To Be Argued By:
Michael J. Hutter, Esq.
Time Requested:
10 Minutes

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.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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Respondents-Respondents.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

PRELIMINARY STATEMENT

The overarching issue before this Court, as framed by the parties' exchanged briefs, is whether the State Division of Human Rights ("SDHR"), or any other state agency for that matter, can impose monetary sanctions on an entity and its attorney for the mere sending of a letter threatening a civil action seeking damages against a person who has filed with SDHR, or the agency, a complaint alleging that the entity violated law under the agency's jurisdiction, upon the dismissal of the complaint on the ground that the complaint was factually unfounded. SDHR maintains that such a threat is an unlawful act of retaliation, based on its view that

the complainant enjoys absolute immunity against the threatened retaliatory action regardless of whether no action is in fact filed.

This issue is raised in the context of two sub-issues. Initially, this Court is asked to determine whether the Administrative Record before SDHR upon which the retaliation sanction was issued contains sufficient evidence from which it may be concluded that petitioners engaged in unlawful retaliation in violation of New York's Human Rights Law when, upon dismissal of the housing discrimination complaint filed against petitioners by complainants by SDHR for failure to establish factually its discrimination claim, petitioner Clifton Park Apartments' attorney sent a letter to complainant asserting that it was damaged by the filing of the complaint and would commence an action against CityVision to recover its damages unless the matter could be resolved. SDHR argues that there is sufficient evidence in the record to support its retaliation finding. Petitioners argue in this reply brief that SDHR's argument must be rejected as it is based upon a flawed understanding of the law governing a retaliation claim, both procedurally and substantively. In this regard, when the governing law is properly applied to the evidence in the Administrative Record, it must be concluded that there was insufficient evidence before SDHR to support the retaliation finding.

The second issue arises only if this Court concludes that sufficient evidence is in the Administrative Record to support SDHR's findings. That issue is whether

the SDHR determination must be vacated because it was decided on an incomplete record. It was incomplete because the Administrative Record of the hearing did not contain evidence admitted at the hearing which petitioners argue shows that complainants have failed to establish a key element of a retaliation claim. The element is that complainants had a reasonable belief that petitioners had engaged in housing discrimination. The evidence which was not included is a CD recording of the pivotal telephone conversation during which the alleged act of discrimination occurred. Complainants give a one-sided recitation of what occurred during the conversation, yet what actually occurred, as the audio recording reveals, was that no discriminatory words were spoken by Clifton Park Apartments rental agent, which shows in turn that the element was not established The CD audio recording was, suffice it to say, inexplicably not placed in the Administrative Record. Tellingly, SDHR makes no argument in response to petitioner's argument on this issue.

If this Court rejects petitioner's argument in this second issue then it will need to address several significant issues, including whether damages can be awarded from the value of complainant's "diverted resources" in bringing a retaliation claim and its related attorney's fees; and whether petitioner's attorney can be liable solely for sending a letter on behalf of his client stating his client was contemplating a damages action against CityVision on account of its dismissed

discrimination claim unless the matter could be settled. While the resolution of these issues should be relatively easy, SDHR's failure to address certain parts and misleading legal arguments requires closer analysis to reject SDHR's arguments as made.

STATEMENT OF FACTS

SDHR presents what can only be deemed a "sanitized" statement of facts. To fully understand the important issues presented for resolution on this appeal, the nature of complainant's activity and conduct must be set forth here.

The business of CityVision extends nationwide from its office in Texas. (R52). Here, an employee, Ms. Leigh Renner, made a "cold call" to Clifton Park Apartments located in Clifton Park, Saratoga County to see if it was engaged in unlawful discrimination. It is not disputed that the call was not preceded by any inquiries as to the nature of its rentals, and the composition of its tenants. A minimal inquiry would have revealed that Clifton Park Apartments has 228 units and it has numerous families with children among its tenants, and that it advertises it is located in a desirable school district. (R63; 238).

Three months after a cold call to Clifton Park Apartments was made on November 9, 2016, complainants filed a "Verified Petition," alleging that it was engaged in "unlawful steering." However, this "Verified Petition" as filed was never signed or notarized. (R47-48). As a result, another "Verified Petition" was

filed on February 23, 2017, this time the petition was actually signed and verified. (R52-53).

