

Kuzminski v New York State Div. of Human Rights

2013 NY Slip Op 31416(U)

June 27, 2013

Supreme Court, New York County

Docket Number: 402153/12

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ~~RONALD PETER H. MOUNTON~~
Justice

PART 400B

Index Number : 402153/2012
KUZMINSKI, MIROSLAV
vs.
NYS DIVISION OF HUMAN RIGHTS
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is *Article 78 procedure*
is decided per attached

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/27/13

[Signature], J.S.C.
~~RONALD PETER H. MOUNTON~~

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 40B

MIROSLAW KUZMINSKI,

Index No.: 402153/12

Petitioner,

against

NEW YORK STATE DIVISION OF
HUMAN RIGHTS and
352-354 WEST 48TH STREET H.D.F.C.,

DECISION/ORDER

UNFILED JUDGMENT

Respondents

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOULTON, PETER H., J.:

In this Article 78 proceeding, petitioner Miroslaw Kuzminski, acting pro se, challenges a Determination and Order After Investigation of respondent New York State Division of Human Rights (SDHR), dated August 7, 2012, finding that there was no probable cause to support petitioner's claim that respondent 352-354 West 48th Street H.D.F.C. (352-354 HDFC, or the Coop) engaged in unlawful housing discrimination based on petitioner's race/color and familial status. Respondent 352-354 HDFC has moved, pre-answer, to dismiss the petition. Respondent SDHR answered, also seeking dismissal, and, in its answer, states that because petitioner and the Coop "are the real parties in interest, [it] will not actively participate in this matter and is submitting on the record." SDHR Answer, ¶ 5.

The thorough SDHR investigation, discussed *infra*, found

that petitioner and/or shareholders who were interviewed attributed any Coop action to prejudice against whites, blacks, Latinos, families with children, gay people, or less "American" Hispanics (meaning non-Puerto Rican) or Europeans. Residents stated that a board member who is Puerto Rican hate whites, blacks and gays, and unfairly assisted another Puerto Rican resident. Further, a board member who is African American is a racist who does not like white or low-income people or children. Additionally, the Coop favors Americans and treats non-Puerto Rican Hispanics and Europeans less well. In sum, nobody appears to get along or appreciate residing in a Coop with well below market rates.

It is well settled that judicial review of an administrative agency's determination is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR 7803 (3); see *State Ofc. of Drug Abuse Servs. v State Human Rights Appeal Bd.*, 48 NY2d 276, 283-284 (1979); *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974). When an SDHR "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." *Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 111 (1st Dept 1998); see *Matter of Ramirez v New York State Div. of Human Rights*, 4 NY3d 789 (2005); *Matter of Baird v New York State Div. of Human Rights*, 100 AD3d 880, 881 (2nd Dept 2012); *Matter of Pajooch v State Div. of Human Rights*, 82 AD3d 609, 609 (1st Dept 2011). Generally, "[a]n action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 NY3d 424, 431 (2009); see *Matter of Pell*, 34 NY2d at 231. Once a court finds "some--indeed, any--rational basis or credible evidence to support an administrative determination, the agency's decision must be upheld" (*Matter of Rivera v New York State Div. of Human Rights*, 18 Misc 3d 1133(A), *5 [Sup Ct, NY County 2008]; see *Matter of Pell*, 34 NY2d at 231), and "[t]he judicial function is exhausted." *Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69, 75 (1983); see *Matter of Hughes v Doherty*, 5 NY3d 100, 107 (2005); *Sullivan County Harness Racing Assn., Inc. v Glasser*, 30 NY2d 269, 277-278 (1972); *Matter of Friedman v New York State Div. of Human Rights*, 2012 WL 2951184, 2012 NY Misc LEXIS 3343, *3 (Sup Ct, NY County 2012).

