



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

WILLIAM PACHECO,

Complainant,

v.

185 EAST 163RD STREET HDFC,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10149659

Federal Charge No. 02-11-0773-8

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 July 27, 2012, by Lilliana Estrella-Castillo, 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.

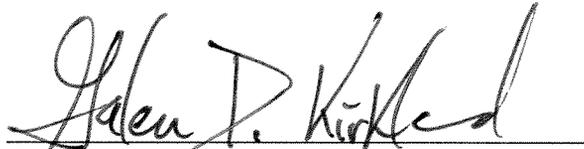
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division’s Rules of Practice, a copy of this Order has been filed 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: *10/26/2012*
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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on the Complaint of

WILLIAM PACHECO,

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185 EAST 163RD STREET HDFC,

Respondent.

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

Case No. **10149659**

SUMMARY

Respondent violated the Human Rights Law when it failed to provide Complainant a reasonable accommodation to gain access to the building where he resides. As a result of Respondent's unlawful discrimination, Complainant is awarded compensatory damages. As a deterrent against similar conduct by Respondent, the State will assess civil fines.

PROCEEDINGS IN THE CASE

On July 18, 2011, 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 Lilliana Estrella-Castillo, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on March 28 and 29, 2012.

Complainant and Respondent appeared at the hearing. The Division was represented by Veanka S. McKenzie, Esq., Senior Attorney. Respondent was represented by Barry Mallin & Associates, by Michael Schwartz, Esq.

FINDINGS OF FACT

1. Complainant has resided at 185 East 163rd Street, Apartment B-5, Bronx, New York (“the Building”) since 1972. (Tr. 11, 13)
2. Complainant became a shareholder in the Building in 1991 when the Building was converted into a low-income cooperative. (Tr. 13, 93, 172, 174)
3. Complainant’s rights as a shareholder are subject to the New York State Private Housing Finance Law, including the maximum limits on resident income, the provisions of the Certificate of Incorporation, Respondent’s by-laws, and his proprietary lease. (Respondent’s Exhibit 2)
4. Respondent’s affairs are governed by a board of directors (“the Board”), who at the relevant time were Marie Thompson (President), Michael D. Johnson (Vice-President), and Mary Jo Mulbah (Secretary). (Tr. 172; Complainant’s Exhibit 12; Respondent’s Exhibit 2)
5. The Building is managed by the Board. (Tr. 172)
6. In November 2008, Complainant suffered a severe stroke which rendered him “hemiplegic with severe limitation in his ability to walk due to permanent neurological impairment.” (Complainant’s Exhibit 1)

7. Complainant needs a scooter or a wheelchair to get around. (Tr. 119; Complainant's Exhibits 1, 2)
8. Complainant needs assistance with his activities of daily living. (Tr. 20, 144-45; Complainant's Exhibits 1, 2)
9. Complainant employs two health care aides to assist him everyday from 10:00 a.m. until 3:00 p.m. (Tr. 44) One health care aide works Wednesday through Saturday, and the other works Sunday through Tuesday. (Tr. 42, 44, 143)
10. After the stroke, Complainant moved to Florida to be near his family. With the Board's approval, in September 2009, Complainant sublet his apartment for a period of two years. (Tr. 18, 20-22, 206-07; Respondent's Exhibit 8)
11. Complainant's subtenant did not remain in the apartment for the entire two years, and Complainant returned from Florida in May 2011. (Tr. 25, 62)
12. Shortly after Complainant returned to his Bronx apartment he started to have problems navigating the steps in front of the Building. (Tr. 25-26)
13. The entrance to the Building has two steps. (Tr. 27; Complainant's Exhibit 8)
14. One step is an uneven slanted threshold where the Building's courtyard meets the sidewalk. (Complainant's Exhibits 6, 7, 8) This threshold is eight feet wide and is 1.5 inches high on one side and 5 inches high on the other side. (Complainant's Exhibits 6, 7, 8)
15. The other step is located at the entrance to the Building. The step is about 5 inches high. (Complainant's Exhibits 4, 5, 8)
16. When Complainant needs to exit the building in his scooter, he does so by allowing his scooter to "jump off" the steps. (Tr. 42)

17. When Complainant needs to enter the building, he is required to get out of his scooter and hold onto the doorway while his health care aide physically lifts the 136 pound scooter up each step. (Tr. 41-43, 144)

18. As a result of Complainant's physical limitations he has fallen several times in front of the Building while attempting to enter the Building. (Tr. 19, 115, 139, 150)

19. Prior to his stroke, Complainant was employed as a banker and was involved as a community activist. (Tr. 68; Complainant's Exhibit 15)

