To Be Argued By:
TONI ANN HOLLIFIELD
Time Requested: Twenty Minutes

COURT OF APPEALS
STATE OF NEW YORK X

In the Matter of CLIFTON PARK APARTMENTS, LLC, &c., et al.,

Respondents,

APL-2022-00179

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Appellant,

et al.,

Respondents.

(And Another Related Proceeding.)
X

REPLY BRIEF ON BEHALF OF APPELLANT NEW YORK STATE DIVISION OF HUMAN RIGHTS

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POINT I

CITYVISION CONSIDERED PINE RIDGE AND PENTKOWSKI'S LETTER TO BE A THREAT OF IMPENDING LITIGATION AND ACTED ACCORDINGLY TO PROTECT ITS INTERESTS FROM THAT ADVERSE ACTION.

Respondent Clifton Park Apartments, LLC, the owner of Pine Ridge II Apartments (Pine Ridge) and David H. Pentkowski, Esq. (Pentkowski) (collectively, Respondents) argue that Pentkowski's testimony at the public hearing demonstrates that, despite the clear content of his July 25, 2017 letter to CityVision Services, Inc. (CityVision) and Leigh Renner (Renner) (collectively, CityVision or Complainants), he had no intention of actually bringing suit against them (*see Brief of Petitioners-Respondents* at 11, 29; R. 113 [CX-2]; 163-164[1]). The Division's Commissioner specifically found Pentkowski's self-serving testimony that the letter was neither retaliatory nor threatening to be "without merit" (R. 72 [*Final Order* at 4]), finding that the letter "clearly sought damages for the money Respondents spent 'as a result of' Complainants' complaint … It is difficult to see how this can be viewed as anything other than a threat" (*Id*.).

[1] Numbers following the letter "R." refer to pages of the *Appendix* filed with Appellant's Brief. *Petitioners-Respondents Supplemental Appendix* is composed entirely of documents which are outside of the hearing record considered by the Division's Commissioner. Said documents are not properly before this Court.

CityVision's subsequent actions make it clear that it felt threatened by the content of Pentkowski's July 25, 2017 letter. Approximately two weeks later, on August 7, 2017, Complainants drafted the instant complaint of retaliation (R. 85-96 [ALJX-2]), later verifying and filing that complaint on August 18, 2017. It is reasonable to conclude that CityVision took these actions quickly in order to protect itself from impending litigation.

Respondents' Brief cites to several cases interpreting the retaliation provisions of the Federal Fair Housing Act (FHA) and the Fair Labor Standards Act (FLSA) in support of its argument that the threat of litigation cannot constitute retaliation, with no context as to the underlying facts or actual rulings of those cases (*see Brief of Petitioners-Respondents* at 31). *Davis v Fenton* (857 F3d 961 [7th Cir 2017]) is a case filed under the FHA by an individual who claimed her former attorney had filed suit against her current attorney in retaliation for her having sued him for deficient representation due to her race. In its decision, the Seventh Circuit found that "filing a lawsuit … can't be considered retaliation except perhaps in extraordinary circumstances not present in this case" (*Id*. at 963), with no indication of what those "extraordinary circumstances" might be.

In *Tzoc v M.A.X. Trailer Sales & Rental. Inc.* (2015 WL 2374594 [SD FL 2015]), a case interpreting the FLSA, the court held

> "[i]n some instances an employer's filing of a counterclaim or lawsuit can give rise to a retaliation claim under the FLSA … [i]t is, however,

> not enough to find a retaliatory motive; **the counterclaim at issue must also be baseless** for this Court to find retaliation"

(*Id*. at *14 [emphasis in original]). There, the court found that an individual's former employer's verbal threat to sue him for $300,000 was not enough to sustain a finding of retaliation, where there was no evidence of whether the alleged counterclaim would have been baseless. Similarly, in *Hutchinson v Honeymoon Corp.* (2017 WL 6502529 [ND OH 2017]), another case interpreting the FLSA, the court held that it was "not prepared to find (where the Sixth Circuit has not yet ruled) that the mere filing of a *non-frivolous* counterclaim is retaliation" (*Id*. at *7 [emphasis added]), clearly agreeing with the *Tzoc* court in the conclusion that a baseless counterclaim could constitute retaliation under the FLSA.

