

Housing Rights Initiative, Inc. v Elliman
2023 NY Slip Op 30037(U)
January 9, 2023
Supreme Court, New York County
Docket Number: Index No. 154472/2022
Judge: Mary V. Rosado
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO

PART

33M

Justice

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INDEX NO. 154472/2022

HOUSING RIGHTS INITIATIVE, INC.,

MOTION DATE 09/23/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

DOUGLAS ELLIMAN, MARJORIE TORNATORE, MARYAM DAGHOUMI, DORIAN NASTO, TOY ONG CHEUNG, 109 CONGRESS STREET LLC, 254-125 LLC, COLDWELL BANKER RELIABLE, CHRISTIAN FLOREZ, OXFORD PROPERTY GROUP, MAY AMOS, 750 TENTH AVE REALTY LLC, AAG MANAGEMENT, INC., REMAX EDGE, ELENA LEAL, 9430 RIDGE OWNERS CORP, KEYSTONE REALTY USA, PARESHKUMAR SHAH, GLEN OAKS VILLAGE OWNERS, INC., CENTURY HOMES REALTY GROUP LLC, JANE GAO, STEVEN CORCORAN REAL ESTATE LLC, SHERRIE MORGAN, HOMEMAX REALTY, ERIC ZHAO, 351 MARINE OWNERS CORP, EXP REALTY, GORDANA SKUGOR, NEW YORK CASAS, CHARLAR ACAR, RALPH FRANKEN LLC, MOMENTUM REAL ESTATE, LILY LUU, STANLEY CHEUNG, AVANGUARD REALTY CORP, JENNY VASSILEVA, DAGINATI LLC, SARDELL REALTY LLC, KAREN SARDELL, EDEL FAMILY MANAGEMENT CORP, JHOLEYNI PENA, REAL NEW YORK, EDWARD XU, CUCCIA EDWARD, J., CHRISTY CHOK, L & C REALTY ASSOCIATE, INC., J SIKAR REALTY, NELLY BERNSTEIN, AAA Y.S. REALTY INC, FEI CHEN, NYC MODERN REALTY, INC., HELEN LIN, GUO XIAN KAI, THE COOP CONNECTION LLC, EILEEN MASSONE, SRL MANAGEMENT LLC, VLADISLAV DAVIDOV, BROOKLYN PROPERTIES OF SEVENTH AVENUE, INC., CARLOS ARZE, 685 STERLING ASSOCIATES LLC, REALTEGRITY NY, CARYL SCHIFF, FOLEY'S 8 REAL ESTATE, TIM FOLEY, MONTGOMERY 5 ASSOCIATES LLC, J. WINTER REAL ESTATE, JEFF WINTER, AIDONIS REALTY, MARIA AIDONIS, KELLER WILLIAMS REALTY OF GREATER NASSAU COUNTY, JOHN ARGYROS, JOHN SILVER LLC, MACCABEE 1 REALTY CORP, DAVID NAJAFI, ASMA BEGUM EMRAN, REALTY PLUS GROUP, INC., DAE KIM, YOUNGGIL CORP, COMFORT PROPERTIES, INC., OSAMA GHEITH, AMERICAN REALTY AIJ 214, LLC, FULTONEX REALTY, EUNICE CHEN, THE PAVILION OWNERS CORP, NEW SPIRIT REALTY, INC., FRANK DESANTIS, APTS 601 79 LLC, HOMETOWN PROPERTIES, JACK CHENG, ABBA REALTY ASSOCIATES, ANAT ELGARISI, MENDEL BOYMELGREEN, RENAISSANCE EQUITY HOLDINGS

**DECISION + ORDER ON
MOTION**

LLC A, CONTACT REALTY, DAYANA ZAMORA, B. BELINDA REALTY LLC, BELINDA GILLIS, 863 STERLING LLC, IVEY NORTH LLC, AYANNA BARTON, BATRA GROUP, INC., JOHNATHAN CRUZ, 251 HIMROD LLC, OLAUSSON PARTRIDGE STEFFAN, REBEKAH GIBSON, MANHATTAN FLATS, Yael David, GUARDIAN REALTY GROUP, DANNY DOUMANIS, 25-41 12TH STREET LLC, MAYFLOWER REALTY AND ASSOCIATES, LINDA CHENG, EVA M. DANIELS REALTY, EVA DANIELS, CITI NEST GROUP LLC, MIKE ATIA, 123 PARK LLC, MAXIMILLION REALTY, INC., BORIS BERYLAND, DAVID REYTBAT, RICHARD CUFFARO, EDWARD ROZENTHAL, NIINA POOLE, PAUL NYLAND

