To Be Argued By:
Michael J. Hutter, Esq.
Time Requested:
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NEW YORK SUPREME COURT
APPELLATE DIVISION – THIRD DEPARTMENT

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In Matter of CLIFTON PARK APARTMENTS, LLC as owner of PINE RIDGE II APARTMENTS and DAVID PENTKOWSKI, ESQ.,

Petitioners-Appellants,

#533592

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS, CITYVISIONSERVICES, INC. and LEIGH RENNER,

Respondents-Respondents.

BRIEF FOR PETITIONERS-APPELLANTS

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PRELIMINARY STATEMENT

This is a proceeding commenced by petitioner Clifton Park Apartments as owner of Pine Ridge II Apartments ("Pine Ridge") and petitioner David Pentkowski, Esq. ("Pentkowski") (collectively "petitioners") pursuant to CPLR article 78, Executive Law §298, and 22 NYCRR §202.57(c) to review a determination of respondent the Interim Commissioner of the New York State Division of Human Rights ("SDHR"), dated June 1, 2020, which adopted, with a modification, the Recommended Findings and Decision and Order of an Administrative Law Judge, dated May 14, 2019, made after a hearing, finding that petitioners wrongfully

retaliated against respondents CityVision Services, Inc. ("CityVision") and Leigh Renner (collectively "complainants") for their filing of a complaint with SDHR, alleging housing discrimination in violation of Executive Law §296(7), a complaint which had been dismissed by SDHR, and awarding complainants compensatory damages and attorneys' fees. (R20-27 [Determination, Notice and Final Order of SDHR]; R38-45) [Recommended Findings]). SDHR has filed a cross-petition pursuant to Executive Law §298 to confirm the determination. (R77-91 [Notice of Petition and Cross-Petition). The proceeding as commenced by petitioners, with the cross-petition of SDHR, was transferred to this Court by order of Supreme Court (James E. Walsh, J.), entered on January 12, 2021, in Saratoga County. (R4-5).[1]

The overarching issue is whether there is sufficient evidence in the administrative or original record before SDHR which supports its retaliation finding. Petitioners argue that record does not have the requisite sufficient evidence because complainants in presenting their case based their retaliation claim on a legal theory that has been rejected by the appellate courts, and failed to put forth evidence that would establish a *prima facie* case under the now controlling precedent. In this

[1] This appeal is being made pursuant to Rule 1250.12(b) of the Rules of Practice of the Appellate Division. The first part of the Record contains a copy of the order of transfer and copies of all submissions to Supreme Court as required by the Rule. The next part contains a reproduction of the administrative or original record before SDHR, as separately provided by SDHR, also required. The items in the original record are cited to the appropriate page of the Record on Appeal, and the original record as filed by SDHR, with the contents of that record cited by its description in SDHR's certification of that record.

regard, the record lack sufficient evidence as there is no testimony from that person and/or specific proof of what the discriminatory conduct involved consisted of, from which the requisite good faith, reasonable belief discrimination was involved could be established or inferred; and the conduct claimed to be retaliatory conduct, a letter written by Petitioner Pentkowski, an attorney, on behalf of his client, Petitioner Pine Ridge, in which complainants are advised that Pine Ridge is actively considering a law suit against them to recover the damages it incurred as a result of the false complaint filed by them, cannot as a matter of law be viewed as retaliatory conduct for purposes of a retaliation claim.[2] Alternatively, if this Court were to find that there is sufficient evidence in that record to support SDHR's determination, petitioners ask that this Court remand the matter to SDHR to consider evidence which was submitted to the ALJ in the underlying hearing but inexplicably not placed in the administrative or original record, evidence which petitioners assert establishes that there is no factual basis to support a retaliation claim,

QUESTIONS PRESENTED

1. Whether there is sufficient evidence in the administrative or original record before SDHR to support SDHR's determination that petitioners engaged in

[2] Petitioner submits this argument can and should be heard on the present original record before SDHR even though evidence of the claimed discrimination conduct, a recording of the underlying telephone conversation, was not placed in the original record although it was submitted to the ALJ presiding over the hearing at the ALJ.s request.

unlawful retaliation against complainants for their filing of a complaint with SDHR accusing petitioner Pine Ridge of unlawful steering with respect to the rental of its apartment.

2. If the Court concludes that there is sufficient evidence in the administrative or original record before SDHR to support SDHR's determination, whether this matter should be remanded to SDHR with instructions to consider upon further review a recording of the subject discriminatory telephone call which was before the ALJ who made the initial recommendation of a finding of retaliation, but not placed in the administrative or original record when the matter was before SDHR.

3. Whether the prevailing party in a proceeding before SDHR may recover the value of time it incurred in prosecuting a retaliation claim based on the filing of a complaint with SDHR.

4. Whether a prevailing party in a proceeding before SDHR may recover its attorneys' fees in prosecuting a retaliation claim.

5. Whether an attorney may be held personally liable for damages under a retaliation claim when the attorney's claimed retaliation was nothing more than the sending of a letter advising complainants that petitioner Pine Ridge was actively considering a law suit against them to recover damages caused by them by the filing of a false complaint, *e.g.*, classic legal representation conduct. representing a client.

