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Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of the
CLIFTON PARK APARTMENTS, LLC, As Owner of
PINE RIDGE II APARTMENTS, and DAVID H. PENTKOWSKI, ESQ.

Petitioners-Respondents,

For a Judgment Under Article 78 of the CPLR

against

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondent-Appellant,

and

CITYVISION SERVICES, INC., LEIGH RENNER,

Respondents.

BRIEF FOR PETITIONERS-RESPONDENTS

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Date Completed: April 13, 2023

STATEMENT PURSUANT TO RULE 500.1(f) OF THE RULES OF PRACTICE OF THE COURT OF APPEAL

Respondent Clifton Park Apartments, is a duly incorporated limited liability company in New York and it has no parents, subsidiaries or affiliates.

STATEMENT PURSUANT TO RULE 500.13(a) OF THE RULES OF PRACTICE OF THE COURT OF APPEAL

There is no related litigation pending as of the date of the filing of this responding Brief.

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PRELIMINARY STATEMENT

Respondent-appellant New York State Division of Human Rights ("SDHR") appeals by permission granted by this Court from a judgment of the Appellate Division, Third Department, annulling a determination of SDHR finding that petitioners-respondents Clifton Park Apartments, LLC ("Clifton Park Apartments") and David M. Pentkowski ("Pentkowski") (collectively "respondents") unlawfully retaliated against respondents CityVision Services ("CityVision") and Leigh Renner (collectively "complainant") for their filing of a complaint with SDHR, alleging Clifton Park Apartments engaged in housing discrimination in violation of Executive Law §296(5). (SDHR Appendix ["A"]4 [Order granting leave to appeal]; 6-8 [Third Department Memorandum and Judgment]).[1] The Third Department decision is officially reported at 204 AD3d 1358 (2022).

The Third Department annulled SDHR's determination on the ground that the evidence in the administrative record did not support a retaliation claim under Executive Law §296(7) as alleged because the alleged retaliatory act was insufficient as a matter of law to support a retaliatory claim under the statute. Respondents argue on this appeal that the Third Department's conclusion is correct, constituting a proper interpretation of Executive Law §296(7) and review of the hearing record.

[1] Complainants did not appear in the Third Department, and have not sought to appear before this Court.

(Executive Law §298 ["The findings of facts on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole."]) Putting this argument in full context, a matter which SDHR fails to do, this Court must keep in mind three undisputed facts:

First, Renner had no intention of renting an apartment at the complex or at any complex in New York. She is a "tester,"[2] a person who conducts fair housing testing to determine if owners of houses or apartments are engaged in rental practices that violate federal or state law. Her testing is made solely through the making of cold calls from her office in Texas to apartments complexes throughout the United States, including New York, posing as prospective tenants. As discussed *infra* at pp. 6-7, testers solicit business for their fair housing services from those they call and claim engaged in a discriminatory practice, and profit from the sale of these services.

Second, the initial complaint to SDHR was that Clifton Park Apartments engaged in unlawful steering in violation of Executive Law §296(5)(a)(1), to wit, directing her to another apartment complex due to her claimed family status.[3] Following an investigation, SDHR dismissed the complaint, determining there was "no probable cause" for the violation as alleged. (A92-93). This determination was based on the investigators' finding that there was no evidence Clifton Park

[2] *See, Havens Realty Corp. v. Coleman*, 455 US 363, 373 (1982).

[3] The other apartment complex to which Renner was allegedly steered to was also owned by Clifton Park Apartments. (A13, ¶2; A198, lines 22-25 to 199, lines 13).

Apartments discriminated against persons with minor children.[4] In short, the complainant's claim was baseless.

Third, the claimed act of retaliation was a letter, sent by Pentkowski on behalf of his client, Clifton Park Apartments, to complainant after the dismissal of the complaint, asserting that the allegations made by complainants were "false, fraudulent and libelous;" his client incurred substantial costs in defending against the complaint; his client was "looking to" complainants for those costs; and seeking a resolution was sought at this time and if he did not hear back from complainants, his client "will proceed accordingly." (A113). Complainants did not respond. However, Clifton Park Apartments took no further action to recover its costs.

With these facts looming large, SDHR nonetheless takes the position that the mere "threat," to the extent Pentkowski's letter constituted a threat, that Clifton Park Apartments may file a lawsuit against the complainants *after* the dismissal of their complaint and without a further claim that the "threat" chilled their efforts to uncover housing violations on the part of Clifton Park Apartments or any other entity in New York is an act of retaliation. Notably, SDHR cites no case that fully supports its argument upon these facts.

[4] As discussed further *infra* at p. 10, the investigator noted that half of the apartments had children and Clifton Park Apartments advertised on its website "Shenendehowa Schools nearby."

Respondents will show in this Brief that there is no basis in law to conclude that the mere sending of a letter which states a lawsuit is being contemplated to recover damages arising from a baseless charge of discrimination that respondents were forced to defend against constitutes a retaliatory act sufficient to support a violation of Executive Law §296(7). While this is an issue of first impression for this Court, respondents' argument is fully supported by federal court interpretations of the federal Fair Housing Act's analogous retaliation provisions, as well as New York state court interpretations of Executive Law §296(7) generally.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the element for establishing a retaliation claim under Executive Law §296(7) requiring proof that the defendant/respondent took adverse action against the person who filed a discrimination complaint against it can be satisfied solely by proof that the defendant/respondent upon dismissal of the complaint as unfounded notifies the person it is considering or threatening an action against the person to recover its damages and attorney's fees in defending against the complaint.
2. Whether the Third Department erred in not remitting this matter after concluding the Administrative Law Judge employed an incorrect standard in determining whether the complaint was brought in good faith and instead addressed the adverse effect issue stated above, properly

addressed the issue and annulled SDHR's Determination upon resolution of that issue against SDHR.

COUNTERSTATEMENT OF THE CASE

Statement Of Facts

SDHR in its opening Brief presents what can only be stated as a Statement of Facts which is cherry-picked to support its argument. To put the parties' respective arguments in full factual context, which respondents argue is necessary for this Court to fully understand and address the issue of first impression before it, a more complete statement of the pertinent facts is required.

- **Parties**

Clifton Park Apartments owns and manages a large apartment complex – Pine Ridge II Apartments – in the Town of Clifton Park, Saratoga County. (A13, ¶2).[5] There are 228 apartments in this complex. (A61, 1.13-17). Approximately half of the apartments have children residing in them. (A93). In this connection, Pine Ridge II's website during the relevant time period advertised "Shenendehowa Schools Nearby." (A93).[6]

[5] Clifton Park Apartments also owns and manages two other apartment complexes in Clifton Park, Andrea Court Apartments and Clifton Park Apartments. (A13, ¶2). When one of the complexes, for example Pine Ridge II, could not accommodate a rental request, Clifton Park Apartments' rental agent would recommend one of its other two complexes. (A198, lines 22-25 to 199, lines 13). Both complexes have families with children

[6] Its current website: apartments.com/pine-ridge-ii-andrea-court-apartments-halfmoon-ny/re62f13/ (last checked April 10, 2023).

