

**Matter of Weinstein v New York State Div. of  
Human Rights**

2007 NY Slip Op 31527(U)

May 23, 2007

Supreme Court, Kings County

Docket Number: 0021957/2006

Judge: Herbert Kramer

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At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23<sup>rd</sup> day of May, 2007

P R E S E N T:

HON. HERBERT KRAMER,

Justice.

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In the Matter of the Application of  
RAYMOND M. WEINSTEIN AS  
ADMINISTRATOR OF THE ESTATE OF  
JOHN J. HOLUB,

Index No. 21957/06

Petitioners,

For an Order Pursuant to Executive Law § 298 under  
Article 15 of the New York State Human Rights Law,

- against -

NEW YORK STATE DIVISION OF  
HUMAN RIGHTS, CADMAN TOWERS, INC., AND  
LUIS PINEDA,

Respondents.

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The following papers numbered 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 - 2 _____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Record before SDHR</u> _____	3 _____

Upon the foregoing papers, petitioner Raymond M. Weinstein as Administrator of the Estate of John J. Holub moves for an order, pursuant to Executive Law § 298 under Article

15 of the New York State Human Rights Law, reversing, setting aside, annulling, vacating, or otherwise modifying the determination issued by respondent New York State Division of Human Rights (SDHR) dated May 30, 2006 which dismissed petitioner's complaint alleging unlawful discriminatory housing practices on the part of respondents Cadman Towers, Inc. (Cadman) and Luis Pineda (Pineda).

According to the petition, Raymond M. Weinstein (Weinstein) resides in the subject apartment at 101 Clark Street in Brooklyn. The apartment is located in a building which is owned and operated by Cadman under the Private Housing Finance ("Mitchell-Lama") Law. The apartment was formerly occupied by John J. Holub (Holub) and his domestic partner John Barry (Barry). In 1994, Holub suffered a stroke caused by a brain hemorrhage which left him paralyzed on his left side. In 1998, Holub and Barry purchased a condominium apartment in San Francisco to be used as a "vacation home" in the summers and winters, as Holub's doctors advised that the weather of these seasons in New York would exacerbate Holub's medical condition. According to the petition, Holub and Barry maintained their primary residence in New York, filing tax returns, voting, performing jury service, holding driver's licences, keeping bank accounts, and receiving mail in New York State. In November 1999, Weinstein moved into the apartment with Holub and Barry and established New York as his primary residence. On May 15, 2003, Weinstein became the legal father of Barry via order of adoption.

On March 11, 2004, Cadman served Holub, Barry and Weinstein with a preliminary notice of grounds for eviction alleging that Holub and Barry do not occupy the apartment as a primary residence and that Weinstein is an illegal sublet. Cadman also served a notice scheduling a hearing on the allegations for March 29, 2004 at the New York City Department of Housing Preservation and Development (HPD). Frances Lippa, the administrative hearing officer (AHO) assigned to the matter by HPD, subsequently advised Weinstein that the March 29, 2004 hearing would not be a formal eviction hearing but rather an informal conference at which time she would make no determination. At the March 29, 2004 conference, Holub, Barry and Weinstein contested Cadman's allegations and submitted documentation intended to substantiate their position that New York was their primary residence and that Weinstein was the legal father of Barry and thus not an illegal sublet. Holub admitted that in 2003, he only spent about four months in New York despite the fact that Mitchell-Lama rules require that shareholders must spend at least 183 days in their subject residences. Holub contended, however, that he is able to cure the alleged residency violation in the notice of eviction by spending the requisite 183 days in New York in 2004, and that Cadman should grant him an accommodation due to his disability. Weinstein contends that Cadman insisted on scheduling a formal eviction hearing based on Holub's admission that he did not spend 183 days in New York the previous year. AHO Lippa thereafter tentatively scheduled a formal eviction hearing at a later date but advised Cadman to present Holub's answer to its Board of Directors (which just two weeks earlier elected six

new members to its nine member board) to discuss the possibility of a cure and to advise HPD whether it wished to proceed with an eviction hearing. In late April 2004, Holub, Barry and Weinstein learned that a formal eviction hearing was to go forward. Following the hearing, held on March 23, 2005, AHO Lippa issued a certificate of eviction based on a finding that Holub and Barry did not reside in the subject apartment as their primary residence.

