Comm'n on Human Rights ex rel. Miller v. New American Realty Corp.

OATH Index No. 2253/24 (July 31, 2024)

Petitioner failed to establish that respondents discriminated against the complainant based on her lawful source of income, gender, pregnancy, marital status, or presence of children. ALJ recommends that the complaint be dismissed.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COMMISSION ON HUMAN RIGHTS EX REL. PATRECE MILLER[1]
Petitioner
- against -
NEW AMERICAN REALTY CORP. AND DIRESH RAGHUBAR
Respondents

REPORT AND RECOMMENDATION

MICHAEL D. TURILLI, *Administrative Law Judge*

Petitioner, the Commission on Human Rights (the "Commission"), brought this discrimination proceeding against respondents, New American Realty Corp. and Diresh Raghubar, under section 8-109 of the Administrative Code and section 1-61 of title 47 of the Rules of the City of New York. By verified complaint of Patrece Miller (the "complainant") dated September 10, 2018, petitioner alleged that respondents refused to rent an apartment to the complainant and denied her equal terms, conditions, and privileges of a housing accommodation because of her lawful source of income, gender, pregnancy, marital status, and presence of children, in violation of section 8-107(5)(a)(1)(b) and (c)(1) of the Administrative Code (ALJ Ex. 1). The complainant intervened in this matter as of right on February 21, 2024 (Tr. 5).

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[1] Upon petitioner's request, and over respondent's objection, the complaint was amended to correct the spelling of the complainant's first name (Tr. 40-41). *See* 48 RCNY § 1-25 (Lexis 2024) ("If a pleading is to be amended less than twenty-five days before the commencement of the trial, amendment may be made only on consent of the parties or by leave of the administrative law judge on motion."); *Dep't of Correction v. Jenkins*, OATH Index No. 3070/09 at 13 (Dec. 16, 2009) ("Amendment of charges in administrative proceedings, where pleadings serve only a notice-giving function is freely granted absent irremediable prejudice.").

A trial was held before me on May 29 and June 5 and 6, 2024. The proceedings were held remotely via videoconference. Respondents appeared without counsel. In keeping with rule 103(A)(8) of Appendix A to title 48 of the Rules of the City of New York, the Rules of Conduct for Administrative Law Judges and Hearing Officers of the City of New York, respondents were advised of their right to be represented by an attorney or a non-attorney representative. The nature of the proceedings and the procedural aspects of the trial were also explained. Mr. Raghubar decided to represent himself and his company in this matter and to proceed without counsel.

Petitioner relied upon documentary and video evidence and the testimony of the complainant. As relief for the alleged discrimination, petitioner sought the imposition of a $45,000 civil penalty and the complainant sought compensatory damages in the total amount of $50,000 (Tr. 93, 95). Mr. Raghubar testified on his own behalf and offered documentary evidence.

For the reasons set forth below, I find that petitioner failed to prove the charges and recommend that the complaint be dismissed.

PRELIMINARY MATTER

At the commencement of trial, petitioner requested a finding of default against respondents for their failure to file a timely answer to the complaint (Tr. 16, 30-31, 70-72). By way of the entry of default, petitioner sought to preclude respondents from participation in the adjudication of this case and to have the allegations in the complaint deemed admitted pursuant to 47 RCNY § 1-14 and 48 RCNY § 2-27.

The Human Rights Law and the Commission's rules require a respondent to file an answer within 30 days of being served with a complaint. Admin. Code § 8-111(a) (Lexis 2024); 47 RCNY § 1-14(a) (Lexis 2024). The answer must be verified and "[a]ny allegation in the complaint not specifically denied or explained [in the answer] will be deemed admitted unless good cause to the contrary is shown." 47 RCNY § 1-14(c). Section 1-14(h) of the Commission's rules provides that "[f]ailure to file a timely answer may result in a finding of default, in which case the allegations in the complaint will be deemed admitted." *See also* Admin. Code § 8-119(e) ("If the respondent has failed to answer the complaint within the time period prescribed in section 8-111 of this chapter, the administrative law judge may enter a default and the hearing shall proceed to determine the evidence in support of the complaint."). The Commission's rules further require petitioner to "refer the case to OATH by serving a notice of referral on the complainant, the respondent, and any necessary party, and filing it, along with copies of the pleadings, with OATH." 47 RCNY § 1-61(a). The notice of referral "must state whether the respondent has complied with the requirement of § 1-14 of this chapter concerning the filing of an answer and, if not, whether the Law Enforcement Bureau seeks to have respondent held in default." 47 RCNY § 1-61(b).

This tribunal's rules of practice applicable solely to cases brought by petitioner pursuant to the Human Rights Law provide:

> If the notice of referral to OATH alleges that a respondent has not complied with the requirements of § 1-14 of the Commission's rules (47 RCNY § 1-14), the respondent must serve and file an affidavit asserting that the respondent has complied with those requirements, or asserting reasons constituting good cause for its failure to comply with those requirements. Such affidavit must be served and filed at or before the first conference in the case, or, if no conference is held, before commencement of the hearing. If the respondent fails to serve and file such an affidavit within the time allowed by this paragraph, the administrative law judge will declare the respondent to be in default and will preclude the respondent from further participation in the adjudication. If the respondent timely serves and files such an affidavit, the administrative law judge will decide the questions presented, and will either declare the respondent to be in default and preclude the respondent from further participation in the adjudication, or will deny the default in full or upon stated terms and conditions which may include such limitations on the respondent's participation in the adjudication as the administrative law judge deems to be equitable.

