ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

IVELICE ROSARIO,

Complainant,

v.

INWOOD TERRACE, INC., METRO MANAGEMENT & DEVELOPMENT, INC.,

Respondents.

Federal Charge No. 02-11-0608-8

NOTICE AND FINAL ORDER

Case No. 10147184

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 10, 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: 9/28/2012
Bronx, New York

Galen D. Kirkland
GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10147184**

SUMMARY

Complainant, who suffers from depression and anxiety disorder, has harbored a dog in her apartment, which violates the rules of her cooperative apartment. Respondents, the owners and managers of the building, have attempted to force Complainant to remove the dog from the premises. Because Complainant has established that the dog prevents her from suffering panic attacks, she will be allowed to continue to harbor the dog in her apartment. No damages are awarded herein; no civil fines are assessed; Respondent shall pay attorneys fees to Complainant's attorneys.

PROCEEDINGS IN THE CASE

On March 8, 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 March 7, 2012 and April 13, 2012.

Complainant and Respondents appeared at the hearing. Complainant was represented by Sperber, Denenberg & Kahan, P.C., by Steven B. Sperber, Esq. Respondents were represented by Tane Waterman & Wurtzel, P.C., by Andrew D. Stern, Esq.

Permission to file post-hearing briefs was granted. Attorneys for both parties made timely submissions. Complainant's attorney made an application for an award of attorney's fees. Respondent's attorney submitted no objections to Complainant's attorney's request.

FINDINGS OF FACT

1. Complainant resides at 99 Hillside Avenue, New York, New York, 10040. (ALJ Exhibit 2)

2. Respondent Inwood Terrace Inc. is a corporation, of which Complainant owns shares, that owns the building located at 99 Hillside Avenue, New York, NY. Respondent Metro Management & Development, Inc. manages the building. (ALJ Exhibit 4)

3. Inwood Terrace has a no pet policy at 99 Hillside Avenue. (Respondent's Exhibit 2; Tr. 24)

4. Complainant, who is 51 years of age, suffers from depression and anxiety disorder. She has suffered from panic attacks since she was in her late teens. Between 2005 and 2009, Complainant was hospitalized two to three times for her condition. (Tr. 7-8, 48)

5. Between 2009 and 2010, Complainant would often suffer from panic attacks when she was home alone after returning from work. Complainant would call her daughter, Leslie Rosario, who would have to leave work early to attend to her mother. (Tr. 9, 108)

6. The Complainant's attacks were frequent and they caused Leslie Rosario to alter her work schedule; she was unable to permanently accommodate her mother by being home when her mother got home from work each day. (Tr. 9)

7. In the summer of 2009, Complainant suffered a panic attack in her home. Complainant's son immediately took her to Dr. Maureen Nelligan, an internist. (Tr. 53, 101)

8. Nelligan noted that Complainant suffered from depression and anxiety and prescribed the medications Zoloft and Klonopin. Dr. Nelligan referred Complainant to Riverdale Mental Health for psychotherapy. (Complainant's Exhibit 5; Tr. 39)

9. Complainant reacted badly to Zoloft. It caused Complainant to feel faint and made her heart race. She was taken to Allen Pavilion, where she met with Dr. Helen Muhlbauer, a psychiatrist. (Tr. 104)

10. Dr. Muhlbauer concurred with the prior diagnoses that Complainant suffered from "severe anxiety disorder." (Complainant's Exhibit 4)

11. Complainant still takes Klonopin, but she has been unable to find a medication for depression that does not produce unwanted side effects. (Tr. 110)

12. Complainant has tried Zoloft and Celexa for her depression, but they have both produced side effects that Complainant could not tolerate, including profuse perspiration. (Tr. 125)

13. Complainant did not find a medical regime the prevented her from suffering panic attacks when she was home alone. She continued to try medications and sought alternative treatments, such as herbal supplements. (Tr. 130-31)

14. Complainant has considered seeking out a psychiatrist for regular treatment and therapy, but she has not done so. Dr. Muhlbauer does not accept Complainant's insurance plan. Dr. Nelligan also suggested some psychiatrists, but they were either not taking new patients or did not take Complainant's insurance. (Tr. 111)

15. On May 10, 2010, Complainant's daughter purchased a dog as a companion for her mother. The dog is a male Lhasa Apso, Schnauzer mix, named Max. It weights about 20 pounds. (Complainant's Exhibits 1, 2A & 2B; Tr. 11, 27, 35, 108)

