

**Stennett v Wilson-Shell**

2008 NY Slip Op 32314(U)

August 20, 2008

Supreme Court, Kings County

Docket Number: 0011328/2008

Judge: James G. Starkey

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, CIVIL TERM, PART 6  
HON. JAMES G. STARKEY

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CARMEN STENNETT,

Plaintiff,

**DECISION**

-against-

INDEX NO.: 11328/2008

PATRICIA WILSON-SHELL AND THE NEW YORK  
STATE DIVISION OF HUMAN RIGHTS,

Defendant.

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Dated: August 20, 2008.

**APPEARANCES OF COUNSEL**

For the Plaintiff(s):

**AMBROSE WOTORSON, ESQ.**

26 Court Street, Suite 1811  
Brooklyn, New York 11242

For the Defendant(s): Wilson- Shell & NYS Division of Human Rights

**New York State Division of Human Rights Legal Department**

**By: Michael S. Swirsky, Esq.,**

One Fordham Plaza, 4<sup>th</sup> Floor  
Bronx, New York 10458

**Caption:** Stennett v. Wilson-Shell & New York State Division of Human Rights

**Index No.:** 11328/2008

Plaintiff Carmen Stennett has moved by order to show cause for an injunction barring defendants Wilson-Shell and The New York State Division of Human Rights (hereinafter “DHR”) from enforcing an administrative judgment against plaintiff. Alternatively, plaintiff seeks to enjoin defendants from enforcing the judgment pending a hearing on whether the judgment should be vacated. Defendants subsequently moved for an order pursuant to CPLR §3211(a)(7) seeking dismissal of the action claiming that the complaint fails to state a cause of action.

### **PROCEDURAL HISTORY**

Based on an action for abuse of process, plaintiff seeks the annulment of a final order on default after hearing issued by defendant DHR. The hearing was held on November 7, 2007, and recommended findings of fact and an order was issued upon the conclusion of the hearing. On November 30, 2007, the Commissioner of the Division of Human Rights adopted the findings and a final order was issued. Plaintiff was served with a copy of the final order on November 30, 2007, which order directed plaintiff to pay defendant Patricia Wilson-Shell damages in the amount of \$135,000.00. Defendant Wilson-Shell’s original complaint with defendant DHR charged plaintiff with unlawful discriminatory practices related to housing in violation of Executive Law, Article 15.<sup>1</sup> Specifically, it was alleged that plaintiff engaged in anti-gay verbal harassment of Wilson-Shell, plaintiff’s tenant. The New York State Division of Human Rights investigated the complaint in accordance with the procedures set out in Executive Law

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<sup>1</sup> Article 15 of the Executive Law is also known and referred to as the Human Rights Law.

§ 297(2)(a).

The New York State Division of Human Right's investigation indicated that plaintiff spoke to an investigator<sup>2</sup> and confirmed that she had received notices of the investigation, but that she was not guilty of the claims against her. After the investigation, the New York State Division of Human Rights made a preliminary determination, pursuant to Executive Law § 297(2)(a), that it had jurisdiction over Wilson-Shell's complaint and that there was probable cause to believe that plaintiff had engaged in unlawful discriminatory practices. The complaint was then referred for a public hearing at which the plaintiff failed to appear. As contained in the written Order, the Administrative Law Judge telephoned plaintiff during a preliminary conference, in which plaintiff identified herself and stated that it was her intention not to participate in the proceedings, or even confirm her mailing.<sup>3</sup>

The Notice of Hearing was mailed to plaintiff at 46 East 57<sup>th</sup> Street, 2<sup>nd</sup> floor, Brooklyn, New York as per the affidavit of service. This is the same address where defendant Wilson-Shell leased an apartment from plaintiff. However, plaintiff asserts that since February 2006, her address has been 911 Nostrand Avenue, Brooklyn, New York, and that she receives all of her mail at this address. The Division Order indicates that "[the notice of hearing] was not returned to the Division as undeliverable and is, therefore, presumably received." At the public hearing, the Commissioner adopted the recommended findings of fact, decision and order of the Administrative Law Judge who heard the complaint. In her order to show cause, plaintiff asserts that she was unaware that Wilson-Shell had filed a discrimination claim against her until April 3,

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<sup>2</sup> In this proceeding, plaintiff denies speaking to any investigator from the New York State Division of Human Rights.

<sup>3</sup> Plaintiff now denies ever speaking to the Administrative Law Judge regarding this action. Further, she maintains that she never received notice of any hearing.

