Banks v Peace of Mind Realty
2019 NY Slip Op 32689(U)
September 6, 2019
Supreme Court, New York County
Docket Number: 160829/2014
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
----------X

NIKITA BANKS,

Plaintiff,

Index No.: 160829/2014

-against-

DECISION/ORDER

PEACE OF MIND REALTY, ANGEL MARTINEZ, ALFRED JOYETTE, PREMIER METRO REALTY CORP., DIANA KOSOV, 1675 LINCOLN LLC, ZUZ REALTY CORP., SIMCHA P. SMITH, GOLDEN LIFE REALTY CORP., MS. WALKER, IMS REALTY GROUP LLC, MATT DOE, CORTELYOU REALTY & ESTATES INC., 5 LINDEN LLC, SPIRE GROUP INC., AHMED TAHA, OPEN HOUSE MANAGEMENT LLC, JEAN CLAUDE DOE, NY STANDARD REALTY LLC, SHMUEL SIMSHI, BRIDGE AND TUNNEL REAL ESTATE BROKERAGE, and KAMELA PAYNE,

Defendants.

----------X

HON. SHLOMO S. HAGLER, J.S.C.:

This action arises out of plaintiff Nikita Banks's claim that defendants Peace Of Mind Realty, Angel Martinez, Alfred Joyette, Premier Metro Realty Corp., Diana Kosov, 1675 Lincoln LLC, Zuz Realty Corp., Simcha P. Smith, Golden Life Realty Corp., Ms. Walker, IMS Realty Group LLC ("IMS Realty"), Matt Doe, Cortelyou Realty & Estates Inc. ("Cortelyou Realty"), 5 Linden LLC, Spire Group Inc., Ahmed Taha, Open House Management LLC, Jean Claude Doe, NY Standard Realty LLC, Shmuel Simshi, Bridge And Tunnel Real Estate Brokerage, and Kamela Payne unlawfully discriminated against her on the basis of lawful source of income in

violation of the New York City Human Rights Law ("NYCHRL"). Plaintiff now moves, pursuant to CPLR 3212, for an order granting summary judgment against Cortelyou Realty. In opposition, Cortelyou Realty requests that, pursuant to CPR 3212 (b), the court search the record and grant it summary judgment dismissing the complaint. For the reasons set forth below, both plaintiff's motion and Cortelyou Realty's request are denied.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff receives a Section 8 voucher to assist her in paying for housing.[1] In the fall of 2013, plaintiff was advised that she would no longer be able to live in her current apartment. Plaintiff, a single mother, living with her teenage son, started searching for a two-bedroom apartment. The complaint states that, although plaintiff found listings that satisfied her budget and location, numerous real estate brokers, agents and landlords, who are the defendants in this action, refused to rent to plaintiff because she received a Section 8 voucher. According to the complaint, "[e]ach of the Defendants has directly prevented [plaintiff] from renting apartments that fit squarely within her requirements and needs, and for which she qualifies, given her voucher." Complaint, ¶ 9. According to plaintiff, as a result of defendants' discriminatory actions, she has been homeless since 2014 and has been staying with friends and family.[2] She continues that she "has [been] forced to be apart from the son she has raised since birth, who has had to stay with his father." *Id.*, ¶ 9.

---

[1] "The Section 8 Tenant-based Assistance Program was established by Federal law (42 USC 1437f) and provides Federal rent subsidies to lower income families to enable them to obtain decent, safe and sanitary housing in the private sector." *Matter of Malek v Franco*, 263 AD2d 427, 428 (1st Dept 1999).

[2] Plaintiff notes that she "has settled with most of the other defendants in this action. One settlement resulted in [plaintiff] obtaining an apartment where she now lives, which accepts her voucher." Plaintiff's Memorandum of Law at 10.

Plaintiff provides examples of the initial conversations she had with defendants when she attempted to rent an apartment. For instance, on June 26, 2014, plaintiff saw an apartment advertised online that matched her criteria. When she called the realtor, who worked for Peace of Mind Realty, the realtor advised her that the apartment was still available. "[Plaintiff] then asked whether he accepted Section 8, and [the realtor] replied that they did not have any two-bedrooms available that were accepting Section 8." *Id.*, ¶ 44.

After numerous failed attempts at renting an apartment, plaintiff contacted the Fair Housing Justice Center ("FHJC"), "a non-profit organization that seeks to eliminate housing discrimination . . . and strengthen enforcement of the fair housing laws." *Id.*, ¶ 5. The FHJC utilizes "testers," who, among other things, pose as prospective renters to determine whether the landlord, realtor or other individual is engaging in discriminatory housing practices. The testers receive training from the FHJC prior to conducting investigations and they record their conversations with the real estate brokers. Plaintiff provided the FHJC with the criteria that she was looking for in an apartment; "namely a two-bedroom apartment for under $1600 per month in or near Brooklyn." *Id.*, ¶ 48. The testers "contacted brokers and agencies that [plaintiff] identified as well as others who advertised apartments that fit squarely within [plaintiff's] criteria, based on size, cost and location." *Id.*, ¶ 6.