16. Max is not a certified or trained service dog. (Tr. 29)

17. Prior to purchasing Max, Leslie Rosario discussed possible remedies for Complainant's condition with family members and investigated pet therapy. (Tr. 23)

18. Leslie Rosario was aware that there was a no pet policy at Inwood Terrace when she purchased Max for Complainant. (Tr. 24)

19. When Complainant is at home, Max follows her. (Tr. 109)

20. Complainant has had panic attacks since May of 2010; however, she has never had a panic attack in her home since then. (Tr. 109)

21. In the early summer of 2010, Metro Management received complaints from other tenants that Complainant was harboring a dog in her apartment. Thereafter, Julisa Carcano,

property manager, sent Complainant a letter demanding that the dog be removed from the apartment. (Respondent's Exhibit 10, 11; Tr. 255-57)

22. On August 5, 2010, Leslie Rosario and her brother Bobby wrote to Carcano asking for an accommodation that would allow their mother to keep her dog. They included a letter from Dr. Nelligan indicating that the dog was "therapeutic" and "comforting" to Complainant. (Complainant's Exhibit 3A & 3B; Tr. 12-13)

23. The co-op board of Inwood Terrace refused to grant Complainant an accommodation allowing her to keep her dog. Instead, Respondents began proceedings to remove Complainant from her apartment. Thereafter, the parties entered into a standstill agreement with respect to that proceeding and the instant proceeding was commenced. (ALJ Exhibit 2; Respondent's Exhibit 1; Tr. 265)

24. Dr. Nelligan testified at the public hearing. She has been Complainant's physician for two and a half years. She stated that Complainant has told her the dog makes her calmer and comforts her. She feels that "it is medically necessary for her to keep her K-9 companion for her continued progress…" (Complainant's Exhibit 6; Tr. 50)

25. Dr. Muhlbauer, in a letter to Complainant, stated that "it would be to your medical benefit to allow you to keep a pet in your home." Dr. Muhlbauer did not prescribe a pet for Complainant but, rather, wrote a letter on November 18, 2010 in support of allowing Complainant to keep the dog Complainant had already bought. (Complainant's Exhibit 4)

26. Dr. Steven Fayer is a psychiatrist and an expert in psychiatry, depression and anxiety disorders. Dr. Fayer said pet therapy is "not a prescribed or customary treatment…" (Tr. 176)

27. Dr. Muhlbauer wrote that "[p]et therapy has been proven by evidence based medicine…to help people with anxiety disorders and hypertension." (Complainant's Exhibit 4)

Dr. Fayer disputes that, stating "There is no evidence-based study…I conducted a literature search on several search engines and I didn't find any documentation that this is evidence-based." (Tr. 180)

OPINION AND DECISION

New York courts have long recognized and upheld the validity of no pet clauses in leases. Harboring a pet in defiance of a no pet clause can be considered a substantial breach of the lease agreement. *Crossroads Apartment Association v. LeBoo*, 152 Misc. 2d 830, 578 N.Y.S.2d 1004 (Rochester City Ct., 1991). Complainant in the instant case argues that her disabilities are such that it is necessary for her to keep her dog in order to use and enjoy her apartment and, therefore, the enforcement of the no pet clause, as it relates to her, violates State Human Rights Law.

A "disability" under New York Human Rights Law is "…a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory techniques…." Human Rights Law §292.21. In order to meet this definition, one must only suffer from some diagnosable impairment. *Nowak v. EGW Home Care, Inc.*, 82 F.Supp.2d 101, 111 (W.D.N.Y. 2000), *citing*, *State Division of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 218-19, 491 N.Y.S.2d 106, 480 N.E.2d 695 (1985), and *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 154-56 (2nd Cir. 1998). Complainant has been diagnosed with depression and anxiety disorders by medical professionals. Complainant suffers from a disability under Human Rights Law.