The allegations Pentkowski's letter refers to were made in a Verified Complaint filed with the Division and were duly investigated.

> "Statements made during or for judicial proceedings, if pertinent, are absolutely privileged and cannot be used later in an action alleging defamation. This rule also encompasses communications made in the course of quasijudicial or administrative proceedings … The requisite criteria are present for applying this rule to the proceedings before the State Division of Human Rights … any statements made during or in preparation for said proceedings are protected by an absolute privilege"

(*Missick v Big V Supermarkets*, 115 AD2d 808, 811 [3d Dept 1985], *appeal dismissed* 67 NY2d 938 [1986]; *see also Wellsville Manor, LLC v Campbell*, 2020 WL 7180987 [WD NY 2020, Dec. 7, 2020, No. 20-CV-000621]). Given this

absolute privilege, Pentkowski's threat to "look[] to" CityVision and Renner, personally, to recoup "damages" (R. 113 [CX-2]) had no basis in law and cannot be said to have been made in good faith. The threats of litigation contained in Pentkowski's letter were; therefore, baseless.

Courts are directed to construe the Human Rights Law "liberally … *regardless* of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed" (Executive Law § 300 [emphasis added]). This statutory admonition obligates this Court to adopt a broad interpretation of the Human Rights Law's retaliation provision.

CityVision was an unrepresented party at the time it received the letter from Pentkowski, Pine Ridge's attorney. It defies both reason and the language and spirit of the Human Rights Law that an unrepresented party would not be protected from retaliation after receiving a clear threat of baseless litigation from an attorney, based upon "a good faith Division claim" (R. 73 [*Final Order* at 5]), simply because Complainants had the foresight to protect their interests in advance of the filing of the threatened litigation.

POINT II

PINE RIDGE AND PENTKOWSKI'S NEW ARGUMENT THAT THEIR LETTER WAS MERELY SEEKING STATUTORY ATTORNEY'S FEES DEMONSTRATES A FUNDAMENTAL MISUNDERSTANDING OF EXECUTIVE LAW § 297 (10), WHICH ALLOWS FOR ATTORNEY'S FEES TO PREVAILING RESPONDENTS ONLY UNDER LIMITED CIRCUMSTANCES NOT APPLICABLE HERE.

In their Brief, Respondents claim that the dismissal of CityVision's initial complaint of housing discrimination left them with the "option of pursuing an award of its attorney's fees" (*Brief of Petitioners-Respondents* at 23), and that they had a "statutory right under Executive Law § 297 (10) to pursue" attorney's fees (*Id*. at 27; see also *Id*. at 30). Respondents also seem to argue, for the first time, that Pentkowski's letter was "merely telling the complainant that 'I am going to pursue' statutorily permitted action to recover those fees and related damages" (*Id*.). These arguments reflect a fundamental misunderstanding of the attorney's fees provision of the Human Rights Law.

Pursuant to Executive Law § 297 (10), "the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section." The subsection authorizes the award of attorney's fees to a prevailing respondent or defendant only upon the motion of that party, wherein it must make a showing that the action or proceeding was "frivolous." It is specified that in order for an action or proceeding to be frivolous, there must be a

finding either that such "action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another…" or that it was brought in bad faith and "could not be supported by a good faith argument for an extension, modification or reversal of existing law." (*Id*.)

In the instant matter, the Division dismissed the initial complaint alleging housing discrimination after a finding of no probable cause – no public hearing was held. Thus, a motion for attorney's fees could not even have been considered. Given the administrative posture of the initial complaint, Pine Ridge and Pentkowski had no statutory right to attorney's fees under Executive Law §297 (10).