STATEMENT OF THE CASE

Statement of Facts

Complainants filed a complaint with SDHR charging petitioners with an unlawful discriminatory practice relating to housing because of familial status in violation of Executive Law, Article 15 ("Human Rights Law") in February, 2016. Specifically, it was alleged that Pine Rudge, which operated and maintained a large apartment complex in Saratoga County, "steered" away complainant Renner from its complex once Renner disclosed over the phone to a rental agent for Pine Ridge that she had three daughters after Renner had been informed of availability of a rental at the complex. (R52-53 [complaint as included in petition]).

The telephone call to Pine Ridge was made by an employee of complainant CityVision, Leigh Renner, on November 9, 2016. CityVision, a Texas not-for-profit advocacy group, conducts fair housing testing. (R212-218; Hearing Transcript 35-41; 39, Findings of Fact 1-3). Through its employees it makes cold calls to apartment complexes throughout the United States, in which it is claimed the caller is seeking to rent an apartment. In the course of the call, the caller will provide certain information in an effort to see if the complex is refusing to rent on prohibited discriminatory grounds. CityVision also provides at a cost educational counseling against prohibited discriminatory rental practices to apartment. (R218; Hearing

Transcript 41). The call Renner made to Pine Ridge was a test to see if it was engaged in any practice of housing discrimination. She had no intent to rent from Pine Ridge.

Approximately 2-3 weeks after the complaint was filed with SDHR, CityVision sent a "conciliation offer" to Pine Ridge. (R60). In it, CityVision offered to resolve its complaint by Pine Ridge paying to it $2500.00 "for the diversion of funds/costs" as damages; submitting proof of training of Pine Ridge employees (which it sold); and updating its procedures to be compliant with FHA rules and regulations. (R60). Attorney Pentkowski made efforts to find out from CityVision what it was complaining about but was unsuccessful in its efforts. (R197-199; Hearing Transcript 20-22).

Following an investigation, SDHR dismissed the complaint. (R62-63). The investigation revealed that the website for the Pine Ridge apartment complex advertised "Shenendehowa Schools Nearby" from its complex, and that half of the apartments in the complex have children. Interviews with tenants with children revealed that they had never been treated differently because of their familial status. All of these facts "undermined" the allegations in the complaint that Pine Ridge discriminated against persons who have children.[3] A finding of "NO PROBABLE CAUSE" to believe that petitioners engaged in or are engaging in the unlawful

[3] It was apparently obvious to SDHR's investigator that CityVision and or Renner never did any background check on Pine Ridge before making its "test call."

discriminatory practice complained of was made and the complaint was dismissed. The determination was issued on June 30, 2017.

On July 25, 2017, petitioner David Pentkowski, Esq. sent a letter on behalf of his client Pine Ridge to CityVision (R152; Folder 3]). The letter stated that Park Ridge "considers the allegations [made in the complaint] false, fraudulent and libelous;" and that Park Ridge is "looking to CityVision and (Renner) for the damages they have sustained as a result of this wrongful conduct." The letter closed by a request for a resolution of the matter and if CityVision did not respond, "we will assume that you do not intend to take responsibility for the damages for these actions and will proceed accordingly."

Complainants in response filed a complaint with SDHR alleging that petitioners Pine Ridge and attorney Pentkowski violated Executive Law §296 (7) by reason of the letter, claiming the letter was unlawful retaliation against them, made because they had filed a discrimination complaint against them with SDHR.

Administrative Proceedings

A hearing was held before ALJ Thomas Protano on June 25, 2018. (R178-257; Hearing Transcript 1-242). At the hearing, the complainant's proof was the complaint they had filed and the letter attorney Pentkowski had written as well as a prior letter he had sent to CityVision, which letters he testified at the hearing he sent. No evidence about the basis por the reason for the original complaint was offered.

Complainants took the position that unlawful retaliation was present by the mere sending of the letter, and the fact that the complaint was dismissed with a determination stating there was no evidence of any discriminatory conduct was irrelevant. In other words, the contents or basis of the dismissed complaint were wholly irrelevant as all that was necessary to prevail is proof that a letter was sent threatening legal action Attorney Pentkowski argued there could be no unlawful retaliation, assuming the letter was even an act of retaliation, where the allegations were false, as he asserted them to be.

At the hearing, CityVision based upon its above referenced theory did not introduce any evidence regarding the contents of the telephone call that was the basis for their initial complaint and the ensuing retaliation complaint they filed *after* that initial complaint was filed. They only offered, in addition to the calling of attorney Pentkowski as a witness, the testimony of Gary Lacefield, a principal of CityVision. (R171; Folder 2, Ex. 5). He testified that he "disagreed with the findings" made in the June 30, 2017 determination (R219-220; Hearing Transcript 42-42). Notably, after Mr. Lacefield testified, attorney Winchell asked the ALJ if he had the recording of that telephone call to which the ALJ said "No." (R226-227; Hearing Transcript 49-50). It was then disclosed that CityVision had recorded the telephone call Renner had initially made. Attorney Pentkowski was unaware of that recording. In response, complainants' attorney stated he would make a copy of the recording,

which he had not reviewed, and provide it to the ALJ who acknowledged that there would be no authentication issue. The ALJ then said: "Get me a CD - - with an affidavit from whoever prepared it." The ALJ added the affidavit would be sufficient for authentication and "I'll include it after the fact." (R226-229; Hearing Transcript, pp. 49-52). Right before the hearing was closed, the ALJ stated: "Just get me the recording." (R240; Hearing Transcript 63). A copy of the CD was concededly sent to the ALJ and to attorney Pentkowski. However, for some reason (undisclosed) the ALJ did not include it in the administrative or original record.[4]

Additionally, after the close of the hearing the ALJ on August 2, 2018 sent a letter to the parties advising that he realized that he had not taken any evidence of complainants' diversion of resources and attorney's fees. (R97). He requested complainants to submit a sworn statement of those damages claims, and gave permission to petitioner to file objections thereto. (*Id*.).