New York State Human Rights Law requires that an owner of property "make reasonable accommodations in rules, policies, practices or services when such accommodations

may be necessary to afford such person with a disability equal opportunity to use and enjoy a dwelling..." Human Rights Law §296.2-a (d)(2). A reasonable accommodation can include making exceptions to a "no-dog" policy if a tenant's disability requires it. In order to establish that such a reasonable accommodation must be made, Complainant must present "medical or psychological evidence to demonstrate that the dog was actually necessary in order to use and enjoy the apartment." *Kennedy Street Quad, Ltd. v. Nathanson*, 62 A.D.3d 879, 879 N.Y.S.2d 197, 198 (2d Dept. 2009); *see also 105 Northgate Cooperative v. Donaldson*, 54 A.D.3d, 414, 416, 863 N.Y.S.2d 469 (2d Dept. 2008). In this case, Complainant has shown that her dog is necessary to use and enjoy her apartment. Dr. Muhlbauer and Dr. Nelligan both state as much, but their testimony is only part of the picture. In addition to the medical evidence submitted by Complainant, she has demonstrated, through empirical evidence, that the dog prevents her from suffering panic attacks when she is at home. She suffered numerous panic attacks when she was home alone before she got Max and has not had one since she bought him, even though she continues to suffer panic attacks when she is away from him. Although Dr. Fayer has asserted that there have been no evidence-based studies on the efficacy of pet therapy in general, Complainant has shown that it works for her—and it has worked for two years. Complainant has, therefore satisfied her burden and Respondents shall be required to allow her to retain her dog.

Where appropriate, a complainant can be awarded damages owing to his or her emotional distress in housing discrimination cases. *Matteo v. New York State Division of Human Rights et al.*, 306 A.D.2d 484, 485 (2nd Dept., 2003). Complainant has described significant levels of stress and anxiety. However, she has not been able to articulate what portion of that stress, if any, can be attributed to the Respondents' refusal to allow her to harbor Max and what portion is

a result of her preexisting depression and anxiety. Moreover, Complainant, not Respondents, created the situation in which she finds herself by harboring a dog in her apartment. Complainant knew of Respondents' rules prohibiting pets and never notified Respondents she had a dog until Respondents directed her to remove it from the premises. Given these realities, Complainant shall not be awarded damages owing to emotional distress.

Section 297 (4)(c)(iv) of 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 Division of Human Rights*, 216 A.D.2d 306, 627 N.Y.S.2d 744 (2nd Dept., 1995); *quoting*, *Batavia Lodge v. N.Y. State Div. of Human Rights,* 35 N.Y.2d 143, 146 (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 (2nd 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, 1230-1234 (SDNY, 1992).

In the instant case, Respondents did not act wantonly, willfully or maliciously when they denied Complainant the right to have a dog. Respondents acted to enforce the building rules after they learned of the dog. Respondents were not placed on notice that the dog was a medical necessity until after the dog was acquired and after they sought to have the dog removed. Complainant has, therefore, not proven that Respondents acted with the requisite "state of mind" that would warrant an award of punitive damages. *Id.*, at 1234.

In 2009, the Human Rights Law was amended to authorize the Division to assess civil fines and penalties on a respondent that has violated the provisions of the law. Human Rights Law §297 (4)(c)(vi). Further, 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).

The Respondents in this case shall not be assessed civil fines or penalties herein. As noted above, Respondents merely acted in accordance with their own rules. Their conduct cannot be considered egregious in any way. The board of Inwood Terrace has a duty to protect the rights of all its tenants and enforcing a no-pet rule can be regarded as such. It would be unjust to penalize Respondents for fulfilling their duties to their other tenants when they acted with no intent to discriminate.

The Human Rights Law also allows for awards of attorney's fees to prevailing Complainants in housing cases. In the instant case, Complainant's attorneys, Steven B. Sperber of Sperber Denenberg & Kahan, P.C., has submitted a retainer agreement along with invoices prepared for billing purposes, which show the hours expended by the firm. The retainer

agreement indicates that Mr. Sperber's time would be billed at $375.00 per hour and the time of his associate, Jacqueline Handel-Harbour, would be billed at $275.00. The timesheets indicate that the firm spent approximately 34.67 hours working on the case and billed Complainant $12,529.67, which includes expenses of $113.00. As a courtesy to Complainant, the firm billed her at a rate of $350.00 per hour for Mr. Sperber's time, despite the agreement to charge $375.00 per hour.

