



**Division of  
Human Rights**

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**MICHAEL T. HELLMANN,**

Complainant,

v.

**AL FRESCO INC., AL FRESCO RESTAURANT,  
GRAZIANO TASSONE,**

Respondents.

**NOTICE AND  
FINAL ORDER**

Case No. 10182659

**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on April 27, 2020, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.


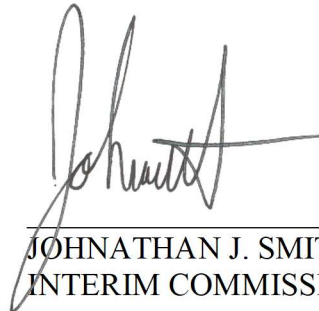
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE JOHNATHAN J. SMITH, INTERIM COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be

inspected by any member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED.**

DATED: **January 13, 2021**  
Bronx, New York



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JOHNATHAN J. SMITH  
INTERIM COMMISSIONER



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**MICHAEL T. HELLMANN,**

Complainant,

v.

**AL FRESCO INC., AL FRESCO  
RESTAURANT, GRAZIANO TASSONE,**

Respondents.

**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. **10182659**

**SUMMARY**

Complainant, a person with disabilities, alleged that Respondents failed to make their restaurant accessible to him and his wheelchair-bound companion. Respondents failed to show that an accommodation was not readily achievable. Respondents are liable to Complainant for damages. Civil fines and penalties are assessed against Respondents.

**PROCEEDINGS IN THE CASE**

On July 20, 2016, Complainant filed a verified complaint with the New York State Division of Human Rights (“Division”), charging Respondents with unlawful discriminatory practices relating to public accommodation in violation of N.Y. Exec. Law, art. 15 (“Human Rights Law”).

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on September 18, 2019.

Complainant and Respondents appeared at the hearing. The Division was represented by Robert Alan Meisels, Esq. Respondents were represented by Edward T. McCormack, Esq.

#### **FINDINGS OF FACT**

1. Complainant has a disability. The left side of his body is weakened; he has a walking impairment and limited use of his left arm. He uses a wheelchair and walks with a cane. (Tr. 6)
2. Respondent Graziano Tassone was the owner of Respondent Al Fresco, Inc. and Respondent Al Fresco Restaurant (“the restaurant”). (Tr. 76-77)
3. Al Fresco Inc. also had an interest in the restaurant. (ALJ Exhibit 2)
4. The restaurant opened in 2014 at 1036 Main Street, Fishkill, New York. Respondents made no modifications to the building. (Tr. 78-79)
5. The restaurant had three entrances, all of which had stairs; there were no ramps. (Tr. 7-8, 81)
6. On December 22, 2014, Complainant sent a letter to Respondents suggesting that modifications needed to be made to the restaurant in order to make it more accessible. Respondents never responded to Complainant’s letter. (Complainant’s Exhibit 8; Tr. 33)

7. On July 4, 2016, Complainant sought to enter the restaurant. Complainant was unable to do so because he could not get up the stairs. (Tr. 8)
8. Complainant can climb stairs, with pain, on “good days,” but is unable to climb at all on “bad days.” (Tr. 50-51)
9. The July 4, 2016 visit was one of 10 to 12 attempts Complainant made to visit the restaurant between 2014 and January of 2017. (Tr. 42)
10. Complainant brought a wheelchair-bound friend, Lisa Tarricone, with him each time he attempted to enter the restaurant. (Tr. 41-42)
11. Tarricone cannot ambulate without the use of a wheelchair. She cannot climb stairs. (Tr. 43)
12. Complainant and Tarricone were never able to eat at the restaurant because they were unable to access the restaurant. (Tr. 42)
13. The restaurant closed in 2017. (Tr. 46, 81)
14. Complainant identified the rear entrance of the restaurant as one that could be modified such that accessibility would be readily achievable. (Tr. 35)
15. The rear entrance had three steps, each of which was approximately six inches in height. (Complainant’s Exhibit 2; Tr. 35)
16. Respondents have offered no evidence to show that the modification Complainant identified was not readily achievable. (Tr. 74-82)
17. As a result of his inability to access the restaurant, Complainant felt “left out, locked out, excluded, [and] suppressed.” He experienced, “extreme frustration, humiliation, emotional distress, despair, [and] depression.” (Tr. 46)

## OPINION AND DECISION

New York State Exec. Law art. 15 (the “Human Rights Law”) makes it an unlawful discriminatory practice for “any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the... disability... of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof...” Human Rights Law § 296.2 (a). Moreover, “a refusal to remove architectural barriers... in existing facilities, where such removal is readily achievable,” when such action is required to accommodate persons with disabilities is a violation of the Human Rights Law. Human Rights Law § 296.2 (c) iii.