On the same day this Verified Petition was filed CityVision sent to Clifton Park Apartments what it called a "conciliation offer" designed to "resolve this matter." (R60). This offer required that for CityVision to drop the complaint a payment of $2,500.00 for CityVision's diversion of funds/costs, and proof of training regarding Fair Housing requirements (training which CityVision will supply at a cost), and a change of its policies and procedures to comply with the Fair Housing Act and updating "their new FHA compliant rules and regulations." (R60). As to the latter demands, CityVision had not made any inquiries beforehand as to what the policies and procedures of Clifton Park Apartments were.

Upon receipt of this offer and the Verified Petition, Clifton Park Apartments retained counsel and on February 27, 2017 retained counsel David Pentkowski, Esq. wrote CityVision to find out what this matter was all about. (R150). This letter was followed-up with telephone calls, but CityVision ignored attorney Pentkowski refusing to provide him with the information about the alleged discriminatory conduct he would need so he could advise properly his client about how to proceed. (R13, ¶¶17-18; 191-197). Apparently, CityVision had a recording of the telephone conversation but never shared it with attorney Pentkowski.

It readily appears that CityVision had no true intent of resolving this matter other than by the acceptance of its demands. While attorney Pentkowski's internal investigation about the call revealed nothing improper (R186-187), he was precluded from finding out what actually transpired during that telephone call by CityVision's stonewalling. (*Id.*).

Following an investigation, the Verified Petition was dismissed by SDHR. The reason is that its investigation found no evidence to support CityVision's allegations of unlawful steering, especially noting the presence of families and children as tenants in the complex and Clifton Park Apartment's advertising that it was located in a highly desirable school district, clear proof that it did not discriminate against families. (R61-62).

Lastly, it is worth mentioning that in petitioner's Verified Petition seeking review of SDHR's Final Order adopting the recommendations of the ALJ that petitioners engaged in unlawful retaliation, it is alleged that the "logical conclusion [from CityVision's conduct] is that the complaint was filed for the sole purpose of attempting to extract payment from [Clifton Park Apartments], or at the very least in reckless disregard of the rights of [Clifton Park Apartments]. Whether this assertion is a sound one looms large on this appeal.

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 (Replying to Point I of SDHR's Brief at pp. 10-16)

A. Introduction

SDHR argues there is substantial evidence in the record as a whole to establish that petitioners engaged in unlawful retaliatory conduct. The argument must be rejected as it is based on a flawed understanding of the controlling standard, as will be shown.[1]

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)

SDHR correctly recognizes that the proper standard in a retaliatory discrimination case such as this requires, as a minimum, proof that the complainants "reasonably believed" that petitioners engaged in unlawful discriminatory conduct, which here would be unlawful steering, which element is derived from this Court's decision in *New York State Office of Mental Retardation*

[1] In making this argument, petitioners do not rely upon the CD audio recording of the critical telephone conversation of November 9, 2016 which was not in the Administrative Record before SDHR. This matter is discussed in Point II.

and Developmental Disabilities v. New York State Div. of Human Rights (164 AD2d 208, 210 [3d Dept. 1990]). However, it fails to realize that this standard, adopted from the federal case law, imposes upon the complainants the burden of showing that they reasonably believed that petitioners had engaged in unlawful steering; and has both subjective and objective components. (*See Little v. United Technologies*, 103 F.3d 956, 960 [11th Cir. 1997]). In doing so, SDHR has in essence created a rule that bars any retaliatory action, and grants absolute immunity to a person who has filed a discrimination complaint from perceived retaliatory actions.

As to the first point, SDHR adopted the ALJ's finding that "respondents have not shown that Complainants' allegations were made in bad faith. (R42). But as noted above, it is the complainants and not petitioners (respondents) who have the burden. The ALJ's citation to *Herlihy v. Metropolitan Museum of Art* (214 AD2d 250, 257 [1st Dept. 1995]) does not at all support his imposition of the burden in the first instance on petitioners. The *Herlihy* jump cite only contains the First Department's rejection of an argument that in the context of a defamation action statutory provisions prohibiting retaliatory conduct do not confer absolute immunity upon the alleged defamer.

The ALJ in reaching his conclusion also erroneously relied upon *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 and this holding to the ALJ then led to the conclusion that to defeat the retaliation claim petitioners must show bad faith on the part of the complainants. However, the precedential value of *Moran* is almost nil, as the courts, including this Court, have rejected its notion of an absolute bar. *See*, *Herlihy v. Metropolitan Museum of Art* (160 Misc.2d 279, 283-284 [Sup. Ct. NY Co. 1994], *mod. on other grounds* 214 AD2d 250 [1st Dept. 1995], citing *New York State Office of Mental Retardation and Developmental Disabilities,* 164 AD2d at 210; *Herlihy*, 214 AD2d 256-257).