As relevant for this motion, on July 21, 2014, a FHJC tester contacted IMS Realty about an advertised rental that met plaintiff's criteria. Among other things, IMS Realty, "was in the real estate business . . . [and] was brokering the rental of apartments," including the subject apartment, located at 2149 Cortelyou Road in Brooklyn, New York. *Id.*, ¶ 22. The tester spoke

to a person named "Matt Doe" who was allegedly an employee of IMS Realty. The tester stated that she and her husband were inquiring about the availability of two-bedroom apartments. Matt Doe informed the tester that there were two-bedroom apartments available at 2149 Cortelyou Road in Brooklyn for $1,600 including heat and hot water. The tester then told Matt Doe that this location may not "work for her and husband, but that her sister was also looking. The tester asked, 'Do they by any chance accept Section 8?' Matt Doe replied, 'Unfortunately, they tried doing Section 8, and it didn't work.' Shortly thereafter, he said, 'Section 8's gonna be a problem.'" *Id.*, ¶ 112.

Cortelyou Realty owns the building located at 2149 Cortelyou Road. According to plaintiff, "Matt Doe was at all relevant times acting on behalf of and with authority from [Cortelyou Realty], and based on the understanding that [Cortelyou Realty] was unwilling to accept Section 8 vouchers at 2149 Cortelyou Rd. . . ." *Id.*, ¶ 115. The FHJC informed plaintiff, in pertinent part, that Cortelyou Realty, in addition to the other defendants, refused to accept Section 8 vouchers. Plaintiff states that it would have been a "futile gesture" to directly contact Cortelyou Realty, as it had an open policy of discriminating against applicants who receive Section 8 vouchers.

Plaintiff commenced this action, which sets forth one cause of action alleging unlawful discrimination based on a lawful source of income and aiding and abetting such conduct, in violation of the NYCHRL. Specifically, "[a]s a direct result of Matt Doe's, IMS Realty Group[], [and Cortelyou Realty's] . . . policy and/practice of discriminating against recipients of Section 8 vouchers, [plaintiff] was denied the opportunity to rent the apartment[]" located at 2149 Cortelyou Road. *Id.*, ¶ 116. In pertinent part, plaintiff also states that defendants represented to

her that a housing accommodation was not available, when in fact it was available, and also refused to rent to her because she received a Section 8 voucher. Plaintiff is seeking actual damages, punitive damages, injunctive relief and attorneys' fees and costs.[3]

Instant Action

In connection with the motion, Moshe Deustsch ("Deutsch"), the owner of YHT Management and an officer of Cortelyou Realty, testified on behalf of Cortelyou Realty. Deutsch testified that Cortelyou Realty does not have any employees and its only function is to own the building located at 2149 Cortelyou Road. The building has thirty rental units and is four stories tall. Deutsch stated that he was unaware if Cortelyou Realty had any policies regarding fair housing. He stated that it hired a management company, namely nonparty YHT Management, to "make sure that they do the right thing." Mullkoff Affirmation, Exhibit "D", Deutsch tr at 25.

Deutsch testified that "[a]ny broker who wants to deal with the rentals [for the apartments available through Cortelyou Realty], they ask to be on the e-mail blast." *Id.* at 43. The email blast provides the brokers with the relevant information about the apartment, including the size, vacancy and price. The brokers are then allowed to advertise the apartments, without any limitations or restrictions on the advertisement. Cortelyou Realty does not advertise for the rental apartments. Deutsch continued that YHT Management, not Cortelyou Realty, keeps track

[3] The prayer for relief requests that the court enjoin defendants from engaging in the discriminatory housing practices and enjoin defendants to make all necessary modifications to their policies and practices to comply with the fair housing laws, including training all employees on fair housing laws. However, in plaintiff's Memorandum of Law, she argues that, as there are no remaining issues of liability, the court should set down the matter for a hearing solely to determine damages and remedial relief.

of the brokers who are on the email blast. Cortelyou Realty does not "act[] at all with brokers" and has given YHT Management the authority to "allow brokers to show and rent apartments at 2149 Cortelyou." *Id.* at 45-46. Further, neither YHT Management nor Cortelyou Realty has a screening process for the real estate brokers.

According to Deutsch, YHT Management "processes applications [to rent apartments] from a variety of brokers." *Id.* at 59. Deutsch acknowledged that Matt Doe worked for IMS Realty and would bring rental applications to YHT Management. The record establishes that Matt Doe has submitted several approved lease requests to Deutsch for apartments located at 2149 Cortelyou Road, where he included the applicants' paystubs, rental application, bank statements and picture ID. *See e.g.* Plaintiff's Exhibit "E" at 25.

