on February 12, 2017, two days before the Department served notice of the trial on February 14, 2017. That respondent left the country before petitioner served the notice of trial suggests that he may not

have been aware of the scheduled trial date. *See Taxi and Limousine Comm'n v. Khan,* OATH Index No. 1792/14, mem. dec. at 3 (Aug. 12, 2014) (ALJ excused respondent's failure to appear at trial based on proof that he was out of the country when the notice of trial was served and on the day of trial). Accordingly, respondent has established good cause for his failure to appear for the trial on March 2, 2017.

Meritorious Defense to the Charges

Respondent must also present a meritorious defense to the charges, which is "akin to a burden of production - the respondent need not produce 'a fully proved defense, but only a legally viable, factually substantial defense' to the petition." *Police Dep't v. Grant*, OATH Index No. 508/07, mem. dec. at 2 (Oct. 12, 2006) (citing *O'Connell*, OATH 1076/91).

In defense of the charges here, respondent maintains that the vendors who petitioner alleges operated his cart only did so for a short period of time during the day because he could not be there for the full 18 hours that is required to set up and clean the cart in the morning and evening (Resp. Mot. at ¶ 11). Respondent contends that "there is no pattern of one person operating the cart other than the permit holder," and that "there were six different persons that operated the cart during that five year period for short periods of time" (Resp. Mot. at ¶ 12). Further, respondent noted that a number of the violations were issued at the same time and the same day to "an incidental operator" of the cart (Resp. Mot. at ¶ 12). Respondent denied having violated any rule that would merit revocation of his license and maintains that he is prepared to testify about the unpaid violations and pay the fines if necessary (Resp. Mot. at ¶¶ 13, 14). In essence, respondent appears to argue that the vendors did not operate as his agents, but were incidental operators of his cart. In response, petitioner contended that respondent has failed to identify specific, factual defenses to the charged violations to satisfy the meritorious defense requirement (Pet. Resp. at ¶ 9).

While respondent's proffered defenses may not defeat all of the Department's charges, they constitute legally viable defenses. Moreover, these defenses may mitigate the penalty of license revocation. As this tribunal has previously held, whether respondent's defenses would mitigate the charges is a proper consideration in the context of vacating a default. *See, e.g., Health and Hospitals Corp. (Jacobi Hospital Ctr.) v. Velez*, OATH Index No. 748/01, mem. dec. at 6 (May 18, 2001) (default vacated where, in response to charges of excessive absenteeism,

AWOLs, and abusive language, respondent offered defenses which could have been either mitigation arguments or defenses to the allegations); *see also Dep't of Correction v. Patrick*, OATH Index No. 871/02, mem. dec. at 2 (Mar. 13, 2002) (basis for vacating a default could be testimony from respondent that would "defeat the charges or mitigate a penalty"); *Health and Hospitals Corporation (Elmhurst Hospital Ctr.) v. Stevens*, OATH Index No. 447/98 at 3 (Nov. 7, 1997), *aff'd*, HHC Personnel Review Board, Decision No. 936 (Jan. 12, 1999) (declining to vacate default where respondent's testimony would not mitigate penalty).

Finally, as has been noted by this tribunal, judgments by default are generally disfavored, particularly where, as in the instant case, the respondent seeks to actively defend against the allegations. *See Khan*, OATH 1792/14 at 4; *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. at 7 (Sept. 25, 2013); *see also Matter of Halaby*, OATH Index No. 1520/96 at 6 (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"). This is especially so where there is no contention that vacating respondent's default would unfairly prejudice petitioner.

Therefore, respondent's motion to vacate his default is granted. Petitioner and respondent are directed to contact the OATH calendar unit by close of business on Tuesday, April 18, 2017, to schedule a conference and subsequent trial as promptly as possible.

Astrid B. Gloade
Administrative Law Judge

April 14, 2017

APPEARANCES:

LORAINE PEONE, ESQ.
Attorney for Petitioner

JONATHAN B. ALTSCHULER, ESQ.
Attorney for Respondent