Court of Appeals
of the
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,

CITYVISION SERVICES, INC., LEIGH RENNER,

Respondents-Respondents.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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Dated: August 9, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals, petitioner-respondents Clifton Park Apartments, LLC, As Owner of Pine Ridge II Apartments, states that it is a New York limited liability corporation with no corporate parent or corporate subsidiary.

TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

Petitioners-respondents Clifton Park Apartments, LLC, As Owner of Pine Ridge II Apartments ("Pine Ridge") and David H. Pentkowski, Esq. ("Pentkowski"), (collectively "petitioners") submit this Memorandum in opposition to the Motion of respondent-appellant New York State Division of Human Rights ("SDHR") for leave to appeal the unanimous Memorandum and Order of the Appellate Division, Third Department ("Memorandum") decided and entered on April 28, 2022.[1]

Petitioners submit the Motion should be denied as the unanimous Memorandum from which SDHR seeks leave to appeal involved the straightforward application of well-settled New York appellate rules governing Appellate Division review of administrative agency final Decisions and Orders, and application of well-settled elements for establishing an unlawful retaliation claim under the State Human Rights Law. SDHR has not shown error warranting review, much less "leaveworthy" issues.

COUNTERSTATEMENT OF THE CASE

- **Statement of Facts**

Respondent CityVision Services, Inc. ("complainant") is a not-for-profit corporation, based in Texas, which is engaged in the prevention of housing discrimination through fair housing testing throughout the United States, including

[1] *See*, Ex. A to Aff. of Toni Ann Hollifield; also reported at 204 AD3d 1358 (3d Dept. 2022).

New York. (R212-218).[2] Petitioner Clifton Park Apartments owns and manages three apartment complexes in Saratoga County, including the Pine Ridge complex.

A CityVision employee, respondent Leigh Renner, placed a telephone call to Pine Ridge, posing as a prospective tenant with three young children. The purpose of the call was to test whether Pine Ridge was engaging in housing discrimination.[3] Following the call, CityVision filed a complaint with respondent SDHR, alleging that the leasing agent who answered the phone at Pine Ridge had unlawfully steered Renner toward a different apartment complex upon learning that she had children. (R52-23). SDHR investigated the complaint and ultimately dismissed it, finding that there was no probable cause to believe that Pine Ridge engaged in an unlawful discriminatory practice. (R62-63). Notably, SDHR's investigation revealed that the website for the Pine Ridge complex advertised "Shenendehowa Schools Nearby" from its complex, and that half of the apartments in the complex have children. (R62-63). It was apparently quite obvious to SDHR's investigator that CityVision and/or Renner never did any background check on Pine Ridge before making its test call, that Pine Ridge did not engage in any housing discriminatory conduct, and that any denial of an apartment to Renner was based on non-availability of an apartment for Renner and her purported children.

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[2] Unless otherwise stated, all references are to the Record on Appeal ("R") in the Appellate Division below.

[3] A transcript of the phone call is included in the Record on Appeal at R262-265.

Petitioner David H. Pentkowski, as counsel for Pine Ridge, then sent a letter to CityVision and Renner, stating that Pine Ridge considered the allegations in the complaint to be "false, fraudulent and libelous"; that Pine Ridge had been forced to expend employee resources and counsel fees defending the allegations; that Pine Ridge would be expecting compensation from CityVision and Renner; and that, if no communication was forthcoming, Pine Ridge would "proceed accordingly." (R152). No lawsuit against CityVision and Renner was ever commenced.

After receipt of this letter, CityVision subsequently filed a second complaint with SDHR claiming unlawful retaliation for filing its first complaint. (R118-127). Following a hearing held pursuant to Executive Law §297(4) (R178-257 [transcript of hearing]), an Administrative Law Judge recommended a finding that attorney Pentkowski's sending of the letter constituted unlawful retaliation in violation of Executive Law §296(7), and that both petitioners should pay a civil fine and damages, but not counsel fees. (R38-45). Notably, Renner did not testify at the hearing and respondents introduced no evidence regarding why respondents believed Pine Ridge had discriminated against Renner. Respondents' position was that the mere actual sending of the letter after dismissal of their complaint constituted unlawful discrimination *per se* in violation of the Human Rights Law. While the CD disc of the telephone call was admitted into evidence, the ALJ never considered it and in fact did not include it as part of the administrative record as required by 9

NYCRR §465(12)(f)(4). (R106-259 [Administrative Hearing Record as filed by SDHR]). As to the ALJ's decision, it was predicated upon the ALJ's determination that respondents failed to show that CityVision and Renner's complaint was made in bad faith, and that Pentkowski's letter was a threat and an act of retaliation that was actionable. (R41-42). The Commissioner of SDHR adopted the entirety of the ALJ's recommendation except the denial of counsel fees, which were awarded. (R20-27).