On May 14, 2019, the ALJ issued "Recommended Findings of Fact, Opinion and decision and Order." (R38-45). He found that petitioners unlawfully retaliated against complainants as charged; and decreed as a civil fine and penalty $2,500.00; and awarded $4,775.00 as damages for CityVision's diversion of resources. In concluding there was a violation, the ALJ found "[petitioners] have not shown that

[4] By order dated October 7, 2021, this Court granted petitioners' motion to permit them to supplement the Record on Appeal with a copy of the CD disc and a transcript of the telephone call. (R262-265). This material is not used in Petitioners' Point I. It is discussed in Point II.

Complainants' allegations were made in bad faith and, therefore, Complainants should prevail." (R42). However, he did not make an award of attorney's fees, concluding that such an award was not authorized under the Human Rights Law. (R43).

SDHR adopted the Recommended Order of the ALJ with a modification. It was of the view that attorney's fees could be awarded and made an award of $10,993.50. (R20-270).

ARGUMENT

POINT I

SDHR'S DETERMINATION THAT PETITIONER ENGAGED IN UNLAWFUL RETALIATORY CONDUCT IN VIOLATION OF EXECUTIVE LAW §296(7) IS NOT SUPPORTED BY SUFFICIENT EVIDENCE IN THE RECORD BEFORE SDHR AS A WHOLE, AND THUS, MUST BE ANNULLED

A. Introduction

1. Governing Law

Pursuant to Executive Law §296(7), it is:

> an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

In order to establish a *prima facie* case of unlawful retaliation, complainants have the burden to show:

> (1) [they] engaged in activity protected by Executive Law §296, (2) [Petitioners were] aware that [they] participated in the protected activity, (3) [they] suffered from a disadvantageous … action based upon [their] activity, and (4) there is a causal connection between the protected activity and the adverse action taken by [Petitioners].

(*Pace v. Ogden Servs. Corp*., 257 AD2d 101, 104 [3d Dep't 1999]; *see also Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Graham v. New York State Off. Of Mental Health*, 154 AD3d 1214, 1220-1221 [3d Dept. 2017]; *Div. of Human Rights on the Complaint of Maureen Hagen v. Selden Fire Dist.*, SDHR Case No. 1016, 7061, 2015 WL 13844059, *3).

Here, the protected activity was complainants' filing of a discrimination claim with SDHR alleging that petitioners engaged in prohibited discrimination in violation of Executive Law §296(5)(a)(1) by "steering" Ms. Renner away from a rental of an apartment in petitioner's Clifton Park Apartment Complex because she had children to another apartment complex. Of note, the fact that SDHR had found that there was no factual basis for complainants' "steering" claim and then dismissed the claim does not invalidate her retaliation claim. (*See Modiano v. Elliman*, 262 AD2d 223 [1st Dept. 1999]). However, that dismissal modifies the first element of complainants' retaliation claim stated above. Complainants must establish that they had a good faith, reasonable belief that the rental agent from Pine Ridge committed

a discriminatory "steering" violation when Ms. Renner informed her of a desire to rent an apartment at the complex for her and her children. (*See, New York State Office of Mental Retardation and Developmental Disabilities v. New York State Div. of Human Rights*, 164 AD2d 208 [3d Dept. 1990]; *see also Matter of Board. Of Educ. of New Paltz Cent. School Dist. v. Donaldson,* 41 AD3d 1138, 1140 [3d Dept. 2007] ["reasonable and good faith belief"]).

In *Office of Mental Retardation*, this Court rejected its prior standard that, in order for a retaliation claim to be sustained, the practice opposed must be determined to be statutorily forbidden. This Court held that this was too strict a standard and adopted the federal standard which is a good faith reasonable belief standard. (*Id*. at 210; *see also Manoharan v. Columbia Univ. College of Physicians & Surgeons,* 842 F.2d 590, 593[2d Cir.1988] ["plaintiff must demonstrate a "good faith, reasonable belief that the underlying challenged actions of the employer violated the law."]). As to this standard:

> It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he [or she] *subjectively* (that is,
> in good faith) believed that [defendant] was engaged in unlawful [discriminatory] practices, but also that his [or her] belief was *objectively* reasonable in light of the facts and record presented. It thus is not enough for a plaintiff to allege that his [or her] belief in this regard was honest and bona fide; the allegations and record must also indicate that the belief, though perhaps mistaken, was objectively reasonable.

(*Little v. United Technologies*, 103 F.3d 956, 960 [11th Cir. 1997] [emphasis in original]).