SDHR in its brief to this Court continues to assert that petitioners had the burden to show that complainants allegations were made in bad faith to prevail, (SDHR Brief, p. 14). However, like the ALJ, no case is cited that supports that imposition of the burden of proof in a retaliation action. While SDHR cites cases holding that once a complainant in a discrimination establishes a prima facie case, the burden then shifts to respondents to show "some legitimate reason" for the allegedly discriminatory act to show that they did not engage in any act of discrimination (*Id.* at 10), those cases do not support its view of the burden of proof. These cases are inapposite as they apply in discrimination cases, especially employment discrimination, and not retaliation cases where a discriminatory motive is not an element of proof. Notably, this Court has not required such a

showing by a respondent in a non-employment discrimination proceeding where it is certainly appropriate. Even if these cases apply here (a doubtful proposition), they still are not controlling precedent here as SDHR has not shown that complainants established a *prima facie* case of unlawful retaliation.

As to petitioners' second point, complainants have not shown that they "reasonably believed" that petitioners engaged in the alleged unlawful steering. This element of proof has, as noted *supra*, both objective and subjective components.

In addressing this point, it must be emphasized that the only proof in support submitted by complainants was their verified complaint in which Renner avers that in the November 9, 2016 telephone conversation with Clifton Park Apartments' rental agent, the agent said that after mentioning "availability on January 1st", the agent then said after Renner informed her she had 3 daughters, availability changed" and the agent "steed[sic] the complainant to another property." (R52). Notably, Renner only reverenced a snippet of the telephone conversation and did not include in the complaint all that the agent told her.[2] Moreover, Renner never testified at the hearing.

The ALJ never made a finding that this mere allegation of what transpired on a telephone call, *i.e.*, one side's recollection, showed that complainants

[2] The entire conversation was recorded on a CD disc, a copy of which has been submitted to this Court along with a transcript thereof.

reasonably believed that Clifton Park Apartments engaged in improper steering. Indeed, there is no basis from which an inference of reasonable belief, both from an objective and subjective perspective, can be made, In this regard, it strains credulity to believe that the rental agent would steer away a prospective tenant based on that tenant having 3 children when Clifton Park Apartment has numerous tenants who have families and advertises on its website as a promotion for its complex that "Shenendehowa Schools Nearby." (R63). Obviously, CityVision made a cold call from Texas to Clifton Park, New York without any investigation, even making a quick Google search. No "reasonable belief" on the part of Renner and CityVision can be found.

Suffice it to say here is no basis to conclude from the record as a whole that complainants established that they reasonably believed that Clifton Park Apartments was engaged in unlawful steering.

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

Petitioners point out their purported impermissible retaliation conduct does not at all involved the actual commencement of a lawsuit against complainants. It involves only a letter contemplating/threatening such an action in the future. That

letter does not indicate that petitioners will in the future engage in any conduct prohibited by law. All that the letter says is a lawsuit against complainant seeking to recover the damages for the unfounded discrimination claim lodged against them *may* be initiated if CityVision is unwilling to resolve the matter. The goal is not to obtain something prohibited by law.

There is simply nothing inherently wrong in doing so as threats to pursue civil claims, unlike threats to pursue criminal charges, are not prohibited. (*See*, Haig, Commercial Litigation in New York State Courts (5th ed) Sec. 67:8; Kores, The Ethics of Threatening, 43 Litigation No, 3, p. 42 [2017] ["Threats are proper where they outline [a party's] future course of action and are based on the [party's} lawful rights…"]). [3]

Not to be overlooked here is respect for the right of free speech. An absolute bar on sending a letter threatening a lawsuit to recover damages for inflicted harm would infringe on those rights due to the chilling effect it would have on the expression of grievances. Where no abuse is present, "public policy mandates free access to the courts for redress of wrongs." (*Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO,* 38 NY2d 397, 404 [1975]).

[3] As to attorney Pentkowski, his involvement violated no ethical norms, as discussed i*nfra* in Point V.

In sum, a letter sent by an attorney on behalf of a client threatening an action to recover damages on behalf of an aggrieved person is not inherently unlawful, and cannot form the basis of a retaliation claim, even under the Human Rights Law.

