

Kennedy v. Shiv Krupa

United States District Court for the Southern District of Florida
August 14, 2019, Decided; August 14, 2019, Entered on Docket
Case No. 19-61213-Civ-SCOLA/TORRES

Reporter

2019 U.S. Dist. LEXIS 138270 *

PATRICIA KENNEDY, individually, Plaintiff, vs. SHIV KRUPA, INC., d/b/a ECONO LODGE, a Foreign Corporation, Defendant.

Core Terms

website, default judgment, facilities, allegations, disabled, venue, place of public accommodation, judicial district, default, entity, hotel, venue provision, costs

Counsel: [*1] For Patricia Kennedy, Individually, on her behalf and on behalf of all other individuals similarly situated, Plaintiff: Thomas B. Bacon, LEAD ATTORNEY, Thomas B. Bacon, P.A., Mt. Dora, FL United Sta; Kimberly Ann Corkill, Corkill Law Firm, P.L.L.C., Pensacola, FL United Sta.

SHIV KRUPA, INC., doing business as, Econo Lodge, Defendant, Pro se, Dalton, GA.

Judges: EDWIN G. TORRES, United States Magistrate Judge.

Opinion by: EDWIN G. TORRES

Opinion

REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION FOR FINAL DEFAULT JUDGMENT

This matter is before the Court on Patricia Kennedy's ("Plaintiff") motion for final default judgment against Shiv Krupa, Inc. d/b/a Econo Lodge ("Defendant") for failure to answer or otherwise defend this case. [D.E. 15]. Defendant did not respond to Plaintiffs' motion and the time to do so has passed. Therefore, Plaintiff's motion is now ripe for disposition. Based on a review of the motion and the underlying record in this case, Plaintiff's

motion should be **DENIED**.¹

I. BACKGROUND

Plaintiff filed this action on May 13, 2019, [D.E. 1] alleging that Defendant operates a website that violates the Americans with Disabilities Act ("ADA"). Plaintiff claims that she qualifies as a disabled person under the ADA [*2] because she is unable to engage in major life activities and cannot walk more than a few steps without assistance. Plaintiff further alleges that she is bound to a wheelchair and has limited use of her hands.

In bringing this action, Plaintiff states that she is a "tester" for purposes of ensuring that places of public accommodation comply with the ADA and that Defendant is the owner and operator of a hotel in Dalton, Georgia. On several dates in May 2019, Plaintiff visited Defendant's websites² to review and assess the features of Defendant's property. But, Plaintiff was unable to do so because Defendant failed to comply with the requirements of the ADA.³ Plaintiff claims that she intends to revisit Defendant's website in the future to test it for compliance so that she may use it to reserve a guest room and avail herself of the property's goods, services, features, facilities, benefits, advantages, and accommodations. Plaintiff served Defendant with a summons and complaint on May 20,

¹ On June 26, 2019, the Honorable Robert N. Scola referred Plaintiff's motion to the undersigned Magistrate Judge for disposition. [D.E. 16].

² The websites include atchoicehotels.com, hotels.com, expedia.com, booking.com, and kayak.com.

³ Some of Defendant's alleged violations include a failure to contain any information on its websites as to whether all goods, facilities, and services at the property are connected to a compliance accessible route. Plaintiff also alleges that the websites fail to provide any information as to the pool(s) and whether there is an accessible lift.

2019, but Defendant failed or otherwise appear in this action. Because Defendant failed to defend this case, Plaintiff requests attorneys' fees, costs, litigation expenses, expert fees, and injunctive relief. [*3]

II. APPLICABLE PRINCIPLES AND LAW

[Rule 55 of the Federal Rules of Civil Procedure](#) sets forth a two-step process for obtaining default judgment. First, when a defendant fails to plead or otherwise defend a lawsuit, the clerk of court is authorized to enter a clerk's default. See [Fed. R. Civ. P. 55\(a\)](#). Second, after entry of the clerk's default, the court may enter default judgment against the defendant so long as the defendant is not an infant or incompetent person. [Fed. R. Civ. P. 55\(b\)\(2\)](#). "The effect of a default judgment is that the defendant admits the plaintiff's well-pleaded allegations of fact, is concluded on those facts by entry by the judgment, and is barred from contesting on appeal the facts thus established." [Buchanan v. Bowman, 820 F.2d 359, 361 \(11th Cir. 1987\)](#) (internal quotation and citation omitted).