After listening to the recorded conversation between Matt Doe and the FHJC tester, Deutsch confirmed that Matt Doe advised the tester that Section 8 was not accepted at 2149 Cortelyou Road. Deutsch testified that YHT Management does not provide any training to its employees regarding Section 8 policies. Deutsch believed that there had been one previous resident at 2149 Cortelyou Road who had received Section 8 in the past.

Examples from the record indicate that YHT Management provided the following limitations to the brokers, in relevant part: "Your file will not be accepted if you post the unit with a lower price! If you feel you have a good file with a good offer contact us . . . . There is a pet deposit requirement for most apartments!" Plaintiff's Exhibit "E", at 35-36. Brokers were also advised, "Remember when contacting current tenants to be courteous and polite." *Id.* at 39.

In one email exchange between YHT Management and Matt Doe, Matt Doe asked, "For 637 E 224th St. #4R 2br do you want $1515 (3 ppl) or $1956 (5 ppl) and #2R 1br do you want $1268 (1 person) or $1515 (3 ppl)?" *Id.* at 8.

YHT Management responded, "it all depends on the clients themselves. We don't want problem people. [W]e want the building to stay a calm and clean place . . . Do you have any good family type people for the higher amount?" *Id.*

Matt Doe replied, "Alright so we aim for the max and try to get the best possible families if we can't I guess we'll go with a lower amount . . ." *Id.*

Plaintiff argues that her motion for summary judgment should be granted because it is undisputed that Cortelyou Realty, through its agent IMS Realty, violated the NYCHRL when it engaged in a discriminatory practice of refusing to allow tenants who received Section 8 assistance to apply to, or rent, apartments at 2149 Cortelyou Road. IMS Realty was accepted into the broker list and was allowed to show and rent 2149 Cortelyou Road to prospective tenants. Plaintiff submits the advertisement placed by IMS Realty for the subject two-bedroom apartment located at 2149 Cortelyou Road. This apartment was subsequently rented to tenants who did not receive Section 8 assistance. Deutsch tr at 78.

In summary, as set forth in Administrative Code § 8-107 (5), the NYCHRL expressly prohibits discrimination in housing on the basis of a lawful source of income, which includes Section 8 vouchers. Plaintiff claims that Cortelyou Realty gave IMS Realty authority to show and rent out its apartments. Plaintiff continues that, it is undisputed that IMS Realty had a policy of refusing to rent or show apartments to prospective tenants like plaintiff, who receive Section 8 vouchers. Further, she alleges that IMS Realty's representations were made within the scope of

its authority to show and rent apartments. Accordingly, plaintiff maintains that, as IMS Realty was acting as Cortelyou Realty's agent when it discriminated, Cortelyou Realty is also liable for this discriminatory practice.

According to plaintiff, even if Cortelyou Realty was unaware that IMS Realty was engaging in discriminatory practices, as a principal, it is liable for its agent's misconduct. Furthermore, assuming arguendo, that IMS Realty was somehow not acting as Cortelyou Realty's agent when it discriminated against Section 8 recipients, Cortelyou Realty would still be liable because it failed to repudiate IMS Realty's behavior. Cortelyou Realty has allegedly taken no steps to prevent the recurrence of unlawful discrimination. As of February 2017, IMS Realty continued to remain on the authorized broker list.

Plaintiff argues that she was injured by Cortelyou Realty's policy of refusing to show or rent apartments to Section 8 recipients. Although the FHJC tester was the one who spoke to IMS Realty, plaintiff argues that it would have been futile for her to contact IMS Realty about the same apartment due to the open and express policy of discriminating against recipients of Section 8 vouchers.

Cortelyou Realty's Opposition

Cortelyou Realty does not dispute that it is a violation of the NYCHRL to refuse to rent to a Section 8 recipient. However, it argues that, based on the factual issues of this case, the court should search the record, deny plaintiff's motion and, pursuant to CPLR 3212 (b), grant Cortelyou Realty "reverse" summary judgment dismissing the complaint.

To begin, Cortelyou Realty argues that, as plaintiff herself never applied for an apartment, she was not aggrieved and cannot maintain an action. Although the tester was

advised that Cortelyou Realty would not accept a Section 8 recipient, plaintiff was not personally rejected. Therefore, according to Cortelyou Realty, it never denied plaintiff the opportunity to rent an apartment. Cortelyou Realty does not cite any caselaw for its standing argument, nor does it address plaintiff's futile gesture argument in its papers. Moreover, during oral argument, Cortelyou Realty conceded that it would have been a futile gesture for plaintiff to make the same apartment inquiry to the same real estate broker. It also noted that the law does not state that a tenant has to go directly to the landlord. However, it argued that there is no evidence that it would have been a futile gesture for plaintiff to go directly to the landlord or to the managing agent. Ultimately, Cortelyou Realty argued that the "essential question" pertains to agency law and the scope of the agent's authority. Oral argument tr at 18.