Petitioners then commenced this proceeding challenging that determination, and SDHR filed a cross-petition to enforce it. (R8-65; 77-100). The petition and cross-petition were then transferred to the Appellate Division Court pursuant to 22 NYCR 202.57(c)(2). (R4-5).

- **Appellate Division Decision**

On their appeal to the Third Department-Appellate Division, petitioners argued, *inter alia*, that the SDHR's determination that they engaged in unlawful retaliation in violation of Executive Law §296(7) must be annulled because its determination was not supported by sufficient evidence in the record as compiled by the ALJ. Specifically, the record did not sufficiently establish key elements of a retaliation claim, namely, that complainants – CityVision and Renner – had a good faith, reasonable belief that petitioners' alleged conduct during the subject phone call constituted an act of unlawful steering discrimination; and that petitioners'

subject letter to complainants constituted retaliatory conduct. (Petitioners' Appellate Brief, Point I). Underlying this argument was petitioners' contention that SDHR employed an incorrect burden analysis, requiring petitioners to show lack of good faith on the part of complainants and not SDHR to show the presence of good faith. Alternatively, petitioners argued that if the Court concluded that the record before SDHR was sufficient to establish unlawful retaliation, the Court must nonetheless vacate the determination and remand the matter to SDHR for its consideration of the audiotape of the subject telephone call and whether with that evidence there was sufficient proof of unlawful retaliation. (*Id.*, Point II).[4]

The Appellate Division held that SDHR did in fact employ an incorrect burden shifting analysis as to the first element of a retaliation claim. (Slip Opinion, p. 2). While such error would ordinarily require a remand to SDHR to review the evidence in the record with the proper burden in mind, Court held that remand here was not necessary because the proof in the record did not establish the requisite retaliatory conduct as the relied upon conduct did not amount to any adverse action upon complainants. In other words, the failure to establish the second element for retaliation doomed complainants' retaliation claim and thus there was no need to

[4] Other issues were raised about the correctness of the relief granted (*Id.* at Points III-V), but the Court did not address them as its decision - annulling the determination - mooted them.

remand the matter to SDHR. (Slip Opinion, p. 3). Accordingly, SDHR's determination was annulled.

ARGUMENT

POINT I

THE MOTION IDENTIFIES NO BASIS FOR LEAVE TO APPEAL

This Court has long held that appeals should be permitted only in "exceptional cases." (*Sciolina v. Erie Preserving Co.*, 151 NY 50, 53 [1896]). The Third Department's unanimous Decision in no way meets this high standard. Leave to appeal to the Court of Appeals is granted for issues that are novel or of State-wide public importance, present a conflict between the Appellate Division's decision and prior decisions of this Court, or involve a conflict among the departments of the Appellate Division. (22 NYCRR 500.22[b][4]). On a motion for leave to appeal, "[a]rguing error below is not enough." (New York Court of Appeals Civil Jurisdiction and Practice Outline §II[F][5]). The certiorari factors listed in Rule 500.22(b)(4) must be addressed.

SDHR's briefing does not analyze, much less mention, the Rule 500.22(b)(4) factors. Stripped of its irrelevant comments about the scope of appellate review of administrative determinations, the Motion amounts to nothing more than claims of error by the Third Department, which would fail to merit review by this Court even if they were well-founded (which they are not).

POINT II

PLAINTIFF FAILS TO IDENTIFIY ANY ERROR BY THE THIRD DEPARTMENT

SDHR raises two claims of error in the Appellate Division Decision. Both are misguided and wrong.

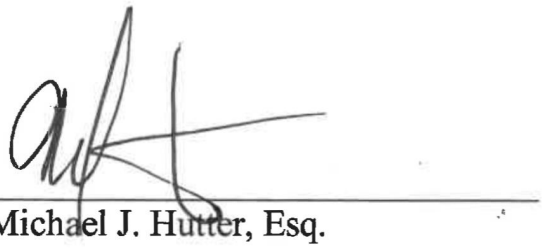
Initially, SDHR argues that error is present because the Appellate Division substituted its judgment for that of SDHR in concluding that petitioners' threat of a lawsuit was an unlawful act of retaliation. This is a mischaracterization of the Third Department's ruling. Its ruling was that the threat of a lawsuit did not as a matter of law amount to an act of retaliation for purposes of a viable retaliation claim. Certainly, this conclusion was one that an appellate court could make, and the SDHR cites no precedent that holds otherwise.

Second, SDHR argues that the Third Department should have remanded the SDHR for its determination of complainants' good faith. But SDHR had already decided in essence that complainants had acted in good faith by finding unlawful retaliation. The Third Department ruled appropriately, and SDHR cites no precedent that suggests otherwise.

CONCLUSION

The Motion should be denied.

Dated: August 9, 2022



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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 Memorandum was prepared on a computer using Microsoft Word.

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Dated: August 9, 2022

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