Comm'n on Human Rights v. Britati Realty, Inc.

OATH Index No. 778/13 (May 21, 2013)

Upon respondents' failure to appear, petitioner demonstrated proper service of the petition and notice of trial. The proof established that a Craigslist ad posted by respondents discriminated against tenants with Section 8 housing vouchers, in violation of the Human Rights Law. A civil penalty of $7,500 was recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COMMISSION ON HUMAN RIGHTS
Petitioner
-against-
BRITATI REALTY, INC., D/B/A BRITATI REALTY TRUST, and ANTHONY FERREROSA
Respondents

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This proceeding was commenced by petitioner, the New York City Commission on Human Rights ("Commission"), pursuant to section 8-109(c) of the Administrative Code of the City of New York. The complaint alleges that respondents Britati Realty, Inc. ("Britati") and Anthony Ferrerosa ("Ferrerosa"), violated the city Human Rights Law by posting a housing advertisement on the Craigslist website which expressed an intent to discriminate against prospective tenants based upon their lawful source of income. *See* Admin. Code § 8-107 (Lexis 2012)**.**

Respondents failed to file an answer to the complaint and failed to appear at a scheduled hearing conducted before me on April 10, 2013. Petitioner presented proper proof of service of the verified complaint and notice of hearing upon respondents (ALJ Exs. 1-4, Pet. Ex. 1). *See* 48 RCNY §§ 2-24(b), 1-28(a) (Lexis 2012). Thus, the evidence established the jurisdictional prerequisites for finding respondents in default and the matter proceeded as an inquest.

At the hearing, petitioner presented documentary evidence and the testimony of a discrimination tester employed by the Commission and Raymond Wayne, Esq., the Commission's assistant managing attorney.

I find that petitioner established that respondents violated sections 8-107(5)(a)(3) and 8-107(5)(c)(2) of the Administrative Code by posting an advertisement which expressed an intent to discriminate against prospective tenants based upon their lawful source of income. For the reasons set forth below, I recommend the imposition of a civil penalty in the amount of $7,500.

PROCEDURAL BACKGROUND

The Commission's rules, which govern the proceeding prior to docketing at the Office of Administrative Trials and Hearings ("OATH"), permit service of the complaint by U.S. mail. 48 RCNY § 2-23 (Lexis 2012); 47 RCNY § 1-11(e) (Lexis 2012). Petitioner served the verified complaint by mail on July 19, 2012, on both Britati and Ferrerosa at Britati's business address in Queens (ALJ Exs. 3, 4). This is the same address provided to the New York State Secretary of State as Britati's corporate service address.[1] I therefore find service of the petition sufficient under the applicable rules.

After the case was referred to OATH on October 17, 2012, petitioner was required to serve a Notice of Trial in accordance with OATH Rule 1-28. 47 RCNY § 1-71(a) (Lexis 2012); 48 RCNY § 2-24(b) (Lexis 2012). OATH Rule 1-28 provides service of a notice of hearing must be made within the timeframe provided by Rule 1-26(d), if applicable. 48 RCNY § 1-28(a). Rule 1-26(d) states that where a party selects a trial date *ex parte*, that party shall serve notice of the trial date within one business day of selecting that date. 48 RCNY § 1-26(d) (Lexis 2012); *see also Dep't of Correction v. Brown*, OATH Index No. 1208/94 at 2 (Aug. 11, 1994), *modified on penalty*, Comm'r Dec. (Oct. 6, 1994) ("where a case is scheduled *ex parte*, notice of trial must be served 'within one business day'").

In this case, the trial date was selected at a conference on February 21, 2013, at which only petitioner was present. Petitioner did not serve notice of trial on respondents until March

[1] The New York State Department of State website permits citizens to search its files through its Business Entity search found at http://www.dos.ny.gov/corps/bus_entity_search.html (last visited May 15, 2013). It supplies the service address for corporations registered in New York State. I take official notice of Britati's registered service address found therein as a matter of public record. *See* 48 RCNY § 1-48 (Lexis 2012) (permitting ALJs to take official notice of "of any fact which may be judicially noticed by the courts of this state"); *Affronti v. Crosson*, 95 N.Y.2d 713, 720 (2001) (finding data taken from public records was "a proper subject of judicial notice"); *Dep't of Education v. Halpin*, OATH Index No. 818/07 at 10-11 (Aug. 9, 2007), *adopted*, Chancellor's Dec. (Aug. 23, 2009), *aff'd*, 62 A.D.3d 403 (1st Dep't 2009) (governmental materials officially noticed in an administrative hearing).