48 RCNY § 2-27(a).

In support of its application, petitioner offered affirmations from the two agency attorneys formerly employed in petitioner's Law Enforcement Bureau who were assigned to this matter (Pet. Exs. 1, 11). The record reflects that petitioner sent the complaint by first-class mail to respondents at 1753 Boston Road, Bronx, New York 10460, on September 12, 2018 (Pet Ex. 1 at Ex. A). By letter dated October 31, 2018, petitioner noted that no answer had been received and warned respondents that failure to file an answer could result in having the allegations "conclusively established against you" and "you excluded from the hearing" (*Id.* at Ex. B). Petitioner offered the recording of a voicemail left by Mr. Raghubar for the assigned agency attorney on December 18, 2018, in which he stated that he just received the first warning letter and that "the best course of action is to send you a response immediately" (Pet. Ex. 11 at Ex. B). Mr. Raghubar called the agency attorney later that same day and said that he would be submitting "an Answer in a week" and that "the case was fraudulent" and a waste of "taxpayer dollars" (*Id.* at Ex. C). She told him that he could raise his defenses in his answer (*Id.*). By letters dated January 16, 2019, and March 26, 2019, sent to the Boston Road address, petitioner again noted that no answer had been received and warned respondents that petitioner "will seek to have the Verified Complaint's allegations be conclusively established against you and have you excluded from the hearing" if "you fail to file a Verified Answer" (Pet. Ex. 1 at Exs. C, D).

On February 6, 2024, petitioner referred the matter to this tribunal (*Id.* at ¶ 9). Petitioner's filing included a copy of the complaint, affidavit of service, warning letters, and notice of probable cause determination (ALJ Ex. 1). Petitioner did not file any notice of referral with this tribunal and confirmed on the second day of trial, after searching its records, that no notice of referral had been sent to respondents (*Id.*; Tr. 53-54). On February 9, 2024, petitioner sent respondents a notice of conference at the Boston Road address, notifying respondents that a remote settlement conference would be held at OATH on March 8, 2024 (Pet. Ex. 1 at Ex. G). On February 26, 2024, petitioner called Mr. Raghubar and Mr. Raghubar asked that a copy of the complaint be e-mailed to him (*Id.* at ¶ 10). Petitioner told Mr. Raghubar about the settlement conference and e-mailed the notice of conference to him (*Id.* at ¶ 10, Ex. I). Mr. Raghubar appeared before Administrative Law Judge Faye Lewis for settlement conferences on March 8 and April 3, 2024, but did not appear for a third conference on April 17, 2024 (*Id.* at Exs. J, K, M, R). At respondents' request, petitioner provided Mr. Raghubar with discovery (*Id.* at Exs. K, L). On April 22 and April 30, 2024, by mail and e-mail, petitioner sent respondents a notice of trial, notifying respondents that a remote trial would be held on May 29, 2024, and warning that failure "to appear at the hearing may result in a declaration of default" (*Id.* at Exs. T, U, V). Neither the notice of conference nor the notice of trial informed respondents that petitioner sought to have them declared in default for non-compliance with the requirements of section 1-14 of the Commission's rules.

The night before the second day of trial, Mr. Raghubar e-mailed a statement to petitioner, wherein he sought to "respond to the accusations brought against [him]" by stating that "the allegations are entirely unfounded" and "contradictory" to his "long and proud history of helping families, including those similar to the [complainant] in this case" (Resp. Ex. B). On the second day of trial, Mr. Raghubar provided a sworn statement, in which he described problems with the mail at the Boston Road address, noted that the office had a different address by the end of 2019, and recalled mailing an answer after speaking with the prior agency attorney (Resp. Ex. A; Tr. 70). Mr. Raghubar surmised the answer may not have been delivered due to problems with the outgoing mail at the office in 2018 (Resp. Ex. A). He did not have a copy of the answer, and petitioner never received an answer from respondents (Tr. 76-77; Pet. Ex. 1 at ¶¶ 3, 6, 8).

"It is well-settled that judgments by default are disfavored where a respondent is present and seeks to defend." *Comm'n on Human Rights ex rel. Jordan v. Raza*, OATH Index No. 716/15, mem. dec. at 6 (Feb. 11, 2015); *see also Comm'n on Human Rights ex rel. Hidalgo v. Ditmas Park Rehabilitation and Care Center*, *LLC*, OATH Index Nos. 2415/13, 2416/13, & 2417/13, mem. dec. at 7 (Sept. 25, 2013) ("The law favors disposition of matters on the merits. This is especially so where . . . the defendant is actively participating in the proceedings and putting forth a defense."). An entry of default under section 2-27(a) is "conditioned upon notice to [the respondent] of non-compliance with the requirements for answering the complaint in a notice of referral served before the first conference." *Raza*, OATH 716/15, mem. dec. at 5, 7 (denying request to declare respondent in default and preclude him from participating in the hearing for failure to file an answer where he was "never notified of his failure to comply with section 1-14 in a notice of referral" and "first advised of his failure in the notice of trial . . . after the date of the pre-hearing conference"); *cf. Comm'n on Human Rights v. Crazy Asylum, LLC.*, OATH Index Nos. 2262/13, 2263/13, & 2264/13, mem. dec. at 3-4 (Oct. 1, 2013) (granting pre-trial motion to find respondents in default and preclude them from participating in the trial where "they failed to submit an answer for two years, even after being repeatedly reminded and admonished for not doing so by Commission staff" and "failed to submit an affidavit demonstrating 'good cause' or offering any explanation for failing to submit an answer" after being served with a notice of referral "which indicated that respondents had failed to comply with the requirements of 47 RCNY § 1-14").