Further, as long as the agency's decision has a rational

basis, a court may not weigh the evidence, or substitute its judgment for that of the agency. See *Matter of Nehorayoff v Mills*, 95 NY2d 671, 675 (2001); *Matter of State Div. of Human Rights (Granelle)*, 70 NY2d 100, 106 (1987); *Matter of Pell*, 34 NY2d at 232; *Matter of Daudier v City of New York Commn. on Human Rights*, 2013 WL 417769, 2013 NY Misc LEXIS 311, *6 (Sup Ct, NY County 2013); *Matter of Gormley v New York State Div. of Human Rights*, 2009 WL 3514254, 2009 NY Misc LEXIS 5560, *8 (Sup Ct, NY County 2009). Nor may a court "overturn an agency's decision merely because it would have reached a contrary conclusion." *Sullivan County Harness Racing Assn., Inc.*, 30 NY2d at 278; see *Matter of Peckham*, 12 NY3d at 431; *Matter of Imperial Diner v State Human Rights Appeal Bd.*, 52 NY2d 72, 79 (1980); *Matter of Mize v State Div. of Human Rights*, 33 NY2d 53, 56 (1973); *Matter of Mott v HPD*, 2013 WL 1783472, *2, 2013 NY Misc LEXIS 1596, *4 (Sup Ct, NY County 2013); *Matter of Friedman*, 2012 WL 2951184, 2012 NY Misc LEXIS 3343, at *4.

Moreover, when an administrative agency's determination "involves factual evaluations in an area of the agency's expertise and is supported by the record, such [determination] must be accorded great weight and judicial deference." *Flacke v Onondaga Landfill Sys., Inc.*, 69 NY2d 355, 363 (1987); see *Matter of Peckham*, 12 NY3d at 431; *Matter of Roberts v Gavin* 96 AD3d

669, 671 (1st Dept 2012); *Matter of Rosario v New York State Div. of Human Rights*, 21 Misc 3d 1108A, *4 (Sup Ct, NY County 2008). "Indeed, a court's opinion that a particular outcome is not fair or is not in the interests of justice is not sufficient to overcome the deference to be afforded an agency acting rationally within its area of expertise." *Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal*, 79 AD3d 630, 635-636 (1st Dept 2010), ~~affd 18 NY3d 446 (2012); see *Matter of Roberts*, 96 AD3d at 672.~~

Thus, the determination of the SDHR in this case is "entitled to considerable deference due to its expertise in evaluating discrimination claims." *Matter of Camp v New York State Div. of Human Rights*, 300 AD2d 481, 482 (2d Dept 2002); see *Matter of Eastport Assoc., Inc. v New York State Div. of Human Rights*, 71 AD3d 890, 891 (2d Dept 2010); *Bruno v Pembroke Mgt., Inc.*, 212 AD2d 314, 318 (2d Dept 1995). In addition, 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 New York State Div. of Human Rights*, 202 AD2d 236, 237 (1st Dept 1994); see *Matter of Pajoooh*, 82 AD3d 609, 609 (1st Dept 2011); *Matter of Pascual v New York State Div. of Human Rights*, 37 AD3d 215, 216

(1st Dept 2007).

In his petition, petitioner asserts that the SDHR's determination of "no probable cause" was not supported by the evidence, that the SDHR misperceived or ignored facts and overlooked evidence provided by him, and that the SDHR did not recognize, for statute of limitations purposes, the ongoing nature of the alleged discrimination. See Petitioner's Statement, Ex. C to Verified Petition. In his opposition to the instant motion, petitioner also claims that the SDHR investigation was "one-sided." See Petitioner's Affirmation in Opposition to Motion to Dismiss the Petition (Aff. in Opp.), at 12-13.

Petitioner filed a complaint with the SDHR on February 10, 2012, alleging that the Coop discriminated against him in the terms and conditions of housing, based on his race/color and familial status, in violation of the New York State Human Rights Law (Executive Law § 296) (NYSHRL). See Verified Complaint (Complaint), Ex. D to Mazzola Affirmation in Support of Motion to Dismiss the Petition (Mazzola Aff. in Support). The Complaint alleges that petitioner has resided at 354 West 48th Street since 1994, and, in 1996, he became a shareholder and proprietary lessee of apartment 5FW in the Coop, a low income housing cooperative. Petitioner subsequently married, and has two

children, a son born in 1998 and a daughter born in 2004. *Id.*

Petitioner alleges that, following the birth of his second child in 2004, the Coop's Board of Directors (the Board) began to discriminate against him because he was white and had young children, and has refused to accommodate his family's need for a larger apartment, despite a prior Board's agreement to offer him a larger apartment when one became available. Petitioner asserts that the Board twice rejected his applications to buy apartments, in 2006 when he sought to purchase and combine an adjacent apartment with his, and in 2008, when he sought to buy a larger apartment, and sold the apartments to people without children. He claims that the Board instead suggested that he and his family move out, and has been trying to evict him. *Id.*