Regarding agency law, Cortelyou Realty does not dispute that it gave IMS Realty authority to act as its agent to seek tenants for the apartment. However, it argues that it did not give IMS Realty the authority to act unlawfully in securing those tenants, nor did it authorize IMS Realty to specifically reject Section 8 tenants. Specifically, Cortelyou Realty states that IMS was not "authorized to do anything other than secure tenants for the premises." Cortelyou Realty's Memorandum of Law at 5. According to Cortelyou Realty, "there is not an iota of evidence that Defendant engaged in misleading conduct that gave a third party a reasonable belief that the rejection of Section 8 tenants by IMS was authorized by Defendant." Defendant's Memorandum of Law at 9. During oral argument Cortelyou Realty argued that Cortelyou Realty, as principal, cannot necessarily be held responsible for every action of its agent and that the scope of Matt Doe's authority is a question of fact. Cortelyou Realty further argues that

Administrative Code § 8-107 (13) is inapplicable as this provision addresses the strict liability imposed on an employer.

Cortelyou Realty maintains that there is no legal requirement to have a specific policy regarding fair housing, just a requirement to comply with those laws. According to Cortelyou Realty, it is neither required to advise its agents not to engage in unlawful acts, nor to inform them of the applicable laws. Further, ratification of IMS Realty's discriminatory acts is allegedly inapplicable in this situation, as Cortelyou Realty was unaware, at the time, that IMS Realty had rejected Section 8 recipients.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from

the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

Pursuant to CPLR 3212 (b), in reviewing a motion for summary judgment, the court "may search the record and grant summary judgment to any nonmoving party without the necessity of a cross motion . . . . even disregard[ing] the tardiness of a cross motion . . . ." *Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 (1st Dept 2015) (internal citations omitted). "The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion." *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 (1st Dept 2006).

II. NYCHRL

The NYCHRL was amended in 2008 to "ban discrimination by landlords against tenants based on their lawful source of income, including Section 8 federal housing vouchers." *Alston v Starrett City, Inc.*, 161 AD3d 37, 39 (1st Dept 2018). Also known as Local Law 10, "the plain language . . . prohibits discrimination against any person or group of persons by virtue of their lawful source of income (Administrative Code § 8-107 [5] [a] [1], [2]), which would include Section 8 vouchers." *Tapia v Successful Mgt. Corp.*, 79 AD3d 422, 423 (1st Dept 2010) (internal quotation marks omitted).

In pertinent part, the provisions regarding unlawful discriminatory practices based on lawful source of income "apply to all housing accommodations, regardless of the number of units contained in each, of any person who has the right to sell, rent or lease or approve the sale, rental or lease of at least one housing accommodation within New York City that contains six or more housing units." Administrative Code § 8-107 (5) (o) (ii).

As set forth in Administrative Code § 8-107 (5) (a) (1) (a), "[i]t shall be an unlawful discriminatory practice for the owner . . . 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 . . . or any agent or employee thereof," to refuse to rent to a person "because of any lawful source of income of such person or persons . . . ." Furthermore, it is unlawful to: discriminate against such persons in the terms and conditions of the rental of such housing accommodation, to represent to them that the housing accommodation is not available to rent, "when in fact it is available to such person." Administrative Code § 8-107 (5) (a) (1) (b) and (c). It is also unlawful to make any "statement . . . which expresses, directly or indirectly, any limitation, specification or discrimination as to . . . any lawful source of income . . . ." Administrative Code § 8-107 (5) (a) (2). Pursuant to Administrative Code § 8-107 (5) (c) (1) and (2), similar terms are set forth as applicable to real estate brokers and their agents.

When considering a motion for summary judgment, courts have held that a landlord's refusal to accept a Section 8 voucher constitutes a prima facie violation of the NYCHRL. *See e.g. Tapia v Successful Mgt. Corp.*, 24 Misc 3d 1222(A), 2009 NY Slip Op 51552(U), *5 (Sup Ct, NY County, 2009), *affd Tapia v Successful Mgt. Corp.*, 79 AD3d at 422.

III. Futile Gesture Doctrine

Cortelyou Realty does not dispute that it is a violation of the NYCHRL to refuse to rent an apartment to a Section 8 recipient. However, in opposition to plaintiff's summary judgment motion, for the first time, it argues that, in essence, plaintiff does not have standing to pursue the action as she herself never sought an apartment.

