

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**
on the Complaint of

NOEL E JEFFERSON,

Complainant,

v.

MARCHESE, RAFFALE MR & MRS O/P,

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 136794

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 11, 2007, by Lilliana Estrella-Castillo, an Administrative Law Judge of the New York State Division of Human Rights (“Division”).

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, 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, this 10th day of May , 2007.



KUMIKI GIBSON
COMMISSIONER

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NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
On the Complaint of

NOEL E. JEFFERSON and ELEANOR ROLLINS,

Complainants,

v.

MR. and MRS. RAFFAELE MARCHESE, Owner of
Premises,

Respondents.

RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER

CASE NO: 136794
136795

SUMMARY

Complainants, who are African American, claim that they were unlawfully discriminated against by Respondents on the basis of their race in violation of the Human Rights Law, when Respondents failed to complete a sale of property to them. Complainants made out a prima facie case of race discrimination, but failed to meet their burden of proof. Therefore, it is recommended that the complaints be dismissed.

PROCEEDINGS IN THE CASE

On August 23, 1989, Complainants filed verified complaints with the New York State Division of Human Rights (Division), charging Respondents with an unlawful housing discriminatory practice in violation of New York Executive Law, Article 15 (Human Rights Law).

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

After due notice, the case came on for hearing before Lilliana Estrella-Castillo, an Administrative Law Judge of the Division. Public hearing sessions were held on February 23, 2006, March 27, 2006 and June 20, 2006.

The Division was represented by then General Counsel, Gina M. Lopez Summa, by Robert Meisels, of counsel. The law firm of Gilmartin, Poster & Shafto, LLP, by Richard A. Bertocci, represented Respondents.

FINDINGS OF FACT

1. On May 14, 1989, Complainants, both of whom are African American females, expressed their desire to purchase property located on 63 Harrison Avenue, East Hampton, New York, to Respondents, owners of the property (Tr. 28, 40). The Respondents, both of whom are Italian nationals, were interested in selling their property because they were returning to Italy (Tr. 29).

2. On May 14, 1989, Complainants were driven to Respondent's property by Betty Cafiso, a real estate broker (Tr. 28, 322). Cafiso told Complainants that the selling price for the property had just been reduced to \$219,000.00 (Tr. 30). Complainants met Respondents at the property and a handshake deal was struck for the sale and purchase of the property (Tr. 32, 222-223).

3. Complainants were very excited about the property because it was an "excellent" deal especially since Respondents offered to include all the furnishings, and would render the house in move-in condition (Tr. 34, 223). Complainants drove back with Cafiso to her office and gave her a \$2,000.00 deposit for the property (Tr. 39; Complainant Exhibit 2).

4. A couple of days later Cafiso mailed Respondents a memo of sale, indicating that the sale price was \$219,000.00, with the terms outlined as 25% down and a mortgage for the

balance (Complainants Exhibit 1). Shortly thereafter, Cafiso informed Complainants that Respondents really wanted \$230,000.00 for the property (Tr. 41-42).

5. Complainants agreed to the sale price of \$230,000.00, and a memo of sale was forwarded to Respondents by Cafiso on May 30, 1989 (Tr. 43-44, 239-240; Complainants Exhibit 3). This memo of sale reduced the down payment to 20% of the sale price. Another memo of sale was forwarded to Respondents by Cafiso on June 6, 1989, changing the down payment terms to a down payment of 15% of the sale price (Complainant Exhibit 5).

6. On June 20, 1989, Cafiso forwarded a letter to Complainants' attorney, advising that she was forwarding the deposit made by Complainants "that are to become part of the 10% deposit" (Complainants Exhibit 4). This last correspondence evidenced that the terms of sale were once again changed by Cafiso.

7. Based on the last memo of sale, on July 5, 1989, Respondents' attorney, Robert Bertocci, forwarded a contract of sale to Complainants' attorney, indicating that the down payment was due in his office on July 7, 1989 (Complainants Exhibits 7 and 8). The contract of sale reflected that Complainants were expected to make a 10% down payment, and the closing would take place on August 9, 1989 (Complainants Exhibit 8).

8. The contract of sale provided such a short period between the signing of the contract and the closing date because Cafiso told Respondents that Complainants had a mortgage commitment and would be able to close on the property right away (Tr. 412). This information was not true (Tr. 147, 263, 294). Complainants had not applied for a mortgage. In fact, they were waiting for the contract of sale before they applied for a mortgage (Tr. 147, 294; Complainants Exhibit 9).

9. Complainants' real estate attorney, Neal Forman, who testified at the hearing, indicated that he advised Complainants not to enter into the contract because it was a "nonperformance contract," he called it a "sham" (Tr. 145, 254, 328). His advice to Complainants was that they should not sign the contract because the very short time period outlined in the contract did not allow sufficient time for Complainants to conduct the inspections necessary to make an informed decision (Tr. 247-248, 340, 356).