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'S RENTAL AGENT AND CIYTVISION'S "TESTER" WHICH WAS ADMITTED AT THE HEARING BUT NOT BEFORE SDHR WHEN IT MADE ITS DETERMINATION PRESENTLY ON REVIEW

It is not disputed that the ALJ failed to include in the Administrative Record of the hearing before him, the Record upon which SDHR would determine whether there was a basis to sustain the retaliation charge against the petitioners, the admitted CD recording of the telephone conversation of November 9, 2016 between CityVision's employee, Leigh Renner, a/k/a Catrina, and the rental agent for Clifton Park Apartments, which the ALJ concededly received from CityVision's attorney and admitted into evidence. (R226-229). Petitioners submit that this CD recording when heard, and not "Catrina's" version of what transpired, shows there is no basis to find that they had a good faith reasonable belief that

Clifton Park Apartments engaged in unlawful steering based on Catrina's "family," an argument developed more fully *infra* at pp. 15-16.

But first, an appellate procedural matter arises. This Court by order dated and entered October 7, 2021, permission to petitioners to include in the Record on Appeal the CD audio recording and a transcript thereof. The issue now is what can be done with this material.[4] Research discloses no appellate decision which permits a panel of an Appellate Division department on a review of a final order of an administrative agency to base a decision as to whether to affirm or dismiss the underlying administrative determination on evidence that was not before the agency. In candor, petitioners are unable to put forth in good faith a basis for this Court to do so. Hence, the argument made by petitioners in their opening brief as supplemented in this reply brief that this Court hold in abeyance the present appeal and remand the matter to SDHR so that SDHR can make a determination as to whether it should adopt the recommendation by the ALJ based upon a complete Administrative Record that includes the recording and transcript. If SDHR then adopts the ALJ's recommendations, petitioners' arguments then should be heard by this Court on that Final Order. Alternatively, petitioners would need to commence a new CPLR article 78 proceeding for review of the final order.

[4] SDHR has ignored this point in its brief.

Petitioners' argument is predicated upon the claim that the audio recording of the complete conversation that transpired on November 9, 2016 shows that there is no basis to find that CityVision and Renner had a good faith reasonable belief that Clifton Park Apartments engaged in unlawful steering based on Catrina's "family." Expressed differently, the failure to include in the Administrative Record before SDHR and then this Court cannot be viewed a harmless error. The argument is as follows.

As to the contents of the CD recording,[5] it reveals that when Catrina asked about availability at the complex, and specifically first available, the agent said "January 1st is my next availability" and then asked about whether the rental would be for Catrina alone or her family, a question obviously asked to determine how many bedrooms Catrina might need. When Catrina said 3 children, the agent said "Um, let me see" *followed by a pause*. After the pause the agent then says "Like I said I have only got the one with credit app pending."

While the incomplete record before SDHR contains only "Catrina's" version as to what occurred, it is evident from the recording that much more occurred which Catrina never disclosed in her complaint. Specifically, it shows that the agent mentioned January 1st as first available as she knew that no vacancies were presently available and that she would next know when a vacancy would be

[5] A true and complete copy of the CD recording has been provided to the Court, along with a transcript thereof, as permitted by this Court's order.

available on January 1st, as the first of the month is when renewals are due. Obviously, not knowing off the top of her head which, if any, of the 228 units in the complex would be coming up for renewal, she paused to check her records. Her records then showed there was only one renewal, and that was not available immediately as there was a credit check.

Petitioners submit that this CD recording when heard, and not "Catrina's" version of what transpired, shows that there was no steering based on Catrina's "family." Nothing was available for Catrina as nothing was in fact available. Yes, the agent mentioned another complex, but that was clearly said in an effort to be helpful and to accommodate Catrina's apparent need for an apartment sooner than later.

