

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 11-0147

In re:

CAROLYN & JULIE ARENDS, a General
Partnership d/b/a JULIE’S JEWELS; JULIE
ARENDS, and individual and CAROLYN ARENDS,
an individual,

Respondents,

DECISION AND ORDER DENYING MOTION FOR DEFAULT JUDGMENT

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (“the Rules”), set forth at 7 C.F.R. subpart H, apply to the adjudication of the instant matter. The case involves a motion for the entry of default by Assistant Administrator of United States Department of Agriculture’s Animal and Plant Health Inspection Service (“USDA”; “APHIS”; “Complainant”; “Administrator”) against Carolyn & Julie Arends, a general partnership d/b/a Julie’s Jewels, and Julie Arends and Carolyn Arends as individuals (“Respondents”).

Procedural History

On February 24, 2011, Complainant filed with the Hearing Clerk for USDA’s Office of Administrative Law Judges (ALJ)(“Hearing Clerk”) an Order to show cause why Respondents’ Animal Welfare Act license should not be terminated. On February 25, 2011, the Hearing Clerk issued a letter to Respondents, together with a copy of the Order and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 et seq.) (“Rules of Practice”), in which Respondents were advised to file an answer within twenty days. The letter was sent by certified mail, return

receipt requested, and the record reflects that Respondent Carolyn Arends certified receipt of the correspondence on February 28, 2011. On March 28, 2011, the Hearing Clerk sent correspondence by regular mail to Respondents, advising them that they had not filed their answer within the time required by the Rules. See, 7 C.F.R. § 1.136. On April 4, 2011, Complainant moved for entry of default judgment against Respondents. On that date, the Hearing Clerk sent a copy of the motion to Respondents by certified mail.

On April 28, 2011, Respondent Carolyn Arends filed pleadings that alleged that she had responded to the Order, and that further alleged that counsel for Complainant acknowledged that Respondent had filed an answer somewhere other than with the Hearing Clerk. Complainant's counsel acknowledged in pleadings filed on April 4, 2011 that Respondents had sent a response directly to her, received on March 23, 2011. On May 2, 2011, Ms. Carolyn Arends' pleadings were filed again, together with supplemental statements from Julie Arends¹ filings which counsel advised were not file in the proper manner. The statements were accompanied by affidavits acknowledged by employees of APHIS.

Factual Assertions

Complainant alleges that the individual Respondents prevented inspection of their premises by APHIS personnel, Animal Care Inspector Cynthia Neis and Supervisory Animal Care Inspector Dr. Richard Watkins on or about September 15, 2010 through lack of cooperation and verbal interference. It was further alleged that Respondents prevented the APHIS agents from conducting an exit interview regarding their inspect attempt, threatened the agents, threatened to kill their animals and appropriated photographs taken by the agents.

Respondents allege that they felt harassed by the inspections in September, 2010, and cited ill health, hospitalizations and general stress as the reasons for their behavior. Respondents

¹ The pleadings are signed by "Julie Robinson", whom I infer is Julie Arends.

observed that they had cooperated at cordial subsequent meetings with other APHIS personnel in February, 2011. Respondent Carolyn Arends offered a settlement of the dispute, but in the alternative asked for a hearing in the matter.

Statutory and Regulatory Authority

The instant matter involves the Animal Welfare Act, 7 U.S.C. §§2131 et seq. (“AWA” or “the Act”), which vests USDA with the authority to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. §2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of the AWA. 7 U.S.C. §2151. USDA, through APHIS, is authorized to terminate a license to any individual who:

6) Has made any false or fraudulent statements or provided any false or fraudulent records to the department of other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal State or local laws or regulations pertaining to the transportation, ownership, neglect or welfare of animals or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. §2.11(a)(6). In addition, USDA is authorized to conduct inspections and investigations of exhibitors and requires those subject to the AWA to give access to their premises to the government for that purpose “at all reasonable times”. 9 C.F.R. §2.11(a)(6).

Pursuant to the Rules, Respondents are required to file an answer within twenty days after the service of a complaint. 7 C.F.R. § 1.136(a). Failure to file a timely answer shall be

deemed admission of all the material allegations in the Complaint. 7 C.F.R. § 1.136(c). The Rules provide that Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for filing of any document or paper, except when the time expires on those dates, the period shall be extended to include the next business day. 7 C.F.R. §1.147(h.)

A response to a motion or request must be filed within 20 days after service or within such shorter or longer period as may be fixed by the Judge or the Judicial Officer . . . 7 C.F.R. §1.143(d).

The doctrine of equitable tolling allows for consideration of whether good cause exists to consider pleadings regardless of non-compliance with a time limitation. Equitable tolling is generally reserved for situations “where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 96 (1990).

Discussion

Complainant cites various cases as precedence in support of its motion for default judgment in this case. Complainant argues that default is appropriate because Respondents failed to adhere to the Rules regarding filing an Answer. However, Complainant did not file a formal complaint under the Rules, but rather issued an Order to show cause, which I construe as a motion or request within the definition of 7 C.F.R. §1.143(d). Notwithstanding the Hearing Clerks’ letter, I decline to hold pro se Respondents responsible for construing the Order as a Complaint.

Even construing the Order as a Complaint, I find that the response of Respondents Carolyn Arends and the partnership were timely filed. The Hearing Clerk mailed Complainant's Order on February 25, 2011. The certified mail receipts reflect that Respondent Carolyn Arends signed for delivery of the mailing on February 28, 2011. She responded directly to Complainant's counsel on March 23, 2011², which constitutes 23 days after the Order was mailed. Pursuant to Fed. R. Civ. Pro. 63, it is appropriate to add three days to the period for timely service when service is effected by mail³.

It is not disputed that Respondents failed to adhere to the Rules or the Hearing Clerk's instructions regarding filing a response. However, I find that Respondents' filing of a response directly with Complainant's counsel constitutes the type of defective pleading that supports equitable tolling of a time period. In this case, although Respondents filed responses in the wrong place, they filed them directly with the individual to whom notice was significant. I find no prejudice to Complainant in the direct receipt of pro se Respondents' responses. Accordingly, entry of default against Respondents Carolyn Arends and the partnership is not warranted⁴.

I further find substantial evidence of record to support equitable tolling of the time period for response from Respondent Julie Arends. Although that Respondent's responses were untimely filed, there is ambiguity regarding her role in the partnership and operation of the facility at issue, which I find comprises extraordinary circumstances meriting equitable tolling. In addition, Ms. Julie Arends' hospitalization and illness represent additional extraordinary circumstances that warrant extending the regulatory time period for filing a response to an Order,

² There is no evidence of record reflecting the date of receipt of Complainant's filings, other than Complainant's counsel's representations in the motion for default.

³ I further take official notice that mail to the main building at USDA is often delayed due to security inspections.

⁴ It is somewhat disconcerting that the government should bring the instant motion for default when it had actual notice and awareness of Respondents' response.

particularly considering her pro se status. Default against Julie Arends is not an appropriate remedy in these circumstances.

Conclusion

Based upon the foregoing, I hereby DENY Complainant's motion for Default Judgment.

So Ordered this th day of June, 2011 in Washington, D.C.

Janice K. Bullard
Administrative Law Judge