In sum, complainants had the burden to establish that they had a good faith, reasonable belief that petitioner Clifton Park Apartments had engaged in an unlawful discriminatory practice, steering; that petitioners' challenged conduct constituted an impermissible act of retaliation; and that they were adversely affected by that retaliatory act. conduct

2. Applicable Appellate Review Standard

Executive Law §298 provides that "[t]he findings of facts on which [a Final Order] is based shall be conclusive if supported by sufficient evidence on the record considered as a whole." Judicial review of the determination made by SDHR below is thus "limited to a consideration of whether that resolution was supported by substantial evidence upon the whole record." (*300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 NY2d 176, 181 [1978] [citations omitted]). In this connection, substantial evidence is defined as "such relevant proof as a reasonable mind may accept as adequate to support the relevant conclusions and factual findings of SDHR. (*Id*. at 180).

The overarching issue before this Court is whether SDHR's determination that petitioners retaliated against complainants based upon their filing of a housing discrimination complaint against Petitioner Clifton Park Apartments and its relevant

findings of fact are supported by substantial evidence inasmuch as the original record of the administrative hearing before it contains "relevant proof as a reasonable mind may accept as adequate to support" those determinations. As pertinent to the determination of this issue, it must be kept in mind that "[i]t is peculiarly within the domain of the Commissioner, who is presumed to have special expertise in the matter, to assess whether the facts and the law support a finding of unlawful discrimination." (*Matter of Club Swamp Annex v. White*, 167 AD2d 400, 401 [2d Dept. 1990], *lv. denied* 77 NY2d 809 [1991]).

3. Petitioners' Argument

Applying the above stated appellate review standard to SDHR's determination as made upon the original record before it, it is petitioner's argument that there is insufficient evidence in that record to support SDHR's determination that petitioners retaliated against complainants in violation of Executive Law §296(7). Specifically, there is insufficient evidence from which it may be reasonably concluded that complainant Renner had a good faith, reasonable belief that Pine Ridge engaged in unlawful steering in violation of Executive Law §296(5)(a)(1) and that petitioners' challenged conduct in response to that alleged conduct constituted an act of retaliation within the meaning of Executive Law §296(7). As will be further shown, the fundamental problem with respect so SDHR's determination is that it rests upon complainant's flawed theory of actionable retaliation, and the ALJ's failure to apply

properly the law governing retaliation as a violation where the underlying complaint has been dismissed.

B. There Is Insufficient Evidence In The Original Record To Establish That Complainants Had A Good Faith, Reasonable Belief That The Underlying Challenged Conduct Of Petitioner Pine Ridge Constituted Unlawful Steering In Violation Of Executive Law §296(5)(A)(1)

Complainants have the burden of proof to establish *prima facie* that they had a good faith reasonable belief that Pine Ridge's rental agent engaged in a discriminatory practice during the subject telephone call on November 9, 2016 by steering complainant Ms. Renner away from its apartment complex to another complex because Ms. Renner stated she had children who would live with her. The only proof in the original record before SDHR as to this element was the testimony of Gary Lacefield, a principal of CityVision (R210-226; Hearing Transcript 32-39), the testimony of Petitioner David Pentkowski (R188-208; Hearing Transcript 11-31), and the Determination and Order After Investigation (SDHR), dated June 13, 2017, dismissing CityVision's complaint, dated February 1, 2017. (R125-126); Folder 2).[5]

[5] A CD disc containing a recording of the subject telephone call was requested by the ALJ, and complainant's counsel provided after the close of the hearing a copy of the disc to the ALJ and attorney Pentkowski. (R226-229; Hearing Transcript 49-52). However, as the CD disc was not placed in the original record, it was not before SDHR on its review of the ALJ recommendation. Thus, the contents of the CD disc are not material in this Point which challenges SDHR's determination as made on the original record.

None of this proof relates to the reasonable, good faith belief of complainants, especially that of Ms. Renner. In this connection, the question that must be asked is how does this proof show the complainants' reasonable and good faith belief that the rental agent's comments to Ms. Renner amounted to unlawful steering. This evidence simply does not go to that belief. What is necessary to establish a *prima facie* case is at a minimum evidence of the contents of the subject telephone call plus proof that shows the requisite good faith, reasonable belief that unlawful starring was committed by the rental agent. Without such evidence, the requisite belief, both subjective and objective, cannot be assessed.

This lack of evidence on the element of reasonable, good faith belief begs the question as to why there is no proof. The answer is provided by complainant's counsel's statements at the hearing. (R236; Hearing Transcript 59). Complainant's case was built on their understanding that all they had to show is that after the complainant's dismissal, petitioners engaged in an act of retaliation. This is all that is required because the merits, actual or arguable, of the conduct are irrelevant. Even a "bogus" contract when dismissed can serve as a basis for a retaliation claim. (R236; Hearing Transcript 59). Under this approach there is no room for a reasonable, good faith belief.