25, 2013. Accordingly, petitioner's notice was untimely. *See Dep't of Correction v. Boyce*, OATH Index No. 1227/97 (Apr. 29, 1997) (where trial date was selected at a pre-trial conference in respondent's absence, notice of trial sent over a month later was untimely).

As this tribunal has previously stated, "the reason for the requirement of prompt notice ought to be obvious. Although for convenience we permit a party to schedule trial *ex parte*, for fairness we require that all sides know promptly that such scheduling has occurred." *Brown*, OATH 1227/97 at 3. However, where the respondent has nonetheless had an adequate time to prepare for trial, we have found that the appropriate sanction for service outside the requisite timeframe is an admonishment. *See Brown*, OATH 1208/94 at 4 (petitioner admonished for serving notice of trial 11 days in advance of trial); *Transit Auth. v. Brady*, OATH Index No. 959/93 at 3 (Aug. 13, 1993) (where respondent received notice of trial 19 days in advance, appropriate sanction was to admonish petitioner for his non-compliance with OATH Rule 1-26(d)); *see also Boyce*, OATH 1227/97 at 7 (admonishment appropriate where respondent not prejudiced by late notice of trial).

Here, petitioner's service of the Notice of Trial did not comport with rule 1-26(d) and petitioner is admonished to follow proper procedure in the future. However service otherwise complied with OATH's rules for service of a Notice of Trial. 48 RCNY § 1-28 (a). Petitioner served their Notice of Trial by mail at Britati's business address, and additionally served notice on respondents' counsel, Robert LaGarenne, Esq.,[2] at Mr. LaGarenne's business address (ALJ Ex. 2).

Respondents were not prejudiced by petitioner's omission and had adequate time to prepare. Respondents were aware of the scheduled hearing, both personally and through their attorney, Mr. LaGarenne. This is clear not only from the mailed notices which were sent to each respondent and to their counsel, but also from Mr. LaGarenne's conduct. In February 2013, when Mr. LaGarenne participated in a conference call with ALJ Zorgniotti, he evinced

[2] Although Mr. LaGarenne did not file a notice of appearance with the tribunal, the record indicates that he represented respondents in initial proceedings at the Commission and continued to represent them when proceedings were commenced at OATH. On February 1, 2013, Mr. LaGarenne participated in a conference call with OATH ALJ Zorgniotti regarding respondents' failure to appear at a scheduled conference that day (*see* ALJ Ex. 5a). The tribunal adjourned the conference to another date as a result of his participation in the call. Although OATH's rules favor the filing of a formal notice of appearance, *see* 48 RCNY § 1-11(a), (c), Mr. LaGarenne's participation in a telephone conference on behalf of a party "shall be deemed" an appearance by the attorney, 48 RCNY § 1-11(c); *see Taxi & Limousine Comm'n v. Jean*, OATH Index 1884/01 & 1885/01 at 3 (Dec. 21, 2001) (attorney's telephone conference call constitutes an appearance notwithstanding failure to subsequently file a written notice of appearance). I therefore find that Mr. LaGarenne represented the respondents.