2008 when she found a notice dated March 24, 2008 from the New York State Division Human Rights when she appeared at 46 East 57<sup>th</sup> Street "merely to check on the premises."

On April 30, 2008, this court heard oral argument on plaintiff's order to show cause and reserved decision. Plaintiff's underlying complaint, dated April 7, 2008, alleges that defendant Wilson-Shell abused plaintiff's due process rights by pressing utterly false claims against plaintiff before the New York State Division of Human Rights for malicious and illegitimate purposes. Specifically, it is alleged that defendant Wilson-Shell gave and caused others to give false testimony concerning plaintiff before the New York State Division of Human Rights. She further alleged that the New York State Human Rights Division failed to afford her due process before purportedly imposing judgment against her for \$135,000.00, thereby violating plaintiff's rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution (as made actionable by 42 U.S.C. Section 1983) and the Due Process Clause of the New York State Constitution. Plaintiff requests that this court vacate defendant DHR's judgment, order a new hearing before defendant DHR and award damages in her favor. In its motion, dated May 14, 2008, defendant DHR seeks dismissal of the action for plaintiff's failure to state a cause of action pursuant to CPLR § 3211(a)(7).

In its motion to dismiss, the New York Division of Human Rights argues that Executive Law § 298 provides the exclusive remedy through which a party may seek judicial review of its decisions. Since plaintiff has not sought relief pursuant to Executive Law § 298, this court has no basis upon which to grant the relief requested by plaintiff. Defendants contend that plaintiff cannot "skirt" the requirements of Executive Law § 298 by seeking judicial review of an order

after hearing through this civil.<sup>4</sup> Further, defendant asserts that the instant action is untimely as there is a 60-day limitation period for the commencement of proceedings for judicial review under Executive Law § 298, and that plaintiff commenced this action well beyond that time frame. Finally, defendant DHR urges that because plaintiff failed to appear at the public hearing, her default precludes her from seeking judicial review, and that her sole recourse is an application to the New York State Division of Human Rights to vacate the default judgment.

### **LAW AND APPLICATION**

The court – for purposes of a motion pursuant to CPLR § 3211 – must accept the factual allegations contained in the complaint as true. See *Becker v. Schwartz*, 46 N.Y.2d 401, 408, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978). The pleading must also be afforded a liberal construction in making a determination as to whether the facts as alleged fit within any cognizable legal theory. See *Leon v. Martinez*, 84 N.Y.2d 83, 87-8, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994).

In the instant case, the motion to dismiss of defendant DHR must be granted on default since plaintiff has filed no papers in opposition thereto. However, even absent such default, the action would have to be dismissed under CPLR § 3211(a)(7) and Executive Law § 298. Even though plaintiff claimed relief under 42 U.S.C. § 1983<sup>5</sup> and the due process clauses of both the New York and United States Constitutions, the ultimate relief she seeks is an order vacating defendant’s judgment and directing defendant New York State Division of Human Rights to

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<sup>4</sup> The affirmation of defendant DHR in opposition to plaintiff Stennett’s order to show cause similarly argues that Executive Law § 298 provides the exclusive mechanism for judicial review and that, although the action is styled as one to vindicate the civil rights of the plaintiff, it is an action to vacate the Order. Defendant DHR also argues, among other things, that a preliminary injunction would interfere with its statutory power under Executive Law § 298 to petition the court to enforce the Order.

<sup>5</sup> 42 U.S.C. § 1983 articulates liability in a “Civil action for deprivation of rights.”

conduct a new hearing. Since plaintiff failed to appear at the public hearing and to answer the complaint against her, a judgment was entered against her by default. *See Executive Law § 297(4)(b)*. It is well settled that such default judgments are not appealable, and that the defaulting party must apply to the rendering agency to open the default in order to facilitate further review. *See Interboro Mgt. Co. v. State Div. of Human Rights*, 139 AD2d 697, 2<sup>nd</sup> Dept. 1988). The rationale is that a party is not aggrieved by a judgment entered after their own default and may not seek to review such a determination. *Interboro Mgt. Co. v. State Div. of Human Rights*, supra at 698. Plaintiff's proper recourse, therefore, is to seek to vacate the default judgment against her at the administrative level and to request that the proceeding be reopened for good cause shown. *See 9 N.Y.C.R.R. § 465.20; Mgt. Co. v. State Div. of Human Rights*, supra at 698.

## CONCLUSION

In light of the above, plaintiff's motion is denied and defendants' motion is granted. This constitutes the decision of this court. Defendants are directed to settle order in accordance with decision with notice of settlement.

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J.S.C.