As noted *supra* at pp. 12-13, this understanding of the law is wrong. It is based on a decision of a New York Supreme Court judge, decided over 45 years that

no longer has any validity, *Moran v. Simpson* (80 Misc.2d 437 [Sup. Ct. Livingston Co. 1974]). *Moran* held that the Human Rights Law implicitly establishes an absolute bar against retaliation for an unfounded complaint of discrimination. However, as expressly recognized by the First Department, the *Moran* case is no longer good law as its holding has been rejected by this Court in *New York State Office of Mental Retardation*, discussed *supra* at p, 13, as noted by the First Department in *Herlihy v. Metropolitan Museum of Art* (214 AD2d 250, 256 [1st Dept. 1995]).

To be sure, the ALJ relied on *Moran* in finding unlawful retaliation on the part of petitioners. (R42; Folder 4, p. 5). This error which was compounded by the ALJ's further observation that complainants should prevail because "[Petitioners] have not shown that complainants' allegations were made in bad faith." (*Id*.). This observation is erroneous as the Human Rights Law imposes the obligation upon complainants to who they acted in good faith, as discussed *supra* at pp. 12-13.

In sum, as complainants failed to introduce any evidence on their good faith, reasonable belief, as required by a retaliation claim's first element, it must be concluded that there is insufficient evidence in the original record to establish that complainants had a good faith, reasonable belief that the underlying challenged conduct of Pine Ridge constituted unlawful steering in violation of Executive Law §296(5)(a)(1).

C. There Is Insufficient Evidence To Establish That The Letter Sent By Petitioner Pentkowski On Behalf Of His Client Petitioner Pine Ridge Apartments To Complainants Advising Complainants That Clifton Park Apartments Was Actively Considering Pursuit Of Litigation Against Complainants To Recover Damages It Incurred As A Result Of A Baseless Claim Of Housing Discrimination Against Constituted Retaliatory Conduct

Complainants also had the burden of establishing that they suffered from a "disadvantageous action" directed to them by Pentkowski because of the filing of their complaint. (*See, Pace*, 257 AD2d at 105). Here, that "disadvantageous action" was Petitioners' claimed act of retaliation. Here, complainants contend, and SDHR agreed by its adoption of the ALJ's Recommendation, that the letter sent by petitioner David Pentkowski in his capacity of attorney for petitioners Clifton Park Apartments to complainants advising them that petitioner was actively considering the pursuit of litigation seeking damages it incurred as a result of the now dismissed complaint, viewed as "false." (R152; Folder 3).

Petitioners contend that the letter, even if viewed as an imminent "threat" of litigation which never occurred, cannot be an act of retaliation for purposes of a retaliation claim as it constituted lawful and permissible conduct by an attorney. The reasons are as follows.

Analysis starts with the letter. It states that Pine Ridge "considers the allegations [made in the complaint] false, fraudulent and libelous;" and that Pine Ridge is "looking to CityVisionServices and (Renner) personally for the damages

they have sustained as a result of this wrongful conduct." The letter closed by a request for a resolution of the matter and if CityVisionServices did not respond, "we will assume that you do not intend to take responsibility for the damages for these actions and will proceed accordingly." (R152).

As to this "threatening" letter, it conveys to complainants' prospective actions that Pine Ridge may pursue if the matter cannot be settled. It does not state in fact that litigation will be commenced. All that it conveys is that there are options that Pine Ridge is considering to recover its damages upon further reflection, i.e., "proceed accordingly," which could include as well no law suit.

This letter cannot be viewed as impermissible retaliation as it references, properly, legal actions that may be available to Pine Ridge to recover its damages. In this regard, there is nothing in the Human Rights Law, the Consolidated Laws, or the common law that bars as a matter of law any and all actions to recover damages resoling from the filing of a baseless complaint. (*See, Herlihy*, 214 AD2d at 256 [Court of Appeals has "rejected the notion of an absolute bar against retaliation for an unfounded complaint of discriminatory practices"]). In fact, Executive Law §297(10) authorizes the recovery of attorney's fees against a party who files a frivolous complaint starting a proceeding before the SDHR. Surely, complainant's theory that *any* action taken against them is barred does not override this statutory prohibition that at the time was a possible action.

In sum, as Petitioner Pine Ridge had every right to seek legal relief for its damages, and no formal law prohibits the pursuit of such relief when the damages are cause by a false or frivolous claim made in an administrative context, the subject letter advising complainants that Pine Ridge was considering legal action cannot be found to be an act of retaliation within the meaning of Executive Law §296(7). Accordingly, it must be concluded that there is insufficient evidence to establish that the letter sent by petitioner Pentkowski on behalf of his client petitioner Pine Ridge to complainants advising complainants that Pine Ridge was actively considering pursuit of litigation against complainants to recover damages it incurred as a result of a baseless claim of housing discrimination against it was retaliatory.