In the mean time, on May 17, 2004, Holub filed a complaint of disability discrimination with the Office of Fair Housing of the Department of Housing and Urban Development, claiming that Cadman discriminated against him by not accepting evidence of disability and the medical circumstances that prevented him from being in New York in the previous year for the required 183 days and that Pineda was trying to evict him as retaliation for Holub filing a discrimination complaint against Pineda four years earlier. The complaint was transferred to SDHR for investigation. On August 13, 2004, Cadman submitted a response to the complaint alleging that Holub's disability had no bearing on the eviction case, that the 183-day residency rule is required by Mitchell-Lama rules with no exception for a tenant who claims to be disabled, and that Pineda was not retaliating against Holub as the complaint against Pineda was voluntarily withdrawn and Pineda suffered no repercussions or harm. On September 3, 2004, Holub replied that the 183-day requirement is not the sole determining factor of primary residency, and alluded to a 1996 federal case involving past allegations of disability discrimination on the part of Cadman. Attempts were

thereafter made to schedule a conciliation and settlement conference. While a telephone conference was held on November 19, 2004 involving the SDHR specialist assigned to the matter, her supervisor, Holub, Barry and Weinstein, it is alleged that SDHR never arranged a formal conciliation conference with Holub and Cadman's attorney despite repeated requests.

On March 21, 2005, Holub died. Weinstein thereafter obtained limited letters of administration for the purpose of continuing the discrimination case, and eventually obtained a Surrogates Court order appointing him administrator of the estate of Holub. In the meantime, Weinstein called attention to the fact that Holub was designated a "handicapped person" by Cadman and given a preferred parking space as the result of a consent order in the prior federal discrimination case against Cadman. In February 2006, Cadman informed SDHR that Barry was vacating the apartment. In March 2006, Weinstein made his "final argument" to SDHR, submitting three additional documents: Holub's answer in the HPD eviction proceedings, an order of the Hon. Carolyn E. Demarest transferring Holub's article 78 proceeding challenging HPD's authorization for eviction to the Appellate Division on a substantial evidence issue pursuant to CPLR 7804(g), and the HPD hearing officer's notes on Pidená's testimony which allegedly calls into question Pidená's credibility.

On May 30, 2006, SDHR issued an order dismissing the complaint, finding that there was no probable cause to believe that Cadman has engaged in or is engaging in the unlawful discriminatory practice complained of. SDHR noted that the record revealed Holub had

multiple disabilities and had been under the care of doctors who advised him to remain outside of New York during the most- severe weather months. However, SDHR noted the findings of AHO Lippa in the HPD proceeding that Holub and Barry acknowledged that they spent only four months in New York because of Holub's health condition, that there was no evidence that Holub's need to avoid extreme temperatures is a temporary situation, that there was "no evidence or claim" that Holub or Barry would, if given the opportunity, reside in the subject apartment for at least 183 days out of the year, and that the apartment is a Mitchell-Lama subsidized apartment and HPD rules require that the shareholder reside in it as a primary residence and not "use it as a hotel." The SDHR further stated:

"Although Mr. Holub was disabled within the meaning of the Human Rights Law, the accommodation requested, a waiver of the HPD residency rules, is not reasonable under the circumstances. HPD rules have been developed to insure that there is a proper allocation of the extremely limited housing space available to moderate income individuals in this community and it would not be a reasonable application of the Human Rights Law to negate these rules under the facts presented here."

The SDHR also found no sufficient evidence that Pineda was "retaliating" against Holub. The instant petition for judicial review ensued.

Where, as here, a determination of no probable cause is rendered without holding a public hearing pursuant to Executive Law § 297(4)(a), the appropriate standard of review is

whether the determination was arbitrary and capricious or lacking a rational basis (*see Hone v State Div. of Human Rights*, 223 A.D.2d 761, 762 [1996]; *Giles v State Div. of Human Rights*, 166 A.D.2d 779, 780 [1990]). The SDHR “has broad discretion in determining the method to be employed in investigating a claim, and its determination will not be overturned unless the record demonstrates that its investigation was abbreviated or one-sided” (*Matter of Bal v State Div. of Human Rights*, 202 AD2d 236, 237 [1994], *lv denied* 84 NY2d 805 [1994])[internal quotation marks and citation omitted]).

Weinstein argues that the SDHR’s finding of no probable cause decision is arbitrary and capricious in that it is based upon the “post facto” decision of the HPD, which only considered the issue of whether making an exception to the 183-day rule is a reasonable accommodation but seemingly ignored the argument that Holub should have been offered an opportunity to “cure” the violation prior to eviction, and was further arbitrary in that the SDHR investigator did not hold a confrontational conference, did not interview key witnesses and considered irrelevant issues. Weinstein also cited another SDHR case involving a disabled shareholder at the property which Weinstein claims was treated differently than Holub’s case. In that other case, SDHR did not refer to the related determination of HPD involving the eviction of said other shareholder.