20. Complainant's once active social life has been curtailed because Complainant cannot leave the Building after 3:00 p.m., when his health care aides leave because he is not able to maneuver the two steps to get back into the Building. (Tr. 26, 44, 68)

21. Complainant has to live by a strict schedule; he has to be home by 3:00 p.m. every day. (Tr. 46) This has caused Complainant to feel depressed. (Tr. 44)

22. Complainant's inability to enter the Building unassisted has affected his quality of life. Complainant cannot go out to dinner or evening receptions because he is not able to enter the Building without assistance. (Tr. 46)

23. A ramp would allow Complainant the ability to exit and enter the Building without any assistance. (Tr. 45) It would also be helpful to Complainant's health care aides who would not have to physically lift the scooter or wheelchair and assist Complainant in getting out and into the chair or scooter after each step. (Tr. 144, 150)

24. On May 26, 2011, Complainant wrote to the Board requesting a reasonable accommodation. (Complainant's Exhibit 11)

25. In the letter, Complainant explained that because of his physical condition he was seeking special permission to sublet his apartment again. He explained that he was aware that

the Board allowed him to sublet once before, and he was requesting special consideration. (Tr. 46, 56, 98-99; Complainant's Exhibit 11) Complainant further explained that he was glad to be back home but "realized that in my condition, I need accessibility. Living here would be great if I could still get around." (Tr. 46, 56; Complainant's Exhibit 11)

26. On June 13, 2011, the Board acknowledged Complainant's letter and set up a meeting to discuss the "subletting policy." (Tr. 56, 174, Complainant's Exhibit 12)

27. On June 16, 2011, the Board met with Complainant and advised Complainant that he would not be allowed to sublet the apartment again because he had already sublet for two years in the last five years. (Tr. 58, 61-62, 117, 175; Respondent's Exhibit 4)

28. Section 12 of the proprietary lease states, in relevant part, that the "maximum term of any sublet shall be one year, with a possible one year renewal at the end of the initial one year term. All renewals are at the Director's sole discretion and require the Director's approval. However, the Lessee may not sublet the apartment for more than two years out of every five years." (Respondent's Exhibit 1)

29. The proprietary lease requires that the apartment be the shareholder's primary residence. (Tr. 94-95, 97; Respondent's Exhibit 1)

30. During the meeting Complainant also asked for a waiver of section 13 of the proprietary lease, which limits the resale price of the shares, because he felt that he and his mother had invested "a lot of money for maintenance and deserved to get some of this back." (Respondent's Exhibits 1, 4) Complainant was also seeking a waiver of Article XIII of the by-laws. Under that article, the City of New York has a right to 40 percent of the profits of each sale. (Respondent's Exhibit 2)

31. Complainant subsequently appealed to Michael R. Bloomberg, Mayor of the City of New York, to waive or reduce the City's right to 40 percent of the profit on the resale of the shares in his cooperative. (Tr. 60, 135-36; Complainant's Exhibit 13)

32. The City of New York informed Complainant that it could not waive its right to 40 percent of the profit on the resale of his shares in the cooperative. (Complainant's Exhibit 14)

33. During the June 16, 2011, meeting, Complainant also advised the Board that he needed "accessibility" to the Building. (Tr. 67, 118)

34. Complainant did not specifically ask Respondent for a ramp; he asked for "accessibility." (Tr. 67, 118, 176, 217)

35. During the June 16, 2011, meeting, the Board denied all of Complainant's requests for accommodations. (Tr. 68)

36. Respondent did not engage Complainant in any further dialogue regarding his requests for accommodations. (Tr. 67)

37. Respondent argued that although the Building has two steps that need to be navigated to enter and exit the Building, the Building is accessible because, in the past other shareholders used wheelchairs and have not asked for an accommodation. (Tr. 182, 220-22, 253, 259, 261; ALJ Exhibit 4)

38. Respondent also argued that if Complainant had asked for a ramp it would have been provided by Respondent because it "does not mind doing it." (Tr. 181, 249, 250, 252)

39. Once Respondent became aware that Complainant was asking for a ramp as an accommodation, Mulbah went on the internet to look at the cost involved in purchasing a ramp. (Tr. 249-50, 254, 255-56)

40. Other than conducting an internet search for the cost of ramps, Respondent has not taken any affirmative steps to install a ramp to allow Complainant access to the Building. (Tr. 256-57, 267-68)

41. In 2011, the New York City Landmarks Preservation Commission (“Landmarks Preservation Commission”) designated the Building as part of the Grand Concourse Historic District. (Tr. 183; Respondent’s Exhibit 5)

42. As a result of the Landmarks Preservation Commission designation, Respondent is required to seek its approval for any proposed work to the Building. (Tr. 183, 201; Respondent’s Exhibits 6, 7)

43. Respondent has taken no steps to find out whether or not a permit is required from the Landmarks Preservation Committee to install a ramp at the Building. (Tr. 255-56)

OPINION AND DECISION

The Human Rights Law §296.18(2) makes it an unlawful discriminatory practice to “refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling, including reasonable modification to common use portions of the dwelling...”

