



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

EDINSON ROSARIO,

Complainant,

v.

FINKELSTEIN-TIMBERGER LLC,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10150502

Federal Charge No. 16GB104513

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 September 17, 2012, 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: *11/16/2012*
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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on the Complaint of

EDINSON ROSARIO,

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FINKELSTEIN-TIMBERGER LLC,

Respondent.

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

Case No. **10150502**

SUMMARY

Complainant, who is Hispanic, from the Dominican Republic, charged Respondent with unlawful discrimination based on race and national origin after Respondent terminated his employment. Complainant was unable to show that his termination occurred under circumstances through which one could infer he was a victim of unlawful discrimination. Therefore, the case is dismissed.

PROCEEDINGS IN THE CASE

On August 10, 2011, Complainant filed a verified complaint with the New York State Division of Human Rights (“Division”), charging Respondent with unlawful discriminatory practices relating to employment 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 S. Protano, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on May 30, 2012.

Complainant and Respondent appeared at the hearing. The Division was represented by Aaron Woskoff, Esq. Respondent was represented by James X. McElwain, Esq.

FINDINGS OF FACT

1. Complainant is Hispanic, of Dominican national origin. (Tr. 7)
2. Respondent is a property management company that manages apartment buildings in Bronx, New York. (ALJ Exhibit 4)
3. In 2009, Complainant began working for the Belmont Arthur Avenue Local Development Corporation (“Belmont Arthur Avenue”) as a building superintendent in the residential building located at 2500 University Avenue, Bronx, New York. (ALJ Exhibit 2; Tr. 7-8)
4. Complainant’s responsibilities included painting, plastering, installing doors and locks, removing trash and keeping the building clean and in good repair. (Complainant’s Exhibit 1; Tr. 7-8)
5. In April of 2011, Respondent took ownership of 2500 University Avenue and Complainant became an employee of Respondent. (ALJ Exhibit 4; Tr. 13)

6. When Respondent bought 2500 University Avenue, the building had been placed in the Alternative Enforcement Program (“AEP”) by the New York City Department of Housing Preservation and Development (“HPD”). (Respondent’s Exhibit 2; Tr. 64)

7. The AEP is a collection of the 200 worst buildings in New York City, based on the number of violations cited by HPD. In April of 2011, Respondent bought ten buildings on the AEP list that had a total of about 5,000 violations. (Respondent’s Exhibit 2; Tr. 64-65, 78)

8. Upon purchasing the building, Respondent had less than three months to correct every violation related to heat, hot water and molds and 80 per cent of the other violations cited by HPD. (Respondent’s Exhibit 2; Tr. 64, 78)

9. If Respondent failed to correct the violations by July 14, 2011, the City of New York would have corrected the problems and billed Respondent for its work, which would have cost Respondent significantly more money than it would have cost Respondent to fix the violations itself. (ALJ Exhibit 4; Tr. 77)

10. After Respondent bought the buildings, Richard Timberger, one of Respondent’s principals, was given a recommendation by Consolato Cicciu, Belmont Arthur Avenue’s manager, to fire Complainant. (Tr. 81-82)

11. Timberger did not fire anyone immediately. Instead he visited the buildings to assess their condition. (Tr. 82-83)

12. Timberger found 2500 University Avenue to be in very poor condition and very dirty. He described the building as “neglected.” Of the ten buildings Respondent bought, Timberger found that seven were clean, though in disrepair, and three were both dirty and in disrepair. (Tr. 84-85)

13. Timberger stated that a first floor apartment in Complainant's building had water dripping from an active leak and the basement was flooded and unlocked. Timberger estimated that the leak had been active for four months. Timberger also found dog excrement on the roof of the building. (Tr. 85-86)

14. There were vacant apartments in 2500 University Avenue that were not cleaned out and had been locked by the City inspectors because they were in such poor condition. The boiler room had dead rats all over and the hallways and windows were dirty. (Tr. 86-87)

15. Because of the condition of the building and the time constraints Respondent was under, Timberger removed Complainant as the superintendent of 2500 University Avenue on or about June 1, 2011. (ALJ Exhibits 2 & 4; Tr. 15)

16. Respondent fired the superintendents in three of the ten buildings it bought and kept the other seven superintendents. (Tr. 91)

17. After Complainant was relieved of his superintendent's duties, he continued to work for Respondent. Respondent paid Complainant his superintendent salary through the end of June plus additional money for working on the repair crews that Respondent used to eliminate the violations in the AEP buildings. Complainant remained employed until July 14, 2011. (Respondent's Exhibit 5; Tr. 94)

18. Complainant was let go after July 14, 2011 because Respondent no longer needed a large crew of workers after it corrected the violations. (Tr. 96)

19. Persio DeLeon is a building superintendent who has worked for Respondent for 30 years. He is of Dominican national origin. (Tr. 116, 119)

20. Edwin Munoz is a building superintendent who worked for Belmont Arthur Avenue. He was retained by Respondent after it bought the building in which he worked. Munoz is from the Dominican Republic. (Tr. 122-23)

21. When Timberger terminated Complainant's employment, Timberger did not know that Complainant was from the Dominican Republic. (Tr. 110)

OPINION AND DECISION

New York State Human Rights Law makes it an unlawful discriminatory practice to discharge an individual from his or her employment because of his or her national origin. Human Rights Law § 296.1(a).

In order to prove his claim of unlawful discrimination, Complainant must first make out a prima facie case. To do so, Complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

Complainant in the instant case is unable to make out a prima facie case of unlawful discrimination. He was a member of a protected class based on his race and national origin; he was qualified for the position he held after having worked in that position for two years; he was relieved of his duties and, ultimately, discharged from Respondent's employ. Complainant has satisfied the first three prongs of the test; however, he has failed to satisfy the final prong of the test.

The building for which Complainant was responsible was in a state of disrepair and dirty

to a point of being a potential health hazard. Timberger looked at the condition of the building, considered the time constraints Respondent was under and reassigned Complainant to other duties. It is significant that Timberger also looked at the condition of other buildings and retained some of the superintendents, at least one of whom was of Dominican national origin. Timberger did not immediately fire Complainant, but rather paid him to continue to assist in correcting the violations in Respondent's newly purchased buildings. Complainant has offered no other evidence to connect his race or national origin to the adverse employment action taken against him. When one considers all these factors it is impossible to infer a nexus between Complainant's race or national origin and the termination of his employment.

Given the above circumstances and considering the fact that Timberger did not know Complainant's national origin, one cannot rationally infer that Complainant was discriminated against. As a result, the case must be dismissed for failure to make out a prima facie 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 the case be, and the same hereby is, dismissed.

DATED: September 17, 2012
Bronx, New York



Thomas S. Protano
Administrative Law Judge