POINT II

ALTERNATIVELY, A DECISION BY THIS COURT AS TO WHETHER THE PETITION SHOULD BE GRANTED OR DENIED SHOULD BE HELD IN ABEYANCE PENDING FURTHER ACTION BY SDHR AND THE MATTER REMANDED TO SDHR WITH INSTRUCTIONS TO CONSIDER THE EVIDENCE OF THE CONTENTS OF THE UNDERLYING TELEPHONE CALL BETWEEN PETITIONER PINE RIDGE'S RENTAL AGENT AND COMPLAINANT UPON A FURTHER REVIEW OF WHETHER THE RECOMMENDED ORDER OF THE ALJ SHOULD BE ADOPTED AS THE FINAL ORDER OF SDHR

Under this Point, petitioners ask this Court in the event the Court rejects the argument made in Point I to consider the evidence of the contents of the subject telephone call that occurred on November 9, 2016, which was before the ALJ (and

disregarded), but not before SDHR as it was not placed for some undisclosed reason in the administrative or original record.[6]

Petitioners submit that a fair reading of the transcript shows that no unlawful steering on the part of Pine Ridge's rental agent occurred and that it precludes a finding that complainants had a good faith, reasonable belief that a discriminatory steering practice was engaged in by the rental agent. In this regard, after the agent was informed the caller had three daughters, the agent said I only have 1 available now and she was waiting on a deposit for it, and she had nothing else at that time as she was awaiting to hear on tenant renewals. The agent then said she had another development 5 minutes away if the caller wanted that number. After the number was given, the called asked whether she was allowed to rent with her service dog, a 75-pound German Shepherd; and that she needed a service dog due to her seizures. The agent responded by saying she would like to see the doctor's note as offered by the caller. Lastly, the agent once again advised the called to check on availability at the other complex.

Suffice it to say, no unlawful steering was involved. The agent did not say no rental because of children, and advised her truthfully that nothing was available then for the caller. Notably, the caller tried to trap the agent into a reasonable

[6] A copy of the CD disc containing the recording has been submitted separately to the Court, and a transcript of the recording is in the Record at R262-263.

accommodation refusal claim with reference to her service dog. The agent's response complied with all anti-discrimination laws. The contents preclude any finding of the requisite good faith reasonable belief element.

In short, there was no illegality by reason of unlawful steering evidenced by the agent's response. Moreover, the evidence surrounding the phone call, namely, the fact that Pine Ridge advertised its close proximity to Shenendehowa schools, a desirable school district, fatally undermines a claim that Pine Ridge was engaging in unlawful steering during the subject telephone call.

However, as this evidence was not before SDHR, petitioners recognize that it cannot be considered by this Court at this time as to whether SDHR's determination based on the record before it should be vacated. Nonetheless, petitioners should not have a determination affirmed when evidence admitted at the underlying hearing but not included at no fault of the petitioners in the record before SDHR where that evidence strongly, if not fully, precludes a finding on the requisite good faith, reasonable belief standard.

Accordingly, alternatively, a decision by this Court as to whether the petition should be granted or denied should be held in abeyance pending further action by SDHR and the matter remanded to SDHR with instructions to consider the evidence of the contents of the underlying telephone call between petitioner Pine Ridge's

rental agent and complainant Renner upon a further review of whether the recommended order of the ALJ should be adopted as the final order of SDHR.

POINT III

THE DAMAGES AWARD OF $4,775.00 MADE BY SDHR TO CITYVISION TO COMPENSATE IT FOR THE MONETARY VALUE OF THE TIME ITS EMPLOYEES INCURRED IN PROSECUTING ITS RETALIATION CLAIM MUST BE VACATED AS THERE IS NO STATUTORY AUTHORIZATION FOR SUCH A DAMAGES AWARD; AND TO THE EXTENT SUCH AN AWARD IS PERMISSIBLE, THE AWARD OF $4,775.00 IS NOT SUPPORTED BY ANY COMPETENT EVIDENCE

Complainants at the request of the ALJ and SDHR submitted a "certification" with respect to damages they claimed to have incurred as a result of the retaliatory conduct of petitioners found to be a violation of New York's Human Rights Law. (R97-98; 141-147; Folder 2 [ALJ Exhibits]). The non-attorney's fees part of this "certification" consisted of nothing more than a compilation of the time spent on tasks performed by CityVision employees with respect to pursuing the retaliation claim against petitioners. Notably, the employees who performed the listed tasks are not identified, the description of the task is minimal if not non-existent, and there is no basis stated from which it may be inferred why the unidentified employees needed to perform the listed task. (R144; Folder 2 [ALJ Exhibits]). The hourly rate charge for these unidentified employees is $265.00, the basis for this rate which is also not given. (*Id*.). The amount requested was $4,775.00. (*Id*.). The ALJ awarded

the full amount of $4,775.00 requested as compensatory damages, and SDHR affirmed this award. (R44 [1]; 21).

The award must be vacated. The reason is that it is not supported by any statutory authority that the value of the time incurred by a party in litigation is compensable, or by any competent evidence establishing the amount of the award. As to the latter, to the extent the tasks for which damages are sought are compensable, a doubtful proposition, there is insufficient proof justifying their amount.

Executive Law §297(9) authorizes a court to award "damages and such other remedies as may be appropriate" for a violation of New York's Human Rights Law. This Court has consistently held that an award of compensatory damages is to be "based upon the pecuniary loss and emotional damages actually suffered by the victim of the [violation], as established by competent evidence adduced at the hearing." (*See, e.g., Matter of New York State Dept. of Correctional Servs. v. State Div. of Human Rights*, 215 AD2d 908, 910 [3d Dept. 1995]).