David Pentkowski is a member of the New York State bar. He advises and represents Clifton Park Apartments with respect to legal matters. (SA148, lines 22-25 to 149, line 1; 112). Hs is not involved with the management of the complex.

CityVision is a Texas not-for-profit self-proclaimed advocacy group which conducts fair housing "testing." (A172-173). Through its employees, so called "testers," it makes cold calls to apartment complexes throughout the United States, including New York, to determine if the complexes are violating federal and/or state laws prohibiting discriminatory treatment in the rental of their apartments. (A70, ¶2). The targeted complexes are obtained from a marketing database that contains information on apartments in the United States, which information includes the telephone number of the listed complex. (A178). Prior to making a call to the listed complex, or after, the testers do not engage in any background investigation of the complex. (*Id*.).

CityVision's testers pose as potential tenants, and in the course of a cold call made will provide certain information, *e.g*., pet ownership, children, age, in an effort to see if the complex is refusing to rent on a prohibited discriminatory ground. (A70, ¶2; A93). If during the phone call the rental agent indicates the complex is violating fair housing laws, CityVision will commence a discrimination proceeding before the federal or state agency overseeing the Fair Housing statutes. (A70, ¶2). Such

proceeding is commenced on behalf of itself and seeks to recover damages for that violation.

CityVision also operates a training program in which it educates rental property owners about rental practices that are illegal and barred under federal and state fair housing laws. (A178, lines 15-25 to 179, lines 1-6). Upon its filing of a fair housing complaint, it will simultaneously send to the offending rental complex a letter, a "conciliation offer," stating the complaint can be resolved by, *inter alia*, of proof of fair housing training which training CityVision provides. (SA14).

Leigh Renner is an employee of CityVision. (A70, ¶3). She is its Operations Manager. (SA14). In that capacity, Ms. Renner makes cold calls on behalf of CityVision. (SA92-93).

● **Renner's Cold Call of November 9, 2016**

On November 9, 2016, Ms. Renner called Pine Ridge II and spoke to its rental agent.[7] Posing as a potential renter, Catrina, she said that she was looking for a 2-bedroom apartment and asked whether anything was available. The agent said January 1st would be "next availability" for an apartment, and when Renner said that would be "perfect," the agent asked whether the apartment was just for her or family. Renner said "it's me and my three daughters, 13, 11, and 8." As the agent is clearly

[7] A transcript of the entire telephone call is reproduced in the Appendix at 218-219.

checking out that January 1st availability apartment, the agent said that apartment had a "credit ap pending," and she was waiting on $300.00 from that tenant.

The agent then told Renner she would give Renner the telephone number for another development Clifton Park Apartments owned which was 5 minutes aways so Renner/Catrina could check with it for availability. Renner than asked if anything else would be available soon, to which the agent responded that she did not know right now as the renewals just went out. The agent then told Renner about Pine Ridge II's apartments, price, and amenities.

Lastly, Renner said she was disabled and needed a service dog, and would that be permitted in the complex. The agent responded do you have papers, clearly indicating that a service dog would be permitted upon the proof of the need, and that she would accept Renner's doctor's prescription letter.

The agent concluded the conversation by saying: "Why don't you call my other office just to see what their availability is because like I said I am waiting on that $300 and it's supposed to come in today. You know what I mean? I would hate to bring you all the way over here and say no I don't have anything." (A119).

- **CityVision's and Renner's Discrimination Complaint Filed with SDHR and Served Upon Clifton Park Apartments**

Sometime in February 2017, CityVision and Renner filed with SDHR a "Verified Complaint" alleging that Clifton Park Apartments on November 9, 2016 during that aforementioned phone call subjected Renner to "discriminatory

steering." (SA2, ¶3). As the "Verified Complaint" was not executed and notarized (SA3), it was refiled, properly executed and notarized on February 23, 2017. (SA4-13).[8]

The verified complaint recounted in a very sanitized fashion what occurred during the November 9th phone conversation. (SA7, ¶2). The claim was that Clifton Park Apartments violated the Federal Fair Housing Act and the New York's Human Rights Law because its agent "steered" Renner to another rental property once the agent heard that Renner had three minor children. (SA¶2).[9] This steering caused harm to the complainants as "Clifton Park Apartments "frustrated the mission of CityVision Services, Inc., and caused it to suffer a diversion of resources and frustration of mission." (SA11).

Notably, CityVision then sent a "conciliation offer" to Clifton Park Apartments. (SA15). It offered to drop the complaint if Clifton Park Apartments would, among other things, pay to it the costs incurred in making the complaint ($2,500.00) and proof of Fair Housing Training of its employees, a service CityVision would provide and charge for; or from some other organization. (SA15).[10] The $2,500.00 cost was purportedly based on the time Renner spent on

[8] A complaint was also filed with the Federal Department of Housing and Development: Office of Fair Housing and Equal Opportunity. (SA12).

[9] As discussed *infra* at pp. 21-22, steering is considered a discriminatory practice.

[10] In essence, as CityVision's principal admitted, it was engaged in the solicitation of business. (A178, lines 15-25).

the call and the evaluation of the merits of a claim, and her training. (A184, lines 11-25 to 185, lines 1-25).

Pentkowski's efforts to speak to someone at CityVision and obtain more information about what transpired during the call were rebuffed. (A112; 150-152). No settlement was reached and the SDHR proceeding continued.

● **SDHR's Dismissal of Complaint**

Upon receipt of the complaint, SDHR commenced an investigation. (SA16). Its investigation produced evidence that based on interviews with tenants, approximately half of the apartments in Pine Ridge II have children and that the tenants with families were never treated differently because of their familial status. (A93). Further investigation revealed Pine Ridge II's website advertises "Shenendehowa Schools Nearby" for its schools, a fact the investigators concluded undermined CityVision's complaint that Clifton Park Apartments discriminated against persons who have minor children. (A93). Lastly, the investigation noted that CityVision's testing for discrimination was "insufficient" and "inconclusive." (A93).

With these facts, SDHR concluded there was no evidence that Clifton Park Apartments engaged in the unlawful discriminatory practice complained of. (A92). Thus, the complaint was dismissed with a conclusion of NO PROBABLE CAUSE

to believe there was a violation. (A92). Its determination was dated June 30, 2017. (A93).