The complaint also alleges that petitioner was harassed by members of the Board, and was disproportionately assessed late fees and penalties, because he was a "white person, and employee of [the] previous managing agent." *Id.* In addition, he claims that he was retaliated against after he complained to the New York City Department of Housing Preservation & Development (HPD) that the Board was refusing to accommodate his need for a larger apartment for his children. *Id.*

The Coop responded to the Complaint, denying any discrimination against petitioner because of his race/color or

because he had children. See Response and Supplemental Response to Complaint, Ex. E to Mazzola Aff. in Support. The Coop, through its Board's president, Jordan Cael, asserted that petitioner had been employed by and received preferential treatment from a former management company of the Coop, which was terminated by the shareholders in 2003 for failing to pay certain bills. Ms. Cael further asserted that, during the tenure of the prior management company, petitioner wanted to combine his apartment with a neighbor's apartment, and apparently had the support of the management company to do that, but, she stated, the current Board was not obligated to abide by the former management's decisions, and the Coop has no waiting list for apartments. *Id.* According to Ms. Cael, after petitioner's neighbor died in November 2004, applications were taken for the purchase of the shares to the apartment, and it was sold in 2006 for \$70,000, considerably more than petitioner had offered. *Id.*

The Coop asserted that petitioner's application to purchase the apartment in 2006 was denied because he did not meet the income eligibility requirements, that he acknowledged as much in a December 2006 e-mail to the Board, and that, in any event, petitioner's offer of \$28,000 would have been rejected in favor of the \$70,000 offer it received. *Id.* The Coop claimed that, at the time, petitioner said nothing about being discriminated

against. The Coop also claimed that petitioner did not submit an application to purchase an apartment in 2008, and that he would have been denied the apartment because he again was not income eligible. Ms. Cael further claimed that petitioner has not been residing in the Coop for several years, but no action has been taken against him to enforce the primary residence clause or otherwise to seek to evict him. *Id.*

The Coop also asserted that petitioner was assessed late fees and penalties in accordance with the Coop's rules, as were other shareholders, who were not white and did not have small children. Ms. Cael asserted that there was no harassment by Board members, that she rarely spoke to petitioner, that there was no retaliation, and that petitioner has refused to accept any decisions made by the Board regarding sales and rentals of apartments and continues to malign the Board at every opportunity. *Id.* In addition, through its attorney, the Coop contended that most of petitioner's claims were barred by the one-year statute of limitations applicable to claims filed with the SDHR.

In rebuttal (Ex. 3 to Administrative Record), petitioner asserted that he had been income eligible for both apartments, that, contrary to the Coop's claim, he had submitted an application for the 2008 apartment, and that he was interviewed

by the Board, at which time he explained how he would finance his purchase; he also submitted documents in support of his assertions. He contended that his claims were timely because the alleged discriminatory actions began in 2003 and were continuing to the present.

The SDHR conducted an investigation, which included meetings with petitioner, interviews with other shareholders of the Coop, conversations with the Board president, and a review of numerous documents submitted by both parties, including the Coop's by-laws, tenant ledgers, a list of residents and their household composition, e-mails from petitioner to the Board, and minutes of Board meetings. Among other things, the investigator visited the Coop building and interviewed petitioner and three other shareholders/residents, Raymond Delgado, Lisa Hernandez, and Hector Zuniga, in their apartments.

Petitioner, during his interview, identified the Board members as: Jordan Cael, president, Jose Kulian, Marcel Lutes, Jorge Pasada, and Georgio Georgiou. Petitioner asserted that Mr. Kulian was a racist, made discriminatory comments about white people, and prevented the eviction of a Latina woman, whose apartment could have gone to petitioner, because he did not want a white person to get the apartment. Petitioner also stated that Ms. Cael had disparaged him for having children, and the Board

gave a three-bedroom apartment to a single man instead of him. See NYS DHR Event History, annexed to Administrative Record, at 5.

In his interview, Mr. Delgado described the Board as a diverse group of white, black, and Latin people, and stated that he believes the Board targets anyone who complains to or about it. As an example, he explained that, after he complained about building facade work, late fees were added to his account for paying an assessment three months late. He also stated he has lived in the building with his sons and grandchildren, and the Board is prejudiced against families. According to Mr. Delgado, who described himself as Latin American/Spanish, Mr. Kuilan, who is Puerto Rican, hates blacks and whites, although Mr. Delgado recalled no discriminatory remarks made by Mr. Kuilan. He further stated that Ms. Cael, who is African American, does not like white or low-income people. *Id.* at 5-6.