Plaintiff preemptively addressed the issue of standing in the complaint and in her motion for summary judgment by alleging that it would be a futile gesture for plaintiff to contact Cortelyou Realty about the apartment. She explained that, after her own efforts yielded no rentals, the FHJC inquired about apartments, on plaintiff's behalf, that specifically fit plaintiff's criteria. The FHJC then informed plaintiff about the defendants' refusal to allow Section 8 recipients to apply for and rent such apartments. Complaint, ¶ 155.

Plaintiff argues that, pursuant to the futile gesture doctrine, there is no requirement that she directly apply for the apartment in order for her to establish a NYCHRL claim. According to plaintiff, she "need not have directly attempted to apply for the Cortelyou apartments when such application was evidently futile, given the open, expressed discriminatory policy that prevented her from being eligible." Plaintiff's Memorandum of Law at 12 n 5. Plaintiff explains that the futile gesture doctrine has been frequently applied to discrimination claims. Plaintiff continues that the futile gesture doctrine would apply to plaintiff's claims under the NYCHRL, as this statute provides even "broader" protections than federal antidiscrimination laws.

Pursuant to CPLR 3211 (e), a failure to raise the defense of standing in an answer or a pre-answer motion to dismiss waives this defense. *See Eida v Board of Mgrs. of 135 Condominium,* 166 AD3d 561, 561-561 (1st Dept 2018) ("Defendant waived the defenses of statute of limitations and lack of standing by failing to raise them in either a pre-answer motion to dismiss or its answer"). However, a waiver may be retracted "by assertion of the defense in connection with the summary judgment. . . . an unpleaded defense may not only be invoked to defeat a motion for summary judgment, but in the absence of surprise or prejudice to, or objection by, the opposing party, it may also serve as the basis for an affirmative grant of such

relief." *Allen v Matthews*, 266 AD2d 782, 784 (3d Dept 1999) (internal quotation marks and citations omitted).

As noted, Cortelyou Realty failed to raise the defense of standing in its answer or a pre-answer motion to dismiss. Nevertheless, inasmuch as plaintiff fully opposed the issue, and the parties also addressed it during oral argument, plaintiff is not prejudiced by this Court's consideration of the issue.

The futile gesture doctrine has been applied to claims alleging a violation of disability discrimination under the NYCHRL. For example, in *Lowell v Lyft, Inc.* (352 F Supp 3d 248, 252 [SD NY 2018]), a plaintiff alleged that defendant, a transportation provider, violated Title III of the Americans with Disabilities Act ("ADA"), the New York State Human Rights Law ("NYSHRL") and the NYCHRL by failing to provide equal, accessible transportation to people with mobility disabilities. Plaintiff alleged that multiple people advised her that "requesting a ride through Defendant's application was futile for individuals in need of [wheelchair accessible vehicles]." *Id.* at 256. Defendant moved to dismiss plaintiff's complaint based on lack of standing, as plaintiff "did not sign up for Defendant's application or otherwise attempt to obtain a ride from Defendant." *Id.* at 255. The Court denied defendant's motion. Discussing the futile gesture doctrine, the Court held that "[t]o plausibly demonstrate the first element of standing, injury, an individual with a disability is not required to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions." *Id.* (internal quotation marks and citation omitted). The Court continued that plaintiff met the second and third requirements for standing as "[h]er injury, not having equal access to Defendant's services, is fairly traceable to Defendant and the Court would

likely be able to redress this injury by requiring Defendant to comply with accessibility laws." *Id.* at 256; *see also Kreisler v Second Ave. Diner Corp.*, 731 F 3d 184, 189 (2d Cir 2013) (internal quotation marks and citation omitted) (discussing "the ADA's mandate that disabled individuals need not engage in a futile gesture if such a person has actual notice that [the private entity] does not intend to comply with [ADA] provisions").

By way of another example, in contrast, in *273 Lee Ave. Tenants Assn v Steinmetz* (330 F Supp 3d 778, 795 [ED NY 2018]), the court concluded that plaintiffs could not rely on the futile gesture theory to support vacancy claims based on defendants' alleged violation of § 3604 (d) of the Fair Housing Act (FHA)[4] and 42 § USC 1982. The court held the following in relevant part:

> "Plaintiffs have not established their burden of proving they were reliably informed of discriminatory policies where they did not have any direct contact with Defendants or their agents—a prerequisite to establishing direct injury under the futile gesture theory. Because there is no indication that Plaintiffs were reliably informed of any discriminatory policy with respect to Defendants' leasing out vacant apartments, they did not have actual notice that Defendants would engage in discrimination."

