

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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2011 FEB 18 AM 11:04
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Proceedings
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PHILLIP JHONG

v.

CFTC Docket No. 06-051

CASTLE TRADING, INC., MAN
FINANCIAL, INC., GREGORY
ZANE PARKER and YURI PLYAM

OPINION AND ORDER

Phillip Jhong (“Jhong”) appeals from the Administrative Law Judge’s (“ALJ”) order dismissing his complaint against Castle Trading, Inc. (“Castle”), Gregory Zane Parker (“Parker”) and Yuri Plyam (“Plyam”) for failure to file a notice of intent to appear at a hearing. Jhong settled with a fourth respondent, Man Financial, Inc. (“Man”). We vacate the order dismissing Jhong’s complaint against the non-settling respondents and remand the case for a hearing.

FACTS

Jhong filed a pro se complaint with the Commission in July 2006, alleging various claims against Man, a futures commission merchant; Castle, an independent introducing broker; and Castle employees Parker and Plyam. Jhong subsequently retained an attorney, Marc I. Zussman, who ceased representing Jhong about two weeks before a scheduled October 22, 2007 hearing. After Jhong retained new counsel, the hearing was rescheduled to December 17. The ALJ ordered the parties to give notice of their intent to appear by December 3. That date passed without notice from Jhong.

The new attorney, Paul W. Thomas, wrote Jhong on December 5, advising him that a settlement agreement with Man had been reached and that he would withdraw if Jhong did not settle with the remaining respondents. Jhong App. Br., Ex. C. Thomas sent Jhong his case file

the following day under a cover letter terminating the attorney-client relationship. *Id.* at Ex. D. The letter reminded Jhong of the date and location of the hearing. *Id.*

The ALJ, upon learning of Thomas's withdrawal, issued an oral order on December 10 cancelling the hearing. *See* Jhong App. Br., Ex. A; Resp. December 11 letter to the Proceedings Clerk. Jhong wrote to the ALJ on December 10 and again on December 11, expressing surprise at the cancellation and asking the ALJ to hold the hearing and let him represent himself. Jhong App. Br., Exs. A, B. Jhong also expressed dismay at his attorney's withdrawal, stating that Thomas had agreed to represent him "all the way up to the hearing." *Id.* at Ex. B. The ALJ nevertheless issued a written order on December 11 in which he confirmed the hearing's cancellation and ordered the parties to show cause as to whether the case should be dismissed. Notice Cancelling Hearing and Order to Show Cause.

Jhong asserted in response that he had a meritorious case and had retained a new lawyer, Stephen F. Dial. Jhong's Response to Order to Show Cause. Respondents Castle, Parker and Plyam moved for summary disposition under Commission Rule 12.310, 17 C.F.R. § 12.301. *See generally* Resp. Memorandum in Response to Show Cause Order. The respondents argued also that Jhong's requests for extended deadlines and rescheduled hearing dates operated as a waiver of his right to a hearing and constituted a separate ground for dismissal. *Id.* at 11-13.

INITIAL DECISION

The ALJ dismissed Jhong's complaint against Castle, Parker and Plyam for "failure to comply with a clear and explicit order to apprise the court of his intention to appear and participate in the scheduled December 17 hearing" *Jhong v. Castle Trading*, [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,740 CFTC Jan. 28, 2008 ("ID") at 61,509. The ALJ found that Jhong's conduct "resulted in unwarranted delays in this matter, and as a

result, all parties incurred substantial costs and inconvenience.” *Id.* He dismissed Jhong’s claim against Man based upon their settlement. *Id.* Jhong’s appeal followed.

DISCUSSION

Jhong, represented on appeal by a fourth attorney, David. S. Lin, argues that he should not be deprived of a hearing because of Thomas’s unilateral withdrawal and asserts that he believed Thomas had filed the notice of intent to participate. *See generally* Jhong App. Br. The respondents contend that the ALJ properly dismissed the complaint for Jhong’s delays and failures to comply with procedural rules and reiterate their arguments for summary disposition. *See generally* Resp. Ans. Br. The respondents move to strike the exhibits to Jhong’s appeal brief as well as a declaration by Jhong that was submitted with his brief. They argue that these documents were not filed in the proceedings before the ALJ and do not fall within the scope of the record as defined in the reparations rules. Motion to Strike at 2. In addition, the respondents argue that the letters to Jhong from Thomas contain inaccurate, misleading and potentially defamatory statements about them. *Id.* at 2-3.

We deal first with the Motion to Strike. Contrary to the respondents’ assertion, our review of the record discloses that Jhong’s letters to the ALJ and Thomas’s letters to Jhong first were received by the Commission and became part of the case file in December 2007, before the ALJ dismissed the case. The respondents replied to Jhong’s first letter to the ALJ, leaving no doubt that they received it. Resp. December 11 letter to the Proceedings Clerk. Jhong’s second letter to the ALJ, to which he attached copies of the letters Thomas wrote to him, indicates that these documents were provided to the respondents. We assume that they were received.