Ms. Hernandez, who lives in her apartment with her son and his wife and minor child, stated that the Board views people as "with them or against them." She said that she is Puerto Rican, like Mr. Kuilan, and that he discriminates against whites, has always had issues with petitioner, and made derogatory remarks to a gay resident. She also stated that she is billed extra fees because her grandson makes noise, and the Coop is taking legal

action against her, claiming this is not her primary residence.
Id. at 6.

Mr. Zuniga stated that the Board "abuses power," and that he was on the Board in the past, and recommended that petitioner be given a larger apartment, but the Board refused and has "personal issues" with petitioner. He also stated that he believes that petitioner is the only resident with minor children, and that the Board is hostile to families with children. He further stated that Ms. Cael is racist, that the Board favors Americans, and that he is Hispanic, but is treated less well than a more "American" Puerto Rican and a European tenant, and was charged \$50 a day to store tools in the basement, when others were not. Another resident, Debby Faizon, telephoned the investigator to state that she, who is African American, had previously filed a race discrimination complaint against the Coop.

After interviewing witnesses and reviewing the parties' submissions, the SDHR concluded that the evidence did not support petitioner's allegations of discrimination. The SDHR found that petitioner was subjected to adverse treatment, but it was based on non-discriminatory reasons, and arose out of long-standing disputes between petitioner and members of the Board, involving petitioner's complaints about various building-related issues. Board meeting minutes indicate that disputes arose over late

fees, mandatory access for exterminators, rental and resale policies, as well as petitioner's efforts to obtain a larger apartment for his family. Documents reviewed by the investigator showed that there are 29 units in the Coop, four of which are occupied by shareholders and their children, of unknown ages. Documents also showed that petitioner was assessed numerous late fees, for a variety of reasons, but that other tenants, who were not white and did not have children, were also assessed such fees; and the evidence does not show that petitioner was disproportionately fined or penalized. See Final Investigative Report, dated August 8, 2012, annexed to Administrative Record.

The SDHR also found that the witnesses' inconsistent and contradictory statements about discrimination by the Board did not support petitioner's claim that the Coop discriminated against him because he had children or because he was white. As the SDHR noted, all the witnesses claimed that one or two of the Board members were prejudiced in some way, either against whites or blacks or Latinos or families with children or gay people, and witnesses reported one or two derogatory remarks allegedly made by Mr. Kuilan. However, none of the witnesses provided instances of discriminatory acts by the Board, or otherwise explained the basis for their beliefs that the Board generally discriminated against families with children, or specifically discriminated

against petitioner based on his race/color or familial status.

Evidence also supports the SDHR finding that petitioner was not denied the purchase of apartments for discriminatory reasons, and that most of the discriminatory actions alleged by petitioner, including the rejection of his applications to purchase apartments in 2006 and 2008, occurred outside the one-year statute of limitations for claims filed with the SDHR.

In opposition to the Coop's motion, petitioner essentially argues, as he did before the SDHR, that the evidence shows that he was discriminated against based on his familial status, and that the conclusion reached by the SDHR was wrong. Petitioner contends that the SDHR came to the wrong conclusion because it "prioritized" his claim as being primarily race-based, when, as he now asserts, his discrimination claim was "[p]rimarily that of Familial Status discrimination and secondarily perhaps a racial matter." *Aff. in Opp.*, at 2.

To the extent that petitioner argues that the SDHR did not adequately address his familial status discrimination claim, and that the SDHR investigation was one-sided, that argument is not supported by the record. *See Matter of Block v Gatling*, 84 AD3d 445, 446 (1st Dept 2011). The record shows that petitioner was given the opportunity to submit evidence in support of his claims, that the SDHR reviewed his evidence, and that the

investigation in this case was not "abbreviated or one-sided." See *Matter of Pajooh*, 82 AD3d at 609; *Cuccia v Martinez & Ritorto, PC*, 61 AD3d 609, 610 (1st Dept 2009); *Matter of Gleason v W.C. Dean Sr. Trucking, Inc.*, 228 AD2d 678, 679 (2d Dept 1996); *Stillman v New York State Div. of Human Rights*, 2008 WL 5026991, 2008 NY Misc LEXIS 8096, *5-6 (Sup Ct, NY County 2008).