Petitioner failed to satisfy its obligations under section 1-61 of the Commission's rules in that it never served respondents with a notice of referral alleging non-compliance with the requirements of section 1-14 and stating its intent to have respondents held in default. Nor did petitioner attempt to correct this omission in the notice of conference or the notice of trial served upon respondents. Neither notice made any reference to respondents' potential default for failure to file an answer and the notice of trial specifically warned respondents that they may be declared in default if they *failed to appear* at the hearing on May 29, 2024. Respondents heeded that warning and appeared for trial, only to be notified belatedly that petitioner was seeking to have them held in default for their failure to file an answer. Such notice was required to be provided to respondents at the time of referral to this tribunal. Under these circumstances, and particularly in light of Mr. Raghubar's status as a self-represented litigant who appeared at trial ready to defend himself against the charges, a finding of default under section 2-27(a) is not warranted.

Petitioner's request to find respondents in default, preclude their participation in the trial, and have the allegations in the complaint deemed admitted is denied.

ANALYSIS

Petitioner alleged that respondents refused to rent an apartment to the complainant and denied her equal terms, conditions, and privileges of a housing accommodation because of her lawful source of income, gender, pregnancy, marital status, and presence of children, in violation of section 8-107(5)(a)(1)(b) and (c)(1) of the Administrative Code (ALJ Ex. 1). Respondents denied the charges (Resp. Ex. B). Petitioner has the burden of proving its claims of discrimination under the Human Rights Law by a preponderance of the credible evidence. *See Comm'n on Human Rights ex rel. Howe v. Best Apartments, Inc.*, OATH Index No. 2602/14, Comm'n Dec. & Order at 9 (Mar. 14, 2016). Preponderance has been defined as "the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence." *Prince, Richardson on Evidence* § 3-206 (Lexis 2008). "If the evidence is equally balanced, or if it leaves the [trier of fact] in such doubt as to be unable to decide the controversy either way, judgment must be given against the party upon whom the burden of proof rests." *Id.*; *see Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976).

In support of the charges, petitioner primarily relied on the testimony of the complainant and the video that she recorded of her interaction with Mr. Raghubar on May 1, 2018. The complainant testified that she had lived in Queens since immigrating from Jamaica in 2003 (Tr. 103, 129). In January or February 2018, she received an eviction notice and an eviction proceeding was commenced against her in housing court (Tr. 104). She was given three months to vacate her apartment (*Id.*). At the time, she had three children and was pregnant with her youngest child, who was born in June 2018 (Tr. 103, 105, 116). She felt overwhelmed and depressed by the eviction and the search for a new apartment (Tr. 105-06).

During the eviction process in early 2018, she received financial assistance from the Human Resources Administration ("HRA") in the form of a voucher, which would provide her $1,534 per month for five years (Tr. 107-08). She was informed that she could start looking for an apartment and the voucher would cover her rent and security deposit (Tr. 109). According to a form entitled Potential Eligibility for Family Homelessness and Eviction Prevention Supplement ("FHEPS"), which the complainant referred to as "the voucher," the complainant was "potentially eligible for the FHEPS program, subject to her/him locating an apartment and final approval of her/his FHEPS application" (Pet. Ex. 2; Tr. 109). The maximum rent was $1,534.00 and the expiration date was August 7, 2018 (Pet. Ex. 2). The form bears the name "Queens House" in the header and provided the contact information for an individual at Queens Community House (*Id.*).

After receiving the voucher, the complainant started searching for an apartment, making "endless phone calls" and browsing the internet every day "to see what will come up" (Tr. 109). She was told by other realty companies that the amount of her voucher was "too small," her family size was "too big," or there were no apartments available (Tr. 112, 122-23, 173-74). On May 1, 2018, she saw respondents' advertisement on Craigslist (Tr. 110). She did not recall the specific contents of the advertisement but believed that "it did say something about vouchers" (Tr. 191-92). She called and spoke with a woman at respondents' office, who told her that they accepted FHEPS vouchers, that apartments were available, and that she should come to the office to complete an application and bring documentation for herself and her children (Tr. 110-13). She picked up her three-year-old son from kindergarten and they traveled to respondents' office in the Bronx that same day (Tr. 111-13). She had a friendly interaction with two employees at the front desk and completed an application (Tr. 112). Five or ten minutes later, she met with Mr. Raghubar, who greeted her and asked if she was pregnant (Tr. 113). When the complainant replied that she was pregnant, Mr. Raghubar told her, "[t]he landlord[s] are not idiots, and they know [your] baby father . . . is going to come to the apartment" (*Id.*). She responded, "[m]e being pregnant doesn't have anything to do with my child['s] father coming to the apartment" (*Id.*). Feeling "uncomfortable" from the interaction, she started to record their conversation on her cell phone (Tr. 114).

The complainant recalled that she asked Mr. Raghubar during their meeting if he had any apartments available and he replied that they had apartments but that she had to transfer her voucher (Tr. 116). Mr. Raghubar stated that her FHEPS voucher was from CAMBA and "he's not going to work with CAMBA" (Tr. 119). She did not "know what CAMBA was because it didn't even say CAMBA on the [voucher]" (*Id.*). The complainant acknowledged that she was not aware of the difference between HRA and CAMBA and noted that "they have an office in HRA" (Tr. 168-69, 193-94).

The recording is approximately one minute long and shows Mr. Raghubar seated in a chair next to the complainant (Pet. Ex. 4; Tr. 116). Mr. Raghubar has a cell phone in one hand and a document entitled "Rental Application" in the other. The recording starts mid-sentence and does not capture the entirety of the conversation. Mr. Raghubar says:

> I don't like dealing with the people in Queens, that's a place called CAMBA. I'm not dealing with them. I'll send you to this Jamaican girl here in the Bronx. She works for NAICA. She'll just transfer your voucher. And I'll find you a place. OK? . . . I don't want to deal with [*inaudible*].

