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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN A. RAKOWER**

PART \_\_\_\_\_

*Justice*

Index Number : 400054/2009
<b>BLANDON, RICHARD A., SR.</b>
VS.
<b>MANHATTAN NORTH MANAGEMENT CO. INC.</b>
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 400054-09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

2, 3, 4, 5, 6

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

APR 03 2009

COUNTY CLERK'S OFFICE  
NEW YORK

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

  
**HON. EILEEN A. RAKOWER**

Dated: 3/31/09

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
In the Matter of the Application of  
RICHARD A. BLANDON, Sr.,

Index No. 400054/09

Petitioner,

-against-

DECISION and ORDER

Mot. Seq. 001

MANHATTAN NORTH MANAGEMENT CO., INC.  
NEW YORK STATE DIVISION OF HUMAN RIGHTS

Respondent

-----X  
HON. EILEEN A. RAKOWER:

Petitioner Richard A. Blandon, Sr. ("Petitioner"), proceeding *pro se*, brings the instant Article 78 Petition to set aside Respondent New York State Division of Human Rights' ("State Division") finding that no probable cause existed to believe that Respondent Manhattan North Management Company, Inc. ("Manhattan North") had engaged in unlawful discriminatory practices.

Petitioner was employed by Manhattan North as an Apartment Inspector from September 29, 2006 until November 14, 2007. As an Apartment Inspector, Petitioner's duties involved inspecting vacant and occupied apartments managed by Manhattan North to determine whether repairs to the premises were required and to confirm the status of finished improvements. Petitioner's employment was on an at-will basis. Petitioner was terminated by Manhattan North on November 14, 2007. The stated reason for his termination was that Petitioner was deemed to have abandoned his position after failing to report to work for four consecutive workdays without providing any notice or justification to Manhattan North.

Petitioner, proceeding *pro se*, subsequently filed a complaint with the State Division, claiming that he was terminated in retaliation for speaking out regarding incidents of racial discrimination at the workplace. Petitioner alleged that, in March of 2007, Petitioner (who is African-American) asked co-worker Richard Colon about the possibility of moving into an apartment which had recently become available. Colon allegedly told Petitioner that he needed to "look out for

[his] people" (referring persons of Hispanic descent), but that Petitioner might be able to find Petitioner a place in another apartment complex. When Petitioner asked Colon why he would put Petitioner and his family in a rat-infested apartment complex, Colon responded "That's what they're there for."

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Petitioner also alleged that, on June 29, 2007, he got into a verbal altercation with Ben Windom, his supervisor. During the argument, Mr. Windom (who is also African-American) allegedly threatened to retrieve a firearm and shoot Petitioner. Petitioner claims that his workload began to decrease in the weeks following the altercation.

According to Petitioner, on September 25, 2007, the maintenance crew had a class on sexual harassment at the work place, and that at this time, Petitioner broached the issue of discrimination in the workplace to his supervisors, citing the conversation with Colon and the verbal altercation with Windom. That same day, Petitioner received an e-mail from Manhattan North's Human Resources Manager Sary Matos informing that there would be a mandatory meeting the next day. The meeting was attended by Petitioner, Windom, Manhattan North Vice President Steven Carter, Matos, and Manhattan North Executive Vice President David Berezin. During the meeting, the parties discussed the June 29, 2007 altercation between Petitioner and Windom, and Windom admitted making the comment about getting his gun in the heat of the moment. Berezin did not take any action against either Petitioner or Windom; however, both received verbal admonishments that they would be terminated if there were any further altercations between the two.

Petitioner further alleged that, on November 7, 2007, he was falsely accused by Berezin of authorizing excessive and improper improvements upon two Manhattan North apartments, including his own apartment, and threatened Petitioner with termination from Manhattan North if he did not pay for the repairs. Petitioner told Berezin that he refused to pay for the improvements because he did not authorize them, and asked if this meant that he was terminated. Berezin responded, "Well..." which Petitioner interpreted to be an answer in the affirmative. Accordingly, Petitioner did not report for work. Petitioner subsequently received a letter from Manhattan North informing him that he was being terminated for abandoning his work.

In addition to the above, Petitioner claimed that he was repeatedly denied raises while others with comparable or less experience received raises; and that Manhattan North failed to compensate Petitioner for overtime and vacation. He also alleged that Manhattan North's failure to hire his son constitutes further evidence of their discriminatory practices.

