

**Solomons v Douglas Elliman LLC**

2013 NY Slip Op 31731(U)

July 29, 2013

Supreme Court, New York County

Docket Number: 110636-2010

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Hon. George J. Silver

PART 10

**FILED** *Notice*

SOLOMONS, PAUL

JUL 31 2013

INDEX NO. 110636-2010

MOTION DATE \_\_\_\_\_

DOUGLAS ELLIMAN LLC, et al COUNTY CLERK'S OFFICE  
NEW YORK

MOTION SEQ. NO. 014

The following papers, numbered 1 to 9, were read on this motion for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits-----

No(s). 1, 2

Answering Affirmation(s) — Affidavit(s) — Exhibits -----

No(s). 3, 4

Notice of Cross-Motion — Affirmation — Affidavit(s) — Exhibits  
— Memorandum of Law-----

No(s). 5, 6, 7

Answering Affirmation(s) — Affidavit(s) — Exhibits -----

No(s). 8

Replying Affirmation — Affidavit(s) — Exhibits -----

No(s). 9

Upon the foregoing papers, the motion is decided as follows:

In this action for housing discrimination based upon a disability in violation of the New York City Human Rights Law, plaintiff Paul Solomons ("plaintiff") moves pursuant to CPLR § 603 for an order severing his causes of action against defendants EliPark Realty Corp. and George Abi-Hassoum; 23 Manhattan Valley North LLC and Baruch Singer; AIM Realty Serives Inc., Tariq Hakeem ("Hakeem"), Old Brownsville Renaissance Corp. ("Old Brownsville"), Stephen B. Gleich ("Gleich") and Tessie Travin ("Travin"); 650 West 189 Limited Partnership, Brian Ritter and Erik Rodrigues; and Best Apartments, Inc., Best Apartments North, Inc., Howard Feingold and Joseph Branco. Defendants Old Brownsville, Gleich and Travin (collectively "moving defendants") cross-move for an order granting them summary judgment and dismissing the complaint against them.

Motion to Sever

Plaintiff's claims against the various defendants, whom plaintiff alleges are brokers and owners of apartments, arise out of separate incidents on separate dates in 2010 during which plaintiff claims defendants discriminated against him in his attempt to rent apartments because of his status as a recipient of Section 8 vouchers from the City of New York. In moving to sever, plaintiff argues that defendants are unwilling to engage in discovery and that this unwillingness has so delayed the matter so as to prejudice plaintiff. Plaintiff also argues that he is not alleging that the various defendants acted jointly and that there are no common questions of fact among the various sets of defendants. Plaintiff previously opposed a motion by defendants 23 Manhattan Valley and Singer to have the action severed.

CPLR § 603 provides that "In furtherance of convenience or to avoid prejudice the court may order a severance of claims or may order a separate trial of any claim or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others." On a motion to sever pursuant to

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

- 1. Check one: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check as appropriate: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

CPLR § 603, the court must consider the issue of whether the convenience and judicial economy of disposing of multiple actions in one trial outweigh the possibility of substantial prejudice or delay to any party. Severance is generally not granted in situations where there are common questions of law or fact, or where the issues are inextricably entwined and denial of severance will not cause significant delay or prejudice to a substantial right (*see Krause v. American Guarantee & Liability Ins. Co.*, 22 N.Y.2d 147, 239 NE2d 175, 292 NYS2d 67 [1968]; *Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc.*, 51 NY2d 358, 414 NE2d 689, 434 NYS2d 189 [1980]; *Erbach Finance Corp. v. Royal Bank of Canada*, 203 AD2d 80 [1st Dept 1994]). The court has considerable discretion in deciding whether severance is proper (*see Shanley v. Callanan Industries, Inc.*, 54 NY2d 52, 429 NE2d 104, 444 NYS2d 585 [1981]; CPLR §§ 603, 1010). Here, the interests of judicial economy are best served by having a single trial. Although plaintiff alleges several discrete incidents of discrimination by several discrete sets of defendants, plaintiff's third amended complaint raises common legal issues regarding possible violations of the New York City Human Rights Law. Moreover, plaintiff's claims of pain and suffering and emotional distress as a result of the alleged discrimination are common to all defendants. Other than alleging delay, plaintiff has not established that a single trial would result in prejudice to a substantial right. Moreover, plaintiff will not be now heard to say that severance is proper simply because his interests have changed. Accordingly, plaintiff's motion to sever is denied.