Documents in the record "specifically detail conferences between the Division and petitioner, and demonstrate that a meaningful investigation of petitioner's complaint occurred. Based on that investigation, the Division's finding of no probable cause was not arbitrary, capricious or lacking a rational basis." *Matter of Ramirez*, 4 NY3d at 790; see *David v New York City Commn. on Human Rights*, 57 AD3d 406, 407 (1st Dept 2008). The court, therefore, is bound to uphold the SDHR's decision, even if the court might have reached a different result. See *Matter of Imperial Diner*, 52 NY2d at 79; *Matter of Mize*, 33 NY2d at 56; *Matter of Barnes v New York State Div. of Human Rights*, 2012 WL 6221095, 2012 NY Misc LEXIS 5537, *11 (Sup Ct, NY County 2012).

Further, "the division's expertise in evaluating discrimination claims . . . may not be lightly disregarded in view of its wide discretion, legislatively endowed, to weigh and assess the conduct of the parties and to reach conclusions based on what is fairly inferable from the facts." *State Ofc. of Drug*

Abuse Servs., 48 NY2d at 284; see *Matter of Barnes*, 2012 WL 6221095, 2012 NY Misc LEXIS 5537, at *14. As the Court of Appeals has cautioned, "[w]hile judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or [to] choose among alternatives." *Matter of Merson v McNally*, 90 NY2d 742, 752 (1997) (internal quotation marks and citations omitted).

With respect to the statute of limitations, as the SDHR notes, the only allegedly discriminatory acts which occurred within the statutory time period were the imposition of late fees and fines. Petitioner contends, however, that the discrimination was ongoing, as shown by the Board's continuing refusal to honor a prior Board's agreement to provide him with the next available larger apartment, and the Board's repeated rejections of his applications. He identifies, however, only two instances when his applications to purchase apartments were denied, in 2006 and 2008.

The continuing violation doctrine provides a narrow exception to the NYSHRL limitations period "where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as

to amount to a discriminatory policy or practice." *Quinn v Green Tree Credit Corp.*, 159 F3d 759, 766 (2d Cir. 1998), quoting *Cornwell v Robinson*, 23 F3d 694, 704 (2d Cir 1994); see *Clark v State of New York*, 302 AD2d 942, 945 (4th Dept 2003); see generally *National R.R. Passenger Corp. v Morgan*, 536 US 101 (2002). The doctrine does not apply here, however, as it does not apply to discrete incidents of discrimination that are not part of a discriminatory policy or practice, "even when they are related to acts alleged in timely filed charges." *Morgan*, 536 US at 113. Thus, "multiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation." *Lambert v Genesee Hosp.*, 10 F3d 46, 53 (2d Cir 1993), cert denied 511 US 1052 (1994); see *Armstrong v Sensormatic/ADT*, 100 AD3d 492, 493 (1st Dept 2012); *Glaser v Fulton-Montgomery Community Coll.*, 50 Fed Appx 17, 20 (2d Cir 2002).

As to petitioner's retaliation claim, the complaint alleges that he was retaliated against for complaining to HPD about the Coop's denial of his requests for a larger apartment. See Complaint, Ex. D to Mazzola Aff. in Support. Assuming that such complaint constitutes protected activity for purposes of a retaliation claim, and to the extent that petitioner also claims retaliation occurred after he filed his Complaint with the SDHR,

the alleged retaliatory acts were a continuation of conduct occurring before he made his complaints. Where, as petitioner here has alleged, adverse actions began before he complained, a respondent's "continuation of a course of conduct that had begun before the [petitioner] complained does not constitute retaliation because, in that situation, there is no causal connection between the . . . protected activity and the [respondent's] challenged conduct." *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 129 (1st Dept 2012); see *Alfano v Starbucks Corp.*, 2012 WL 2353763, 2012 NY Misc LEXIS 2746, *11 (Sup Ct, NY County 2012).

For all of the above reasons, the court finds that the SDHR determination had a rational basis in the record and was not arbitrary and capricious, and thus will not be disturbed. See *Antonecchia v New York State Div. of Human Rights*, 15 AD3d 151, 151 (1st Dept 2005). It is accordingly

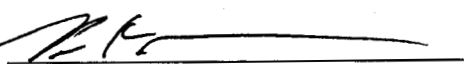
ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: June 27, 2013

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

ENTER:


HON. PETER H. MOULTON