(Pet. Ex. 4 at 0:00:03-0:00:23). When the complainant asked, "[w]hy?" and Mr. Raghubar responded, "because their agency, they don't work the way I'd appreciate" (*Id.* at 0:00:24-0:00:30). Mr. Raghubar then placed a call on his cell phone and said to the person on the other end of the line:

> Hey Ven, Wah Gwaan. You back in the office? Nice. OK, so, listen, I have this Jamaican family that came into my office and they have FHEPS. The agency that they're rolling with is CAMBA and I really don't like dealing with that agency. Can I send her to you? Hmm? Not yet. I have some, I have something. OK, so you'll do everything one time. OK. And look at this picture I'm about to send you. I'm about to send you a picture. Look at it.

(*Id.* at 0:00:30-0:01:15). Mr. Raghubar then asked the complainant, "Hey, can I take a picture? Please. Come here. It's alright you can stay like that. What [*inaudible*] eyes" (*Id.* at 0:01:17-0:01:23). Mr. Raghubar took a picture of the complainant's child and told her that the child had big eyes like him (Tr. 189).

The complainant recalled that Mr. Raghubar assured her that he could find her an apartment after transferring her voucher and they left "on a very good note" (Tr. 119). She acknowledged that Mr. Raghubar appeared to have arranged for someone from NAICA to help her with her voucher (Tr. 186, 193). She did not know whether NAICA and CAMBA were similar organizations (Tr. 181). She did not receive the contact information for NAICA and never received a call from NAICA (Tr. 119-20). She called respondents' office three times over the next week to check on the status of her application and spoke to the receptionist (Tr. 120). During one of those calls, she told the receptionist that what Mr. Raghubar did "was wrong" but that she was still willing to work with him because she needed an apartment (*Id.*). Mr. Raghubar never called her back and they never had any further conversation (Tr. 120-21). She acknowledged that Mr.

Raghubar never said that he did not accept vouchers but maintained that respondents "didn't accept [her] voucher . . . for whatever reason" (Tr. 204-05). Feeling that she was given the "runaround[]," she "gave up" and started to look elsewhere for housing (Tr. 121, 183). With only three or four weeks until her eviction, she never attempted to use her voucher again (Tr. 122-23). She felt "depressed" because she "had [her] hopes up because [Mr. Raghubar] was one of the realtors that really assured [her] that he could get [her] into somewhere with the voucher" (Tr. 121). She explained that "up to this day, it hurts because [she] still ha[s] a voucher that's not valid that was expired in August of 2018, that [she] could have used . . . in an apartment that would have helped [her] and [her] family in a better situation . . . ." (Tr. 121-22).

The complainant eventually found an apartment in Brooklyn before her eviction and secured a lease, effective June 1, 2018 (Tr. 123-24; Pet. Ex. 5). Feeling stigmatized, she did not attempt to use her voucher for the Brooklyn apartment and paid $1,800 rent per month in cash to the landlord (Tr. 131, 133, 145; Pet. Exs. 5, 6). The apartment in Brooklyn was not "ideal," as it was far from her friends and family, in a neighborhood with drugs and guns, and infested with rodents and roaches (Tr. 130-31, 141-43, 202). Her children were not happy to change schools and she continued to work in Queens with almost a two-hour commute each way (Tr. 135-37, 143-44; Pet. Exs. 7, 8).

The complainant was diagnosed with anxiety and depression and started to experience symptoms in 2019 (Tr. 145-46). She attended therapy with a licensed social worker and was prescribed medication (Tr. 146; Pet. Ex. 10). She discussed her "upset[ting]" interaction with respondents with her therapist and testified that the voucher experience and her search for housing caused her stress and anxiety (Tr. 117, 150-53). The complainant provided a medical record dated July 30, 2020, from Cumberland Health Center, which documented an appointment with the social worker to address her "anxiety disorder" and noted such diagnosis for the time period of May 5, 2020 to the present, along with a prescription for sertraline, commonly known as Zoloft (Pet. Ex. 10). She testified that she still suffered from depression regarding the loss of her voucher, given that she continues to pay $1,800 per month in rent (Tr. 152-53).

Mr. Raghubar testified that he became a licensed real estate agent in 2002 and worked for Century 21, where he became one of their top sales agents by 2007 (Tr. 214). Shortly thereafter, he started his own real estate brokerage business (Tr. 214, 228).[2] In the process of renting an apartment for one of his clients, he first learned about vouchers issued under the Work Advantage Program (Tr. 214-15). He sensed a business opportunity, noting that the homeless shelter system had about 350,000 outstanding housing vouchers (Tr. 217-18). By late 2008, he began working with homeless families who had vouchers and developed "extensive" experience with the voucher system (Tr. 215, 218). He placed advertisements "explicitly and clearly" inviting homeless families with vouchers to call his office for help (Tr. 219). He estimated that his company had helped more than 6,000 homeless families under about ten different voucher programs, including WAP, LINC, FHEPS, and Section 8 (Tr. 216, 218, 221). He served as an equal housing opportunity instructor for real estate agents and trained his own agents "not to discriminate" (Tr. 218-19). He understood that voucher discrimination was unlawful and noted that this was the first time that he had been accused of discrimination (Tr. 218).