The failure of the ALJ to include the CD in the Administrative Record meant that SDHR on its review of the ALJ's "Recommended Findings of Fact, Opinion and Decision and Order" did not have the highly probative CD before it on the issue of whether a retaliation claim was established, and, obviously, had not considered it. No explanation has been forthcoming as to why and how this failure occurred. This failure to include in the Administrative Record admitted evidence, is not only highly irregular but also improper, and cannot be condoned Just as the appellant in an appeal from an order/judgment of Supreme Court to include in the record on appeal "all of the relevant papers before the Supreme Court" (*Babayeu v.*

Kreitzman, 168 AD3d 655, 655 [2d Dept. 2019]), the ALJ hearing a SDHR proceeding, and not a party, must prepare a record for SDHR review purposes which includes all evidentiary matters before the ALJ at the hearing. (*See*, 9 NYCRR §465.12[e]). While a civil litigant's failure to assemble a proper record will lead to the dismissal of the litigant's appeal (*see, Babayeu*, 168 AD3d at 656), by analogy the failure here should result in a remand to SDHR as the proper remedy. Certainly, petitioners should not be put at a disadvantage and punished for the failure.

Petitioners submit that the remedy is for this Court to vacate SDHR's determination and remand the matter to SDHR with instructions to include in the Administrative Record the CD recording, and decide whether to accept or reject the ALJ's Recommendations upon the now complete record.

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 (Replying to Point II of SDHR's Brief)

SDHR awarded CityVision $4,775.00 as its damages for its "diverted resources" in responding to Clifton Park Apartment's threat of litigation. (R20,

42). In doing so, it accepted at face value the tasks purportedly undertaken by unidentified employees and the hourly rate of the employees for those tasks. As to the latter, SDHR accepted without any analysis whatsoever CityVision's specified hourly rate for its employees (unidentified) of $265.00, which is $115.00 more than its attorney's paralegal rate of $150.00 and only $160.00 less than the attorney's billing rate of $425.00 (R144-145). Astonishingly, SDHR makes no effort to justify this award; indeed, it ignores the amount of the award and the claimed proof underlying it. Rather, all that SDHR argues is that awards for "diverted resources" is proper.

The award must be vacated. SDHR's argument that such an award is proper is meritless; and in any event, even if authority to make such an award is permissible, the proof CityVision submitted in support thereof is not at all supported by competent evidence. Affirmance establishes a bad precedent for future cases.

Analysis of SDHR's legal argument in support starts with consideration of the expenditures CityVision seeks compensation for and its proof in support of these expenditures. Tellingly, SDHR does not at all discuss or even mention these matters. But they need to be stated lest the Court fails to understand the implications of SDHR's argument in future litigation.

The expenditures are set forth in a "certification" (R142-144), which certification was submitted after the hearing part of the proceeding ended. In essence, it consists of the incidents, if not annoyances, that accompany the ordinary lawsuit. Thus, it contains 18 items, referencing the time spent by a CityVision employee (not identified), with a brief description of the task engaged in. (R144). They range for the most part to "emails" and "discussions with counsel" involving, again, an unidentified employee, and the drafting of documents by someone. No mention is made as to the necessity for these expenditures. It also claims without any support whatsoever the time of the employee (unidentified) is $265.00 an hour. (*Id*.). In sum, this "certification" lacks any basis from which a reasoned determination can be made as to whether the sums claimed were for necessary work or were reasonable.

As expected, SDHR relies on New York cases that it claims support the recovery of damages for "diverted resources." However, as petitioners argued in their opening brief at pp. 25-26, they are not persuasive. The reason is that they refer to using a "diverted resource" rationale to support the standing of the organization who expended those resources as a basis to establish the "injury in fact" standard for establishing the organization's standing to sue in the cases. There is no mention in those cases that the courts are saying those expenditures are also compensable. Thus, petitioners submit that this Court should not follow them.

To sanction the recovery of these types of expenditures that CityVision is claiming, namely, unidentified personnel incurring time for tasks not shown to be necessary at an extremely high hourly rate, comparable to attorney billing rates will only encourage in the future parties to seek recovery for any task and encourage fraud, especially since SDHR appears to turn a blind eye to the reasonableness of those claim, as done here., The "certification" here may be an aberration with recognition that these types of expenditures are compensable once attorneys realize they can obtain compensation for apparently anything they claim to be related to the prosecution of not only a retaliation claim but a discrimination claim. Where will it end, especially because SDHR refuses to put any limit on what is recoverable? The sky is the limit seems to be the governing standard, which simply cannot be tolerated. In the absence of statutory basis for the recovery of "diverted resources", the award must be vacated.

If this Court holds that "diversion of resources" expenditures and costs are recoverable, then it must address the sufficiency of CityVision's proof in support. As petitioners argued in their opening brief at pp. 26-27, the "certification" as proof to support an award is hardly a sound basis upon which an award can be made. Its conclusory nature is the reason. The "certification" is simply not competent evidence to support an award of damages, even in an administrative proceeding. Tellingly, as mentioned previously, SDHR makes no effort whatever

to justify its reliance on this proof, or explain why it can be deemed reliable evidence. Its studied ignorance is inexplicable.