The amount of an award of attorney's fees in a case at the Division is determined by the "lodestar" method. See, *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.2d 421, 788 N.Y.S.2d 281 (2004); *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 176 Misc.2d 325 327, 672 N.Y.S.2d 230 (N.Y. Sup. 1997), *appeal dismissed*, 245 A.D.2d 269 (1st Dept. 1998), *appeal dismissed*, 93 N.Y.2d 919 (1999), *lv. denied*, 94 N.Y.2d 753 (1999). The lodestar method "estimates the amount of the fee award by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989).

A reasonable attorney's fee is "one calculated on the basis of rates and practices prevailing in the market, i.e. 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation' and one that grants the successful civil rights plaintiff a 'fully compensatory fee,' comparable to what 'is traditional with attorneys compensated by a fee paying client.'" *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989)(citation omitted).

The following should be considered in assessing the overall reasonableness of the hours expended: (1) hours that inefficiency or duplication of services may be discounted; (2) hours that are excessive, unnecessary or reflect "padding" should be disallowed; and (3) hours claimed should be weighed against the court's own knowledge, experience and expertise as to the time

required to complete similar activities. *McIntyre* at 232.

Complainant's attorneys expended just under 35 hours in litigating this matter. The retainer agreement is dated January 28, 2011, which means that the firm was involved in the case from its beginnings, before it was filed with the Division.

Complainant's attorneys charged $350.00 per hour for a partner's time and $275.00 for an associate's time. In Manhattan, where Complainant lives and the law firm is located, Courts have approved hourly rates as high as $520.00 for a senior partner in a Manhattan law firm. A rate or $365.00 per hour was considered acceptable for a junior partner with 12 years experience in landlord and tenant matters. Both Sperber and Handel-Harbour have more than 12 years experience and their hourly rate cannot be considered excessive. *Nestor v. Britt*, 16 Misc.3d 368, 374, 834 N.Y.S.2d 458, 462 (N.Y. Civ. Ct. 2007); See also, *140 West 28th Street Associates LLC v. 140 West Associates, LLC*, 32 Misc3d 1239, 938 N.Y.S 2d 228.

With respect to the hours expended on the case, the Division has determined that 57 hours for a similar case in which a tenant was permitted to harbor a dog as an accommodation to his disability was "fair and reasonable." *Erster v. Clearview Gardens Corp.*, DHR Case No. 5804550 (January 27, 2003). A review of the law firm's invoices shows no indications of "padding" or duplicative, unnecessary or excess charges. Given that fact, the expenditure of 35 hours by Complainant's attorney is reasonable. In addition, the firm expended one and one half hours preparing their fee request, which should also be awarded. *Solow Management Crop. V. Tanger*, 19 A.D.3d 225, 227, 797 N.Y.S.2d 456 (1st Dept. 2004), citing *David Z. Inc. v. Timur on Fifth Ave., Inc.*, 7 A.D.3d 257, 258, 77t N.Y.S.2d 242 (1st Dept. 2004). One and one-half hours, billed at a rate of $350.00 per hour amounts to $525.00. When this is combined with the amount actually billed to the client, the total award for attorney's fees is $13,054.67.

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 within fourteen days of the issuance of the Commissioner's Final Order, Respondents shall make a reasonable accommodation in housing to Complainant by withdrawing any eviction proceedings based upon a "no pets" rule; issuing a document to her stating that regardless of any Respondents rules, regulations, proprietary leases or previous agreements between the parties, she is permitted to keep her present dog in her apartment for the life of the dog; and, upon the demise of the dog, should Complainant require the reasonable accommodation of a comfort pet, such accommodation will be granted; and it is further

ORDERED, that Complainant's attorney's request for an award of attorney's fees is granted, and it is

ORDERED, that Respondent shall pay to Sperber Denenberg & Kahan, P.C. $13,054.67 for attorneys fees within 60 days of the date of this Order. Said payment shall be made by Respondent in the form of a certified check made payable to the order of Sperber Denenberg & Kahan, P.C. and delivered to 120 Broadway, Suite 948, New York, NY, 10271 by certified mail, return receipt requested; and it is further

ORDERED that Respondents shall simultaneously furnish written proof of their compliance with all of the directives contained within this Order to Caroline Downey, General Counsel of the Division at her office address at One Fordham Plaza, 4th Floor, Bronx, New York,

10458. Respondent shall cooperate with the Division during any investigation into their compliance with the directives contained in this Order.

DATED: July 10, 2012
Bronx, New York

Thomas S. Protano
Administrative Law Judge