Mr. Raghubar recalled meeting with the complainant and was aware at the time that she intended to pay her rent with a voucher (Tr. 232). He did not think that he could help the complainant through CAMBA and "made almost every arrangement to try to help her" rent an apartment with her voucher (Tr. 222, 224). He testified that FHEPS vouchers are issued and administered by HRA, but non-profit organizations provide supportive services to tenants, such as finding real estate companies, filling out the paperwork, and submitting the paperwork to HRA (Tr. 233-34). He did not like working with CAMBA, which mostly operated in Queens and Brooklyn and not in the Bronx, because he had never been successful placing tenants into housing through that organization and it was "well-known" that CAMBA "will screw up the deal for the tenant" and "make you look bad in front of the landlord" (Tr. 222, 234-35, 240). CAMBA only communicated directly with the tenant, and he was unable to contact the organization by phone or e-mail to process the rental package (Tr. 222). He explained that if he successfully convinced a landlord to accept a tenant with a voucher, and then the non-profit organization did not complete "the follow up process," the "landlord will shy away from ever wanting to deal with programs" (Tr. 242). He had been successful working with other similar organizations, such as NAICA, BronxWorks, Catholic Charities, and Women in Need (Tr. 222-23). With these other organizations, he could "actually speak to somebody and help the tenant move out [of] the shelter"

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[2] His mother initially owned a portion of the company but transferred her ownership to him sometime prior to 2018 (Tr. 228-30).

(Tr. 243). He noted that an HRA-issued FHEPS voucher "can be used through any of these non-profits as long as my company found the client and apartment. That's how it works. I've done it thousands of times . . . ." (Tr. 223, 233).

Mr. Raghubar tried to help the complainant by moving her to NAICA, an organization that would be able to help her (Tr. 224). He did not refer the complainant to another real estate broker or get paid a fee for sending the complainant to NAICA (Tr. 237-38). He called Ven, a case manager at NAICA, to help the complainant obtain the same services that she would have received from CAMBA (Tr. 238-39). Based on his regular practice, he insisted that he would have provided the complainant with NAICA's contact information before she left his office (Tr. 224-25). She had to contact NAICA and provide them with her information for them to process the voucher (Tr. 225). According to Mr. Raghubar, the complainant was under the misimpression that he was going to help her transfer the voucher to NAICA (*Id.*). He did not recall any further communication with the complainant and did not know whether the complainant obtained housing (Tr. 243-45).

Although Mr. Raghubar once operated the company with about 20 real estate agents, he now has only 12 agents working under his license and there has been little to no work for them (Tr. 246-48). New American Realty no longer has any employees or maintains an office and has had no corporate profits in recent years (Tr. 247-48, 250, 256-58). Mr. Raghubar does not own a home or a car or have any other personal assets (Tr. 252, 260-62).

Lawful Source of Income Discrimination

The Human Rights Law broadly prohibits discrimination in housing on the basis of lawful source of income by an owner or their agent, or a real estate broker. Admin. Code § 8-107(5)(a)(1)(b) (prohibiting discrimination by an owner, lessor, or any "other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation," or any agent thereof, against any person because of "any lawful source of income of such person" "in the terms, conditions, or privileges of the sale, rental, or lease of any such housing accommodation"); Admin. Code § 8-107(5)(c)(1) (prohibiting real estate brokers from "refus[ing] to sell, rent or lease any housing accommodation . . . to any person or group of persons or [] refus[ing] to negotiate for the sale, rental or lease, of any housing accommodation . . . to any person or group of persons . . . because of any lawful source of income of such person or persons, . . . or otherwise [] deny[ing] or withhold[ing] any housing accommodation . . . from any person or group of persons . . . because of any lawful source of income of such person or persons"); *see Comm'n on Human Rights ex rel. Howe v. Best Apartments, Inc.*, OATH Index No. 2602/14 at 7 (Feb. 18, 2015), *modified on penalty*, Comm'n Dec. & Order (Mar. 14, 2016) (finding that a real estate broker violated section 8-107(5)(a) and (c) of the Administrative Code by refusing to show rental properties to a Section 8 voucher holder). Housing accommodation is defined as "any building, structure or portion thereof that is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings." Admin. Code § 8-102. Lawful source of income is defined as "child support, alimony, foster care subsidies, income derived from social security, or any form of federal, state, or local public assistance or housing assistance including, but not limited to, section 8 vouchers, whether or not such income or credit is paid or attributed directly to a landlord." *Id.*

Section 8-107(5)(o) of the Administrative Code, which was in effect at the time of the alleged discrimination in 2018, provided:

> The provisions of this subdivision, as they relate to unlawful discriminatory practices on the basis of lawful source of income, shall not apply to housing accommodations that contain a total of five or fewer housing units, provided, however . . . (ii) the provisions of this subdivision shall apply to all housing accommodations, regardless of the number of units contained in each, of any person who has the right to sell, rent or lease or approve the sale, rental or lease of at least one housing accommodation within New York City that contains six or more housing units, constructed or to be constructed, or an interest therein.

Admin. Code § 8-107(5)(o) (Lexis 2019). This provision was repealed on February 15, 2021, thereby prospectively eliminating any exemption based upon the number of housing units for lawful source of income discrimination claims. NYC Local Law 119 of 2020, §§ 2, 3.