#### Cross-Motion for Summary Judgment

Plaintiff's first cause of action in his third amended complaint alleges that defendants, by refusing to accept plaintiff's Section 8 voucher as payment for rent, violated Section 8-107 (5) (a) (1) and 8-107 (5) (a) (2) of the Administrative Code of the City of New York. These sections make it

an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation . . . any agent or employee thereof:

(1) to refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation or an interest because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such persons.

(2) To discriminate against any person because of such person's actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status, or because of any lawful source of income of such person, or because children are, may be or would be residing with such person, in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith.

Plaintiff's second cause of action alleges that defendants' refusal to negotiate for the rental of an apartment and their denial of housing accommodations because of plaintiff's Section 8 status violated sections 8-107 (5) (c) (1) and (2) of the Administrative Code of the City of New York. These sections make it

an unlawful discriminatory practice for any real estate broker, real estate salesperson

or employee or agent thereof:

(1) to refuse to sell, rent or lease any housing accommodation, land or commercial space or an interest therein to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space or an interest therein to any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons, or to represent that any housing accommodation, land or commercial space or an interest therein is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any housing accommodation, land or commercial space or an interest therein or any facilities of any housing accommodation, land or commercial space or an interest therein from any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons.

(2) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or an interest therein or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation, land or commercial space or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, or alienage or citizenship status, or any lawful source of income, or to whether children are, may be or would be residing with a person, or any intent to make such limitation, specification or discrimination.

Plaintiff's third cause of action alleges that defendants violated section 8-107 (6) which makes it "an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so."

In support of the cross-motion for summary judgment, Gleich avers that he is vice president of Old Brownsville, which owned the property located at 1227/1229 Bedford Avenue in Brooklyn, New York. The building, according to Gleich, contained four residential units. In March 2010 one of the loft apartments in the building became available for rent. Gleich claims that he and Travin, Old Brownsville's president, agreed to contact Hakeem, a real estate broker, to rent the loft apartment for \$1,250 per month. Gleich contends that he gave Hakeem no instructions other than to rent the apartment and Hakeem exercised complete control over the rental process. Gleich claims that he never instructed Hakeem not to rent the apartment to plaintiff or Section 8 tenants in general. Gleich avers that he did not learn about plaintiff's interest in renting the apartment until Old Brownsville was served with the complaint in this action. Gleich further contends that he is not a real estate broker, salesperson, employee or agent thereof and that neither he nor Old Brownsville owns any other building in the City of New York containing at least six residential units.

Travin avers that she never spoke with Hakeem about renting the loft apartment and never told Hakeem not to rent the apartment to plaintiff or any other Section 8 tenant. Like Gleich, Travin claims she is not a real estate broker, salesperson, employee or agent thereof.

Hakeem avers that he is a licensed real estate broker for AIM Realty, Inc. Hakeem claims he was contacted by Gleich in March 2010 to rent the loft apartment for no less than \$1,250 per month. Within a week of receiving the listing, which was not an exclusive, Hakeem placed advertisements for the apartment on Craig's list and on Back Page, an online version of the Village Voice. In or around March 2010 Hakeem received a phoen call from plaintiff who claimed to have seen one of Hakeem's advertisements and wanted to see the loft apartment. Hakeem's practice was to pre-screen tenants before showing them the property so as to ensure that the tenants are serious and have good credit. Hakeem claims this practice was done in his sole discretion based upon his experience as a real estate broker. Hakeem spoke with plaintiff who indicated that he was architect, that his credit was good and that he wanted to rent the apartment right away. Hakeem informed plaintiff that he would have to pay Hakeem's broker fee, the first month's rent and a security deposit. Thereafter Hakeem sent plaintiff an email asking that all future correspondence be done in writing. In response to the email, plaintiff informed Hakeem that he was an architectural consultant, that he participated in Section 8 and that he had a disability. Based upon his past experience with Section 8, Hakeem believed that it takes a Section 8 tenant approximately two months to rent an apartment from the time a Section 8 application is submitted. Hakeem claims that he knew the owner wanted to rent the loft apartment quickly and thus a Section 8 tenant would not have been a good choice. Hakeem also contends that he did not think the loft apartment would pass Section 8 inspection because it did not have any defined bedrooms, there were no closets and ceiling beams were exposed from work done by a prior tenant. Hakeem avers that he did not want to meet with plaintiff because plaintiff had lied to him about his employment as an architect and because plaintiff had failed to inform him of his Section 8 status. Hakeem also had problems collecting his broker's commission from past Section 8 tenants and did not want to risk losing his commission again. Moreover, Hakeem was concerned that since plaintiff had lied to him he would also lie to the owner of the apartment. Hakeem responded to plaintiff's email and informed him that the owner of the apartment was not interested in participating in the Section 8 program. Hakeem claims that this response was made for the sake of brevity and in the interest of not calling plaintiff a liar. Hakeem avers that Old Brownsville never gave him any parameters for renting it, other than that the rent could not be below \$1,250. Hakeem states he was never instructed by anyone affiliated with Old Brownsville not to rent to Section 8 tenants. Moreover, Hakeem contends that he did not have a written brokerage agreement with Old Brownsville and that he acted as an independent broker. After his initial conversation with Gleich in March 2010 Hakeem never spoke to Gleich again until he found a bona fide tenant to discuss with Gleich. Hakeem claims he did not speak to either Gleich or Travin at the time that he pre-screened plaintiff.