- **Pentkowski's Letter to CityVision Upon the Dismissal on Behalf Of Clifton Park Apartments**

By letter dated July 25, 2017, Pentkowski contacted CityVision and Renner on behalf of his client Clifton Park Apartments. (A113). He stated that his client considered the complaint they filed to have contained "false, fraudulent and libelous" statements, and forced it to retain counsel and use employee time to address those claims. Pentkowski then stated his client was looking to CityVision and Renner for compensation for those damages. (A113). Pentkowski concluded his letter by stating: "If you would like to discuss a resolution to this claim at this time, please have your representative contact the undersigned within 10 days of the date of this letter. Not hearing from anyone on your behalf within that timeframe, we will assume that you do not intend to take responsibility for these actions and will proceed accordingly". (*Id*.).

Pentkowski stated that when he prepared the letter, he did not consider the possibility that he might sue CityVision. (A163, lines 9-13). The letter was sent in an attempt to get CityVision to respond to his client's claim that it was damaged by the complaint and talk about it. (A163, lines 14-25). In other words, he was "looking to see if we could just have a conversation about having us made whole for their having brought something that shouldn't have been brought by rights." (A164, lines

13-16). As to the words "will proceed accordingly" in his letter, Pentkowski explained it meant what it says, namely, if he did not hear from CityVision he would proceed on that basis. (A164, lines 18-21). About how he would proceed, Pentkowski was silent.

Pentkowski did not hear from CityVision in response to the letter. Nothing further occurred on the part of Clifton Park Apartments vis-à-vis CityVision.

● **Complainant's Response to Letter**

Complainants did not respond directly to Pentkowski's letter. Instead, complainants immediately started the preparation of a complaint to SDHR alleging a retaliation claim; and then at the request of SDHR filed a complaint on or about August 18, 2017. (A108; 97). Afterwards, complainants retained counsel to represent them in the prosecution of their claim on or about October 2, 2017. (A108; 109).

● **CityVision's Claim Alleging Retaliation**

CityVision's claim as filed with SDHR, using a federal Housing Discrimination form, alleged that both Clifton Park Apartments and Pentkowski subjected it "to housing discrimination on the basis of filing a Fair Housing Claim, a violation of Sec. 818 of the [Fair Housing] Act, through interfering, coercion and intimidation." (A85, 89). The factual predicate for this claim was Pentkowski's July 25, 2017 letter and CityVision's belief that the "letter threat][end] a lawsuit." (A89).

On or about September (apparently) 6, 2017,[11] SDHR issued a "Determination After Investigation," finding that it had jurisdiction over the complaint and that probable cause existed to believe that respondents engaged in the unlawful discriminatory practice complained of. (A97).

The matter was then scheduled for a public hearing before an Administrative Law Judge ("ALJ") of the SDHR. (A81).

● **Hearing**

The hearing was conducted on June 25, 2018. (A88). CityVision's claim was prosecuted by its retained attorney Andy Winchell, Esq. (A139). It was completed in two hours with only two witnesses testifying. (A138, 200).

Initially, it is important to note attorney Winchell's position was that respondents engaged in unlawful retaliation in violation of Fair Housing Act §818, 42 U.S.C. §3617, and Executive Law §296(7) by reason of its sending of two "threatening" letters, a letter dated February 27, 2017 (A102) and the letter dated July 25, 2017. (A103). His theory of liability was that the mere sending of the letters in response to CityVision's filing of a discrimination complaint with SDHR was a per se violation of the cited anti-retaliation sections, and that nothing more needed to be proven. (R144-145, 195, lines 11-25 to 59, lines 7-25).

[11] The date of the letter as to the month as reproduced is unclear.

The proof presented at the hearing mirrored that legal theory. Thus, Pentkowski was called as a witness to testify to and authenticate the two letters, February 27, 2017 and July 25, 2017, which he, of course, did. (A148-168; 149-150, 158-159). Attorney Pentkowski then offered further testimony as to why he sent those two letters, discussed *supra* at pp.11-12.

CityVision's only other witness was Gary Lacefield, PhD, its principal officer. (A169-172). His testimony was presented by telephone. (*Id.*). Mr. Lacefield testified to receiving two letters and a phone call from attorney Pentkowski (A173-174) and he added he was "shocked" by the conduct. (A174, line 15).

While no evidence was proffered at the hearing as to what damages, if any, CityVision sustained, Lacefield submitted on August 10, 2018, in response to the ALJ's request dated August 2, 2018, a "Certification" as to the damages incurred by CityVision in response to the charged retaliation. (A106-111). The damages were monetary, representing the time staff spent after receipt of the letter – 18 hours at $265.00 per hour – and its attorney's fees including paralegal – 39.3 legal hours at $275.00 per hour and 1.4 paralegal hours at $90.00 per hour – for a total of $21,742.00. (A106, ¶3; 108, 109-111). Notably, these charges related to the mere prosecution of a retaliation claim, and recovery of any damages sustained upon receipt of the letter. Of course, Pentkowski had no opportunity to cross-examine Lacefield about the charged expenses.

The existence of a recording of Renner's telephone call of November 9, 2017 was raised at the hearing. CityVision's attorney asked the ALJ if he had the recording of that telephone call to which he responded "No" as it was not in the SDHR record. (A186, lines 23-25 to 187, lines 1-3). It was then agreed that CityVision's attorney who had a recording of the telephone call would provide it to the ALJ and Pentkowski with an affidavit satisfying authentication evidentiary requirements. (A188-189, lines 1-6). A copy of the recording was concededly sent as required.[12]

● **ALJ Decision**

The ALJ issued his "Recommended Findings of Fact, Opinion and Decision/Order" on May 14, 2019. (A69-76). He found that both Clifton Park Apartments and Pentkowski engaged in unlawful retaliation by the mere sending of the July 25, 2017 letter, which he concluded could be viewed as a threat to sue CityVision because it had filed the initial discrimination complaint. (A72). In support, the ALJ cited and relied upon *Moran v. Simpson* (80 Misc2d 437 [Sup. Ct. Livingston Co. 1974]), which held that the Human Rights Law established an absolute bar for an unfounded complaint of retaliation.[13] The fact that no further

[12] A transcript of the recording is in the Appendix at 218-219.

[13] As discussed *infra* at pp. 35-36, this holding has been rejected by the First Department in *Henry v. Metropolitan Museum of Art* (214 AD2d 250, 256 [1st Dept. 1995]) and by the Third Department in *Matter of New York State Off. of Mental Retardation & Dev. Disabilities (Staten Is. Dev. Ctr.) v. New York State Div. of Human Rights* (164 AD2d 208 [3d Dept. 1990]).

action, judicial or otherwise was taken by Clifton Park Apartments was viewed as irrelevant. (A73).