A disability is “... a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques...” Human Rights Law § 292.21. In order to meet this definition, a person must only show he suffers from some diagnosable impairment. *See State Division of Human Rights v. Xerox Corporation*, 65 N.Y.2d 213, 491 N.Y.S.2d 106 (1985). A disability may also be a record of such impairment or the perception of such impairment. Human Rights Law § 292.21.

Respondents do not dispute that both Complainant and Tarricone have disabilities as defined by the Human Rights Law. Nor do Respondents dispute Complainant’s characterization of the restaurant as inaccessible to certain persons with disabilities, including Complainant and Tarricone. Respondents were on notice in December of 2014 that the restaurant was inaccessible. They took no action to make modifications to the restaurant that would remediate

the problems and offered no evidence to suggest that a modification would not be readily achievable. In July of 2016, Complainant made one of numerous attempts to enter and dine at the restaurant but was unable to enter due to Respondents' failure to modify the restaurant. Complainant was aggrieved by this and, as a result, Respondents are in violation of the Human Rights Law.

Complainant is entitled to an award of compensatory damages owing to the emotional distress he suffered as a result of Respondents' violation. "Mental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct." *New York City Transit Auth. v. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). "An award of damages for mental anguish will be upheld where...it is reasonably related to the wrongdoing, is supported by substantial evidence, and is comparable to awards for similar injuries." *Kondracke v. Blue*, 277 A.D.2d 953, 716 N.Y.S. 2d 533 (4th Dep't. 2000); *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

As a result of Respondents' actions, Complainant has suffered emotionally. He and his dinner companion were forced to make other dinner plans each time they visited the restaurant. Complainant felt locked out and experienced frustration, humiliation, despair and depression. Accordingly, an award of \$2,000 will effectuate the remedial purposes of the Human Rights Law and is consistent with similar cases. *MTA Trading, Inc. v. Kirkland*, 84 A.D.3d 811, 922 N.Y.S.2d 488 (2d Dept. 2011); *Bemis v. N.Y. State Div. of Human Rights*, 26 A.D.3d 609; 809 N.Y.S 2d 274 (3d Dep't. 2006).

Because of Respondent's actions, Respondents shall also be liable to the State of New York for civil fines and penalties. Human Rights Law § 297 (4)(e) requires that "any civil

penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article.” The additional factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of the respondent’s culpability; any relevant history of respondent’s actions; the respondent’s financial resources; and other matters as justice may require. *Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540, November 15, 2007, *aff’d*, *Sherwood Terrace Apartments v. N.Y. State Div. of Human Rights (Gostomski)*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009), *119-121 East 97<sup>th</sup> Street Corp, et. al., v. New York City Commission on Human Rights, et. al.*, 220 A.D.2d 79; 642 N.Y.S.2d 638 (1st Dept.1996)

A civil fine is appropriate in this matter. Human Rights Law §297 (4)(c)(vi) permits the Division to assess civil fines and penalties, “in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious.”

The proof established that Respondents’ failure to act was not willful, wanton, and malicious. However, Respondents have violated the Human Rights Law. Respondents were on notice as early as December of 2014 that the restaurant was not accessible. Nevertheless, Respondents failed to make the restaurant accessible. Given the above, and the Division’s goal of deterrence, a civil fine of \$1,000.00 is appropriate in this case.



## ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that Respondent and their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in providing a public accommodation; and it is further

ORDERED that Respondents shall take the following affirmative action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant, Michael T. Hellman, \$2,000.00 as compensatory damages due to his emotional distress. Payment shall be made in the form of a certified check made payable to Complainant, Michael T. Hellman, and sent to New York State Division of Human Rights, c/o Robert A. Meisels, One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York 10458. Interest on this award shall accrue at a rate of nine per cent per year from the date of the Commissioner's Order until payment is made in accordance with Division practice and C.P.L.R. §5004.
2. Within 60 days of the date of the Commissioner's Final Order, Respondents shall pay to the State of New York the sum of \$1,000.00 as a civil fine and penalty for their violation of the Human Rights Law. The payment of the civil fine and penalty shall be made by Respondents in the form of a certified check, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Interest shall accrue at a rate of nine per cent per year from the date of the Commissioner's Order

until payment is made.

3. Respondents shall cooperate with the Division during any investigation into its compliance with the directives contained in this order.

DATED: April 27, 2020  
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano". The signature is written in a cursive style with a large, sweeping initial "T".

Thomas S. Protano  
Administrative Law Judge