



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**MARQUISHA R. PARKER,**

Complainant,

v.

**3091 REALTY LLC, THOMAS STEINER,**

Respondents.

**NOTICE AND  
FINAL ORDER**

Case No. 10151339

**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 January 31, 2013, 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 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: 5/8/2013  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER



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GOVERNOR

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**MARQUISHA R. PARKER,**

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**3091 REALTY LLC, THOMAS STEINER,**

Respondents.

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

Case No. **10151339**

**SUMMARY**

Complainant, who suffers from asthma, brought this action against Respondents, her landlords, because she wants her apartment to be free from smoke. Respondent has made efforts to accommodate Complainant. Therefore, Respondent has satisfied its duties under the law and the case must be dismissed.

**PROCEEDINGS IN THE CASE**

On October 19, 2011, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents 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 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. Public hearing sessions were held on June 13, 2012 and June 15, 2012.

Complainant and Respondents appeared at the hearing. The Division was represented by Aaron Woskoff, Esq. Respondents were represented by Josh Rosenblum, Esq.

#### **FINDINGS OF FACT**

1. Complainant suffers from asthma. She was first diagnosed in 2008. (Tr. 8)
2. Complainant has lived at 2007 Newbold Avenue, Apartment B41, Bronx, New York, 10462, since March, 2009. Respondents own that building. (ALJ Exhibit 2)
3. In January of 2011, Complainant’s asthma symptoms became worse. (Tr. 31)
4. On June 11, 2011, Complainant suffered an asthma attack and went to the emergency room at Lenox Hill Hospital for treatment. On September 18, 2011, Complainant again visited the emergency department at Lenox Hill (Complainant’s Exhibits 1; Tr. 13)
5. Complainant’s discharge instructions noted that asthma can be triggered by “Medications (like aspirin), tobacco smoke, air pollutions, exercise, dust mites and pet dander.” (Complainant’s Exhibit 1)
6. Complainant then spoke to some of her neighbors and discovered that the tenant in the apartment next to her, Cynthia Santiago, is a smoker. (Tr. 32)

7. Complainant asserts that her apartment fills with smoke because of the smoking habits of the tenant next door. (Tr. 41)

8. Although Complainant is convinced the smoke is coming through the cracks in her walls, she has never seen smoke emanating through those cracks. (Tr. 144)

9. Complainant states that when during the daytime hours, the smoke conditions become less severe. (Tr. 43-44)

10. As a result of the smoke conditions, Complainant often sleeps at her mother's apartment five to six days per week. (Tr. 44)

11. Complainant has opened the windows and used fans to get rid of the smoke, but that was not effective in alleviating the condition. (Tr. 46)

12. In February 2011, Complainant spoke to Respondent Steiner and Manny Sandoval, the building superintendent, about the smoke condition. (Tr. 39-40)

13. Shortly thereafter, Respondent and Complainant settled an action against Complainant in Civil Court for non-payment of rent. The action had been filed by Respondent in September 2010. (Respondent's Exhibit 2; Tr. 42, 160)

14. During the negotiations for the settlement of the abovementioned case, Complainant raised her concerns about the smoke conditions. (Tr. 161)

15. In response to Complainant's concerns, Respondent offered Complainant different apartments that were away from the smoke. Respondent also offered to offset Complainant's costs of moving. (Tr. 161-63)

16. Complainant refused to move to the available apartments. (Tr. 163)

17. Steiner also offered Complainant the option of taking future vacancies. Complainant refused that accommodation. (Tr. 166)

18. Santiago rents a rent-stabilized apartment. Respondent Steiner cannot prevent rent-stabilized tenants such as Santiago from smoking. Her lease does not contain a smoking ban. (Tr. 163)

19. Since January 2012, Steiner has implemented a smoke free policy barring new tenants from smoking in the residence. (Tr. 164)

20. Steiner also offered Santiago another apartment, but Santiago did not wish to move. (Tr. 165)

21. Santiago agreed to buy an air purifier and to smoke near an open window in her apartment. (Tr. 166)

22. Steiner has installed “no smoking” signs in the common areas of the building. (Tr. 167)

23. Steiner also agreed to commence litigation to remove any tenants who smoked in hallways and common areas. He asked Complainant to testify as a witness to those allegations but Complainant would not agree. (Tr. 166)

24. The cracks in Complainant’s apartment were caulked and sealed. Complainant asserts that this did not stop the smoke conditions. (Tr. 57, 169)

25. Complainant’s front door was also replaced and, thereafter, weather stripping was applied to the perimeter of the door. This action stopped the smoke from entering Complainant’s apartment from the hallway. (Tr. 65)

### **OPINION AND DECISION**

Under the Human Rights Law, a landlord must make reasonable accommodations and/or modifications to the structure in order to accommodate a tenant with a disability in order that she may use and enjoy her apartment. Human Rights Law § 296.18. Those accommodations can

include taking steps to lessen the smoke conditions caused to a tenant by a neighbor's smoking habits. *Upper East Lease Associates, LLC v. Cannon*, 30 Misc. 3d 1213(A), 924 N.Y.S. 2d 312 (Table), 2011 WL 182091 (N.Y. Dist. CT, Nassau, 2011)(finding that a landlord's failure to alleviate smoke emanating from a neighbor's apartment can constitute a breach of the "warranty of habitability" owed to a tenant.) See also, *Poyck v. Bryant*, 13 Misc. 3d 699, 820 N.Y.S. 2d 774 (Civ. Ct., New York, 2006).

Steiner has attempted to alleviate Complainant's smoke problems. Complainant's walls and floors have been caulked. The Complainant's apartment door has also been replaced and weather stripping installed. Respondents have attempted to crack down on smoking in the common areas. When these measures failed to satisfy Complainant, Respondent Steiner attempted to move Complainant, who refused to move. He also attempted to move Santiago, who, similarly, refused. Santiago has a lease that is rent-stabilized. Steiner cannot unilaterally change his agreement with Santiago in order to accommodate Complainant. Complainant is seemingly seeking a smoke-free environment in which to live, which is something Steiner simply cannot provide.

Even if one feels that Steiner has not done enough to accommodate Complainant, Complainant's case fails because she has failed to establish a need for a more smoke free environment. In order to prevail, Complainant must "demonstrate through either medical or psychological expert testimony or evidence" that she needs a more smoke-free environment to "use and enjoy the apartment." See, *One Overlook Ave. Corp. v. New York State Div. of Human Rights*, 5 N.Y.3d 714, 806 N.Y.S. 2d 165 (2<sup>nd</sup> Dept., 2005). Complainant has failed to make that showing. She has established that she suffers from asthma and that tobacco smoke is an irritant. She has not shown that the tobacco smoke is so pervasive in her apartment that it interferes with

her ability to use and enjoy the apartment.

In addition to cigarette smoke, air pollution and dust mites can also trigger asthma attacks. There has been no evaluation of Complainant's apartment with respect to those known irritants. Without such an evaluation and without medical testimony, Complainant is unable to establish that the cause of her asthma problems can be attributed to the cigarette smoke in her apartment or that an accommodation for her asthma can even be effected. Additionally, Respondent has made its best efforts to accommodate Complainant. Consequently, the case 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 case be, and the same hereby is, dismissed.

DATED: January 31, 2013  
Bronx, New York



Thomas S. Protano  
Administrative Law Judge