The ALJ did not undertake any analysis as to whether CityVision established by its evidence that Clifton Park Apartments was engaging in a discriminatory practice during the telephone call of November 9th before filing its complaint. Rather, the ALJ simply held in conclusory fashion that "CityVision's initial discrimination complaint was made in good faith, that [Clifton Park Apartments and Pentkowski] have not shown that complainant's allegations were made in bad faith" and therefore, "complainants should prevail." (A73).[14]

Upon his finding of unlawful retaliation, the ALJ awarded CityVision $4,775.00 as damages and issued a civil fine of $2,500.00. (A73-74; 75-76, decretal paragraph 4, subparagraphs 1, 4). The ALJ did not make an award of attorney fees, on the ground that the Human Rights Law did not provide for such an award in a retaliation case. (A74). The ALJ's Recommended Order set forth his conclusions as discussed above. (A75-76).

● SDHR's Review of The ALJ Decision

On the administrative review of the ALJ's Recommended Order, the Commissioner of SDHR issued a "Notice and Final Order" on June 21, 2020. (A51-

[14] As discussed *infra* at pp. 24-25, the ALJ ignored substantial case law that establishes a retaliation claim has to prove, *inter alia*, that Clifton Park Apartments and Pentkowski had a good faith belief that they had engaged in an unlawful steering. (A73).

58). He adopted the ALJ's Recommended Order with one modification. Specifically, the Commissioner added the ALJ's finding that Clifton Park Apartments and Pentkowski engaged in unlawful retaliation, and the fine and damages were appropriate. (A51). However, the Commissioner rejected the ALJ's denial of an award of attorney's fees, concluding that an award of attorney's fees was permissible for a successful retaliation claim (A51-53); and then awarded $10,988.00 and related expenses in attorney's fees. (A53-56). The Final Order thus awarded CityVision $15,763.00. (A56).

Proceedings Below

- **Respondent's Article 78 Proceeding Challenging SDHR Determination and Transfer to Third Department**

Clifton Park Apartments timely commenced a CPLR article 78 proceeding in Saratoga Supreme Court, seeking to annul SDHR's Final Order. (A11-12 [Notice of Petition]; 13-21 [Verified Petition]). Supreme Court upon SDHR's motion transferred the proceeding to the Appellate Division, Third Department pursuant to Executive Law §298 and 22 NYCRR §202.57(c). (A9-10 [Supreme Court Order]; 22, 27-28).

In accordance with the Appellate Division Rules of Practice 1250(b), SDHR submitted to the Third Department the original record that was before it. However, the record did not contain the recording of the November 9th telephone call that the ALJ requested and that was provided to him. By motion, made by Clifton Park

Apartments and Pentkowski, the Third Department permitted the including of the audio recording and a transcript thereof in the record on appeal before it.

By their Brief as petitioners-appellants, respondents argued that the Final Order must be annulled as SDHR failed to prove an act of retaliation for purposes of Executive Law §296(7) and that CityVision had a good faith reasonable belief that the conduct it challenged as unlawful steering constituted a violation of Executive Law §296(7). Additionally, they argued that Pentkowski as an attorney was immune from any liability as there was no evidence that he acted in bad faith in submitting the letter on behalf of his client; the award of $4,775.00 in damages was improperly made; and that there was no basis for an award of attorney's fees to the prevailing party on a retaliation claim.[15]

In response, SDHR argued that the Final Order was proper in all respects and should not be disturbed. In response to the opening Brief's arguments, SDHR argued that the *filing* of a lawsuit based solely upon the content of a complaint dismissed by SDHR can constitute retaliation, citing *Moran v. Simpson* (80 Misc.2d at 437); and that it necessarily followed that the threat of a lawsuit can form the basis of a retaliation claim. It then argued that in fact the Commissioner determined that

[15] The Court may take judicial notice of the Brief, as well as SDHR's responding Brief and the Reply Brief from NYSCEF, at Docket No. 14, 16, 18.

CityVision made a "good faith" claim. SDHR then addressed the remaining arguments made in the opening Brief.

● **Third Department Decision**

The Third Department annulled SDHR's Determination/Final Order, and granted the petition. (A6-8; 204 AD3d 1358). Initially, the Court found that the ALJ employed an incorrect burden-shifting analysis in the aspect of whether complainants had proved a valid retaliation claim in that complainants were required to show that they had a reasonable belief that Clifton Park Apartments had engaged in a discriminatory practice as alleged. (A7; 204 AD3d at 1359-1360). With this error, the Court recognized that it would ordinarily remit the matter to SDHR for further proceedings. However, such remittal was not warranted here.

Remittal was not warranted because the Court concluded complainants failed to establish a key element of a retaliation claim, conduct on the part of Clifton Park Apartments and Pentkowski which constituted an adverse action against them. The Court held the mere sending of the July 25th letter did not rise to the level of actionable retaliation. Some additional action in addition to the sending of the letter that adversely impacted complainants was required as to permit a finding of "intimidation, coercion, threats or interference" and none was proven. (A8; 204 AD3d at 1360-1361).

The Court therefore annulled SDHR's determination and granted the petition.

ARGUMENT

POINT I

CITYVISION'S INITIAL HOUSING DISCRIMINATION COMPLAINT FILED WITH SDHR ALLEGING CLIFTON PARK APARTMENTS ENGAGED IN UNLAWFUL STEERING, A DISCRIMMINATORY PRACTICE, WAS DISMISSED ON THE GROUND IT WAS FACTUALLY UNFORNDED

Respondents' argument on this appeal starts with a discussion of the pertinent Executive Law provisions governing housing discrimination and CityVision's initial housing discrimination claim made against Clifton Park Apartments, which SDHR dismissed as factually unfounded. It is important to do so to put respondents' substantive arguments as made in Point II in support of affirmance of the Third Department judgment in proper context.

Article 15 of the Executive Law – known as the Human Rights Law – prohibits housing discrimination. (Executive Law §296[5]). In pertinent part, this statutory provision declares the refusal to rent a housing accommodation to a person because of the "familial status" of such person is an unlawful discriminatory practice. (Executive Law §296[5][a][1]). Thus, an apartment owner violates the section when the owner refuses to rent an apartment to a person because the person has a child. (*See*, *Montanaro v. Weichert*, 145 AD3d 1563, 1564 [4th Dept. 2016]). However, an actual refusal to rent based on the prospective renter's "familial status" is not the only way the section can be violated.

A violation of Executive Law §296(5)(a)(1)'s "familial status" prohibited discriminatory ground can also be present when the apartment owner guides a prospective tenant away from its apartment complex to a certain other apartment complex based on the person's "familial status." This discriminatory practice is generally referred to as "steering." (*See, Carr v. Pinnacle Group*, 2010 NY Slip Op. 50847(U) at *5-6 (Sup. Ct. NY Co.); *see also* Smolla, Federal Civil Rights Acts [3d ed] §3:39; *Zuch v. Hussey*, 394 F.Supp. 1028, 1047 [ED Mich. 1975] [Keith, J.] [interpreting Fair Housing Act §3064(a)]).[16] Thus, an apartment complex owner's conduct that amounts to an effort to direct a prospective tenant to another apartment complex based on the person having a child can be an unlawful discriminatory practice under Executive Law §296(5)(a)(1).