273 Lee Ave. Tenants Assn v Steinmetz, 330 F Supp 3d at 794-795 (internal quotation marks and citation omitted).

The instant plaintiff is not comparable to the plaintiffs in *273 Lee Ave. Tenants Assn v Steinmetz*, because here, plaintiff was "reliably informed of any discriminatory policy with respect to Defendants' leasing out vacant apartments." *273 Lee Ave. Tenants Assn v Steinmetz*, 330 F Supp 3d at 795. First, the tester contacted 2149 Cortelyou Road as it matched plaintiff's criteria. Then, the tester immediately notified plaintiff that Section 8 was not accepted there.

---

[4] Pursuant to 42 § USC 3601, also known as the FHA, "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."

It is well settled that the provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016). Under the circumstances of this case, given the purpose of Local Law 10, plaintiff did not have to engage in a futile gesture by directly applying for the apartment in order to pursue a claim. Moreover, as the apartment was evidently only advertised through a real estate broker, plaintiff would not have any obligation to directly seek out the landlord and request to be considered for available apartments.

III. Agency Law

By its own terms, the NYCHRL makes an employer liable for the discriminatory conduct of its employee, agent or independent contractor. *See* Administrative Code § 8-107 (13) (a): "An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions 1 and 2 of this section." While a defendant is entitled to present factors demonstrating that it, for example, had a program educating its employees and agents on unlawful discriminatory practices, these factors only mitigate the damages. Administrative Code § 8-107 (13) (e).

The complaint herein alleges that IMS Realty violated subdivisions listed in section five of Administrative Code § 8-107.[5] Therefore, if plaintiff meets her burden on summary judgment establishing that IMS Realty engaged in this discriminatory conduct and also demonstrates that IMS Realty is an agent of Cortelyou Realty, strict liability applies.

[5] These actions include refusing to allow a Section 8 tenant to apply for, and rent, the apartment, and making statements expressly discriminating on the basis of lawful source of income, as listed under Administrative Code § 8-107 (5) (a) (1) (a) (b) and (c), Administrative Code § 8-107 (5) (a) (2) and Administrative Code § 8-107 (5) (c) (1) and (2).

Here, plaintiff has established a prima facie claim that IMS Realty violated Local Law 10 by refusing to accept her Section 8 voucher for the apartment. It is undisputed that IMS Realty expressly denied Section 8 recipients the opportunity to rent the two-bedroom apartment available at 2149 Cortelyou Road solely based on their receipt of housing subsidies. The conversation on the recorded line indicates that, when the FHJC tester inquired about the apartment, she was advised that it was available. However, when the FHJC tester stated that her sister, a Section 8 recipient, may be interested in the apartment, IMS Realty advised that the Section 8 recipient would not be eligible to rent the apartment based on the fact that she received Section 8.

"An action for housing discrimination is, in effect, a tort action, and ordinary tort-related vicarious liability rules apply. . . . Liability generally flows from the agent to the principal . . . ." *Short v Manhattan Apts., Inc.,* 916 F Supp 2d 375, 399 (SD NY 2012) (internal citations omitted). "Under the law of . . . New York . . . , principals may be held liable for torts committed by their agents when such agent acts within the scope of their agency." *Bigio v Coca-Cola Co.,* 675 F3d 163, 175 (2d Cir 2012), *cert denied* 568 US 1138 (2013). Furthermore, a principal will be held liable for its agent's actions within the scope of agency, even if the "acts or statements exceeded the agent's actual authority or disobeyed the principal's general or express instructions to the agent." *Bicounty Brokerage Corp. v Burlington Ins. Co.*, 88 AD3d 833, 835 (2d Dept 2011) (internal quotation marks and citations omitted).

To bind a principal, "an agent must have authority, whether apparent, actual or implied. Actual authority . . . may be express or implied, but in either case it exists only where the agent may reasonably infer from the words or conduct of the principal that the principal has consented

to the agent's performance of a particular act." *In re Parmalat Sec. Litig.*, 594 F Supp 2d 444, 451-452 (SD NY 2009) (internal quotation marks and citation omitted). "Actual authority . . . is created by direct manifestations from the principal to the agent, and . . . is interpreted in the light of all the circumstances attending these manifestations, including the customs of business, the subject matter, any formal agreement between the parties, and the facts of which both parties are aware." *New York Community Bank v Woodhaven Assoc., LLC,* 137 AD3d 1231, 1233 (2d Dept 2016) (internal quotation marks and citations omitted).

Courts have found that housing discrimination claims made pursuant to the NYCHRL are analyzed the same way as under the FHA. *See e.g. Fair Hous. Justice Ctr., Inc. v Broadway Crescent Realty, Inc.*, 2011 WL 856095, *9, 2011 US Dist LEXIS 24515, *23 (SD NY 2011) ("Claims of housing discrimination under the NYSHRL and NYCHRL are analyzed under the same standard as claims arising from the [FHA]"); *see also Wilson v Phoenix House* 42 Misc 3d 677, 710 (Sup Ct, Kings County, 2013) ("The New York State and Federal courts have found a substantial identity between the language and purposes of Executive Law § 296(5), Administrative Code § 8-107, and the federal Fair Housing Act (42 USC § 3601 et seq.").

