Matter of Stone

OATH Index No. 1945/14, mem. dec. (June 8, 2015)
[Loft Bd. Dkt. No. TR-0889]

In Loft Board proceeding, administrative law judge finds that attorney's repeated refusals to reply to discovery requests or comply with ordered deadlines warranted a sanction of a formal admonishment.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIONA CAMPBELL STONE
Petitioner

MEMORANDUM DECISION

JOHN B. SPOONER, *Administrative Law Judge*

This case concerns a remanded coverage application for the buildings located at 13 Thames Street and 15 Thames Street, Brooklyn, New York. The procedural history of the case may be found in the OATH report and recommendation. *Matter of Stone*, OATH Index No. 1945/14 (June 4, 2015). The owner's attorney has requested that petitioners' attorney, Mr. Hillgardner, be sanctioned for his repeated failure to meet various discovery deadlines. In his affirmation, counsel indicates that his firm devoted some 30 hours of time for which his client was billed some $14,800 for the two motions submitted in August and November 2014. For the reasons explained below, the request for sanctions is granted and Mr. Hillgardner is formally admonished for his conduct.

Counsel for the owner accurately identified some six deadlines that Mr. Hillgardner failed to meet, largely without explanation. The remanded case was conferenced in April 2014 and scheduled for trial in July 2014, with the parties to exchange witness lists and exhibits no later than July 8, 2014. In addition, petitioner's attorney was to provide a list of all tenants seeking protected occupancy. Mr. Hillgardner failed to provide the discovery agreed to, requiring adjournment of the trial. Mr. Hillgardner was then directed to provide a reply to the owner's discovery demands no later than July 25, but did not do so. Even after the owner's

attorney filed a motion to strike on August 25, 2014, Mr. Hillgardner failed to submit a reply by September 4, 2014, as required by OATH rules and the motion papers themselves (although the motion papers contained an obvious typographical error giving the year as "2013"). On September 15, 2014, this tribunal sent Mr. Hillgardner an e-mail directing him to submit a reply to the owner's discovery demands no later than September 19, 2014, a deadline which once again Mr. Hillgardner failed to meet without explanation and without requesting an extension.

Not until September 26, 2014, did Mr. Hillgardner submit any written reply to the owner's five-month-old discovery requests in the form of a motion for a protective order on a number of procedural grounds. Three of the grounds given in the motion were utterly meritless: that the name of the owner was inaccurately given as Thames Holdings LLC (the owner of 15 Thames Street) instead of as Thames Street Lofts LLC; that the motion papers had the incorrect year of 2013 for the return date; and that the five-month delay in replying should be excused due to Mr. Hillgardner's preparation of an Article 78 proceeding, his hacked e-mail, and having to participate in a July 2014 conference call concerning discovery while outside of his office.

After the motion for a protective order was denied, Mr. Hillgardner was directed by me to provide the requested discovery no later than November 5, 2014, and failed to do so. I again directed him to provide the discovery by November 10 and he did not, prompting yet another motion to strike from the owner's attorney. By a November 26, 2014 e-mail from this tribunal, Mr. Hillgardner was once more directed to submit all outstanding discovery no later than December 4, 2014. He was expressly warned that a failure to abide by the order might result in sanctions, including preclusion from offering evidence or testimony, fines, or costs. Mr. Hillgardner was told that he would be heard at the January 15, 2015, hearing as to why sanctions should not be imposed due to his "willful failure" to abide by the directions of an OATH judge.

Ultimately Mr. Hillgardner provided proofs of residential occupancy and a witness list, on December 10 and 16, 2014, some eight months after they were first requested. On December 23, 2014, Mr. Hillgardner was reminded by e-mail that he would be required to respond to the request of the owner's attorney that sanctions, including attorneys' fees or fines, should be imposed.