Here, complainants are seeking to recover damages for the value of the time they spent in pursuing their retaliation claim, a damages claim which is separate from the value of the time their attorney incurred in pursuing the claim on their behalf. This claim is, in essence, a claim for "costs." (*See, Birnbaum v. Birnbaum*, 157 AD2d 177, 177 [4th Dept. 1990]; *Owens v. Town of Huntington*, 125 Misc2d

574, 578 [Co. Ct. Suffolk Co. 1984] [travel time as cost; not compensated]; Siegel and Connors, New York Practice [6th ed] §414 [expense of litigation]). However, under New York law the prevailing party in litigation cannot recover its costs, unless there is statutory authorization allowing for such recovery. (*See, Stevens v. Central Nat. Bank*, 168 NY 560 [1901]; NYJur2d, Costs, §1). As no statute permits the recovery of the claimed costs here, there is no basis to award complainants $4,775.00. (*Cf., Owens*, 125 Misc2d at 578). In this connection, it is notable that the Legislature has enacted statutes providing for an award of costs in an action. (*See, e.g.*, RPAPL §861 [2] ["reasonable costs associated with maintaining [the] action"]). The absence of such language in Executive Law §297(9) certainly shows that the Legislature did not intend to allow recovery for "costs" in discrimination cases.

Petitioners would note the Fourth Department decision in *Matter of Sherwood Terrace Apartments v. New York State Div. of Human Rights*, 61 AD3d 1333 [4th Dept. 2009]) which affirmed an award by SDHR to a party for the value of the resources expended by it in investigating a housing discrimination claim on behalf of complainants therein. To threw extent this decision supports SDHR's award here, the decision should not be followed. The reason is that the decision is based on two decisions, *Havens Realty Corp. v. Coleman* (455 US 363, 376 [1982]) and *Mixon v. Grinker* (157 AD2d 423, 426-427 [1st Dep't 1990]), which are standing cases. They conclude the injury-in-fact standard of standing was satisfied by the claimed

expenditures in the course of investigation. Thus, they are distinguishable as they do not establish that such expenditures are actually recoverable as compensatory damages.

Assuming an award is permissible for a party's own time incurred in prosecuting a retaliation claim, there must be a proper foundation for it. Here, the "certification" submitted is so woefully deficient it cannot serve as a proper foundation for the award. In that regard, its deficiencies are readily apparent, namely, the tasks are insufficiently described, there is no showing that the tasks were necessary, there is no identification of the employees who performed the task, and no basis given for a flat hourly rate of $265.00 applicable to each task.[7] Thus, the certification as made in view of these deficiencies cannot constitute competent evidence, sufficient to support the award as made by the ALJ. In this regard, certainly as such a "certification" would not be tolerated for as support for an award of attorneys' fees, it should not be tolerated for an award of non-attorney time.

Accordingly, the damages award of $4,775.00 made by SDHR to CityVision compensating it for the monetary value of the time its employees incurred in prosecuting its retaliation claim must be vacated as there is no statutory authorization

[7] It must be noted that this hourly rate credited by the ALJ is $10.00 less than the hourly standard for attorneys' fees ($275.00), and $175.00 more than the non-legal rate, as set by the Division itself. (R25).

for such a damages award; and to the extent such an award is permissible, the award of $4,775.00 is not supported by any competent evidence.

POINT IV

THE AWARD OF ATTORNEY'S FEES MADE BY SDHR TO CITYVISION MUST BE VACATED AS THERE IS NO BASIS IN LAW AUTHORIZING AN AWARD OF ATTORNEYS' FEES TO COMPLAINANTS AS THE PREVAILING PARTY ON THEIR RETALIATION CLAIM

Executive Law §297(10) provides that "[w]ith respect to all cases of housing discrimination in an action or proceeding at law under this section [§297[9]] … the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party …." While the statute clearly permits an award of attorney's fees in housing discrimination cases, it does not provide for an award of attorney's fees in retaliation cases even if based on an underlying complained of housing discrimination. Nonetheless, complainants sought recovery of their attorney's fees. The ALJ rejected the argument, finding the absence of any statutory authorization for an award in retaliation cases fatal to their claim. (R43). However, SDHR rejected the ALJ's finding, concluding that authority for such an award could be implied because the retaliation claim arose because of complainants' underlying discrimination claim. (R20-21).

SDHR's determination must be rejected. The reason is that it is based upon a flawed interpretation of the statute, which is not deserving of any deference by this Court.

The starting point is recognition of New York's acceptance of the so-called American Rule which provides that a party's attorney's fees are recoverable in litigation only if permitted by statute, or the parties' agreement. (*Hooper Assoc., LTD v. AGS Computers, Inc*., 74 NY2d 487, 490 [1989]; *Halstead v. Fournia*, 134 AD3d 1269, 1271 [3d Dept. 2015]). Here, the complainants and the Division point to Executive Law §297(10) as authorizing an award of attorney's fees, albeit impliedly. However, such an argument runs afoul of the well-established statutory construction canon that statutes in derogation of the common law, which Executive Law §297(10) clearly is, are to be construed strictly. (*Matter of Mingo v. Chappus*, 123 AD3d 1347 [3d Dept. 2014]). This rule renders the complainants and the Division's argument meritless as it precludes an implied basis for award of attorney's fees. (*Halstead,* 134 AD3d at 1272).