knowledge of the proceedings and was informed of OATH's procedure for seeking adjournments (ALJ Ex. 5a). On February 20, 2013, Mr. LaGarenne e-mailed the Commission and the tribunal, indicating that he had been directed by his client not to appear at a scheduled conference (ALJ Ex. 5c). In reply, the ALJ Addison sent an e-mail notice of the scheduled trial date, April 10, to both parties, including Mr. LaGarenne (ALJ Ex. 5b). Finally, on April 9, 2013, the eve of trial, Mr. LaGarenne sent an e-mail transmission to the Commission asserting that the proceedings must be stayed because "the above named respondent" had filed a bankruptcy petition that day (ALJ Ex. 1). Taken together, these communiqués show that respondents and their counsel were fully cognizant of the proceedings and chose not to attend. Although the March 25 date of mailing was only 12 business days prior to the April 10 hearing, I find that service of the Notice of Trial was sufficient, with respect to the method of service, and because respondents had actual notice and were not prejudiced. *See, e.g., Office of the City Clerk v. Flintlock Construction Services, LLC*, OATH Index No. 428/11 at 1-2 (Nov. 19, 2010) (emails established respondent's actual notice of the proceedings, rendering service sufficient); *Admin. for Children's Services v. Solomon*, OATH Index No. 304/06 at 2-3 (May 15, 2006) (finding service sufficient where petitioner served by mail and respondent had actual notice).

Respondents made no appearance at the hearing, either in person or in writing, and no correspondence was sent to the tribunal on their behalf.

PRELIMINARY MATTER

Counsel asserted in his April 9 e-mail to the Commission that his client had, that day, filed a voluntary petition under Chapter 7 of the U.S. Bankruptcy Code, case number 1-13-42087 (ALJ Ex. 1). He asserted, therefore, that the Commission is foreclosed from commencing or continuing any legal proceeding against "the above named respondent," pursuant to section 362(a) of Title 11 of the U.S. Code (ALJ Ex. 1). Both Britati and Ferrerosa were named above so it is not clear whether Mr. LaGarenne intended to exclude one of them by using the singular "respondent."

Petitioner argues that the pending bankruptcy matter does not stay a trial that is already scheduled, and that proceedings under a regulatory agency's enforcement powers may proceed despite a bankruptcy filing without violating Federal law (Tr. 5-6). Case law supports petitioner's position.

The filing of a bankruptcy petition does not operate as a stay to enforcement of a governmental unit's police and regulatory power. 11 U.S.C. § 362(b)(4) (Lexis 2013). The federal district court in New York has found that an agency charged with enforcement of anti-discrimination laws is one such governmental unit. *See EEOC v. Le Bar Bat, Inc.*, 274 B.R. 66 at *70 (S.D.N.Y. 2002) (finding that as a "government unit" acting within its enforcement powers to combat discrimination, the EEOC is exempt from the automatic stay provisions of section 362(a)). Moreover, because the Commission is not a debtor, it is questionable whether the automatic stay would even apply. *See Kadesh v. United Air Lines, Inc.*, 2003 U.S. Dist. LEXIS 2548 at *1 (S.D.N.Y. 2003) (automatic stay provision of section 362(a) may be extended to a non-debtor only in "unusual circumstances"). I find that petitioner demonstrated its entitlement to proceed against respondents despite the bankruptcy filing.

Moreover, since counsel referred to his client using the singular "respondent," even if this proceeding were subject to a stay occasioned by a bankruptcy filing by one of the respondents, the tribunal would not be inhibited from proceeding against the other.

ANALYSIS

The Human Rights Law prohibits discrimination by real estate office employees as well as owner's agents on the basis of lawful source of income. Section 8-107(5)(c)(2) states that real estate brokers may not "declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, . . . which expresses, directly or indirectly, any limitation, specification or discrimination as to . . . any lawful source of income. . . ." Admin. Code § 8-107(5)(c)(2) (Lexis 2012). The law applies to agents of the owner, generally. *See* Admin. Code § 8-107(5)(a)(3). "Lawful source of income" is defined as "income derived from . . . any form of federal, state, or local public assistance or housing assistance including section 8 vouchers." Admin. Code § 8-102(25) (Lexis 2012). The prohibition against housing discrimination based on lawful source of income in the Human Rights Law "shall not apply to housing accommodations that contain a total of five or fewer housing units." Admin. Code § 8-107(5)(o) (Lexis 2012). Thus, to establish a violation, petitioner must prove that the building has six or more units.

Petitioner bears the burden of establishing a *prima facie* case of discrimination. *Comm'n on Human Rights v. Rent The Bronx, Inc.*, OATH Index No 1619/11 at 7 (July 27, 2011),

adopted, Comm'n Dec. & Order (Oct. 27, 2011) (advertisement for housing stating "no programs" was discriminatory with respect to lawful source of income).