From a policy perspective, petitioners submit that a determination that this certification is competent evidence will serve as precedent in future cases that will encourage overreaching. One can expect a deluge of submissions tracking the certification here and going beyond. How are these claims to be determined without any standard?[6] At this point it would seem that any non-legal task engaged in before a proceeding is commenced and while it is pending is compensable. In other words, there really are no limits. Hyperbole aside, SDHR's determination here is arbitrary and capricious.

The award of $4,775.00 must be vacated, either because there is no statutory basis for such an award, or because the proof submitted to establish CityVision's "diversion of resources" is legally insufficient to support any such award.

[6] Note that even SDHR could not give a reason why all of CityVision's claims were accepted and at the hourly rate requested. (R42).

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 IT AS THE PREVAILING PARTY ON THEIR RETALIATION CLAIM
(Replying to Point III of SDHR's Brief)

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 …."(emphasis added). SDHR argues that notwithstanding the absence of explicit statutory language stating the prevailing party in a retaliation-based claim under the Human Rights Law may also be awarded its attorney's fees, SDHR has the authority to make an award of attorney's fees here to CityVision, the prevailing party in the instant retaliation action.[7]

The argument must be rejected. There is no basis in law to bootstrap the authority to award attorney's fees in a housing retaliation action when the Human Rights Law has the authority to award attorney's fees in a housing discrimination action just because the housing discrimination action was the predicate action. This is especially so because the housing discrimination action was dismissed by

[7] To the extent this Court agrees with SDHR's argument, petitioners do not make any argument that the amount of the attorney's fees award was arbitrary and copious.

SDHR as unfounded. In these circumstances, it is disingenuous to argue, as SDHR does in its only argument in support of its position, the actions are "intertwined," and thus there must exist authority to award attorney's fees in a retaliation action.

Dominic v. Consolidated Edison Co. of New York, Inc. (822 F.2d 1249 [2d Cir. 1987]), relied upon by SDHR, is readily distinguishable. In *Dominic*, the issue was not whether an award of attorney's fees was permissible for plaintiff who prevailed on his age discrimination retaliation action. Rather, the issue was whether for purposes of determining the amount of attorney's fees plaintiff was entitled to under his successful retaliation claim a court could consider the amount of time which related to the unsuccessful age discrimination act. (*Id.* at 1259-1260). The Court held a court could do so because the facts in both claims were "inextricably intertwined." (*Id*.).

Thus, as it can readily be seen, the "inextricably intertwined" argument has no rule in determining whether there is *authority* to award attorney's fees as distinct from determining the *amount* of an award of attorney's fees.

Accordingly, this Court for the reasons stated in petitioner's opening brief should conclude that there is no statutory basis to award attorney's fees to the prevailing party in a housing retaliation action.

POINT V

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

(Replying to Point I of SDHR's Brief at pp. 16-18)

SDHR's argument in a nutshell is that attorney Pentkowski may be sued for damages and attorney's fees merely because, acting in bad faith, he sent a letter to CityVision in the course of his representation of Clifton Park Apartments in which he asserted that his client is considering a lawsuit against CityVision for what his client perceived to be a false and fraudulent attack on Clifton Park Apartments by its complaint that was dismissed by SDHR on the ground it had no factual foundation. Why the sending of the letter was in bad faith is not fully explained. In this regard, SDHR has deemed the absence of any allegation that attorney Pentkowski was seeking to benefit himself by this action or that he wrote the letter to further some personal animus he had against CityVision is irrelevant. In sum, SDHR's contention rests solely on attorney Pentkowski sending a letter on behalf of his client, which SDHR found its tone to be "threatening" and thus in bad faith.

The position of SDHR must be rejected. The reason is that it is contrary to well-established New York law that - for sound policy reasons - limits an

attorney's liability to third-parties when representing a client to situations where, as this Court has stated, the attorney has been "guilty of fraud or collusion or of a malicious or tortious act." (*Gifford v. Harley*, 62 AD2d 5, 7 [3d Dept. 1978]).[8] Only in these situations can it be said that the attorney's conduct in the cause of representing a client is bad faith conduct which strips the attorney of immunity from suit. (*See, Hahn v. Wylie*, 54 AD2d 629 [1st Dept. 1976]).

