

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Saad Mheirat
d/b/a Corner Grocery/Winchester Market,

Respondent.

Docket No. C-13-1239
FDA Docket No. FDA-2013-H-1026

Decision No. CR3075

Date: January 10, 2014

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, Saad Mheirat d/b/a Corner Grocery/Winchester Market, alleging facts and legal authority sufficient to justify the imposition of a civil money penalty of \$2,000. Although Respondent timely answered the Complaint and requested a hearing through its counsel, it failed to comply with the provisions of my pre-hearing order. I issued a show cause order that directed Respondent to explain why it failed to comply with the pre-hearing order. The show cause order informed Respondent that if it failed to respond or to demonstrate good cause for its non-compliance with the pre-hearing order, I may impose sanctions against it. Respondent did not file a response. Therefore, I sanction Respondent by striking its answer, entering a default judgment against Respondent and ordering Respondent to pay a civil money penalty in the amount of \$2,000.

CTP initiated this case by serving a Complaint on Respondent and filing a copy of the Complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The Complaint alleges that Respondent unlawfully sold cigarettes to a minor, failed to verify that a cigarette purchaser was of sufficient age and impermissibly sold single cigarettes, thereby violating the Federal Food, Drug, and Cosmetic Act (Act) and its implementing regulations found at 21 C.F.R. Part 1140. CTP seeks a civil money penalty of \$2,000.

On September 5, 2013, CTP served the Complaint on Respondent by United Parcel Service, pursuant to 21 C.F.R. §§ 17.5 and 17.7. In the Complaint and accompanying cover letter, CTP explained that within 30 days Respondent should pay the penalty, file an answer, or request an extension of time within which to file an answer. CTP warned Respondent that if it failed to take one of these actions within 30 days an Administrative Law Judge could, pursuant to 21 C.F.R. § 17.11, issue an initial decision by default ordering Respondent to pay the full amount of the proposed penalty.

On October 31, 2013, I issued an Acknowledgment and Pre-hearing Order (Pre-hearing Order) that acknowledged receipt of Respondent's answer and notified the parties of a mandatory settlement conference scheduled for December 4, 2013, at 2:00 PM ET. The Pre-hearing Order also required the parties to provide my office with a telephone number where that party could be reached at the time of the settlement conference. Respondent failed to provide my office with a telephone number prior to the settlement conference.

On December 4, 2013, neither Respondent nor his counsel appeared at the mandatory settlement conference at 2:00 PM ET. Twice during the time period scheduled for the settlement conference, the settlement attorney I assigned to conduct the conference attempted to call the telephone number Respondent's counsel listed on the notice of appearance he filed, but the settlement attorney could not reach Respondent's counsel.

On December 11, 2013, I issued an Order to Show Cause (Order) to determine whether Respondent had good cause for failing to comply with the Pre-hearing Order. I ordered Respondent to explain why it failed to provide my office with a telephone number where it could be reached at the time of the settlement conference and why it failed to appear for the mandatory settlement conference on December 4, 2013, at 2:00 PM ET. The Order explained that I might accept Respondent's late response if it could show good cause for the delay. The Order further explained that if Respondent could not show good cause, I might dismiss its request for hearing and enter a default judgment. *See* 21 C.F.R. § 17.35(a)(1)-(3),(e).

Respondent had the obligation to maintain contact with my office and to participate in the mandatory settlement conference that I scheduled or explain why it did not do so. Respondent's failure to communicate with me after it filed an answer in this case constitutes failure to comply with my pre-hearing orders, failure to defend this cause of action, and misconduct that interferes with the speedy, orderly, or fair conduct of the hearing in this case. 21 C.F.R. § 17.35(a)(1)-(3). Therefore, as authorized by the regulations, I strike Respondent's answer and enter a default judgment pursuant to the provisions of 21 C.F.R. § 17.35.

Striking Respondent's answer leaves the Complaint unanswered. For purposes of this decision, I assume the facts alleged in the Complaint are true and conclude that default judgment is merited based on the allegations of the Complaint and Respondent's abandonment of the proceeding. 21 C.F.R. § 17.11(a). In support of that conclusion, I make the following findings of fact and conclusions of law:

On September 5, 2013, CTP served the Complaint on Respondent by United Parcel Service, pursuant to 21 C.F.R. §§ 17.5 and 17.7. Specifically, CTP's Complaint alleges that:

- Respondent owns Corner Grocery, an establishment that sells tobacco products and is located at 4232 Winchester Road, Memphis, Tennessee 38118. Complaint ¶ 3.
- On August 23, 2012, during an inspection of Respondent's establishment, an FDA-commissioned inspector observed a violation of 21 C.F.R. § 1140.14(d) "for selling individual cigarettes" Complaint ¶ 10.
- On November 29, 2012, CTP issued a Warning Letter to Corner Grocery explaining that the inspector's August 23, 2012 observation constituted a violation of a regulation found at 21 C.F.R. § 1140.14(d). In addition to describing the violation, the letter advised Respondent that the FDA may initiate a civil money penalty action or take other regulatory action against Respondent if it failed to correct the violation. The letter also stated that it was Respondent's responsibility to comply with the law. Complaint ¶ 10.
- On December 12, 2012, Faye Ahashem responded to the Warning Letter on Respondent's behalf by telephone and electronic mail. "Mr. Ahashem stated that the employee who sold the individual cigarette was reprimanded[] and retrained regarding the sale of tobacco products to minors. Mr. Ahashem also stated that he posted signs stating 'no individual cigarettes' and '18 or older to purchase tobacco.'" Complaint ¶ 11.