Substantively, Jhong’s letters to the ALJ are requests or motions to reconsider the decision to cancel the hearing. As such, they clearly fall within the scope of Rule 12.404, which

states that the appeal record shall include, among other things, “pleadings, motions and requests filed.” 17 C.F.R. § 12.404. Thomas’s letters materially support Jhong’s contentions that Thomas withdrew abruptly and that Jhong believed the hearing would go forward as scheduled. The respondents have not identified the statements in the letters that they claim are inaccurate, misleading or potentially defamatory. We reject their conclusory arguments to strike them on that basis. Moreover, the respondents waived those objections by not raising them when the letters first appeared in the record.¹ Accordingly, the motion to strike is denied.

In addressing the merits of Jhong’s appeal, we apply the principle that a presiding officer cannot sacrifice fundamental fairness to a party in the pursuit of efficiency. *Bartel v. Prudential-Bache Securities, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,278 at 35,221 (CFTC July 7, 1988). The imposition of unduly harsh sanctions is inconsistent with fundamental fairness. *Dick v. Chicago Commodities, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,934 at 31,738 (CFTC Feb. 3, 1986) (“[s]anctions must be ‘just’ given the circumstances of the sanctioned behavior”) (citation omitted). Severe sanctions that deprive a litigant of a decision on the merits are reserved for flagrant conduct where a party acts in bad faith. *Compare Hall v. Diversified Trading Systems, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,131 at 41,751 (CFTC July 7, 1994) (deeming a complainant’s failure to amend his inartfully drafted complaint or respond to discovery requests insufficient to warrant dismissal) *with Dick*, ¶ 22,934 at 31,738-40 (affirming a default order against respondents who repeatedly refused to respond to discovery requests despite multiple motions for sanctions).

¹ We also decline to strike Jhong’s Declaration, which merely describes and reiterates the contents of the letters and attests to their veracity. We also decline to strike Exhibit E, a copy of a release executed by Jhong pursuant to his settlement with Man. Although Exhibit E plays no part in our disposition of this appeal, its inclusion in the record does not prejudice any party.

Jhong's failure to provide timely notice of his intent to appear at the December 17 hearing is a lapse of procedural accountability, but does not amount to bad faith or exhibit a willful intent to delay the proceedings. Thomas's letters establish that the attorney did not withdraw until three days after the deadline for filing the notice of intent. It was reasonable for Jhong to believe that Thomas had complied with the filing deadline, especially since Thomas's December 5 letter informs him that the hearing "will" take place on December 17. Jhong App. Br., Ex. C.

When Jhong learned of the hearing's cancellation, he promptly requested reconsideration and provided assurances that he would be present. Jhong submitted letters rather than formal pleadings, but as a pro se litigant (pending his retention of new counsel) Jhong is afforded a degree of lenience in complying with procedural rules. *Hall*, ¶ 26,131 at 41,751 (holding that "allowances must be made for pro se status in interpreting and applying procedural requirements"). In these circumstances, the delayed submission of Jhong's notice of intent to appear at the December 17 hearing does not warrant the extreme sanction of dismissal. In addition, dismissal of a complaint on procedural grounds runs counter to the Commission's strong policy preference for resolving reparations cases on the merits.² *Marlow v. Oppenheimer Rouse Futures, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,904 at 34,212 (CFTC Sept. 9, 1987) (citations omitted).

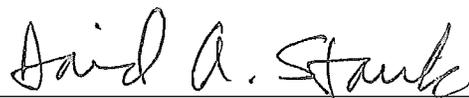
² The dismissal order mentions that Jhong's first attorney, Zussman, withdrew shortly before an earlier scheduled hearing, although the order does not cite that event as a specific basis for dismissing Jhong's complaint. Jhong contends that the termination of Zussman's services resulted from Jhong's refusal to pay for an expert witness. Jhong's Resp. to Order to Show Cause at 1. This is consistent with the facts that Jhong's prehearing memorandum, prepared when he was represented by Zussman, identifies James French as an expert witness, but no testimony was filed for French. This bona fide attorney-client dispute does not meet the bad faith standard for dismissing a complaint.

CONCLUSION

The order of dismissal is VACATED with respect to Jhong's complaint against Castle, Parker and Plyam. The case against these respondents is reinstated and remanded for a hearing. Because the ALJ who heard this case is not available to preside over it on remand, the Office of Proceedings shall assign it to the Commission's other ALJ.

IT IS SO ORDERED.

By the Commission (Chairman GENSLER and Commissioners CHILTON and O'MALIA)
(Commissioners DUNN and SOMMERS not participating).



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 18, 2011