Plaintiff, in his verified bill of particulars, states that he communicated with Hakeem by email regarding the loft apartment and also spoke with staff members of the Fair Housing Justice Center. Plaintiff does not allege any communications with Old Brownsville, Gleich or Travin.

In moving for summary judgment, Old Brownsville, Gleich and Travin argue that they cannot be held liable for Hakeem's alleged discriminatory actions, which they do not concede, in attempting to procure a tenant for the loft apartment. Specifically, moving defendants argue that Hakeem was not their agent but was, at best, an independent contractor based upon the fact that (1) he had complete control over the rental process and in determining who would be presented to Old Brownsville as a viable tenant and (2) any commissions to which Hakeem was entitled as a result of finding a tenant would be paid not by Old Brownsville but by the tenant. Moving defendants further contend that they had no actual knowledge of Hakeem's alleged discriminatory conduct.

Moreover, moving defendants argue that the first cause of action in the third amended complaint should be dismissed because plaintiff did not have a Section 8 voucher as of March 27, 2010 for the rental of a loft apartment with no utilities or heat included at a monthly rent of \$1,250. Moving defendants also contend that they cannot be held liable under the New York City Administrative Code because the certificate of occupancy for the building establishes that it contained only four rental units at the time plaintiff sought to rent and there is no allegation in the complaint that Old Brownsville owned

any other buildings in the City of New York containing at least six rental units.

According to moving defendants, plaintiff's second cause of action must be dismissed because there is no evidence that moving defendants are real estate brokers, real estate salespersons or employees or agents thereof. Moving defendants also argue that the third cause of action should be dismissed because there is no evidence that moving defendants knew of plaintiff's interest in the loft apartment and thus there is no evidence that they aided or abetted Hakeem's alleged discriminatory actions.

In opposition to the cross-motion, plaintiff avers that he first received a Section 8 voucher in or about February 2008 and that he has received Section 8 rental assistance continuously since that date. Plaintiff claims that he received a voucher transfer on or about August 31, 2009 which qualified him for a studio apartment. In 2009 plaintiff sought an accommodation qualifying him for a permanent upgrade to a one bedroom apartment. Plaintiff received the transfer voucher qualifying him for an upgrade on or about June 1, 2010. According to plaintiff, he continued to receive Section 8 rental assistance throughout the pendency of the transfer application process.

Plaintiff argues that the cross-motion should be denied as premature as none of the moving defendants have been deposed. Plaintiff also argues that a question of fact exists regarding whether Hakeem was moving defendants' agent and whether moving defendants instructed Hakeem not to rent the apartment to Section 8 tenants.