However, this court does not find the SDHR’s finding to be arbitrary or capricious. In reviewing the SDHR’s determinations, considerable deference is accorded to the SDHR because of its expertise in evaluating discrimination claims (*see Sidoti v State Div. of Human*

*Rights*, 212 AD2d 537 [1995]). Further, when considering matters under the arbitrary and capricious standard, a court cannot substitute its judgment for that of the agency, so long as the agency's decision is rationally based in the record (*see Colton v Berman*, 21 NY2d 322 [1967]). In this matter, Holub was not the only shareholder in the subject building who was served with a notice of eviction on primary residency grounds and thus it cannot be argued that Holub was singled out by reason of his disability. The essence of Holub's complaint with SDHR is that by reason of his disability, and the necessity for him to spend more than half a year away from New York, Cadman should have waived the 183-day residency requirement as a reasonable accommodation to Holub in order to afford him an equal opportunity to enjoy the apartment. The New York State Human Rights Law, Executive Law § 296(18)(2) provides that it is "an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, managing agent of, or other person having the right of ownership or possession of or the right to rent or lease housing accommodations ... [t]o refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling" (*see also* Executive Law § 296[2-a][d][2] [forbidding the "owner ... of publicly assisted housing accommodations ... [from] refus[ing] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling"]). However, SDHR's determination that the waiver of HPD's

primary residence rules would not be a reasonable accommodation for disabled tenants under the Human Rights Law, as it is important to maintain a proper allocation of extremely limited moderate income housing, is not irrational on its face and the agency should be entitled to deference on this view of the law. Since the record indicates that Holub was but one of many shareholders who Cadman sought to evict based on violation of the primary residence rules, and the waiver of these rules would not constitute a reasonable accommodation, SDHR's finding of no probable cause is rationally based therein.

Weinstein argues that SDHR failed to consider the issue of Cadman's denial of the opportunity for Holub to cure the residency violation, and that Cadman should have been obligated to afford Holub the opportunity to cure as another "reasonable accommodation." However, Weinstein grounds this argument on Holub's contractual rights under his shareholder agreement and HPD rules and procedures, which he alleges require that the housing company provide the shareholder a right to cure any violations of a nonviolent or nondisruptive nature prior to eviction. Thus, Weinstein argues in reality that the rules themselves were not followed, not that Cadman did not make an exception to the rules as a "reasonable accommodation" to Holub under the Human Rights Law. There is no showing that Cadman otherwise denied only Holub the opportunity to cure by reason of his disability. Therefore, it appears that Caman's alleged failure to abide by an obligation to allow Holub to cure the residency violation was an issue to be addressed by HPD in the eviction proceeding, not by SDHR in the discrimination proceeding.

While the final determination of SDHR is terse and references the findings of the AHO in the HPD proceeding, such does not conclusively establish that SDHR failed to conduct a full and fair investigation or come to independent conclusion. “As long as a petitioner has a full opportunity to present his claims, neither a hearing nor a confrontation conference is mandated” (*Gleason v W.C. Dean Sr. Trucking, Inc.*, 228 AD2d 678, 679 [1996][citations omitted]). Weinstein does not allege that he was denied the opportunity to submit any document or item of evidence into the administrative record or make any particular argument in support of the petition. Further, while a portion of the HPD determination is quoted in the SDHR’s decision, such does not prove that SDHR relied entirely on HPD’s findings or otherwise did not consider its own record in reaching its conclusions as to probable cause. The fact that SDHR did not reference HPD findings with respect to its proceeding involving another disabled shareholder in Cadman’s building creates no showing that the investigation performed with respect to this other shareholder was more “complete” than that performed with respect to Holub. There is further no basis to disturb the agency’s finding that Pineda was not retaliating against Holub when the notice of eviction was served.

The court has considered Weinstein’s remaining contentions and finds them insufficient to demonstrate that the determination of SDHR was arbitrary or capricious.

As a result, the instant petition is denied and this proceeding is dismissed.

The foregoing constitutes the decision and order of the court.

ENTER,

A handwritten signature in black ink, appearing to be the initials 'H.K.' or similar, written over the printed name 'J. S. C.'.

J. S. C.

HON. JUSTICE HERBERT KRAMER