10. It is clear from the record that no attempts were made by Forman to negotiate a more favorable contract for Complainants (Tr. 57, 75-76, 94, 359, 370, 413). According to Forman, after receipt of the contract of sale, there was nothing to negotiate and the deal was "dead" (Tr. 154-161, 174, 268).

11. Nothing else happened between the parties after the contract of sale was delivered to Complainants' attorney.

12. Complainants filed discrimination complaints with the Division alleging that they were never told why Respondents did not sell them the property; which led them to believe that it was because they are African Americans (Tr. 78-80, 96, 275). They attribute this to a statement made by Cafiso, in which she allegedly told them, "there may be a problem; the woman who lives across the street came over after you drove off and asked who you were. We told them you were going to buy the house, and she said, I just might buy it myself even though I own the one across the street." (Tr. 161-162; Respondents Exhibit A).

13. Complainants interpreted this comment by the neighbor to mean that she objected to Complainants purchasing the property because they are African Americans (Tr. 80, 161-162). Complainants do not know the race of the neighbor (Tr. 80, 164).

14. Complainants also allege unlawful discrimination because the sale price was increased after Complainants agreed to purchase the property, and then Respondents refused to sell to them by providing a contact that, according to their attorney, could not be timely performed (Tr. 268).

15. Complainants timely filed complaints against Respondents on August 23, 1989 (ALJ Exhibits I and II).

16. The Division sent Respondents a mailgram informing them that a complaint had been filed against them (ALJ Exhibit IX). It reads as follows:

A COMPLAINT HAS BEEN FILED WITH THIS DIVISION ALLEGING
DISCRIMINATION REGARDING YOUR REFUSAL TO SELL THE
PREMISES AT 63 HARRISON AVENUE EAST HAMPTON NEW YORK
11937
YOU ARE NOW HEREBY INFORMED NOT TO DISPOSE OF PREMISES
PRIOR TO THE ADJUDICATION
INVESTIGATORY CONFERENCE WILL BE SCHEDULED AND YOUR
APPEARANCE IS NECESSARY

17. On September 1, 1989, Bertocci informed the Division that the mailgram was forwarded to him since Respondents, are "Italian nationals who lived here for several years on assignment by Mr. Marchese's employers and they have now returned permanently to Milan, Italy." (ALJ Exhibit IX). Bertocci advised that he was Respondents' attorney and attorney-in-fact, and that he "assume that this complaint was filed by either or both of Eleanor Rollins or Noel Jefferson" (ALJ Exhibit IX).

18. On October 11, 1989, Bertocci wrote to the Division demanding an immediate hearing (Complainants Exhibit 20).

19. On November 27, 1989, Bertocci again wrote to the Division and advised that "We have no knowledge of this complaint other than a Mailgram received from your Hauppauge office to which we responded on September 1, 1989." (Complainants Exhibit 21). In that same

correspondence Bertocci wrote that "I will vigorously defend my clients on the merits in any hearing ..." and that he "would appreciate it if you could dispose of this case by moving it to the top of the calendar."

20. As a result, a Pre-Hearing settlement conference was held on December 19, 1989, where Complainants and Bertocci appeared and actively participated. At the settlement conference Complainants refused Bertocci's offer to purchase the property for \$219,000.00, with an opportunity to litigate their damages at a later date. Complainants were advised by the administrative law judge that their refusal of the offer to purchase may foreclose future damages (Page 9 of Pre-Hearing Transcript, included in ALJ Exhibit IX).

21. After the Pre-Hearing settlement conference, no further action was taken on the complaints until 1999, when the Division mailed a Notice of Hearing to the parties.

22. Respondents sold the property in 1992, to two Caucasian males. As a result of the recession, the property was sold for \$180,000.00, which was less than their original asking price (Tr. 95; ALJ Exhibit IX, Complainants Exhibits 13, 14).

DECISION AND OPINION

The initial issue to be resolved is whether the Division has jurisdiction over Respondents. I find that the Division has jurisdiction over Respondents because Respondents waived any jurisdictional objections when Respondents' counsel appeared at the Division's administrative proceeding and litigated the instant action on the merits. The second issue is whether Respondents unlawfully discriminated against Complainants when they did not sell Complainants the property. I find that although Complainants made out a prima facie case, they did not meet their burden of proving race discrimination.

The issue regarding service of the complaint was raised by Respondents after the Division failed to provide Bertocci with a copy of the affidavit of service for the complaints. Respondents' counsel argued that if the Division could not produce an affidavit of service, the complaints must be dismissed for lack of jurisdiction. Respondents' counsel is wrong. First, the Division does not use affidavits of service when it serves complaints. Therefore, the lack of an affidavit of service does not, by itself, divest the Division of jurisdiction. Second, Respondents waived any jurisdictional objections when their attorney appeared before the Division and litigated the matter on the merits. See, *Matter of United States Power Squadrons v. State Human Rights Appeal Board*, 84 A.D.2d 318 (2nd Dept. 1981), *affd.*, 59 N.Y.2d 401 (1983), wherein the Court held that:

Although CPLR 320 (subds [b], [c]) permits a defendant to contest a claim on the merits while preserving jurisdictional objections, this provision is applicable to "civil judicial proceedings" (see CPLR 101) and not to administrative proceedings before the Division of Human Rights. Thus, [petitioner] waived its jurisdictional objections when it appeared before the Division of Human Rights, subpoenaed documents from the Division of Human Rights, and actively sought a favorable determination on the merits.

