



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**CHRISTINE RUSSELL-BRUST,**

Complainant,

v.

**THE BAYBERRY CLUB HOMEOWNERS  
ASSOCIATION, INC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10149036

**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 February 28, 2013, by Margaret A. Jackson, 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: 5/10/2013  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER



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**CHRISTINE RUSSELL-BRUST,**  
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v.

**THE BAYBERRY CLUB HOMEOWNERS  
ASSOCIATION, INC.,**  
Respondent.

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

Case No. **10149036**

**SUMMARY**

Complainant alleges that she was unlawfully discriminated against on the basis of her disability when Respondent advised her that she was required to remove a brick walkway that she had installed in front of her home. The walkway that was installed was not in compliance with Respondent's bylaws. However, Complainant is seeking damages because Respondent's actions "agitated" her. After mediating with Complainant, Respondent offered Complainant a reasonable accommodation. Therefore, the complaint must be dismissed.

## **PROCEEDINGS IN THE CASE**

On May 25, 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 Katherine Huang, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on April 23, 2012, and May 14, 2012.<sup>1</sup>

Complainant and Respondent appeared at the hearing. Complainant was represented by Leeds Brown Law, P.C. by Gregory N. Filosa, Esq. of Counsel. Respondent was represented by Law Offices of Stephen J. McGiff, P.C., Stephen J. McGiff, Esq., of counsel.

On August 22, 2012, ALJ Margaret A. Jackson was reassigned to this case pursuant to N.Y.C.R.R. § 465.12 (d) (2).

## **FINDINGS OF FACT**

1. Respondent is a condominium community which consists of 32 units. (T2 at 70)
2. In 2000, Complainant was diagnosed with systemic lupus nephritis. (T1 at 22)
3. Complainant’s medical condition causes damage to her joints and extremities, specifically her hands, feet, and thighs. As a result, any extensive walking results in nerve pain and she must use a cane. (T1 at 23-24)

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<sup>1</sup> The transcript dated April 23, 2012, is indicated as T1. The transcript dated May 14, 2012, is indicated as T2 throughout the order.

4. In 2006, Complainant and her husband bought a condominium in Respondent's community. (T1 at 68)

5. Respondent has a Homeowners Association (Board) consisting of a president and four members who are homeowners. The Board handles the day to day operations of the community. (T2 at 70)

6. Respondent's offering plan and bylaws for the community require a formal request to the Board for approval for changes to exterior design and location in relation to surrounding structures, including walkways. (T2 at 93-94, 105)

7. In 2002, community resident John Dolan, who has a disability, re-bricked his walkway. Dolan was required to reinstall the brick walkway to its original specifications because it was not uniform with the other walkways in the community and it did not comply with the bylaws. (T2 at 102; Respondent's Exhibit 5)

8. In 2006, the rain gutter on Complainant's home overflowed and the water caused the bricks on her walkway to shift and become slippery when it iced over. (T1 at 27-28)

9. During this time, Complainant and her husband used their garage for ingress and egress from their home because they were afraid of slipping and falling if they used the front walkway. (T1 at 28)

10. On November 27, 2006, Complainant submitted a request to Respondent's Board to repair the gutter on her home. On December 3, 2006, the gutter was repaired. (T2 at 72 )

11. In 2008, Complainant changed her attic fan and garage door after speaking with John Dolan, who had become the President and Operations Manager of the Homeowners Association. Complainant did not submit a formal written request to Respondent's Board. (T1 at 17-18)

12. In February 2008, Complainant submitted a formal written request to Respondent to install a handrail for her front porch. Dolan verbally approved Complainant's request. (T2 at 89)

13. In 2009, Complainant spoke to Dolan on her front lawn, telling him that she and her husband wanted to change their walkway. (T2 at 73-74)

14. In June 2009, Complainant and her husband hired a contractor to reset the bricks on her walkway but the contractor told them that the walkway's foundation needed to be replaced. (T2 at 29-30)

15. In June 2010, Complainant told Dolan that she and her husband were replacing her walkway. Dolan told Complainant and her husband if they kept the walkway the same color, red, with 4x8 size bricks, reusing the same bricks or red 4x8 pavers, they would not need to submit a formal written request to change the walkway because it would not necessarily be considered a change. (Tr. 109) Dolan then said that he would have the contractor that Respondent uses in the community, JA Masonry, contact them for an estimate. Complainant did not want to use Respondent's contractor. (T1 at 34)

16. Complainant and her husband obtained three estimates from other masons including Cambridge pavers. Complainant's husband discussed Complainant's medical condition with the Cambridge paver contractor and he recommended large bricks with beveled edges for better footing. (T1 at 34)

17. On July 9, 2010, Complainant and her husband had the Cambridge paver they selected reinstall their walkway using large beveled bricks in a bright onyx color with bluish accents. The mason also extended the walkway 7 inches into the driveway. (T1 at 35; T2 at 76)

18. On August 30, 2010, the Board sent Complainant a letter stating that she must submit a request in writing with specifications, in advance for approval, if she anticipated doing any

outside work. The letter also stated that her walkway was not done in compliance with the other community walkways because the walkway was not a standard red brick or red paver brick size and it needed to be squared off, eliminating the 7 inch extension. (T1 at 42, 44-45; Complainant's Exhibits 2, 4, 5)