Paraphrasing this Court's language in *Halstead*, strictly construing the language of Executive Law §297(10), nothing beyond an intent to award attorney's fees in a case alleging actual discrimination can be discerned. In this connection, if the Legislature intended to authorize an award of attorney's fees in retaliation cases, it surely would have done so. (*See, Board of Educ. of Syracuse city School Dist. v.*

State Div. of Human Rights, 38 AD2d 245, 248 [4th Dept. 1972]; McKinney's Cons. Laws of NY, Book 1, Statutes, §230).

Accordingly, this Court should conclude there is no basis in law authorizing an award of attorneys' fees to complainants as the prevailing party on their retaliation claim.

POINT V

PETITIONER ATTORNEY PENTKOWSKI IS ENTITLED TO IMMUNITY FROM SUIT AGAINST HIM ALLEGING A RETALIATION CLAIM AS COMPLAINANTS IN THEIR COMPLAINT ALLEGE ONLY AS A BASIS FOR THIS CLAIM AGAINST HIM IS THAT HE REPRESENTED IN THIS MATTER HIS CLIENT PINE RIDGE AND IN THAT CAPACITY SENT THEM A LETTER THEY VIEWED AS THREATENING LITIGATION

The complainant's retaliation claim alleged unlawful retaliation against them by both Clifton Park Apartments and its attorney David Pentkowski, naming them both as respondents. (R138; Folder [ALJ Exhibit 4]). The claim as against attorney Pentkowski was based solely upon the fact that he signed and mailed the July 25, 2017 letter to complainants on behalf of his client, Petitioner Clifton Park Apartments. Of note, there was, and never has been, any allegation that attorney Pentkowski was not acting in good faith or for the legitimate purpose of protecting the interests of his client. Nonetheless, SDHR found attorney Pentkowski liable for retaliation, albeit with no discussion.

The claim as made that attorney Pentkowski unlawfully retaliated against complainants for their filing of a complaint against his client Pine Ridge is baseless as attorney Pentkowski enjoyed immunity from suit. This argument of immunity, ignored by complainants and DHRC, is based on well-established New York law. In this regard, New York law is clear that an attorney is immune from suit for engaging in routine attorney conduct, and may not be sued for advising his or her client, even when such advice is erroneous, except in the case of "fraud, collusion, malice or bad faith." (*See, e.g., Beattie v. Long*, 164 AD2d 104, 109 [1st Dept. 1990] [immunity shield protects attorney who merely advised client and had no "personal interest" in the advice]; *Gifford v. Harley*, 62 AD2d 5, 7 [3d Dept. 1978] ["The attorney may be held liable to third-parties only if he or she has been guilty of fraud or collusion or of a malicious or tortious act."]). As stated by the First Department: "It is recognized that '[t]he public interest … demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients …." (*Hahn v. Wylie*, 54 AD2d 629 [1st Dept. 1976] [citation omitted]).

Notably, this rule applies where there are alleged violations of state or federal civil or constitutional rights. (*Nicoleau v. Brookhaven Memorial Hosp. Ctr.*, 181 AD2d 815, 816 [2d Dept. 1992]; *Zhu v. Fisher, Cavanaugh, Smith & Lemon, P.A.*, 151 F.Supp2d 1254, 1259 [D. Kan. 2001] [Fair Housing Act §3617 alleged to have

been violated.]). Significantly, as most pertinent to this appeal, courts have also found that attorneys are not liable for violations of the New York State Human Rights Law where they were merely acting in their representative compacities and within their scope of authority, as here. (*See, Sullivan v. State Div. of Human Rights*, 73 AD2d 946 [2d Dept. 1980] [no violation of Human Rights Law where attorney merely communicated to plaintiff vendors that defendants' vendors would not modify contract of sale to increase time to get mortgage]).

Complainants and DHRC have not addressed this precedent, indeed, have in essence, ignored it. There is no basis for doing so as this precedent is still good law and there is no basis for distinguishing it. To allow an attorney to be liable for merely representing his or her client, as complainants seek and DHRC has held, represents bad policy as such a position "could discourage attorneys from representing clients with proper vigor and thus impeded the access of litigation to court." (Restatement [Third] of the Law Governing Lawyers [2000] §57, comment b).

Accordingly, this Court should conclude that attorney Pentkowski is entitled to immunity from suit against him alleging a retaliation claim based on the Human Rights Law.

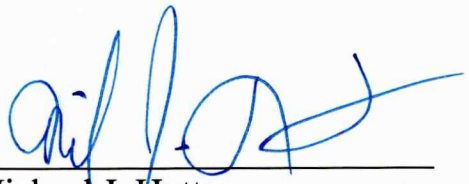
CONCLUSION

The verified petition should be granted, and SDHR's Final Order, dated June 1, 2020, annulled, and the cross-petition denied. Alternatively, the matter should be remanded to SDHR for further proceedings as discussed in Point I (C). If the matter is to be remanded, the retaliation claim as alleged against petitioner David Pentkowski and the claim for compensatory damages and attorney's fees should still be dismissed.

Dated: October 18, 2021

Respectfully submitted,

POWERS & SANTOLA, LLP

by 

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to the Practice Rules of the Appellate Division 1250.8(j) that the foregoing Brief was prepared on a computer using Microsoft Word.

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