ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **JABRINE L. TAYLOR,** Complainant, v. **RICHARD PACCONE,** Respondent.	**NOTICE AND FINAL ORDER** Case No. 10138880

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 9, 2011, by Edward Luban, 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: MAR 11 2011
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

JABRINE L. TAYLOR,

Complainant,

v.

RICHARD PACCONE,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10138880**

SUMMARY

Complainant alleged that Respondent unlawfully terminated her tenancy because she filed a discrimination complaint with the New York State Division of Human Rights ("Division"). Because the evidence does not support the allegations, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On February 2, 2010, Complainant filed a verified complaint with the 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 Edward Luban, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on October 27, 2010.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent was represented by Thomas J. Valerino, Esq.

At the close of the presentation of Complainant's case, Respondent moved to dismiss the complaint for failure to present a prima facie case. ALJ Luban reserved decision on Respondent's motion. (Tr. 151-52)

Permission to file post-hearing briefs was granted. The Division waived submission of a brief. Respondent submitted proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent is the owner of a residential property located at 102-104 Shotwell Park, Syracuse, New York ("Shotwell"). Respondent's wife owns a residential property located at 1506-1508 Teall Avenue in Syracuse ("Teall").[1] Each property contains two apartments. (Tr. 225)

2. Respondent and his wife do not reside in Syracuse. They have an "RV" and stay at Brennan Beach in Pulaski, New York in the summer and in Florida during the winter. (Tr. 223)

3. Respondent has only a minimal role in dealing with his tenants. William Torres, who resides at Shotwell, is Respondent's property manager. Torres maintains Shotwell and Teall, collects rent at both properties, has direct contact with the tenants, and makes final decisions concerning the properties and the tenants. Michele Torres, Torres' wife, helps him manage the properties. (Tr. 155-57, 167, 170, 176, 217, 229)

[1] Teall is spelled "Teal" in the transcript.

4. In October 2008, Complainant and her two daughters moved into Shotwell. Complainant had a written lease for one year at a monthly rent of $825.00. After the lease expired, Complainant remained in Shotwell as a month-to-month tenant. (Tr. 51, 117, 146)

5. After several months at Shotwell, Complainant began receiving rental assistance from the Department of Social Services ("DSS"). DSS paid a portion of Complainant's rent directly to Respondent each month. Complainant was responsible for the balance of the rent. The amounts to be paid by DSS and Complainant fluctuated, but at all times DSS paid a substantial portion of the rent, which remained $825.00 per month. This arrangement lasted until approximately January 2010. (Tr. 160-63)

6. Complainant acknowledged that she was behind in her rent most of the time she resided at Shotwell. Her rent payments were "sporadic." (Tr. 77, 166)

7. Torres spoke with Complainant several times about her arrears, which included a balance for two months of utility service. Torres and Complainant made several agreements for payment of the arrears. Complainant did not comply with these agreements. (Tr. 104, 166-67, 170)

8. On June 17, 2009, Complainant and Michele Torres entered into a written agreement for payment of $1,677.19 Complainant owed Respondent. Complainant agreed to pay $200.00 each week from June 23 through August 11, 2009 and $77.19 on August 18, 2009. Complainant also agreed to pay $53.00, her share of the monthly rent, on July 21, August 18, and September 1, 2009. (Tr. 101, 104; Respondent's Exh. 3)

9. On July 8, 2009, Torres gave Complainant a notice terminating her lease and asking her to vacate Shotwell by August 8, 2009. Complainant sent Respondent a text message about the

notice. Respondent told Torres that he would address the issue when he was in Syracuse. (Tr. 171, 195; Respondent's Exh. 8)

10. On July 10, 2009, Complainant met with Torres, Michele Torres, Respondent, and Tylyn Bozeman, an attorney who was the law guardian for Complainant's children. At the meeting, Torres said that he wanted Complainant to vacate the apartment because she was not paying the rent. Respondent proposed that Complainant move to an apartment at Teall. Respondent believed that the Teall apartment would be more affordable because the rent was only $625.00 per month, $200.00 less than Complainant's rent at Shotwell. In addition, Respondent believed that the apartment at Teall, which has no stairs, would be more suitable for Complainant, who has a disability and had fallen down the stairs at Shotwell. (Tr. 116, 170, 172-75)

11. At the meeting, the parties agreed to revise the June 17 agreement by moving the payment schedule back two weeks. Under the revised agreement, Complainant's final payment of $77.19 was due on September 1, 2009, together with $53.00 for September rent. (Respondent's Exh. 3)

12. The revised agreement also provided, "One missed payment and/or lack of communication will nullify this agreement and eviction process take [*sic*] place." (Tr. 93; Respondent's Exh. 3)

13. Complainant, Torres, Michele Torres, and Bozeman signed the revised agreement. (Tr. 99, 101, 176; Respondent's Exh. 3)

14. Complainant did not make all of her payments under the agreement, and she did not bring her payments current by September 1, 2009, as the agreement required. (Tr. 94, 111, 113, 177, 218)

15. In or around October or November 2009, Torres told Respondent that he wanted to evict Complainant. Respondent told Torres to give Complainant more time. Torres also spoke with Respondent's attorney, who asked Torres to delay any eviction proceeding until after the holidays. (Tr. 177, 201, 219-20)

16. In November 2009, Torres notified Complainant by text message that he would file for an eviction in January. (Tr. 177-79)

17. On December 31, 2009, Complainant filed a complaint against Respondent with the Division. (Tr. 14)

18. The Division sent a copy of the complaint to Respondent at his post office box in Liverpool, New York. The Division did not establish the date it mailed the complaint to Respondent. (Tr. 150, 232)