Executive Law §297 provides for procedures to address discriminatory practices. Subdivision (1) provides that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice" may file a complaint alleging that a person has committed a discriminatory practice and seek damages; and subdivision (9) provides that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages."

[16] The New York courts frequently look to decisions of the federal courts interpreting provisions of the Federal Fair Housing Act ("FHA") which are comparable to those of the Executive Law provisions for guidance in interpreting Executive Law provisions. (*See, Stalkes v. Stewart Tenants Corp*., 93 AD3d 550, 551 [1st Dept. 2012]; *Francis v. Kings Park Manor, Inc*., 944 F.3d 370, 380-381 [2d Cir. 2019]).

However, Executive Law §297(1) also provides that a court action does not lie where the conduct is filed with SDHR. (*See, Hirsch v. Morgan Stanley & Co., Inc*., 239 AD2d 466 [2d Dept. 1997]).

As pertinent here, no issue has been raised as to whether a tester, such as CityVision, can maintain a retaliation claim before SDHR. In this regard, Executive Law §297(1) says "any person" claiming to be aggrieved can bring that claim, and no precedent in New York holds that a complainant's status as a tester precludes his or her ability to pursue a discriminatory practice claim proceeding before SDHR.

Here, CityVision field a verified complaint against Clifton Park Apartments with SDHR claiming that Clifton Park Apartments engaged in unlawful steering by its agent's conduct in guiding its tester (Renner) to another apartment complex which it owned during the November 9, 2017 telephone call. (SA7-13). Renner averred under oath that once she stated the apartment would be for herself and her three daughters, ages 13, 11 and 8, after being told there was availability at the complex, "the availability changed and [Clifton Park Apartments} steered [her] to another property." (SA11).

As more fully discussed *supra* at pp. 10-11, SDHR's investigation found no evidence supporting the claim. Rather, the evidence, the presence of children in approximately half of the apartments in the complex and the advertising for tenants touting "Shenendehowa Schools Nearby," undermined the claim of steering as

averred. (A93). In essence, the investigation shows that SDHR did not at all credit the sworn allegation of Renner, and thus dismissed the complaint.

With this dismissal, it is important to note that Clifton Park Apartments had the option of pursuing an award of its attorney's fees from CityVision. In this regard, Executive Law §297(10) provides that SDHR had the discretion to award Clifton Park Apartments its reasonable attorney's fees incurred in responding to the complaint as it was a "prevailing party." To support such an award, Clifton Park Apartments would have to establish, as stated in the section, that the complaint was "frivolous," as defined, *i.e.*, it was filed "without any reasonable basis." (Executive Law §297[10][b]).

POINT II

THE THIRD DEPARTMENT CORRECTLY HELD THAT SDHR'S FINDING THAT THE EVIDENCE IN THE RECORD OF THE HEARING WAS INSUFFICIENT TO SUPPORT A FINDING THAT RESPONDENTS TOOK ADVERSE ACTION AGAINST CITYVISION, AN ELEMENT OF A RETALIATION CLAIM, THEREBY REQUIRING ANNULLMENT OF SDHR'S DETERMINATION

A. Introduction

1. Retaliation Cause of Action/Claim

Analysis of respondents' argument starts with Executive Law §296(7). It provides:

> 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.

To establish a *prima facie* case of retaliation under this provision, a plaintiff/ complainant has the burden of submitting sufficient evidence to establish: (1) It engaged in a protected activity by opposing conduct prohibited by the Human Rights Law; (2) Defendants/Respondents were aware of that activity; (3) It was subject to an adverse action; and (4) There was a causal connection between the protected activity and the adverse action. (*Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Hollandale Apartments & Health Club, LLC v. Bonesteel*, 173 AD3d 55, 68-69 [3d Dept. 2019]; *Langton v. Warwick Val. Cent. Sch. Dist*., 144

AD3d 867, 868 (2d Dept. 2016]; *Treglia v. Town of Manlius*, 313 F.3d 713, 719 [2d Cir. 2002]). Once this showing has been made, a burden shifting analysis is then employed to rebut the *prima facie* case under which the defendant/respondent must articulate a legitimate non-discriminatory reason for the adverse action, shifting the ultimate burden back to the complainant to demonstrate that this reason was a pretext. (*Hollandale Apartments*, 173 AD3d at 69; *Langton*, 144 AD3d at 868; *Treglia*, 313 F.3d at 719).[17]

As pertinent here, a plaintiff/complainant may pursue a retaliation claim even if the underlying activity protected by the Human Rights Law, *e.g.*, filing a complaint alleging discriminatory conduct, is dismissed, either because the underlying conduct complained of was not in fact unlawful or was not supported by the evidence. (*Dodd v. Middletown Lodge [Elks Club] No. 1097*, 264 AD2d 706, 707 [2d Dept. 1999]; *Modiano v. Elliman*, 262 AD2d 223 [1st Dept. 1999]; *Treglia*, 313 F.3d at 719). However, in such a situation a plaintiff/complainant must additionally show to establish a *prima facie* case that he/she possessed a reasonable belief that the discriminatory practice alleged in the complaint occurred. (*See, Matter of Electchester Hous. Project v. Rosa*, 225 AD2d 772, 773 [2d Dept. 1996]; *Matter of New York State Office of Mental Retardation and Developmental Disabilities*

[17] The Second Circuit utilizes this approach in determining whether a retaliation claim is a violation of Fair Housing Act, 42 USC §3617. (*See, Regional Economic Community Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 53-54 [2d Cir. 2002]).

[Staten Is. Dev. Ctr.] v. New York State Div. of Human Rights, 164 AD2d 208, 210 [3d Dept. 1990] ["we adopt what has been identified above as the Federal standard for retaliatory discrimination cases"]; *Treglia*, 313 F.3d at 719 ["possessing a good faith, reasonable belief"]; *see also Matter of Mohawk Finishing Prods. v. New York State Div. of Human Rights*, 57 NY2d 892 [1982]).[18]

2. Parties' Argument

The Third Department held the hearing evidence failed to support SDHR's finding that respondents took adverse action against CityVision, and on that holding, annulled SDHR's determination and granted the petition dismissing CityVision's complaint. (A8; 204 AD3d at 1360-1361).