19. Complainant responded to the Board's letter by removing the 7 inch extension and sending a letter to the Board requesting a meeting to discuss the walkway. (T1 at 42)

20. On September 3, 2010, Complainant received a notice from Respondent containing a list of approved vendors for any required work. (T1 at 44)

21. On September 9, 2010, Ed Bonner, then President of the Board, scheduled a meeting with Complainant for September 13, 2010, and informed her that her new walkway violated the bylaws because the bricks were not the proper size and color. (T2 at 52-53)

22. On September 15, 2010, Complainant sent a letter to her neighbors and Respondent, notifying them that she has lupus with a lengthy description of what lupus is and an explanation that the newly installed bricks in her walkway would accommodate her. Complainant included the dimensions of the bricks, pictures of the bricks, applicable sections of the Fair Housing Act (FHA) and the American with Disabilities Act (ADA). (Complainant's Exhibit 6)

23. Dolan contacted the manager from Cambridge pavers to inquire whether their pavers were ADA compliant. (T2 at 122-123)

24. Dolan was unaware of Complainant's medical condition. He thought the issue with compliance with the bylaws presented legal issues, and retained an attorney. (T2 at 124, 147)

25. Dolan also asked Complainant to submit proof that the bricks she selected were better for her medical condition. Ed Safrey, Vice President of the Board, told Complainant the Board would review documentation from Cambridge pavers and get back to her. (T2 at 80)

26. At the September 15, 2010 meeting, Complainant told Respondent that she had never submitted a formal request before making renovations, and that she did not believe she needed one for her walkway. (T2 at 49)

27. After the meeting, Complainant became agitated. (T2 at 15; ALJ 1)

28. On October 14, 2010, the Board sent Complainant notification that it would seek legal action if she did not undo the changes to her walkway because the Board had established a uniform guideline that require all bricks/pavers to be 4 x 8 inches in size and red in color. Complainant was given 15 days from the date of the letter to make the requested changes. (T1 at 56; Complainant's Exhibit 7)

29. On November 12, 2010, Complainant received a letter from Respondent stating that it was prepared to request a court order to compel Complainant to comply with its rules by removing the driveway. (T2 at 58)

30. On March 1, 2011, Complainant and her attorney met with Respondent to mediate the walkway issue. Complainant stated that because of her medical condition, she needed the walkway to assist her walking in and out of her house. (T1 at 58)

31. After meeting with the attorneys, the Board offered to install another handrail the length of the walkway as an accommodation. The Board also offered to for the reinstallation of the walkway, provided she and her husband pay them back in installments or keep the walkway and return it to its prior specifications when they left. (T2 at 131-32)

32. Shortly thereafter, on May 25, 2011, Complainant filed the instant complaint. (ALJ 1)

33. Complainant still has the walkway which the Cambridge paver installed. (T2 at 24)

## OPINION AND DECISION

Under the Human Rights Law, a disability is defined 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.” A disability may also be a record of such impairment or the perception of such impairment.” Human Rights Law § 292.21. This definition has been interpreted to include any medically diagnosable impairments and conditions which are merely “diagnosable medical anomalies.” *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 219, 491 N.Y.S.2d 106, 109 (1985).

The Human Rights Law provides that it is 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” (Human Rights Law § 296 [18] [2]). To establish a violation of the Human Rights Law for failure to provide a reasonable accommodation, the Complainant must establish a disability; Respondent knew of her disability or should reasonably be expected to know of it; the accommodation must be necessary in order for the Complainant to use and enjoy his or her dwelling; and the Respondent refuses to make such an accommodation. *Matter of One Overlook Ave. Corp. v New York State Div. of Human Rights*, 8 AD3d 286 (2004).

By definition, Complainant has a disability under the Human Rights Law. Other residents, including Dolan, were granted requests to change their walkways as long as they complied with the bylaws which required using red 4x 8 bricks. An accommodation should not extend a preference to disabled residents relative to other residents, as opposed to affording them equal opportunity. Accommodations that go beyond affording a disabled tenant an equal

opportunity to use and enjoy a dwelling are not required by law. *Hubbard v. Samson Mgmt. Corp.*, 994 F.Supp.187 (1998) Complainant never produced evidence that but for the accommodation, she would be denied an equal opportunity to use and enjoy her dwelling.

Further, there is no evidence that Respondent Board members knew about Complainant's medical condition or that she provided medical documentation to support her request for a reasonable accommodation. Nonetheless, once the Board became aware of her medical condition it did not refuse to offer an accommodation. In fact, Respondent engaged in mediation in order to review and make a final decision with respect to Complainant's request. Complainant submitted a letter to Respondent describing her medical condition along with copies of sections of the FHA and ADA. Nonetheless, after engaging in an individualized interactive process, mediation, a choice of reasonable alternatives as an accommodation, including retaining the walkway she installed, was offered to Complainant. Complainant chose to retain the walkway. Until an accommodation is denied, there is no unlawful discrimination. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1219 (11 thCir. 2008)

There is no evidence that Respondent unlawfully discriminated against Complainant. Therefore, her 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: February 28, 2013  
Hempstead, New York

A handwritten signature in black ink that reads "Margaret A. Jackson". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

Margaret A. Jackson  
Administrative Law Judge