At the hearing on January 15, 2015, Mr. Hillgardner excused his repeated failure to provide discovery by contending that "much" of his clients' possessions were at the premises and inaccessible due to the vacate order (Tr. 16), that his clients were living in Spain, the South,

Alaska, and New Jersey, and unable to communicate with him (Tr. 17), that he was prejudiced because the prior owner failed to file an answer to the 2011 coverage application (Tr. 18), and that he had an appellate brief due on December 4, 2014, the day before the most recent deadline imposed by this tribunal (Tr. 20).

OATH rules provide two grounds for sanctions. First, a party who refuses to comply with orders of this tribunal regarding discovery may be subject to sanctions under OATH rule 1-33, including "the preclusion of witnesses or evidence, drawing of adverse inferences, or, under exceptional circumstances, removal of the case from the calendar, dismissal of the case, or declaration of default." Second, attorneys appearing before OATH who fail to conduct themselves properly may be subject to sanctions under OATH rule 1-13(e), including "formal admonishment or reprimand, assessment of costs or imposition of a fine, exclusion of the offending person from the proceedings, exclusion or limitation of evidence, adverse evidentiary inference, adverse disposition of the case, in whole or in part, or other sanctions as the administrative law judge may determine to be appropriate." In one past case, an attorney who persistently violated OATH rules and orders of an OATH judge by disrupting a trial was barred from appearing at OATH and fined $2,500. *See Dep't of Education v. Brust,* OATH Index No. 2280/07, mem. dec. (Sept. 25, 2009).

Mr. Hillgardner's repeated failure to reply at all to his adversary's discovery requests or to submit information required by express orders of this tribunal is troubling. His pretrial excuses, that he had other litigation responsibilities in April 2014, that his e-mail was hacked sometime around June 2014, that he had to participate in conference calls while out of his office, and that he was somehow prejudiced because the previous owner failed to answer to an application for which the hearing was held over two years before, were as lamentably unconvincing as those offered at the trial itself. Mr. Hillgardner's dilatory and irresponsible conduct caused considerable delay in the completion of the trial, to the detriment of his clients, the owner, and the owner's counsel.

For several reasons, however, I do not believe that harsher sanctions, such as a fine or an award of costs, are required. First, Mr. Hillgardner ultimately provided the discovery required in advance of the adjourned trial date. Most of the prejudice caused by his missed deadlines was the delay in scheduling the trial, which affected both parties equally. When Mr. Hillgardner finally replied to the discovery demands, he raised a colorable procedural issue regarding a past

owner's failure to answer the application. At the trial itself, Mr. Hillgardner made it clear that the primary reason he could not supply documents was that his clients failed to provide them, asserting that the documents were stored in the building to which they no longer had access. Mr. Hillgardner also conducted himself professionally and competently during the trial, providing copies of exhibits as required by this tribunal's rules. *Cf. Dep't of Correction v. Bolanos*, OATH Index No. 853/15 at 4-5 (Mar. 19, 2015) (attorney's repeated failure to reply to adversary's discovery requests found to be "indecorous" but undeserving of a formal sanction).

Finally, the two pretrial motions prepared by the owner's attorney, while well-written, were more zealous than essential. The second motion in particular, which included a 33-paragraph affirmation and 11 exhibits, reiterated most of the arguments already made in the first motion. The potential prejudice created by Mr. Hillgardner's failure to provide discovery was an inability to prepare for testimony and evidence offered by petitioners at the hearing. While there was nothing improper about submitting the pretrial motions, it cannot be said that they were required in order to preserve the owner's rights at the hearing to preclude evidence not provided in discovery.

For his unprofessional behavior in this case, I hereby formally admonish Mr. Hillgardner and warn him that, if he appears before this tribunal in the future, he must adhere to all deadlines mandated by OATH rules or by orders of OATH judges, and generally conduct himself professionally at all times, or he should expect to receive more drastic sanctions.

John B. Spooner
Administrative Law Judge

June 8, 2015

APPEARANCES:

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