SDHR argues the Third Department erred in annulling its determination. In its view, SDHR reasonably interpreted Pentkowski's letter on behalf of his client Clifton Park Apartments as a threat of "retaliatory litigation" prohibited by the Human Rights Law's protection against retaliation (SDHR Br., p. 18); and that such threat established the third element. (SDHR Br., p. 14). In essence, SDHR's position is that a person who has sustained damages and incurred attorney's fees in defending itself against a baseless discrimination complaint contacts the complainant and informs the complainant that it is considering action to recover those damages, that

[18] SDHR acknowledged below this additional element to establish a *prima facie* case of retaliation when the underlying complaint has been dismissed. (A52).

person has exposed himself/herself to a retaliation cause of action, even if no further action is undertaken.

Respondents argue that where, as here, they did nothing more than assert that they were damaged by CityVision's filing of a baseless complaint and were "looking to" CityVision for compensation for those damages, their conduct did not rise to the level of actionable retaliation. This is especially so since Clifton Park Apartments, as mentioned *supra* at pp. 23-24, had a statutory right under Executive Law §297(10) to pursue recovery as damages its attorney's fees in defending against the complaint.

Merely telling the complainant that "I am going to pursue" statutorily permitted action to recover those fees and related damages cannot subject a person to a retaliation action. Alternatively, respondents argue that to the extent this Court concludes the July 27th letter can form the basis for establishing the third element, the retaliation claim must still fail because CityVision has not established, much less claimed, any legally sufficient materially adverse effects as the law requires.

In the course of their arguments, respondents will show that SDHR has cited no case in which a state or federal court has concluded that the mere sending of a letter without further follow-up action threatens a lawsuit in response to the filing of a complaint constitutes actionable retaliation. In that regard, the cases SDHR does cite in support are readily distinguishable and inapposite, or have been rejected by the courts.

B. There Is Insufficient Evidence In The Hearing Record To Establish *Prima Facie* The Third Element Of A Retaliation Cause Of Action Alleged Pursuant To Executive Law §297(1)

Respondents' argument herein has three separate contentions, acceptance of any one of the three supports their argument.

1. The July 25th Letter Cannot Be Viewed as a Threat of Retaliatory Litigation for Purposes of Supporting the Third Element

Analysis begins with the letter of July 25th that Pentkowski wrote to CityVision on behalf of his client Clifton Park Apartments. (A103). SDHR has declared this letter to be a threat of "retaliatory litigation." (SDHR Br., p. 18; 72). To be sure, SDHR's characterization of the letter is entitled to judicial deference. (*See, e.g. Matter of Murphy v. New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 652). However, where the characterization or conclusion is unreasonable or arbitrary, a court is not bound by it. (*Id.* at 655). This is the situation here.

As more fully discussed *supra* at pp. 11-12, attorney Pentkowski informed CityVision that his client was damaged, including the incurring of attorney's fees in order to defend itself in response to the complaint and that his client was "looking to" CityVision to reimburse those expenses. (A113). Pentkowski further informed CityVision that his client was open to a resolution of the issue upon a discussion if CityVision was desirous of such discussion. (A113). If no response from CityVision was received, Pentkowski advised that his client "will proceed accordingly."

No express threat that litigation would be pursued was made in the event CityVision failed to respond to the letter. The only future conduct on the part of Clifton Park Apartments expressed was that it would "proceed accordingly," a statement that did not expressly state that an action would be commenced, and indicated only that future litigation was one option among others, *e.g.*, do nothing.

Pentkowski was saying in the letter what he was thinking about, as Pentkowski himself testified. (A164, lines 13-25 to 165, lines 1-2). He was contemplating possible litigation, but did not state he would in fact initiate litigation if CityVision did not contact him. Properly viewed, the letter was hardly a *threat* that litigation would be commenced. SDHR's contrary conclusion is unreasonable and not entitled to any deference. With this conclusion, no act of retaliation to support the cause of action is present.

2. The Mere Sending of the July 25th Letter, Assuming It Is a Threat of Retaliatory Litigation, Cannot Serve as an Act of Retaliation for Purposes of the Third Element

To the extent this Court defers to SDHR's characterization, the issue then becomes whether the mere sending of a letter threating litigation constitutes an act of retaliation for purposes of the third element. In this regard, it must be stressed that no litigation was ever commenced, indeed, CityVision never heard anything from respondents after the July 25th letter was sent.

With this backdrop, the mere sending of the letter cannot be viewed as an unlawful act of retaliation. In this regard, Clifton Park Apartments was "threatening" to take action to recover its damages, attorney's fees, action the Executive Law said it could do. Executive Law §297(10) specifically authorizes an award to a defendant/respondent against whom a discriminatory practice was filed of its attorney's fees incurred in defending itself against the complaint upon a showing that the complaint was "frivolous." Expressed differently, Executive Law §297(10) permits a "retaliatory" action to recover attorney's fees against a complainant who files what is deemed a frivolous complaint. With this statutory authorization, respondents' "threatening" letter surely cannot then be deemed an act of retaliation subjecting Clifton Park Apartments to a lawsuit.

Nor is there any common law doctrine that overrides statutory or common law right to pursue the recovery of damages sustained as a result of a baseless complaint of discrimination and to make a threat to pursue such a recovery. As the First Department has noted, "[T]he Court of Appeals [has] rejected the notion of an absolute bar against retaliation for an unfounded complaint of discriminatory practices." (*Herlihy v. Metropolitan Museum of Art*, 214 AD2d 250, 256 [1st Dept. 1995], citing *Matter of Mohawk Finishing Prods. v. New York State Div. of Human Rights*, 57 NY2d 892 [1982]). SDHR's argument on this appeal is, in effect, an effort to establish such a bar.

Research discloses no New York case that addresses the issue of whether a mere threat to commence a lawsuit with no action ever commenced, as here, constitutes retaliatory conduct under Executive Law §296(7). However, research does disclose several federal cases holding that mere threats to commence an action against a person who filed a federal complaint alleging a violation of federal anti-discrimination provisions, the Fair Housing Act and Fair Labor Standards Act, do not constitute retaliation under the statutes' provisions prohibiting retaliation. (*See, e.g., Davis v. Fenton*, 857 F.3d 961, 963 [7th Cir. 2017] [FHA]; *Doherty v. ASAP Messenger Service, LLC*, 2019 WL 11307624, at *2 [D NJ] [FLSA]; *Hutchinson v. Honeymoon Corp*., 2017 WL 6502529, at *7 [ND Ohio] [FLSA]; *Tzoc v. M.A.X. Trailer Sales & Rental, Inc*., 2015 WL 2374594, at *14 [SD FL] [FLSA]).

The FHA provision makes it unlawful "to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by §3603, 3604, 3605, or 3606 of this title." (42 U.S.C. §3617); and the FLSA provides that an employer is prohibited from "discharg[ing] or in any other manner discriminat[ing] against [an] employee because such employee has filed [a] complaint or instituted . . . any proceeding under [the FLSA]." (29 U.S.C. §215(a)(3). Respondents submit

that the interpretation of these provisions by the cases cited above fully support their argument here.

