

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

MARIA COLON DE OQUENDO,

Complainant,

v.

REV. JOEL LOBAINA, LANDLORD,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10117423

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Order of Dismissal ("Recommended Order"), issued on October 28, 2008, by Thomas J. Marlow, 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 GALEN D. KIRKLAND, 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: **JAN 23 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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MARIA COLON DE OQUENDO,
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REV. JOEL LOBAINA, LANDLORD,
Respondent.

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

Case No. 10117423

SUMMARY

Complainant alleged that Respondent committed an unlawful discriminatory act relating to housing by commencing a court action to evict her, her daughter, her boyfriend, and her disabled son from their apartment because of her son's disabilities, because of her disabilities, and because of familial status. Because the evidence does not support the allegation, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On April 24, 2007, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to housing 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 Respondent 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 J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on April 23, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by David Narain, Esq., on behalf of Joseph Altman, Esq.

Permission to file proposed findings of fact and conclusions of law was granted. Respondent so filed after the conclusion of the public hearing.

For consistency, all Division Exhibits are now Complainant’s Exhibits.

FINDINGS OF FACT

1. In February of 2007, Complainant was the victim of domestic abuse and needed a place to live for herself, for Louis Belez (“Belez”) who was her boyfriend, for her daughter, and for her son, Jose, a 14 year old boy who suffers from autism, mental retardation, and attention deficit, hyperactivity disorder. (Complainant’s Exhibit 1; Tr. 21-23, 38, 138-39, 141)

2. In February of 2007, Complainant spoke with Reverend Jose Vargas (“Vargas”) from her church about her need for housing. Vargas contacted Respondent and asked if Respondent could help Complainant. (Tr. 21-22, 47-48, 138-39)

3. In February of 2007, Respondent offered Complainant an apartment with the rent of \$1,200.00 per month. (Tr. 138) Complainant could not afford the rent so Respondent reduced it to \$960.00 per month. (Tr. 138-39) Complainant signed a lease for the apartment, agreeing to pay a security deposit in the amount of \$960.00. (Joint Exhibit 1; Tr. 139-40)

4. Complainant never informed Respondent of her son's medical condition. (Tr. 47-48, 141-42) I do not credit Complainant's testimony that she informed Respondent of her son's medical condition approximately five or six days after she moved in. (Tr. 116)

5. The apartment was in good condition when Complainant moved in. (Tr. 142) I do not credit Complainant's testimony that the apartment was in bad condition when she moved in. (Tr. 26-28, 51-53, 55-56)

6. Shortly after Complainant moved in, other tenants began complaining to Respondent about the noise coming from Complainant's apartment saying they can hear things being thrown against the wall and on the floor. (Tr. 150-51) Other tenants threatened to move out if Respondent did not do something about the noise coming from Complainant's apartment. (Tr. 154-55)

7. Complainant's son, Jose, damaged the entrance door to the apartment building and the entrance door to Complainant's apartment. (Tr. 174-75) Respondent would have understood why this happened if Complainant had informed him of Jose's medical condition. (Tr. 171) I do not credit Complainant's testimony that the entrance door to her apartment was damaged simply by Belez opening it the second day they were living there when Respondent came to talk to Complainant. (Tr. 25-27)

8. Respondent attempted to gain entrance to Complainant's apartment to inspect it and make any necessary repairs but Complainant refused to allow him to enter. Complainant would scream and yell at Respondent when he asked for permission to enter the apartment. (Tr. 143-46, 148)

9. Complainant had two dogs in the apartment in violation of the terms of the lease. Complainant removed the dogs after Respondent discovered them. (Joint Exhibit 1; Tr. 152-53)

10. On or about April 8, 2007, Respondent went to Complainant's apartment but Complainant was not home. Respondent told Belez that he wanted them to move. (Tr. 36, 113, 154) When Complainant learned that Respondent wanted them to move, Complainant told Respondent that she was going to stay in the apartment so that he would "lose the house." (Tr. 160)

11. Complainant testified that on April 8, 2007, when she was not present, Respondent made negative comments about her son's disabilities to her son and in the presence of Belez. (Tr. 113) Belez, however, testified that, although he spoke with Respondent on April 8 and Respondent said Complainant's son was crazy, he could not recall whether Complainant's son was present at that time. (Tr. 122) I credit Respondent's testimony that he never said that Complainant's son was crazy. (Tr. 159-60)

12. After Respondent informed Complainant that he wanted her to move, Complainant made numerous complaints to the Department of Housing Preservation and Development of the City of New York ("HPD") regarding various conditions in the apartment. (Complainant's Exhibits 2, 6, 7; Joint Exhibit 4)

13. In or around April of 2007, Respondent commenced a court proceeding to evict Complainant because Complainant refused to move out of the apartment after the following: failing to pay rent; having dogs in the apartment; failing to pay a security deposit; failing to allow Respondent to enter the apartment to make repairs; being a noisy, disruptive tenant; and, her son, Jose, damaging two doors. (Joint Exhibit 1, 4; Tr. 150-52, 154-55, 160)