SDHR's response is that "petitioner cannot be said to have acted in good faith in the instant natter, and he is, therefore, not immune from liability under the Human Rights Law. (SDHR Brief, pp. 16-17). Why "it cannot be said" is not explained other than the citing to the sending of the letter, Even the context of the letter is misstated in that SDHR argues the original complaint was investigated, suggesting that there was merit to it, when the true story is that the initial complaint was dismissed for lack of any factual support that Clifton Park Apartments was discriminating in the rental of it apartments upon family status. Of note, SDHR does not cite any case supporting its position that the mere sending of a letter on behalf of a client exposes the attorney to a retaliation claim and research discloses none. Citation to *Missick v. Big V Supermarkets*, 115 AD2d 808, 811 [3d Dept 1985], *app dismissed* 67 NY2d 938 [1986]) is not pertinent as that decision

[8] A contrary rule would have a chilling effect on an individual's ability to obtain representation and the attorney's ethical obligation of zealous representation of a client as an attorney may be deterred by the spectre of a lawsuit against the attorney. (See Restatement (Third) of the Law Governing Lawyers § 57 [2000] Comment b).

involves the litigation privilege in a defamation action which is not the situation here as attorney Pentkowski is expressing his view of CityVision's conduct in filing the unfounded complaint in the first instance without making any factual investigation as to whether Clifton Park Apartments rented to families.

It must be emphasized that attorney Pentkowski's act of writing the letter was not an inherently wrongful act that was prohibited by formal law. Indeed, a recent Ethics Opinion issued by the New York State Bar Association, Ethics Opinion 1228 (8/30/21), states that "[n]othing in the Rules [of Professional Responsibility] would specifically prohibit the proposed conduct here, which is to threaten a civil suit." (*Id*. at ¶5). To be sure, the Ethics Opinion states that an attorney may not make false or deceptive statements of fact in the threatening of a civil suit, which attorney Pentkowski did not do. Notably, the Ethics Opinion opines that "an attorney's threat to file suit as a last resort of a dispute is not rendered by a certain date [as here] will in most cases not rise to the level of a false statement of fact." (*Id*. at ¶10). This Ethics Opinion is certainly strong precedent that supports the argument here that his mere letter here cannot form the basis of a retaliation claim against him.

Suffice it to say that SDHR appears to be seeking to penalize attorneys who represent persons and entities who have been aggrieved by baseless actions commenced by persons under the Human Rights Law so as to deter them and their

clients from suing these persons who engage in lawless action. There is no principled policy basis for doing so. In this regard, if SDHR's position is upheld, there is no reason why its position should be limited to SDHR-based actions. There will be a veritable Pandora's box of litigation seeking to extend and penalize attorneys who are doing nothing more than representing their clients in an ethical fashion.

In short, SDHR is engaged in overreaching and its effort here to attack and penalize attorneys must be slapped down.

POINT VI

PETITIONERS HAVE NOT CHALLENGED THE IMPOSITION OF THE CIVIL FINE AND PENALTY (Replying to Point IV of SDHR's Brief)

Executive Law §297(4)(c)(vi) authorizes SDHR to assess as a civil fine and penalty a monetary amount not to exceed $50,000.00 to be paid by a respondent found to have committed a non-willful discriminatory act. Here, the ALJ determined that the sum of $2,500.00 would be an appropriate fine and penalty for petitioner's found unlawful retaliation action. (R162). SDHR upheld that fine and penalty as assessed. (R20).

SDHR argues, curiously, on this appeal that the assessed fine and penalty of $2,500.00 should be affirmed as it cannot be viewed as arbitrary and capricious, curiously because petitioners have not challenged that award as made. Of course,

if the retaliation finding is vacated, that award will also be vacated. But otherwise petitioners do not make any argument that the award was arbitrary and capricious.

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 II. If the matter is to be remanded, the retaliation claim as alleged against petitioner David Pentkowski, and the claim for recovery for the value of its so-called "diverted resources" and attorney's fees should still be dismissed.

Dated: December 23, 2021

Respectfully submitted,

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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 Reply Brief was prepared on a computer using Microsoft Word.

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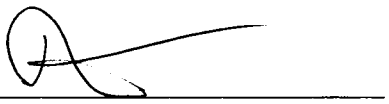
Dated: December 23, 2021



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