Accordingly, the July 25th letter cannot be viewed as a threat of retaliatory litigation for purposes of the third element, resulting in a failure to have sufficient evidence to support a finding of retaliation under Executive Law §296(5).

3. There is no Evidence in the Hearing Record that Shows the Mere Sending of the July 25th Letter had a Sufficient Material Adverse Effect upon CityVision so as to Satisfy the Third Element

To establish the third element, there must be proof that CityVision suffered an adverse action based on the sending of that July 25th letter. Adverse action means the retaliatory act had "some materially adverse effect on [CityVision]" and "must be of sufficient magnitude to permit a finding of intimidation, coercion, threats or interference." (*Hollandale Apartments & Health Club, LLC v. Bonesteel*, 173 AD3d 55, 69 [3d Dept. 2019], citing *Joseph's House & Shelter, Inc. v. City of Troy*, 641 F.Supp2d 154, 159 [NDNY 2009] [internal quotation marks and citations omitted]; *Lynn v. Vill. of Pomona*, 373 F.Supp2d 418, 433 [SDNY 2005] [internal quotation marks and citations omitted], *aff'd* 212 Fed.Appx. 38 [2d Cir. 2007]; *see also Hatfield v. Cottages on 78th Community Assoc*., 2021 WL 778604, at *4-5 [D Utah]). Whether this standard has been met must be objectively analyzed from "the perspective of a reasonable person in the [complainant's] position." (*Gerari v. Union*

Square Condominium Assoc., 891 F.3d 274, 277 [7th Cir. 2018], citing *Burlington N. & Santa Fe Ry. v. White*, 548 US 53, 68-70 [2006]).

Here, SDHR makes no argument that CityVision suffered the requisite adverse action, a telling admission that there is no evidence to support a finding of adverse effect. In that regard, there is *no* proof, much less claim, that the mere sending of the letter to CityVision had a negative impact on its business. The absence of such proof means the element has not been satisfied. (*See, Torres v. Pisano*, 116 F.3d 625, 640 [2d Cir. 1997] [holding that employer's isolated request that employee drop EEOC complaint was not unlawful retaliation under Title VII because plaintiff refused request, and did not suffer any negative consequences as a result of such refusal]; *Ali v. Szabo*, 81 F.Supp2d 447, 467 [SDNY 2000] [dismissing prisoner's retaliation claim where prisoner did not allege any injury as a result of defendant's action]; *Mishk v. DeStefano*, 5 F.Supp2d 194, 202 [SDNY 1998] [dismissing First Amendment retaliation claim against employer for lack of evidence of any negative impact of alleged retaliatory transfer]; *Fluent v. Salamanca Indian Lease Auth*., 847 F.Supp. 1046, 1056 [WDNY 1994] ["[T]here has been no harm resulting from the alleged retaliation. In the absence of any injury, there can be no claim."]).

To the extent there might be an argument that the adverse effect element has been established because CityVision's President and staff were "shocked" upon

receipt of the July 25th letter (A174, lines 18-23), such emotional reaction does not create an adverse effect. (*Gerari*, 891 F.3d at 276-277; *Levy v. Lawrence Gardens*, 2023 WL 2667045, at *6 [EDNY]; *see also Sporn v. Ocean Colony Condo Assoc*., 173 F.Supp2d 244, 251-252 [D NJ 2001] [defendant's actions resulting in the "shunning" of complainant did not rise to the level of the requisite adverse effect]).

Notably, the "shock" from the letter itself did not cause any interruption in CityVision's making of cold calls as its own "Damages Report" shows. (A108). The relevant time entries after July 25th reflecting damages show only preparation for the bringing of a retaliation claim. Nothing showing any harm from the letter itself. In short, their reaction to the letter was purely "Let's Sue!"

In this regard, there was no need to commence a retaliation action when no suit was filed by Clifton Park Apartments. The letter did not compel that action as the letter obviously did not interfere with any cold calls after its receipt, as CityVision essentially admits. The decision to do so was CityVision's decision. Instead of speaking to attorney Pentkowski about the letter, CityVision ignored the request to discuss and went into *immediate* litigation mode. (A134). Where, as here, the purported "adverse action," the filing of the retaliation claim, is the claimant's own voluntary decision, the adverse effect requirement is not met.

C. SDHR's Argument That The Mere Sending Of The July 25th Letter Threatening Legal Action Establishes This Element Is Meritless

Turning to SDHR's argument that the conceded sending of that July 25th letter threatening legal action is sufficient evidence to establish the third element, that argument is meritless. The reasons are as follows.

Initially, SDHR takes the position that its interpretation of the retaliation statute and what needs to be shown to establish the third element must be deferred to by this Court. (SDHR Br., 12-15). The argument must be rejected as what is in issue is the proper interpretation of a statute, Executive Law §297(1). In such a situation, deference to SDHR's view is not entitled to deference. (*Matter of Polan v. State of N.Y. Ins. Dept*., 3 NY3d 54, 58 [2004]; *Matter of Dawn Joy Fashions v. Commissioner of Labor of State of N.Y*., 90 NY2d 102, 107-108 [1997]).

As to the arguments on the law, SDHR cites to cases it claims support its argument. These decisions are readily distinguishable and inapposite to the facts here.

In *Moran v. Simpson* (80 Misc2d 437 [Sup. Ct. Livingston Co. 1974]), Supreme Court held in effect that a person who files a discrimination claim with SDHR cannot as a matter of law be "retaliated against" by the filing of a lawsuit alleging the allegations made in the SDHR complaint were false. Such a "retaliation" action was filed and the complainant filed a counterclaim alleging damages as a result of the filing of the action. Supreme Court granted partial

summary judgment on liability under the counterclaim, allowing the complainant to pursue damages sustained as a result of the filing. (*Id*. at 439).

The *Moran* decision and its absolutist approach has been rejected by subsequent appellate decisions. (*See, Herlihy v. Metropolitan Museum of Art*, 160 Misc2d 279, 284 [Sup. Ct. NY Co. 1994], *affd. on this ground*, 214 AD2d at 256); *Matter of N.Y. State Off. of Mental Health*, 164 AD2d at 210). In short, it is of questionable precedential value.