Respondent failed to answer the complaint or to appear at the scheduled hearing. Under the Commission's rules, "[a]ny allegation in the complaint not specifically denied or explained shall be deemed admitted unless good cause to the contrary is shown." 47 RCNY § 1-14(b) (Lexis 2012). Thus, all of the following allegations, which are contained in the verified complaint (ALJ Ex. 3), are deemed to be true.

Respondent Britati is a broker of residential property (¶ 2). Respondent Ferrerosa is also known as "Tony" and is a principal or agent of Britati (¶¶ 3, 4), and "William" is either an alias for Ferrerosa or is his agent (¶¶ 4, 5). Both Ferrerosa and Britati are housing providers, as defined by section 8-102 (¶¶ 2, 3). Respondents posted an advertisement for a rental apartment that stated in Spanish "[a]bsolutamente no 'vouchers' o la ayuda del gobierno se aceptan" (¶ 7). The statement translates to "[a]bsolutely no 'vouchers' or government subsidies are accepted" (¶ 7). The apartment in question is located in a building that contains six or more units (¶ 9).

The Commission presented additional proof in support of its case. Daniella Eras, who works for the Commission as a discrimination tester, is fluent in Spanish and English (Tr. 14). She testified that, on March 14, 2012, she was engaged in her usual tasks searching for ads that demonstrated signs of discrimination in housing, employment, and public accommodations (Tr. 15). On Craigslist.org, a website that offers listings for housing among other categories, she found an ad for an apartment in Ozone Park, Queens, which stated in Spanish "absolutely no vouchers or government subsidies are accepted" (Pet. Ex. 2; Tr. 15, 17). She said this phrase is an indication of discrimination on the basis of lawful source of income under the New York City Human Right Law (Tr. 17). Later the same day, a colleague identified an ad for a different apartment in Woodhaven, Queens, which used identical language (Pet. Ex 3; Tr. 18, 20).

Both ads indicated they were posted on March 13, 2012, and both offered the same contact phone number (Pet. Exs. 2, 3; Tr. 20). The ad for the Ozone Park apartment indicated the contact person's name was "TONY" (Pet. Ex. 2).

On March 15, 2012, Ms. Eras called the phone number that was common to both ads and asked for Tony (Tr. 22). The man who answered identified himself as William and told her the Ozone Park apartment was located in a private home and had already been rented. The Woodhaven apartment, he said, was in a "six-story family house" and was available (Pet. Ex. 4;

Tr. 22, 26). He did not indicate the number of apartments in the house. Ms. Eras told William that she intended to move in with her sister and she asked to schedule an appointment to see the Woodhaven apartment. William asked if she and her sister had W-2's and paystubs and she indicated they did. They scheduled an appointment for 6:30 that afternoon. She asked for the actual address of the apartment, but he would not provide it. He instead gave her the address of his real estate office, on 97th Street in Queens, where she would meet him (Pet. Ex. 4; Tr. 22).

Ms. Eras did not keep the appointment (Tr. 25). After hanging up the phone, she searched the address William gave her for the real estate office using the Google search engine and found that the address was for Britati Realty (Tr. 23). Ms. Eras memorialized the conversation in a memorandum dated March 20, 2012, which was consistent with her in-court testimony (Pet. Ex. 4).

Asked where she obtained the name of William Ferrerosa, she stated that a colleague called a different contact number on the Woodhaven ad and, when the call went to voicemail, the outgoing message provided the name "William Ferrerosa" (Tr. 25).

Raymond Wayne, Esq., the Commission's assistant managing attorney, testified that he spoke with a William Ferrerosa on July 25, 2012, when Ferrerosa called the Commission after receiving the Commission's verified complaint (Tr. 27-28). Mr. Wayne believed he was contacted because his name is listed in the cover letter sent by the Commission with the complaint when it is served (Tr. 28). Without being asked any questions by Mr. Wayne, Mr. Ferrerosa told Mr. Wayne that certain landlords who listed with him told him they would not accept Section 8 housing vouchers; he said he was unaware that refusing them violated a city law. Mr. Wayne told Mr. Ferrerosa that he was required to submit an answer to the complaint (Tr. 27-28; Pet. Ex. 5). Two days after receiving the call, Mr. Wayne memorialized the conversation in an affidavit that was consistent with his in-court testimony (Pet. Ex. 5).