Local Law 119 did not expressly indicate any intent for the statute to be applied retroactively and simply stated that it would "take[] effect 90 days after it becomes law." *Id.* at § 3. Despite the remedial nature of the statute, in the absence of clear legislative intent, its retroactive effect would impermissibly impact respondents' substantive rights by imposing new liability for past conduct. *See Regina Metro. Co., LLC v. NYS Div. of Housing & Community Renewal*, 35 N.Y.3d 332, 367-70 (2020) (finding that statutory amendments to the Rent Stabilization Law, if applied to past conduct, "would impose new liability and thus have a 'retroactive effect'—altering substantive rights in multiple ways" and triggering "the presumption against retroactivity");

Whitehead v. Pine Haven Operating LLC, 222 A.D.3d 104, 108-09 (3d Dep't 2023) (holding that the repeal of a law, which had conferred immunity for health care services rendered in response to the COVID-19 pandemic, was not retroactive where there was "no express indicator of retroactivity" by the legislature and "the retroactive application of the repeal . . . would merely punish healthcare providers 'for past conduct they cannot change'"); *Comm'n on Human Rights ex rel. Martin v. Hudson Overlook, LLC*, OATH Index No. 137/06 at 15 n.4 (Aug. 30, 2006), *aff'd*, Comm'n Dec. & Order (Dec. 5, 2006) (finding that the amended civil penalty provisions of the Human Rights Law did not apply retroactively).

The parties did not address at trial whether the lawful source of income provisions of the Human Rights Law applied to respondents at the time of the alleged discrimination in May 2018. The complaint alleged that respondents were real estate brokers and had "the right to sell, rent, or lease, or approve the sale, rental, or lease, of at least one (1) housing accommodation within New York City that contains six (6) or more housing units" (ALJ Ex. 1 at ¶¶ 2, 3). However, on this record, petitioner failed to establish that respondents had the right to sell, rent, or lease, or approve the sale, rental, or lease, of at least one housing accommodation in New York City with six or more units in 2018. The complainant did not provide any testimony regarding specific housing accommodations offered by respondents. She could not recall the specific contents of respondents' advertisement on Craigslist and testified that respondents told her that they had apartments available. Petitioner did not offer any evidence detailing the apartments listed for rent by respondents in 2018. Petitioner also failed to elicit any testimony from Mr. Raghubar on cross-examination regarding the apartment buildings within respondents' rental portfolio and whether any of those buildings had six or more units. Mr. Raghubar testified briefly about the scope of respondents' business, stating that they placed over 6,000 families with vouchers in housing over the years. While it is possible that respondents had the right to rent or approve the rental of at least one housing accommodation in New York City containing six or more units in 2018, such a finding would be speculative on this record. *See Comm'n on Human Rights v. Rent The Bronx, Inc.*, OATH Index No. 1619/11 at 9 (July 27, 2011), *adopted*, Comm'n Dec. & Order (Oct. 27, 2011) (finding that the Commission failed to prove a pattern and practice of lawful source of income discrimination where the evidence of the number of apartments in each building listed on respondent's website was "limited" and "insufficient" and "it would be erroneous to make assumptions about the size of the other buildings where apartments were listed"); *cf. Comm'n on*

Human Rights ex rel. Agosto v. American Construction Assocs., LLC, OATH Index No. 1964/15 at 5-6 (Dec. 1, 2015), *modified on penalty*, Comm'n Amended Dec. & Order (Apr. 5, 2017) (finding that lawful source of income provisions applied to an owner who rented out more than five rooms in a building with a certificate of occupancy for only three units); *Comm'n on Human Rights v. Shahid*, OATH Index No. 1381/13 at 3 (May 13, 2013), *adopted*, Comm'n Dec. & Order (July 26, 2013) (finding that respondent was the owner of an eight-unit rental building based on HPD records).

Even if the lawful source of income provisions of the Human Rights Law applied to respondents in 2018, petitioner failed to prove intentional discrimination against the complainant because of her lawful source of income. A disparate treatment or intentional discrimination claim based on lawful source of income under the Human Rights Law can be shown by direct evidence or circumstantial evidence using the *McDonnell Douglas* framework. *See Comm'n on Human Rights ex rel. Watson v. PPC Residential, LLC*, OATH Index Nos. 2245/19 & 2246/19, mem. dec. at 12-13 (Mar. 17, 2023) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); *see also Short v. Manhattan Apartments, Inc.*, 916 F. Supp. 2d 375, 396 (S.D.N.Y. 2012). Petitioner bears the burden of proving a *prima facie* case of discrimination. *See American Construction Assocs., LLC*, OATH 1964/15 at 5. A *prima facie* case requires a "minimal showing" of the complainant's membership in a protected class and that an adverse action occurred under circumstances giving rise to an inference of discrimination. *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29, 35-36 (1st Dep't 2011); *see Best Apartments, Inc.*, OATH 2602/14, Comm'n Dec. & Order at 8-9 (setting forth the elements of a *prima facie* case of discrimination under section 8-107(5) of the Administrative Code). Once that showing is made, the burden "shifts to the [respondent] to articulate through competent evidence nondiscriminatory reasons that actually motivated [respondent] at the time of its action," and then petitioner "must show those reasons to be false or pretextual" or that the respondent "was motivated at least in part by discrimination." *Bennett*, 92 A.D.3d at 35-36, 39; *see Best Apartments, Inc.*, OATH 2602/14, Comm'n Dec. & Order at 9.

Based upon the evidence offered at trial, it was undisputed that the complainant had a FHEPS voucher from HRA, contacted respondents after seeing their advertisement that referenced housing vouchers, and was told that respondents accepted vouchers and had apartments available. The contemporaneous video recording established that respondents refused to assist the complainant in securing housing with her voucher while she worked with the non-profit organization CAMBA in Queens and contacted NAICA to transfer the FHEPS voucher to that organization in the Bronx. Mr. Raghubar assured the complainant that he would then "find [her] a place" (Pet. Ex. 4). The parties disputed whether respondents provided the complainant with the other organization's contact information, but it was undisputed that the complainant and Mr. Raghubar never communicated again and that she did not secure housing with her voucher through respondents' real estate broker services.