EEOC v. Outback Steakhouse of Fl., Inc. (75 F.Supp2d 756 [ND Ohio 1999]) is distinguishable as that case involved the filing of a Title VII retaliation claim by the EEOC arising from a counterclaim by the defendant against the plaintiff in her separate Title VII action alleging discrimination by the defendant. *EEOC v. Levi Strauss & Co*. (515 F.Supp. 640 [ND Ill. 1981]) involved the filing of an action by EEOC alleging unlawful retaliation by the defendant by the filing of a defamation action against a complainant who alleged before the EEOC a claim of alleging sexual harassment while that EEOC proceeding was pending. Similarly, *Thomas v. Petrulis* (125 Ill. App3d 415 [App. Ct. 2d Dist. 1984]) involved the actual filing of a defamation lawsuit by the defendant in against a complainant in a pending EEOC proceeding alleging sexual harassment and discrimination.

As to *Illiano v. Mineola Union Free School Dist*. (585 F.Supp.2d 341 [EDNY 2008]), it is true that Judge Spatt observed that a threat to sue could be the basis for

a retaliatory cause of action. (*Id*. at 352). However, that observation is pure *dictum* as *Illiano* involved the actual termination of the plaintiff's employment, and not a threat to do, after she complained about a religion-based hostile work environment.

SDHR's final argument is one of policy, namely, a mere threat to sue following a claim of discrimination must not be permitted lest the spectre of a lawsuit deters the filing of a discriminatory complaint. (SDHR Br., pp. 16-17). Certainly, the filing of discrimination claims should not be "chilled," regardless by whom made, i.e., actual discrimination victim or a "tester." However, one cannot overlook that substantial harm can be done to a housing entity by unsubstantiated or false claims of discrimination. Those damages include out-of-pocket costs such as retaining counsel to defend against the charge and reputational harm. Moreover, it does not strain credulity to conclude that the right to file a discrimination claim can be abused by unscrupulous complainants who seek to profit by the threat, knowing that even the threat of the filing or continued pursuit of a filed claim, which claim is readily defensible by a defendant, can cause harm to apartment owners (individuals or entities), because it is cheaper to settle with the complainant on his or her terms than to continue in a litigation mode. Such actions should not be condoned, much less encouraged.

In sum, no person, including testers, should have immunity from suit if they file what is in effect a baseless claim of discrimination. Giving immunity or even

allowing a mere threat to sue by a prevailing defendant to establish the basis of a retaliation claim would only encourage frivolous claims made to extract a financial settlement made to avoid what could be financially ruinous defense costs.[19] Not doing so has the beneficial effect of ensuring that complainants make sure that their claims of discrimination are grounded in law and in the facts.

In any event, the policy issue has been resolved and it has been resolved against SDHR's position. This has been evidenced by the Legislature's enactment of Executive Law §297(10) which permits a person who has been the subject of a frivolous discrimination claim to recover the person's attorney's fees incurred in defending the action. Certainly, if a defendant/respondent's filed claim seeking attorney's fees is proper, a mere threat to do must likewise be proper.

Accordingly, SDHR's arguments must be rejected.

D. Conclusion

The evidence in the hearing record fails to support any finding that the third element for a retaliation claim has been satisfied, as held by the Third Department.

[19] The record contains reference to the existence of such abuse. (A16 [Verified Petition], at n. 3, citing Hunt, "Dialing for Dollars – Fair Housing Advocacy or Just Business," Accessibility Defense Trends (blog posting available at accessdefense.com/?p=2808 [last viewed April 10, 2023]).

POINT III

IF THIS COURT HOLDS THE THIRD DEPARTMENT ERRED IN CONCLUDING THE HEARING EVIDENCE DID NOT SUPPORT SDHR'S FINDING THAT RESPONDENTS TOOK ADVERSE ACTION AGAINST CITYVISION, IT SHOULD REMIT THIS MATTER TO SDHR FOR FURTHER PROCEEDINGS TO DETERMINE UNDER THE CORRECT APPROACH WHETHER CITYVISION HELD A REASONABLE BELIEF THAT CLIFTON PARK APARTMENTS WAS ENGAGING IN HOUSING DISCRIMINATION

(In response to SDHR's Point II)

As discussed in Point I, the party pursuing a retaliation claim pursuant to Executive Law §296(7) must satisfy by the party's proof four elements. The Third Department below addressed two of the elements. Initially, the Court found as to the claim's first element, the ALJ failed to apply the correct standard for determining the element where, as here, the underlying complaint was dismissed as unfounded, the ALJ placed the burden on respondents to show the absence of good faith, and not upon CityVision to establish it acted in good faith as the standard required. (A7; 204 AD3d at 1360). The Court then stated that while such an error would typically result in remittal for further proceedings, it did not do so. Instead, the Court addressed whether there was sufficient evidence in the record to support the finding that Clifton Park Apartments took adverse action against CityVision. (A7; 204 AD3d at 1360). Upon addressing that issue, the Court concluded that there was insufficient evidence, and as a result annulled SDHR's determination. (A8; 204 AD3d at 1360-1361).

The Third Department's decision not to remit and instead address the adverse action retaliation element was certainly appropriate. The issue was properly before it, and its resolution made unnecessary the remittal. To the extent SDHR seems to be arguing that the retaliation element should not have been addressed until the first element was resolved upon, such a step makes no sense. The first and third elements are completely separate and their resolution are not intertwined. Why then should the Court then wait until the first element is decided? SDHR provides no reason for doing so. Simply stated, there is no bar, legal or administrative that requires such a step.

As to this Court's remitter if it should conclude the Third Department erred in finding insufficient evidence of adverse action retaliation, respondents fully recognize that the proper course of action would then be for the Court to remit this matter to SDHR for further proceedings as to determine whether CityVision held a reasonable belief that Clifton Park Apartments was engaging in housing discrimination under the correct standard, as the Third Department held.

However, a question is present if this Court finds the third element was established, remits the matter to SDHR, and SDHR determines upon remittal that CityVision established that it acted in good faith. While that would mean CityVision proved a viable retaliation cause of action, respondents' further arguments challenging SDHR's determination which were properly raised before the Third

Department and not addressed by the Court by reason of its annulment of SDHR's determination– the award of compensatory damages and attorney's fees, and imposing liability upon respondent Pentkowski solely because he was acting in his capacity as Clifton Park Apartments' attorney in this matter was improper and not supported in law - still need to be addressed by the Third Department. This Court's remitter must not preclude any further judicial review of these issues and preserve for further review if necessary.

CONCLUSION

The judgment appealed from should be affirmed.

Dated: April 13, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to the Court's Rules of Practice Rule 500.11(c)(1) that the foregoing Respondent's Brief was prepared on a computer using Microsoft Word.

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COUNTY OF NEW YORK) SS

Dave Jackson, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

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Respondent's Brief

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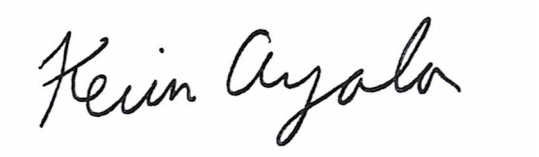

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