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Manhattan North submitted a position statement in response to Petitioner's complaint. With respect to the conversation between Petitioner and Colon, wherein the latter was alleged to have made racially derisive comments towards Petitioner, Manhattan North stated that the matter was promptly and thoroughly investigated. Specifically, after Petitioner complained to Matos, she convened a meeting with Petitioner, Colon, and Berezin. At this meeting, Colon strongly denied making any racially incendiary comments, but nevertheless apologized to Petitioner if he misunderstood something Colon said to have been racially insensitive, and assured Petitioner that he would be more careful in the future. Moreover, Berezin verbally admonished Colon to be more careful in choosing his words. From the time following this meeting until Plaintiff's termination, Plaintiff did not raise any further complaints regarding any racially insensitive conduct on the part of Colon.<sup>1</sup>

As for the altercation between Petitioner and Windom, Manhattan North asserted that Berezin convened a meeting in June 2007 with the two shortly after Petitioner reported the incident to Matos, who in turn informed Berezin. At this meeting, both Petitioner and Windom dismissed the altercation as an isolated incident in which both individuals were hot-headed. Petitioner again complained about the altercation with Windom at the sexual harassment class, which prompted the second meeting (referenced above) in which both were verbally admonished.

Manhattan North stated that, in or around October 2007, it received an invoice from one of its contractors containing charges for excessive and inappropriate improvements made to Petitioner's apartment, as well as to the apartment of another Manhattan North employee, at Petitioner's request. The contractor advised that the work was authorized by Petitioner. This work included the installation of a custom ceramic wall and floor tiles in the kitchen of both apartments, and the use of custom paint throughout Petitioner's apartment, all of

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It should also be noted that the State Division's investigation determined that Colon had no authority to give Petitioner the apartment he inquired about, and that the apartment was subject to an substantial waiting list of applicants.

which was contrary to company procedure. Further, Petitioner failed to have this work approved by a supervisor, as required by company policy. Manhattan North estimated that the improvements authorized by Petitioner on the two apartments resulted in an overcharge of approximately \$6,000.

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On November 7, 2007, Berezin held a meeting with Matos, Manhattan North CFO Jonathan Warner, and Petitioner regarding the invoice. Petitioner admitted to ordering the improvements, but claimed that he personally paid the contractor for them. Manhattan North alleged that, when confronted about the charges, Petitioner became belligerent and stormed out of the meeting while it was still in progress. When Petitioner returned, Berezin offered Petitioner the option of paying 50% of the overcharges in an installment plan. Petitioner responded, "Do what you have to do, I'm not paying anything," and stormed out of the room.

After the November 7 meeting, Petitioner failed to report to work for four consecutive days. Petitioner did not contact anyone at Manhattan North or otherwise explain his absence. On November 14, 2007, Petitioner was terminated by Manhattan North on the grounds that he had abandoned his job, as per company policy. Petitioner subsequently wrote a letter to Manhattan North stating that he thought that he had been terminated on November 7, 2007. In that letter, Petitioner stated that he had interpreted Berezin's reply of "Well..." (in response to Petitioner asking if his refusal to pay for the improvements would result in his termination) to indicate that he was terminated at that time.

With respect to Petitioner's claims that Manhattan North failed to give Petitioner proper pay raises, Manhattan North contended that it did in fact give Petitioner a 3% raise in 2007 – the same amount as all other employees. Manhattan North also asserted that it did in fact compensate Petitioner for any overtime worked. Further still, Manhattan North stated that there is no record that Petitioner ever sustained a work-related injury that would entitle him to disability benefits.

As for Manhattan North's refusal to hire Petitioner's son to assist him, the company maintained that hiring Petitioner's son to work under his supervision would pose a conflict of interest. While Windom's son worked with Windom previously, Windom's son was hired by the prior management and before this policy was in effect. Moreover, Matos advised Petitioner that Berezin would inform Petitioner as to any job openings for his son where such employment would not create a conflict.