This evidence established a *prima facie* case of housing discrimination based on the complainant's lawful source of income. *See Comm'n on Human Rights v. Jenkins*, OATH Index No. 2331/13 at 6 (Dec. 18, 2013), *adopted*, Comm'n Dec. & Order (April 14, 2014) (finding, in a default proceeding, a *prima facie* case of housing discrimination in violation of section 8-107(5)(c)(1) where a real estate broker implicitly refused to rent an apartment to the complainant based on his protected class by promising to contact him, but not doing so, and failing to schedule an appointment for him to view the apartment). Respondents, however, provided credible and corroborated testimony that their actions were actually motivated by the complainant's organizational affiliation as opposed to her possession of an HRA-issued FHEPS voucher. The contemporaneous video evidence showed that Mr. Raghubar repeatedly stated that he would not "deal" with CAMBA and that he called the case manager at NAICA for the complainant's voucher to be transferred to that organization. He testified that non-profit organizations, like CAMBA and NAICA, provided tenants with supportive services in the process of securing housing with a voucher, which was corroborated by the organizational name on the complainant's FHEPS eligibility form. He offered unrebutted testimony that his Bronx-based company had placed over 6,000 families in housing under ten different voucher programs, including FHEPS, through similar organizations, such as NAICA, BronxWorks, Catholic Charities, and Women in Need, and that he had never been successful in placing voucher holders in housing through CAMBA, which mostly operated in Queens and Brooklyn and not within the Bronx. Although Mr. Raghubar testified that FHEPS vouchers can be used through various non-profit organizations, there was no evidence regarding the specific process for transferring a voucher from one organization to another.

Petitioner failed to demonstrate that respondents' nondiscriminatory reason was false or pretextual or that discriminatory animus was at least a factor in respondents' actions. Petitioner argued that respondents "ghosted" the complainant, or failed to follow up with her, after the May

1, 2018 meeting (Tr. 280, 286, 288). The complainant credibly testified that she ended the meeting with Mr. Raghubar "on a very good note," called the receptionist at respondents' office three times over the next week to check on the status of her application, and never heard from Mr. Raghubar again (Tr. 119-21). However, the evidence did not establish that Mr. Raghubar was aware that the complainant had spoken to respondents' receptionist the week after the meeting, or why Mr. Raghubar or someone else from his office did not follow up with the complainant after she called. Mr. Raghubar did not recall any communication with the complainant after the meeting, which was reasonable given that six years have elapsed since the incident. Particularly where respondents repeatedly communicated that they accepted vouchers and Mr. Raghubar called the case manager at NAICA during the recorded meeting, the fact that the complainant never heard from Mr. Raghubar or NAICA after the meeting was insufficient to prove that respondents' unwillingness to work with CAMBA was pretext for intentional discrimination based on her lawful source of income or that respondents' actions were motivated in part by discriminatory animus. *Cf. Comm'n on Human Rights ex rel. Nieves v. Rojas*, OATH Index No. 2153/17 at 4-6 (Oct. 24, 2017), *adopted*, Comm'n Dec. & Order (May 16, 2019) (finding, in a default proceeding, that a real estate broker told the complainant that the landlord did not accept any subsidies and refused to show the apartment to him because it would be a "waste" of time); *Best Apartments, Inc.*, OATH 2602/14 at 6-7 (finding, in a default proceeding, that a real estate broker told the complainant that his Section 8 voucher was "a problem" and refused to show any apartments to him).

It bears noting that the complainant's FHEPS eligibility form displayed the name of the non-profit organization Queens Community House, not CAMBA. This potential discrepancy was not raised by the parties and was left unexplained on this record. The complainant did not provide any testimony regarding Queens Community House and there was no evidence that she showed the eligibility form to Mr. Raghubar during their meeting. In fact, she testified that "I always tell the realtors that I have [a voucher], but I never actually brought it there because it's my first time" (Tr. 119). During the recorded conversation, Mr. Raghubar told the complainant, "I don't like dealing with the people in Queens, that's a place called CAMBA" (Pet. Ex. 4). Petitioner did not elicit any testimony from Mr. Raghubar on cross-examination regarding the distinction, if any, between CAMBA and Queens Community House, or why he believed that the complainant had been assisted by CAMBA as opposed to Queens Community House.

In sum, petitioner failed to prove by a preponderance of the credible evidence that the lawful source of income provisions of the Human Rights Law applied to respondents in 2018, or that respondents intentionally discriminated against the complainant because of her HRA-issued FHEPS voucher. The evidence established that respondents refused to assist the complainant to secure housing with her voucher while she worked with CAMBA, a non-profit organization which respondents found problematic. However, petitioner did not prove that respondents acted with discriminatory animus towards the complainant because of her lawful source of income.

In her closing statement, the complainant argued that respondents made her "jump through unnecessary hoops to get her voucher accepted," which constituted the separate unlawful discriminatory practice of making an inquiry that expressed a limitation on her lawful source of income in violation of section 8-107(5)(c)(2) of the Administrative Code (Tr. 284-87). This provision prohibits real estate brokers from making any statement or inquiry "in connection with the prospective purchase, rental or lease of any housing accommodation . . . which expresses, directly or indirectly, any limitation, specification or discrimination as to . . . any lawful source of income." Admin. Code § 8-107(5)(c)(2). Indeed, respondent's statements that he would not work with CAMBA and that the complainant would have to transfer her voucher to another non-profit organization may have violated this provision of the Human Rights Law. *See Short*, 916 F. Supp. 2d at 401 (finding that a real estate broker's use of separate, burdensome protocols for certain voucher applicants expressed a "limitation, specification or discrimination" in violation of section 8-107(5)(c)(2) of the Administrative Code).