14. Complainant lived in the apartment for nine months and only paid one month's rent. (Tr. 58) Complainant never paid the security deposit. (Tr. 151-52) After April 8, 2008,

Respondent did not attempt to collect rent; he wanted the lease terminated and the apartment vacated. (Tr. 170)

15. After Complainant vacated the apartment pursuant to a stipulation of settlement of the eviction proceeding, Respondent had to make several repairs for conditions that did not exist when he rented the apartment to Complainant. (Joint Exhibit 2; Tr. 147-48)

16. Complainant claims that Respondent began an eviction proceeding because her son, Jose, has disabilities and because of familial status. (ALJ's Exhibit 1) Although Complainant has asthma and heart problems, she does not think Respondent terminated the lease because of her disabilities. (Tr. 108)

17. I do not credit Complainant's testimony attempting to explain why she failed to pay rent, failed to pay the security deposit, and had dogs in the apartment.
(Tr. 33-35, 59-61, 64, 71-79)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an owner of a housing accommodation to deny a housing accommodation to any person because of disability or familial status. Human Rights Law § 296.5(a)(1)

Complainant contends that Respondent committed an unlawful discriminatory act relating to housing by commencing a court action to evict her, her daughter, her boyfriend, and her disabled son from their apartment because of her son's disabilities and because of familial status. Complainant has the burden to establish by a preponderance of the evidence that such unlawful discrimination occurred. To meet her burden to establish that unlawful discrimination occurred, Complainant must initially show by a preponderance of the evidence that she is a

member of a protected class, that she was qualified to rent a housing accommodation, that she was denied the housing accommodation, and that the denial occurred under circumstances giving rise to an inference of unlawful discrimination. *See Hirschmann v. Hassapoyannes*, 11 Misc.3d 265, 811 N.Y.S.2d 870 (N.Y. Sup. Ct. 2005).

Complainant's son, Jose, who lives with her, suffers from autism, mental retardation, and attention deficit, hyperactivity disorder. Respondent entered into a lease agreement with Complainant and Complainant paid the rent for the first month. After Respondent began an eviction proceeding, Complainant had to vacate the apartment pursuant to a stipulation of settlement of the eviction proceeding. Respondent had complained about behavior of Complainant's son, and one of the reasons for commencing the eviction proceeding was his behavior. Under these circumstances, Complainant has met the burden of establishing a prima facie case of unlawful discrimination because of disability. Such burden has been described as "de minimis." *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 671 N.Y.S.2d 759 (1st Dept. 1998). Because Complainant has established a prima facie case of unlawful discrimination, the burden shifts to Respondent to establish that he was motivated to begin the eviction proceeding by a legitimate, nondiscriminatory reason. *See Hirschmann*, 11 Misc. 3d at 269.

Respondent has rebutted the inference of unlawful discrimination by presenting evidence that he began the eviction proceeding for legitimate, nondiscriminatory reasons. Respondent credibly testified that he began the eviction proceeding because Complainant refused to move out of the apartment after the following: failing to pay rent; having dogs in the apartment; failing to pay a security deposit; failing to allow Respondent to enter the apartment to make repairs; being a noisy, disruptive tenant; and, her son damaging two doors. Respondent was credible

when he testified that Complainant never told him of Jose's medical condition and that he would have understood the reason for Jose's behavior if he had been so informed.

Once Respondent articulates a legitimate, nondiscriminatory reason for his actions, Complainant has the burden to prove that the reason proffered by Respondent was merely a pretext for unlawful discrimination. *Id.* at 269. Complainant attempted to make excuses for failing to pay rent, having dogs in the apartment, and failing to pay the security deposit but I do not credit her testimony. Further, I do not credit Complainant's testimony that the door to her apartment was damaged simply by Belez opening it the second day that they were living there when Respondent came to talk to Complainant. I also do not find credible Complainant's testimony regarding the condition of the apartment when she moved in. Clearly, "room for choice exists" in choosing to accept the testimony of the Complainant or the Respondent with regard to what Complainant told Respondent about Jose's medical condition and about the condition of the apartment when Complainant moved in. However, after Belez could not support the testimony of Complainant that Respondent made negative comments to Jose about his disabilities in the presence of Belez, and after weighing all of the evidence and considering the demeanor of the witnesses, I credit the testimony of Respondent. *See Mittl v. N.Y. State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003)

Had Complainant informed Respondent of Jose's medical condition, he may have understood Jose's actions; however, there was no credible explanation that would lead to an understanding of Complainant's failure to pay rent, failure to pay a security deposit, and failure to allow Respondent to enter the apartment to make repairs, yelling and screaming at him when he attempted to do so. The evidence fails to establish that Respondent's reason for commencing an eviction proceeding was a pretext for unlawful discrimination.

It should be noted that no evidence was presented to establish that Respondent discriminated against Complainant because of familial status.

After considering all of the evidence presented, and evaluating the credibility of the witnesses, I find that the evidence does not prove that Respondent unlawfully discriminated against Complainant because of disability or familial status. Therefore, the complaint must be dismissed.

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 the complaint be, and the same hereby is, dismissed.

DATED: October 28, 2008
Bronx, New York



Thomas J. Marlow
Administrative Law Judge