The statute defines the term “disability” as “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.

To establish a violation of the Human Rights Law for failure to provide a reasonable accommodation, the complainant must demonstrate that he suffers from a disability, that he is otherwise qualified for the tenancy, that because of the disability the accommodation was necessary for him to use and enjoy his apartment, and that the reasonable accommodation can be made. (See, *Matter of One Overlook Ave. Corp. v. New York State Div. of Human Rights*, 8 A.D. 3d 286, 777 N.Y.S. 2d 696 (2nd Dept. 2004)).

Complainant alleges that he is disabled and that Respondent unlawfully discriminated against him when Respondent refused to grant him the accommodations necessary for him to use and enjoy his apartment. Specifically, Complainant was seeking that Respondent: (1) approve the request to sublease his apartment again; (2) waive New York City's share of the profits if Complainant sold his shares; and (3) make the Building handicap accessible.

There is no question that Complainant is disabled within the meaning of the Human Rights Law; he has mobility impairments as a result of a stroke. As a result of his disability, Complainant needs a wheelchair or scooter to get around. Complainant is a qualified shareholder in the Building. However, Complainant failed to make out a prima facie case of unlawful disability discrimination regarding the subletting and selling of the apartment, because neither of these accommodations are reasonable accommodations that would afford Complainant "equal opportunity to use and enjoy a dwelling." Both accommodation requests would necessarily require that Complainant not reside in the apartment, an outcome which is inconsistent with Human Rights Law §296.18(2).

However, Complainant made out a prima facie case of unlawful disability discrimination because a ramp is necessary for Complainant to enter and exit the Building in order for him to use and enjoy his apartment, and Respondent refused to grant Complainant this accommodation.

Respondent did not produce any evidence that providing the requested accommodation would cause Respondent an undue financial or operational hardship. On the contrary, Respondent, by its Board members, testified that it “had no problem” granting the accommodation. According to Respondent’s witnesses, the only reason Complainant did not get the accommodation was because Complainant never specifically asked for a ramp as a reasonable accommodation.

Respondent’s refusal to grant Complainant a reasonable accommodation, in light of the fact that Respondent is fully aware that Complainant is disabled and needs a wheelchair or scooter, is a clear violation of the Human Rights Law. Respondent’s argument that Complainant did not ask for accessibility to the Building is not credible. Respondent was placed on notice that Complainant needed accessibility to the Building when Complainant wrote to the Board on May 26, 2010. The fact that Complainant did not specifically request a ramp when he met with the Board is unavailing. Complainant advised Respondent that he needed “accessibility.” Complainant’s complaint does not fail because he did not, at that initial stage, state that he needed a ramp. When Respondent was confronted with Complainant’s request for a reasonable accommodation, it was required to engage in a good faith interactive process whereby it could clarify and identify the appropriate reasonable accommodation. (*See generally* Human Rights Law §300). Had the Board engaged in the interactive process, it would have discovered that the reasonable accommodation needed was a ramp.

Based on the above analysis, it is clear that Respondent violated the Human Rights Law when it denied Complainant’s request for a reasonable accommodation, which would have allowed him the full use and enjoyment of the apartment which can only happen if he has access to the Building where he resides.

As a result of Respondent's unlawful discrimination, Complainant is entitled to an award for pain and suffering. Because of the "strong antidiscrimination policy" of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision." *Batavia Lodge v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, "[m]ental 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). The severity, frequency and duration of the conduct may be considered in fashioning an appropriate award. *New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

As a result of Respondent's unlawful discrimination, which essentially imprisoned Complainant in his apartment after 3:00 p.m. because he was not able exit or enter the Building unassisted, Complainant felt depressed. Complainant's once active life has been curtailed, not just by the physical limitations as a result of his stroke, but because of the barriers that Respondent has ignored and has allowed to continue to obstruct Complainant's exit and entrance into the Building. An award of \$5,000.00 for emotional distress, pain and suffering, humiliation and mental anguish, will effectuate the purpose of the Human Rights Law. *Bayport-Blue Point School District v. State Division of Human Rights*, 131 A.D.2d 849, 517 N.Y.S.2d 209 (1987).