However, the complaint did not assert any such claim under section 8-107(5)(c)(2) of the Administrative Code (ALJ Ex. 1). Rather, as set forth above, the complaint alleged a violation of 8-107(5)(c)(1) of the Administrative Code for refusal to rent or lease a housing accommodation because of the complainant's lawful source of income (*Id.* at ¶ 11). Neither the complainant nor petitioner moved to amend the complaint to conform to the evidence regarding an expressed limitation on her voucher, and I decline to do so *sua sponte*, considering the lack of notice and prejudice to the self-represented respondents. *See Murray v. Murphy*, 24 N.Y.2d 150, 157 (1969) ("The first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged."); *see also Taxi & Limousine Comm'n v. Saini*, OATH Index No. 1193/24 at 6 (Feb. 8, 2024) (declining to amend the charges *sua sponte* where petitioner failed to prove a violation of one rule and "did not accuse respondent of violating . . . the rule more aligned with these facts"); *Dep't of Correction v. Hedges*, OATH Index No. 1962/15 at 12-13 (Aug. 21, 2015), *adopted*, Comm'r Dec. (Mar. 8, 2016) (declining to conform the charge to the evidence where petitioner did not request it and "to do so might prejudice respondent").

Gender, Pregnancy, Marital Status, and Presence of Children Discrimination

The Human Rights Law further prohibits discrimination in housing on the basis of gender, marital status, and children residing in the household, by an owner or their agent, or a real estate broker. Admin. Code § 8-107(5)(a)(1), (c)(1). In addition to the lawful source of income claims addressed above, petitioner alleged that respondents refused to rent an apartment to the complainant and denied her equal terms, conditions, and privileges of a housing accommodation because of her gender, pregnancy, marital status, and presence of children, in violation of section 8-107(5)(a) and (c) of the Administrative Code (ALJ Ex. 1). In its closing statement, petitioner made only a passing reference to respondents' "inappropriate comments about her being a single mother" and photographing the complainant's child and did not cite to any cases in support of its claims (Tr. 280, 291). The complainant did not address the claims of discrimination based on gender, pregnancy, marital status, or the presence of children in her closing statement and focused entirely on the lawful source of income claims.

Nevertheless, the evidence established a *prima facie* case of housing discrimination based on the complainant's gender, pregnancy, marital status, and presence of children. The complainant offered credible and unrebutted testimony that Mr. Raghubar asked her if she was pregnant and commented regarding the presence of her "baby father" in the home at the beginning of their meeting on May 1, 2018. Although these statements were made over six years ago and were not captured on the video recording, the complainant's recollection was corroborated by the fact that she made a recording of their subsequent interaction that day. She explained that Mr. Raghubar's comments made her feel uncomfortable and caused her to record the rest of their interaction. If Mr. Raghubar had not commented on her pregnancy or "baby father," it is unlikely that she would have recorded any part of their meeting. In any event, Mr. Raghubar did not deny the statements attributed to him and suggested that he was inquiring into the size of her household (Tr. 175-76).

The video evidence showed that Mr. Raghubar commented on the complainant's child's eyes and took a photograph of the child to share with his colleague at NAICA.

As set forth above, respondents provided credible and corroborated evidence of the nondiscriminatory reason that actually motivated their actions, namely the complainant's affiliation with CAMBA. Petitioner failed to demonstrate that respondents' unwillingness to work with CAMBA was pretext for intentional discrimination based on the complainant's gender, pregnancy, marital status or children, or that respondents' actions were motivated in part by discriminatory animus. During the recorded conversation, Mr. Raghubar repeatedly stated that he would not work with CAMBA and even called the case manager at NAICA to discuss transferring the complainant's voucher to that organization. Mr. Raghubar did not raise the complainant's pregnancy or marital status during the recorded conversation, and the complainant acknowledged that Mr. Raghubar asked to take the photograph because her child had big eyes like him. Although respondent's conduct was inappropriate and unprofessional, the evidence was insufficient to establish that respondents refused to rent an apartment to the complainant or denied her equal terms, conditions, and privileges of a housing accommodation because of her gender, pregnancy, marital status, or the presence of her children. *See Comm'n on Human Rights ex rel. Lissade v. Baron*, OATH Index No. 188/16 at 15 (Aug. 25, 2017), *adopted*, Comm'n Dec. & Order (Aug. 8, 2018) (finding that petitioner failed to prove housing discrimination claim where respondent offered credible and corroborated evidence that she did not provide the complainant with a sublet application because she decided to allow her sick brother to live in her apartment instead, and petitioner failed to show that respondent's legitimate non-discriminatory reason was pretext for discrimination based on the complainant's race, color, or national origin).

FINDINGS AND CONCLUSIONS

1. Petitioner failed to prove that respondents had the right to sell, rent, or lease, or approve the sale, rental, or lease, of at least one housing accommodation within New York City containing six or more units at the time of the alleged discrimination in May 2018.

2. Petitioner failed to prove that respondents refused to rent an apartment to the complainant or denied her equal terms, conditions, and privileges of a housing accommodation because of her lawful source of income.

3. Petitioner failed to prove that respondents refused to rent an apartment to the complainant or denied her equal terms, conditions, and privileges of a housing accommodation because of her gender, pregnancy, marital status, or the presence of her children.

RECOMMENDATION

I recommend that the complaint be dismissed.

Michael D. Turilli
Administrative Law Judge

July 31, 2024

SUBMITTED TO:

ANNABEL PALMA
Chair and Commissioner

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NEW AMERICAN REALTY CORP. AND DIRESH RAGHUBAR
Self-Represented Respondents