The State Division conducted an investigation of Petitioner's claims which entailed the review of the parties' position statements and their annexed exhibits; documents actively sought by the State Division in the course of its investigation; and numerous interviews with Petitioner, Manhattan North employees, and other persons familiar with the circumstances and allegations surrounding Petitioner's complaint. In addition, the State Division conducted a three hour fact-finding conference in which Petitioner and Manhattan North participated. On November 13, 2008, the State Division concluded that no probable cause exists to suspect that Manhattan North had engaged in unlawful discriminatory practices against Petitioner.

Petitioner now seeks to have the State Division's determination overturned on the grounds that the State Division "did not properly investigate [his] case." Petitioner has submitted a Notice of Petition and Verified Petition. Annexed to the latter as exhibits are the State Division's November 13, 2008 decision; Manhattan North's November 14, 2007 letter terminating Petitioner; various correspondence between Petitioner and Manhattan North employees; records of counseling meetings regarding the altercation with Windom and the improvements to Petitioner and another individual's apartment; and other documents submitted to the State Division which Petitioner claims the State Division overlooked in reaching its conclusion.

The State Division has submitted an Answer and has filed the record of the State Division proceedings at issue in this Article 78 proceeding. However, the State Division has stated that it is not actively participating in this matter as Manhattan North and Petitioner are the real parties in interest.

Manhattan North has submitted a Verified Answer, an Affirmation in Opposition, and a Memorandum of Law in Opposition to the Petition. Annexed to Manhattan North's Affirmation in Opposition is a copy of the complaint filed by Petitioner with the State Division; Manhattan North's position statement filed with the State Division with its respective exhibits; the State Division's request for additional information from Manhattan North and its written responses; a State Division memorandum chronicling its investigation into Petitioner's claims; the State Division's November 13, 2008 determination; and Petitioner's Article 78 Petition.

It is well settled that the “[j]udicial review of an administrative determination is confined to the ‘facts and record adduced before the agency’.” (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency’s determination but must decide if the agency’s decision is supported on any reasonable basis. (*Matter of Clancy-Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency’s determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency’s determination “arbitrary and capricious” if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

The First Department has held that where, as here, a petitioner is challenging a State Division determination of no probable cause made without holding a public hearing pursuant to Executive Law §297(4)(a), “the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis” (*McFarland v. New York State Div. Of Human Rights*, 241 A.D.2d 108, 111 [1st Dept. 1998]) (citations omitted).

The Court of Appeals has observed that the standard for establishing an unlawful discriminatory practice under Executive Law §296 mirrors the standard in Title VII cases. First, a complainant is required to establish a *prima facie* case of discrimination by showing by a preponderance of the evidence that the complainant belongs to a protected class, and that he or she was discharged from a position for which he or she was qualified under circumstances giving rise to an inference of discrimination. If the complainant makes this *prima facie* showing, the burden of proof then shifts to the employer to demonstrate that the complainant was terminated for a legitimate, non-discriminatory reason. If the employer is successful, it is then for the fact-finder to determine whether the purported justification is pretextual. If the asserted non-discriminatory reason is found to be pretextual, the fact-finder is permitted - but not required - to infer discrimination (*Mittl v. New York State Division of Human Rights*, 100 N.Y.2d 326, 330 [2003]) (citation omitted).

Based upon the record before it, the court finds that the State Division’s determination of no probable cause to suspect Manhattan North of discriminating

against Petitioner was neither arbitrary and capricious, nor devoid of a rational basis. The State Division gave due consideration to Petitioner's allegations, conducting numerous interviews, considering documents submitted by Petitioner, holding a three hour fact-finding conference amongst the parties, and actively seeking out additional documentation from Manhattan North to further assess Petitioner's claims.

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There is nothing in the record which mandates the conclusion that Petitioner made even a *prima facie* showing of discrimination by Manhattan North. Manhattan North refuted Petitioner's various allegations and demonstrated that it immediately investigated Petitioner's complaints against Colon and Windom (who is also African-American) and took proper remedial action in each case. Moreover, even assuming for purposes of argument that Petitioner made a *prima facie* showing of discrimination before the State Division, Manhattan North demonstrated a legitimate, nondiscriminatory reason for Petitioner's termination.

Wherefore, it is hereby

ORDERED that the Petition to set aside the State Division's determination of no probable cause is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: March 31, 2009

  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
APR 03 2009  
COUNTY CLERKS OFFICE  
NEW YORK