POINT III

THE DIVISION HAS NOT ARGUED IN FAVOR OF A COMPLAINANT HAVING ABSOLUTE IMMUNITY FROM DEFAMATION ACTIONS STEMMING FROM BAD-FAITH COMPLAINTS.

Respondents continue to argue, as they did before the Third Department, that the Division is seeking to establish an absolute bar against retaliation for unfounded complaints of discrimination (*Brief of Petitioners-Respondents* at 30). The Division does not now, nor has it ever advanced this argument during the course of this proceeding.

Respondents rely on the First Department's decision in *Herlihy v Metropolitan Museum of Art* (214 AD2d 250 [1st Dept 1995]). The Division recognizes the First Department's decision in *Herlihy*, wherein it stated, "statutory provisions prohibiting retaliatory conduct do not confer, *upon bad-faith complainants* making false discriminatory-related charges, absolute immunity from defamation actions that may arise out of those charges" (*Id*. at 257 [emphasis added]). However, *Herlihy* is factually distinguishable from the instant matter.

Herlihy was a defamation case in which a former employee alleged that volunteers she supervised falsely reported to her employers' Human Resource Office that she had made anti-Semitic comments (*Id.* at 254). The First Department recognized that the Human Rights Law bars "[r]etaliation by employers against

individuals for complaining of or opposing actions that they believe are discriminatory…" (*Id.* at 256, *citing* Executive Law §§ 296 [1][e] and [3-a][c]), and that the law "exist[s] to encourage victims of workplace discrimination to come forward and report discriminatory incidents…" (*Id.* [internal citations omitted]). However, the court found, the *Herlihy* defendants' accusations were not privileged as they did not occur within a "quasi-judiciary proceeding" (*Id.*). Here, by contrast, the Complainants' initial claims of housing discrimination – claims, the Division found upon the record of an evidentiary hearing were made in good faith, even though the Division ultimately found no probable cause to warrant a hearing – were presented through a quasi-judicial administrative process.

Respondents question the precedential value of the holding in *Moran v Simpson* (80 Misc2d 437 [Sup Ct, Livingston County, January 24, 1974]), claiming that the *Herlihy* decision rejected the reasoning of *Moran* (*see Brief of Petitioners-Respondents* at 35-36). However, there is no indication that the court in *Moran* considered the question of whether there was an "absolute bar," and no part of the court's reasoning in *Moran* has been directly overruled – it remains good law.

In the instant matter, the Division's Commissioner did not determine liability based upon an assumption that an absolute bar existed, instead referring to CityVision and Renner as "Complainants making a good faith Division claim" (R. 73 [*Final Order* at 5]).

CONCLUSION

THAT THIS COURT REVERSE THE MEMORANDUM AND JUDGMENT OF THE APPELLATE DIVISION, THIRD DEPARTMENT, DATED APRIL 28, 2022, AND CONFIRM IN ITS ENTIRETY THE NOTICE AND FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ON THE COMPLAINT OF CITYVISION SERVICES, INC AND LEIGH RENNER, DATED JUNE 1, 2020, OR, IN THE ALTERNATIVE, THAT THIS COURT REMIT THE MATTER TO THE DIVISION OF HUMAN RIGHTS FOR ADDITIONAL FACT-FINDING ON THE ISSUE OF WHETHER THE INITIAL COMPLAINT WAS FILED IN GOOD FAITH; AND SUCH OTHER AND FURTHER RELIEF AS THIS COURT DEEMS JUST AND PROPER.

Dated: Bronx, New York
April 24, 2023

Respectfully submitted,

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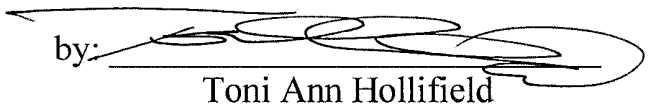
by: 
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CERTIFICATION OF COMPLIANCE

This brief was prepared on a computer, using a Microsoft Word program. The type is Times New Roman, Fourteen Point and it is double-spaced. It contains 1,814 words.