As stated in the verified complaint, petitioner asserts that William Ferrerosa, who responded to the complaint addressed to Britati and Anthony Ferrerosa, is an agent of Britati and is Anthony Ferrerosa. Respondent invites the inference that he is the same person that Ms. Eras spoke with by phone on March 15, 2012. I find such an inference appropriate. *Office of the Comptroller v. Abbey Painting Corp.,* OATH Index No. 2544/11 at 30 (June 26, 2012), *adopted,* Comptroller's Dec. (Aug. 2012) (citing *Ridings v. Vaccarello*, 55 A.D.2d 650, 651 (2d Dep't

1976) (facts may be proven by circumstantial evidence which give rise to a reasonable inference that the thing in question occurred).

As to whether the Woodhaven apartment was located in a building with six or more residential units, Ms. Eras's testimony was that the apartment was located in a "six story house" which is insufficient to identify the number of units. However, paragraph 9 of the verified complaint asserts that the housing accommodation has six or more units and is sufficient to establish the fact.

Therefore, petitioner has met its burden of establishing a prima facie case of discrimination by lawful method of payment. The proof shows that respondents posted an advertisement on the Craigslist.org website for an apartment in a building containing more than five units and which prohibited payment by "vouchers or government subsidies." Respondents failed to answer or appear to offer any evidence that rebuts petitioner's proof. Accordingly, the charge that respondents posted an advertisement intended to discriminate against prospective tenants based on their lawful source of income is sustained.

FINDINGS AND CONCLUSIONS

1. Respondents were properly served with the petition and notice of hearing.
2. Petitioner established that respondents violated section 8-107 of the Administrative Code.

RECOMMENDATION

Here, respondents have been found guilty of posting a housing advertisement that discriminates based upon lawful source of income, a violation of the New York City Human Rights Law. Under section 8-126(a) of the Administrative Code, the Commission may impose a civil penalty up to $250,000 for such discrimination to "vindicate the public interest." Admin. Code § 8-126(a) (Lexis 2012). A civil penalty is imposed to "punish the violator." Its intent is to "strengthen and expand the enforcement mechanisms of the law so the Commission could prevent discrimination from playing any role in actions related to employment, public accommodations, housing and other real estate." *119-121 East 97th St. Corp. v. NYC Comm'n on Human Rights*, 220 A.D.2d 79, 88 (1st Dep't 1996).

In a similar case of discrimination based upon lawful source of income, a $5,000 civil penalty was imposed to vindicate a single instance of discriminatory advertising that indicated

Section 8 vouchers would be rejected. *See Comm'n on Human Rights v. Rent The Bronx, Inc.*, OATH 1619/11 at 22. There, respondent appeared and established a basis for mitigating his penalty due to his history of working to assist recipients of Section 8 vouchers find housing through his own brokerage business. By contrast, no mitigation was offered here where respondents failed even to appear and offer a defense. *See Comm'n on Human Rights v. Tantillo*, OATH Index Nos. 105/11, 106/11 & 107/11 (Feb. 24, 2011), *modified on penalty*, Comm'n Dec. & Order (May 23, 2011) (where landlord, who failed to appear for hearing, refused to accept Section 8 housing vouchers on one occasion, Commission imposed $20,000 civil penalty).

Petitioner has requested a $7,500 civil penalty, which I do not find unreasonable under the circumstances. I therefore recommend a penalty of $7,500.

Tynia D. Richard
Administrative Law Judge

May 21, 2013

SUBMITTED TO:

PATRICIA L. GATLING
Commissioner

APPEARANCES:

PAUL LABOSSIERE, ESQ.
CARLOS VELEZ, ESQ.
Attorneys for Petitioner

No appearance by or for Respondent