19. Respondent's daughter Monica picked up the Division's mailing from Respondent's post office box and forwarded it with other mail to Respondent in Florida. (Tr. 232, 235)

20. On or about January 5 or 6, 2010, Torres sent Complainant a registered letter giving her 60 days to vacate her apartment. Complainant did not accept the letter; it was returned unopened. (Tr. 180)

21. In or about the period January 8 to 11, 2010, Torres served Complainant with a 60-day notice to quit terminating her tenancy. Torres gave Complainant 60 days instead of the legally required 30 days so that she and her daughters would not have to move out during the winter. (Tr. 58, 180, 220; Complainant's Exh. 1)

22. Torres terminated Complainant's tenancy because of her continual failure to pay the rent. (Tr. 194, 245, 249)

23. I take official notice that December 31, 2009 was a Thursday. Because of the intervening New Year's Day holiday and weekend, and because Complainant's first complaint was sent to Respondent's post office box in Liverpool, was then forwarded to Respondent in Florida, and was not sent to Torres, I credit Torres' testimony that he was unaware of the complaint at the time he served the notice to quit. (Tr. 181)

24. On January 12, 2010, Respondent sent the Division a response to Complainant's first complaint. Respondent prepared this response between January 10 and 12, 2010. (Tr. 242, 247-48; Complainant's Exh. 2)

25. The Division investigated Complainant's first complaint and found no probable cause to support her allegations. (Tr. 14)

26. After Torres served the 60-day notice to quit, Respondent continued to offer Complainant the apartment at Teall. Torres made appointments for Complainant to view the apartment, but Complainant did not keep the appointments. (Tr. 185, 203, 244, 249-50; Respondent's Exhs. 7, 9)

27. Complainant remained in her apartment after the expiration of the 60-day notice period. Subsequently, Respondent brought a holdover eviction proceeding against Complainant in Syracuse City Court. On April 13, 2010, that proceeding was heard before the Hon. Vanessa Bogan, who issued an order and warrant of eviction. (Tr. 39-40, 66, 147-48; Respondent's Exh. 6)

28. On April 30, 2010, the City Marshal executed the warrant of eviction and removed Complainant from Shotwell. (Tr. 12-13, 39-40)

29. In this proceeding, Complainant does not challenge the legitimacy of the City Court eviction proceeding. (Tr. 39-40)

OPINION AND DECISION

It is an unlawful discriminatory practice for a property owner to retaliate against a tenant because she has complained about discrimination. Human Rights Law §296.7. To prove a prima facie case of retaliation, Complainant must establish that she engaged in protected activity, that Respondent was aware she engaged in such activity, that she suffered an adverse action based on such activity, and that there was a causal connection between the protected activity and the adverse action. *Pace v. Ogden Services Corp.*, 257 A.D. 2d 101, 104, 692 N.Y.S. 2d 220, 223-24 (3d Dept. 1999); *Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F. 3d 35, 54 (2d Cir. 2002). If Complainant meets this burden, Respondent must present a legitimate, non-discriminatory reason for his action. If Respondent does so, Complainant must show that the reason Respondent has presented was merely a pretext for discrimination. *Id.*

Complainant engaged in protected activity when she filed her first complaint with the Division. Complainant suffered an adverse action when Torres served her with the 60-day notice to quit. A causal connection between Complaint's complaint and the service of the notice to quit could be inferred because Torres served the notice just eight days after Complainant filed her Division complaint. *Velez v. Frion Realty Corp.*, 300 A.D. 2d 103, 104, 750 N.Y.S. 2d 847-48 (1st Dept. 2002). However, Complainant did not establish that Torres was aware of her complaint at the time he served the notice to quit. Complainant did not establish when the Division notified Respondent of Complainant's complaint or when Respondent received such notice, and Torres credibly testified that he was not aware of the complaint when he served the notice to quit.

Even if the temporal connection between Complainant's filing of her complaint and

Torres' service of the notice to quit was sufficient for a prima facie case of retaliation, Respondent has presented a legitimate, non-discriminatory reason for his action. Torres terminated Complainant's tenancy because of her ongoing failure to pay rent. Torres sought to evict Complainant for this reason well before she filed her Division complaint. On July 8, 2009, Torres served Complainant with a termination notice. That notice was resolved by the revised repayment agreement the parties signed two days later, but Complainant did not comply with the agreement. In October or November 2009, Torres told Respondent and Respondent's attorney that he wanted to evict Complainant. Respondent and his attorney asked Torres to wait until after the holidays. In November 2009, in accordance with Respondent's request, Torres notified Complainant that he would begin eviction proceedings in January.

Complainant failed to prove that Respondent's explanation for his actions was a pretext for discrimination. Complainant acknowledged that she was behind in her rent throughout her tenancy. In addition, Complainant presented no evidence that Respondent had a retaliatory motive. On the contrary, Respondent took steps to accommodate Complainant even as he proceeded with the eviction. Because Complainant was a month to month tenant, Respondent could have terminated her tenancy by giving her one month's notice. New York Real Property Law § 232-b. However, Torres gave Complainant 60 days' notice so that she and her children would not have to move out during the winter. Respondent also continued to offer Complainant a more affordable apartment at Teall. These actions are inconsistent with an intent to retaliate against Complainant.

The ultimate burden of proving unlawful discrimination always remains with Complainant. *Ferrante v. American Lung Ass'n.*, 90 N.Y.2d 623, 630, 665 N.Y.S. 2d 25, 29 (1997). Because Complainant failed to sustain her burden, the 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 9, 2011
Syracuse, New York

Edward Luban
Administrative Law Judge