It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment (*Bendik v Dybowski*, 227 AD2d 228 [1<sup>st</sup> Dept 1996]). The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial (*id.*). "On a motion for summary judgment, the court should accept as true the evidence submitted by the opposing party" *Pellegrini v Brock*, 2009 NY Slip Op 6721 [1<sup>st</sup> Dept]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1<sup>st</sup> Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

Based upon the record before the court, questions of fact exist which require denial of moving defendants' cross-motion. The email from Hakeem to plaintiff wherein Hakeem informed plaintiff that moving defendants were not interested in participating in the Section 8 program raises questions of fact regarding the level of control moving defendants exerted over Hakeem. The email statement contradicts Hakeem's claim that he was never told by Old Brownsville not to rent to the loft apartment to a Section 8 tenant. The statement also contradicts Hakeem's claim that the only limitation placed by Old Brownsville on his ability to rent the apartment was the amount of the monthly rent and raises questions of fact regarding the instructions that were given to Hakeem by Gleich and/or Travin and whether moving defendants had actual knowledge of the alleged discriminatory statement or acquiesced in Hakeem's making of it (Administrative Code of the City of New York section 8-107 (13) (c)). Hearsay evidence is admissible to defeat summary judgment where it is not the only evidence offered, where the declarant is presumably available to testify in accordance with his or her prior statement, or where there is a reasonable excuse for failing to submit evidence in admissible form. Hakeem is presumably available to testify regarding the statement he made to plaintiff about Old Brownsville's unwillingness to accept a Section 8 tenant. Plaintiff, who has already been deposed for two days, has made several attempts to depose the moving defendants, none of which have been successful. Thus, it cannot be said that plaintiff has waived his entitlement to depositions of moving defendants. More importantly, plaintiff does not have personal knowledge of the operative facts regarding the relationship between Hakeem and moving defendants, making his need for discovery more than "an ineffectual mere hope" (*compare Kramer v Danalis*, 66 AD3d 539 [1<sup>st</sup> Dept 2009]). Since facts essential to establish opposition to the cross-motion "may exist but cannot then be stated" (CPLR § 3212 [f]) and because plaintiff has a reasonable excuse for being unable to oppose the cross-motion with admissible evidence, Hakeem's email statement is sufficient to raise a triable issues of fact with respect to plaintiff's first and third causes of action.

Further, the Appellate Division, First Department has previously held that the 22 year old

certificate of occupancy for 1227/1229 Bedford Avenue "does not conclusively prove how many apartments were in the building when plaintiff tried to rent it" (*Solomons v Douglas Elliman*, 94 AD3d 468 [1<sup>st</sup> Dept 2012]). Since the certificate of occupancy did not conclusively establish a defense to plaintiff's claims (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324, 865 NE2d 1210, 834 NYS2d 44 [2007]) in the context of a motion to dismiss, it does not do so in the context of a summary judgment motion either. Plaintiff's claim that he was still receiving Section 8 rental assistance in March 2010 during the pendency of his request for an accommodation upgrade raises questions of credibility that are best resolved by the trier of fact (*see Martin v Citibank, N.A.*, 2009 NY Slip Op 5906 [1<sup>st</sup> Dept]).

However, with respect to the second cause of action, the mere hope that evidence sufficient to defeat the cross-motion is insufficient to deny it. Plaintiff has made no showing that discovery will lead to evidence establishing that Gleich and Travin are real estate brokers, salespersons or employees thereof (Administrative Code § 8-107 (5) (c) (1), (2)). As plaintiff has failed to make the requisite showing to withstand a summary judgment motion on the ground of a need for discovery (*Fulton v Allstate Ins. Co.*, 14 AD3d 380 [1<sup>st</sup> Dept 2005]) moving defendants are entitled to summary judgment on plaintiff's second cause of action. Accordingly, it is hereby

ORDERED that plaintiff's motion to sever is denied; and it is further

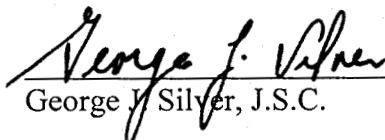
ORDERED that the cross-motion for summary judgment is granted to the extent that plaintiff's second cause of action is dismissed as against defendants Old Brownsville Renaissance Corp., Stephen B. Gleich and Tessie Travin. The cross-motion is otherwise denied; and it is further

ORDERED that plaintiff is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.

**FILED**

JUL 31 2013

COUNTY CLERK'S OFFICE  
NEW YORK

  
George J. Silver, J.S.C.

**GEORGE J. SILVER**

Dated: **JUL 29 2013**  
New York County