The FHA imposes liability without fault on employers in accordance with traditional agency principles. *Mitchell v Shane*, 350 F3d 39, 50 (2d Cir 2003). Further, similar to the principals stated above, when analyzing claims under the FHA, courts have found that a principal is vicariously liable for the discriminatory acts of its agent, even if did not authorize the agent to discriminate. *See Mancuso v Douglas Elliman, LLC*, 808 F Supp 2d 606, 630 (SD NY 2011) (internal quotation marks and citation omitted) ("DE's only other argument about agency, that it

cannot be vicariously liable because it did not make or authorize [the agent to discriminate] . . . . has no basis in law").

For example, as noted by plaintiff, in *Cabrera v Jakabovitz* (24 F 3d 372, 377 [2d Cir 1994]), an action brought alleging violations of the FHA, the court upheld a jury verdict rendering landlords vicariously liable as principals for the discriminatory acts of real estate brokers acting as their agents. The court found there was "ample evidence" for the jury to conclude that the landlords "had manifested a desire to have AM Realty act on their behalf in renting their apartments, and that AM Realty had accepted this agency." *Id.* at 387. Among other things, the landlords provided the brokers with listings of the available apartments and criteria, the brokers screened applicants using these criteria and the landlords "had the power to deny further listings to AM Realty if the brokerage referred unacceptable applicants for the apartments." *Id.*

As another example, in *Khodeir v Sayyed*, 2016 WL 5817003, *1, 2016 US Dist LEXIS 139276, *2, (SD NY 2016) plaintiffs asserted claims against the owner and the managing agent of the building alleging familial status discrimination in violation of the FHA. The owner argued that there were no specific allegations with respect to his conduct and that no agency relationship existed. The court noted that, "[a]lthough owners of real estate may be held vicariously liable for discriminatory acts by their agents and employees under the FHA, the fact that [defendant] allegedly owns the building does not automatically mean that [the managing agent] acted as his agent when carrying out his alleged acts of discrimination." 2016 WL 5817003 at *9, 2016 US Dist LEXIS 139276 at *27 (internal quotation marks and citation omitted). However, on the other hand, "[p]laintiffs need not allege at the Motion to Dismiss phase, or prove at trial, that [the

owner] authorized [the managing agent] specifically to discriminate in order to be liable for that discrimination." *Id.* (internal quotation marks and citation omitted). The court ultimately denied the owner's motion to dismiss on the basis of agency. It held that, in relevant part, the managing agent conceded harassing plaintiffs because they had four children, which was direct evidence of discrimination and the managing agent exercised day to day control over the building.

Here, plaintiff satisfied her burden on summary judgment to establish that IMS Realty was acting as Cortelyou Realty's agent when it unlawfully discriminated on the basis of income. It is undisputed that IMS Realty was one of the brokers charged with the responsibility of advertising and renting the apartment for Cortelyou Realty. In addition, similar to *Cabrera v Jakabovitz* (24 F 3d at 388), Cortelyou Realty "benefitted from the brokers' service by renting their vacant apartments." Although IMS Realty was given broad latitude while managing the advertising and tenant selection process, there were certain limitations placed on requested leases, such as the amount of rent. In one circumstance, the applicants were screened "according to the landlords' rental criteria," as IMS Realty was advised that good family types were preferable. *Cabrera v Jakabovitz*, 24 F 3d at 388. Cortelyou Realty still had the ultimate authority on whether IMS Realty's proposed tenant application would be accepted and it could certainly choose to work with other real estate brokers.[6]

---

[6] *See e.g. Hughes v The Lillian Goldman Family*, LLC, 153 F Supp 2d 435, 451 (SD NY 2001). "In this case, the plaintiff has pointed to numerous facts similar to those relied upon by the *Cabrera* court that establish that there is a genuine issue for trial with respect to the existence of an agency relationship between Marks, through his broker position at JMG, and the Solil defendants such that Marks's knowledge of the plaintiff's race may be imputed to the Solil defendants").

Cortelyou Realty has conceded that IMS Realty's "function as an agent was to attempt to find a tenant for the vacant apartment." Cortelyou Realty's Memorandum of Law at 5. The questions of whether Cortelyou Realty was aware of IMS Realty's discriminatory practices or whether it specifically authorized, or even rejected them, are irrelevant. *See Mancuso v Douglas Elliman, LLC*, 808 F Supp 2d at 630. As a result, the only remaining issue is whether the scope of the agency relationship between Cortelyou Realty and IMS Realty included setting limitations and conditions on prospective tenants.