A review of the documents and testimony offered at the hearing confirms that the complaints were not mailed to Respondents at the time the complaints were filed with the Division. Apparently, the Division only sent Respondents a mailgram informing them that a complaint had been filed with the Division. The mailgram was then forwarded to Bertocci, Respondents' attorney. Bertocci in turn immediately communicated with the Division and sought an adjudication of the complaints on the merits. Bertocci demanded and, indeed received an expedited pre-hearing conference. Bertocci continued to defend Respondents during and through the conclusion of the public hearing in this matter. And, while it is true that he

continued to claim that a complaint was never served, he also continued to defend the complaints on the merits.

Respondents cannot have it both ways. They cannot allege that the Division does not have jurisdiction over them because they were not served with copies of the complaints when they were filed, and at the same time seek to have the complaints dismissed on the merits. *See, Henderson v. Henderson*, 247 N.Y. 428 (1928); *Muslusky v. Lehigh Valley Coal Company*, 225 N.Y. 584 (1919).

Here, the complaints were served on Respondents' counsel after he made an appearance and advised that Respondents had not received a copy of the complaints. He received a copy of the complaints within a couple of months after the complaints had been filed, and has continued to receive notice of all actions taken on the complaints pursuant to the Division's Rules of Practice. *See*, 9 N.Y.C.R.R. § § 465.13 (b); 465.13 (c).

Having determined that the Division has jurisdiction over Respondents, I turn to Complainants' allegations of race discrimination.

In discrimination cases it is Complainants who must establish a prima facie case of discrimination. To establish a prima facie case of discrimination Complainants must demonstrate that they are members of a protected class, and that others, who are not in that class, were treated more favorably. *See, Dunleavy v. Hilton Hall Apartments Co., LLC, et al.*, 14 A.D.3d 479, 789 N.Y.S.2d 164 (2nd Dept., 2005).

If Complainants establish a prima facie case of discrimination, then Respondents must produce evidence showing that its actions were legitimate and non-discriminatory. After Respondents articulate non-discriminatory reasons for their actions, Complainants must show that Respondents' proffered reasons are pretextual. The burden of proof always remains with

Complainants, and conclusory allegations of discrimination are insufficient to meet this burden. See, *Broome v. Biondi*, 17 F.Supp.2d 211 (S.D.N.Y. 1997), citing, *Soules v. United States Department of Housing & Urban Development*, 967 F.2d 817 (2nd Cir., 1992).

Complainants made out a prima facie case of discrimination. They are members of a protected group, African Americans, and expressed a desire to acquire the property and were not given an explanation for why the property was not sold to them.

The main reason Complainants felt that they were discriminated against was that no one explained why the property was not sold to them. This, however, had more to do with the interaction between the parties' respective attorneys, than actions of the Respondents. The attorneys each had concerns regarding the sale of the property. Forman's concern was that the contract did not allow sufficient time before the closing date to perform inspections and make an informed decision on the purchase, and Bertocci's concern was that Complainants could not afford to purchase the property because the terms of the sale kept changing. Although the attorneys' concerns were legitimate, neither attorney communicated to Complainants that there was no contract. There were no negotiations at all after the contract of sale was delivered to Forman. This unfortunately, left Complainants in a position where they were unable to negotiate the terms of the contract, or decide that they did not want the property.

It is apparent that some of the miscommunication came about as a result of Cafiso's involvement in the sale of the property. However, Cafiso was conspicuously absent from the hearing, although she was listed as a witness by the Division. Cafiso knew that Respondents were anxious to sell their property before they left the country. Cafiso represented to them that Complainants had a mortgage commitment which would allow them to close on the property before they left for Italy. This information turned out not to be true. When the sale did not

happen and Cafiso lost the sale commission, Complainants relied on Cafiso's statement that the sale did not happen because a neighbor expressed an interest in purchasing the property, as evidence of Respondents' discriminatory intent in not selling them the house. Even if the statement was made, it is open to interpretation and not necessarily evidence of discriminatory intent, since there is absolutely no evidence, real or circumstantial, that the neighbor influenced Respondents into not selling the house to Complainants.

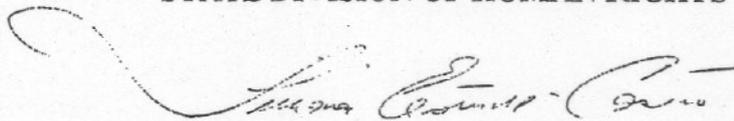
ORDER

Based on 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 the complaints be, and the same hereby are dismissed.

Dated: April 11, 2007
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS



Lilliana Estrella-Castillo
Administrative Law Judge