A court must review the sufficiency of the complaint before determining whether a moving party is entitled to default judgment pursuant to [Rule 55\(b\)](#). See [United States v. Kahn, 164 F. App'x 855, 858 \(11th Cir. 2006\)](#) (citing [Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 \(5th Cir. 1975\)](#)). "While a complaint . . . does not need detailed factual allegations," a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 \(2007\)](#) (internal citations omitted). If the admitted facts are sufficient to establish liability, the [*4] Court must then ascertain the appropriate amount of damages and enter final judgment in that amount. See [Nishimatsu, 515 F.2d at 1206](#); see also [PetMed Express, Inc. v. MedPets.com, Inc., 336 F. Supp. 2d 1213, 1216 \(S.D. Fla. 2004\)](#).

Damages may be awarded only if the record adequately reflects the basis for the award, which can be shown with submission of detailed affidavits establishing the facts necessary to support entitlement to the damages requested. See [Adolph Coors Co. v. Movement Against Racism and the Klan, 777 F.2d 1538, 1544 \(11th Cir. 1985\)](#). An evidentiary hearing on the appropriate amount of damages is not required by [Rule 55](#), and it is within the Court's discretion to choose whether such a hearing should take place. See [SEC v. Smyth, 420](#)

[F.3d 1225, 1232 n.13 \(11th Cir. 2005\)](#); [Tara Productions, Inc. v. Hollywood Gadgets, Inc., 449 F. App'x 908, 911-12 \(11th Cir. 2011\)](#). With this guidance in mind, we turn to the allegations found within Plaintiffs' Complaint to determine whether default judgment is appropriate.

III. ANALYSIS

Plaintiff's motion seeks an entry of final default judgment against Defendant for failing to defend or otherwise respond to the allegations in this case. Plaintiff argues that she is entitled to attorney's fees, costs, litigation expenses, expert costs, and injunctive relief because Plaintiff was obligated to retain counsel to prosecute this action. Plaintiff also contends that fees and costs are allowed under [42 U.S.C. § 12205](#) because Plaintiff is a prevailing party. As such, Plaintiff seeks (1) to enjoin Defendant from discriminating [*5] against individuals with disabilities, (2) to require Defendant to remedy its websites to bring it into compliance with the ADA, and (3) to award Plaintiff her reasonable attorney's fees, expenses, and costs in the amount of \$5,607.50.

The ADA is a landmark piece of legislation that prohibits discrimination against disabled individuals. Title I regulates discrimination in the workplace; Title II prohibits discrimination by public entities; and Title III prohibits discrimination by private entities in places of public accommodation. With respect to Title III, it provides the following:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

[42 U.S.C. § 12182\(a\)](#). A "public accommodation" is defined by the ADA as including a "hotel." See [42 U.S.C. § 12181\(E\)](#). To establish a prima facie case for ADA discrimination, Plaintiff must establish the following: (1) she is disabled; (2) the property is a place of public accommodation; and (3) she was denied full and equal treatment because [*6] of her disability. [Access 4 All, Inc. v. Bamco VI, Inc., 2012 WL 33163, at *2 \(S.D. Fla. Jan 6, 2012\)](#).

Liability for noncompliance with the ADA is imposed upon "any person who owns, leases (or leases to), or operates a place of public accommodation" that

discriminates against an individual on the basis of disability. See [42 U.S.C. § 12182](#). Discrimination includes the failure to remove architectural barriers in existing facilities where such removal is "readily achievable." [42 U.S.C. § 12182\(b\)\(2\)\(A\)\(iv\)](#). "Where removal is not 'readily achievable,' failure of the entity to make goods, services and facilities "available through alternative methods if such methods are readily achievable,' may constitute discrimination under the ADA." [Gathright-Dietrich v. Atlanta Landmarks, Inc., 452 F.3d 1269, 1273 \(11th Cir. 2006\)](#) (quoting [42 U.S.C. § 12182\(b\)\(2\)\(A\)\(v\)](#)). "If a defendant is found to violate the ADA, a court may grant injunctive relief, including 'an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities.'" [Access 4 All, Inc., 2012 WL 33163, at *2](#) (quoting 28 U.S.C. § 12188(a)(2)).⁴

On June 13, 2019, the clerk entered default against Defendant for failing to respond to Plaintiff's complaint. [D.E. 14]. After a clerk's entry of default, a defendant is deemed to admit all well-pleaded factual allegations in the complaint. See [Nishimatsu Const. Co., Ltd. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 \(5th Cir. 1975\)](#). However, an entry of default against a defendant does not automatically establish that a plaintiff [*7] is entitled to a default judgment. For example, a defendant is not deemed to admit facts that are not well-pleaded or conclusions of law. See *id.* "Conceptually, then, a motion for default judgment is like a reverse motion to dismiss for failure to state a claim," and default judgment is only appropriate if the uncontested complaint alleges "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." [Surtain v. Hamlin Terrace Found., 789 F.3d 1239, 1245 \(11th Cir. 2015\)](#) (internal quotation marks and citations omitted).