"Whether an agency relationship exists under this standard [New York law] is a mixed question of law and fact. Summary judgment is appropriate if the material facts from which an agency may be inferred are not in dispute or where the facts will reasonably support only one reasonable conclusion." *Hughes v The Lillian Goldman Family, LLC*, 153 F Supp 2d 435, 450 (SD NY 2001) (citation omitted). As set forth below, in this situation, questions of fact remain as whether IMS Realty was granted actual authority, whether express or implied, to bind Cortelyou Realty for its actions.

In opposition to plaintiff's motion, Cortelyou Realty states that it appointed IMS Realty for the specific task of finding a tenant for a vacant apartment. It claims that it did not authorize IMS Realty to do anything more. In support of its contentions, Cortelyou Realty explains that it did not have any screening process for its brokers and was unaware of who was brokering its apartments. Moreover, Cortelyou Realty never had any contact with the brokers. Brokers were not provided with any restrictions or conditions on accepting or rejecting Section 8 tenants. Deutsch also testified that Cortelyou Realty did not advertise for any of its available apartments. Instead, the brokers were allowed to advertise for the apartments without any restrictions or

limitations. "[W]here, as here, the circumstances raise the possibility of a principal-agent relationship but no written authority of the agent has been proven, questions of agency and of its nature and scope . . . are questions of fact to be submitted to the jury under proper instructions by the court." *Fogel v Hertz Intl.,* 141 AD2d 375, 376 (1st Dept 1988) (internal quotation marks and citations omitted).

Accordingly, drawing all inferences in Cortelyou Realty's favor, questions of fact remain as to whether IMS Realty acted outside the scope of its authority when it uniformly refused to allow Section 8 tenants the opportunity to apply for, and subsequently rent, the apartment. *See e.g. Bicounty Brokerage Corp. v Burlington Ins. Co.,* 88 AD3d at 836. (Triable issues of fact as to whether the agent "exceeded the scope of its authority in issuing the subject alleged binders"). Therefore, summary judgment, which is a "drastic remedy," is not appropriate at this time. *Brunetti v Musallam*, 11 AD3d 280, 280 (1st Dept 2004).

In addition, plaintiff has failed to meet her burden on summary judgment to establish that Cortelyou Realty is vicariously liable for IMS Realty's discriminatory acts on the basis of apparent authority. Apparent authority, which may also bind a principal, occurs when, "[i]n the absence of actual authority, words or conduct by the principal that are communicated to a third party may create the apparent authority of the agent to act on behalf of the principal." *New York Community Bank v Woodhaven Assoc., LLC,* 137 AD3d at 1233; *see also Hallock v State of New York*, 64 NY2d 224, 231 (1984) ("Rather, the existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal -- not the agent") (internal quotation marks and citation omitted).

Here, there is no indication that Cortelyou Realty, as principal, made any representations to plaintiff, as a third party, that gave rise to the reasonable belief that IMS Realty possessed the authority to screen and subsequently discriminate against Section 8 tenants, on its behalf. *See e.g. Standard Funding Corp. v Lewitt*, 89 NY2d 546, 551 (1997) ("Nor do we find any record support for a determination that Lewitt had apparent authority to enter into or procure financing agreements on behalf of Public Service Mutual. . . . Public Service Mutual made no representations regarding Lewitt's authority to procure on its behalf premium financing for its proposed insureds").

Contrary to plaintiff's contentions, ratification is inapplicable in this situation. Cortelyou Realty alleged that it was unaware IMS Realty had been rejecting prospective tenants based on the fact that they were Section 8 recipients. Further, there is no allegation that Cortelyou Realty derived a benefit from IMS Realty's acts. *See e.g. Standard Funding Corp. v Lewitt*, (89 NY2d at 552) (internal citation omitted) (Express ratification occurs when a principal "adopt[s] the agent's actions and elect[s] to become a party to the transaction[ ]. Moreover, the rule that ratification may be implied where the principal retains the benefit of an unauthorized transaction with knowledge of the material facts has no application here.").

Accordingly, for the reasons provided in the decision, plaintiff's motion for summary judgment is denied and Cortelyou Realty's informal request for summary judgment is also denied.

CONCLUSION

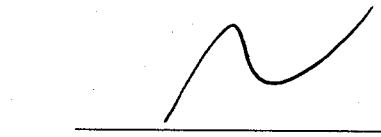
Accordingly, it is

ORDERED that plaintiff Nikita Banks's motion for summary judgment is denied; and it is further

ORDERED that the remaining claims shall continue.

Dated: September 6, 2019

ENTER:



J.S.C.

Hon. SHLOMO S. HAGLER, J.S.C.