Section 297.4(c)(iv) of the Human Rights Law permits the Division to award punitive damages in cases of housing discrimination. The Division is vested with an "extremely strong statutory policy of eliminating discrimination." *Van Cleef Realty, Inc. v. State Div. of Human Rights*, 216 A.D.2d 306, 627 N.Y.S.2d 744 (2d Dept. 1995) (*quoting Batavia Lodge v. New York*

State Div. of Human Rights, 35 N.Y.2d 143, 359 N.Y.S.2d 25 (1974). Punitive damages, however, require more than just a mere showing that the law has been violated. They may be awarded for violations when a respondent acts with reckless or callous disregard for the complainant's rights and intentionally violates the law. *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 909 (2d Cir. 1993) (citing *Smith v. Wade*, 461 U.S. 30, 51 (1983)). There should be a finding of "wanton, willful or malicious behavior." *Ragin v. Harry Macklowe Real Estate Co.*, 801 F. Supp 1213, 1230-34 (S.D.N.Y. 1992). See also *Umansky v. Masterpiece International Limited*, 276 A.D.2d 692, 715 N.Y.S.2d 638 (2d Dept. 2000). Complainant is not entitled to punitive damages because the record does not support a finding that Respondent intentionally violated the law or engaged in wanton, willful or malicious conduct.

The Human Rights Law §297.4(c)(vi) allows the Division to assess civil fines and penalties against a respondent that has violated the Human Rights Law. The 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 respondent's culpability; any relevant history of respondent's actions; respondent's financial resources; 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 97th 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).

Respondent in this case is assessed civil fines and penalties in the amount of \$5,000.00, which shall serve as a deterrent to this self-managed low income cooperative. Although Respondent did not intentionally violate the Human Rights Law, it did violate the law when it did not engage Complainant in a dialogue regarding his needs for “accessibility” and then, once it became aware that a ramp would provide Complainant the “accessibility” that he needed, it still failed to take any affirmative steps to provide Complainant with a reasonable accommodation.

Finally, relying on *Rodriguez v. 551 West 157th Street Owners Corp.* 992 F. Supp. 385, (S.D.N.Y. 1998), Respondent argued that it was not required to construct a wheelchair ramp on an existing building. Respondent’s reliance on *Rodriguez* is misplaced. The court in *Rodriguez* was interpreting Section 3604(f)(2) of the federal Fair Housing Act, (42 U.S.C. §3601 *et seq*). The relevant statute to these proceedings is the Human Rights Law, specifically New York State Executive Law, Article 15 §296.18(2) which was amended, effective October 31, 2010, to “clarify that reasonable accommodations made by housing providers include reasonable modifications by the housing providers of common use portions of the dwelling, so that persons with disabilities will be able to have one of the most basic of human rights: the opportunity for reasonable access to their homes.” (See, NY Bill Jacket, 2010 A.B. 10771, Ch. 196). Furthermore, unlike federal law, the Human Rights Law requires that the owners pay the cost of modifications to common use arrears, where reasonable. Once again, Respondent did not provide any evidence that it is unable to provide Complainant with the reasonable accommodation of a ramp.

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 its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices; and it is further

ORDERED, that Respondent, and its agents, representatives, employees, successors, and assigns, shall not retaliate against Complainant for having brought this discrimination complaint; and it is further

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

1. Within 60 days of the receipt of the Final Order, Respondent shall provide written proof that it has taken reasonable steps to seek a permit, if one is required, from the Landmarks Preservation Commission proposing to make the entrance to the Building wheelchair accessible;
2. Within 60 days of the receipt of the Final Order, Respondent shall provide written proof that it has taken reasonable steps to acquire, construct or purchase a ramp that will provide Complainant with access to the Building;
3. Within 60 days of the receipt of the Final Order, Respondent shall pay to the Complainant the amount of Five Thousand Dollars (\$5,000.00) for pain and suffering. Interest shall accrue from the date of the Final Order until payment is made.
4. Payment shall be made by Respondent in the form of a certified check made payable to the order of Complainant, William Pacheco, and mailed by certified mail, return receipt requested to Complainant with a copy to the New York State Division of

Human Rights, Compliance Unit, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

5. Within 60 days of the receipt of the Final Order, Respondent shall pay the State of New York the amount of Five Thousand Dollars (\$5,000.00) for civil fines;
6. Payment shall be made by check payable to “State of New York” and mailed or delivered to the New York State Division of Human Rights, Compliance Unit, One Fordham Plaza, 4th Floor, Bronx, New York 10458.
7. Respondent shall furnish written proof to the New York State Division of Human Rights, Compliance Unit, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained in this Final Order.
8. Respondent shall cooperate with the representatives of the Division during any investigation into the compliance with the directives contained within this Final Order.

DATED: July 27, 2012
Bronx, New York



Lilliana Estrella-Castillo
Administrative Law Judge