⁴ Congress has set forth numerous factors to determine if a barrier is "readily achievable," including the 1) nature and cost of the action; (2) overall financial resources of the facility or facilities involved; (3) number of persons employed at such facility; (4) effect on expenses and resources; (5) impact of such action upon the operation of the facility; (6) overall financial resources of the covered entity; (7) overall size of the business of a covered entity; (8) the number, type, and location of its facilities; (9) type of operation or operations of the covered entity, including composition, structure, and functions of the workforce of such entity; and (10) geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity. See [42 U.S.C. § 12181\(9\)](#).

Here, Plaintiff alleges that Defendant violated the ADA because portions of Defendant's website fails to describe any of the hotel's accommodations for the disabled. She claims that, in the future, she intends to revisit Defendant's website and/or use Defendant's website to reserve a guest room and avail herself of the goods, services, features, facilities, benefits, advantages, and accommodations of the property. But, even if we accept Plaintiff's allegations as true — as we must given the procedural posture of this case — Plaintiff's motion for default judgment lacks merit because there is no evidence that venue is proper.

In a suit to enforce the ADA, venue is proper in any judicial district [*8] where a suit could be brought to enforce Title VII of the Civil Rights Act of 1964, because the ADA incorporates the venue provisions of the Civil Rights Act of 1964. See [42 U.S.C. § 12117\(a\)](#). This means that the venue provision in Title VII supersedes the general venue provision in [§ 1391](#):

Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.

[42 U.S.C. § 2000e-5\(f\)\(3\)](#); see also [Pinson v. Rumsfeld, 192 F. App'x 811, 817 \(11th Cir. 2006\)](#) ("The venue provisions of [§ 2000e-5\(f\)\(3\)](#) were intended to be the exclusive venue provisions for Title VII employment discrimination actions and . . . the more general provisions of [§ 1391](#) are not controlling in such cases.").⁵

Plaintiff alleges in her complaint that "venue is properly located," in this district "because the injury occurred in this district." [D.E. 1 at ¶ 4]. There is no [*9] evidence,

⁵ Put more simply, venue is proper: (1) in any district court in a state where the alleged Title VII violation occurred, (2) in the judicial district where the employment records that pertain to the alleged Title VII violation are maintained, (3) in the judicial district where plaintiff would have worked had there been no Title VII violation, and, if none of the previous three conditions exist, (4) in the judicial district where the defendant's principal office is located.

however, that Defendant resides in this district or that Defendant established a business of public accommodation within Florida. Instead, the opposite is true because Plaintiff claims that Defendant owns a hotel in Georgia. And there is no allegation as to how Defendant availed itself of this district with a place of public accommodation in a different state.

The only connection to this district is that Defendant owned and operated a website that is accessible in South Florida. But, to allow an ADA plaintiff to access a website to confer venue on any place of public accommodation within the United States cannot be the law because it would have "far-reaching implications," for purposes of determining proper venue. See *Poschmann v. Ponte Vedra Corp.*, 2018 WL 7890201, at *3 (S.D. Fla. Dec. 27, 2018). In effect, "Plaintiff would be able to establish venue in h[er] home district over any hotel in the country," that maintains an accessible website. *Id.* Because "[s]uch a rule would drastically widen the scope of the current venue statute," and "produce such far-reaching results," we are left with a complaint that fails to meet any of the venue requirements under [42 U.S.C. § 2000e-5\(f\)\(3\)](#). *Id.* Accordingly, Plaintiff's motion for default judgment should be **DENIED** and this case should **[*10]** be **DISMISSED** for lack of venue.⁶

IV. BACKGROUND

Based on the uncontested facts, we hereby **RECOMMEND** that Plaintiff's motion for final default judgment be **DENIED**. [D.E. 15].

Pursuant to Local Magistrate [Rule 4\(b\)](#) and [Fed. R. Civ. P. 73](#), the parties have seven (7) days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's

Order based on any unobjected-to factual or legal conclusions included in the Report. [28 U.S.C. § 636\(b\)\(1\)](#); [11th Cir. Rule 3-1](#); see, e.g., [Patton v. Rowell](#), 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security*, 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida this 14th day of August, 2019.

/s/ Edwin G. Torres

EDWIN G. TORRES

United States Magistrate Judge

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⁶While we need not consider whether we have personal jurisdiction, Defendant's failure to appear in this action does not waive its right to challenge personal jurisdiction. See [Jackson v. FIE Corp.](#), 302 F.3d 515, 523 (5th Cir. 2002) ("[A] party's right to object to personal jurisdiction certainly is waived under Rule 12(h) if such party fails to assert that objection in his first pleading or general appearance. But a party's right to contest personal jurisdiction is not waived by his failure to appear at all.").