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 102, 103, 346, 359, 360

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, and after oral argument, which was held on December 13, 2022, where Randolph McLaughlin, Esq. and Casey Pearlman, Esq. appeared for Plaintiff Housing Rights Initiative, Inc. (“Housing Rights” or “Plaintiff”) and Jeffrey Buss, Esq. appeared for Defendants Abba Realty Associates, Inc. (“Abba Realty”), Anat Elgarisi (“Elgarisi”), and Mendel Boymelgreen (“Boymelgreen”) (collectively “Moving Defendants”), Moving Defendants’ motion to dismiss pursuant to CPLR §§ 3211 (a)(1) and (a)(7) is denied.

I. Factual and Procedural Background

Plaintiff brought this action against the Moving Defendants and a variety of other real estate agents, brokerage firms, property management companies, and property owners, alleging violations of the New York State Human Rights Law (“NYSHRL”) and New York City Human Rights Law (“NYCHRL”) (NYSCEF Doc. 1). Plaintiff’s Complaint was filed on May 25, 2022 (*id.*). It is alleged that Defendants have willfully and intentionally refused to rent apartments to tenants who intend to pay their rent with CityFHEPS rental vouchers (*id.* at ¶¶ 4-5).

Plaintiff is a nonprofit housing group (*id.* at ¶ 9). It is alleged that Plaintiff has been injured by having to expend staff time and other resources to investigate and to respond to Defendants' discriminatory rental practices, which have not only diverted resources away from other activities but have frustrated Plaintiff's mission (*id.*). Plaintiff utilized testers whose investigations allegedly revealed source of income discrimination by Defendants who refused to accept CityFHEPS vouchers for advertised apartments.

To qualify for a CityFHEPS voucher, a household must have a gross income at or below 200% of the federal poverty level. Further, the household must (a) include a veteran who is at risk of homelessness, or (b) the New York City Department of Social Services must determine that a CityFHEPS voucher is required to avoid shelter entry, or (c) the household must be facing eviction and includes someone who lived in a shelter and has an active adult protective services case, or (d) would otherwise be eligible for CityFHEPS if they were in a shelter (NYSCEF Doc. 49). The CityFHEPS voucher is issued to some of New York City's most indigent and vulnerable citizens and is meant to prevent homelessness and relieve New York City's overly burdened shelter system. Plaintiff alleges that in 2019, only 20% of New Yorkers with a CityFHEPS voucher were able to secure housing, and that one of the primary reasons for this low percentage is source of income discrimination (NYSCEF Doc. 1 at ¶ 94).

Plaintiff alleges that Defendants must comply with anti-discrimination laws under the NYSHRL and NYCHRL (*id.* at ¶ 95). Further, Plaintiff allege that the monthly rent charged by all named Defendants at each of the properties Plaintiff investigated did not exceed the CityFHEPS program's maximum allowable rent (*id.* at ¶ 96). Moreover, Plaintiff alleges that all Defendants, their employees, or their agents, told Plaintiff's testers that Defendants would not accept CityFHEPS as a source of payment for rent at the investigated properties (*id.* at ¶ 97).

As to the Moving Defendants, it is alleged that on January 24, 2022, one of Plaintiff's testers, posing as a prospective tenant, contacted Elgarisi for an apartment located at 1405 New York Avenue, Apartment 4C, Brooklyn, New York (the "1405 Apartment") (NYSCEF Doc. 1 at ¶ 137). It is alleged that the 1405 Apartment is owned by Defendant Renaissance Equity Holdings LLC, and that Defendants Abba and Elgarisi were authorized to act as agents for Renaissance and acted as such at the time of the tester's inquiry (*id.*). Although the listing advertised the apartment for \$1,620 a month, and Elgarisi confirmed the apartment was available, when the tester asked if a CityFHEPS voucher could be used, Elgarisi allegedly stated "not for this apartment." (*Id.*)

It is further alleged that on January 27, 2022, one of Plaintiff's testers asked Boymelgreen about an apartment located at 1415 New York Avenue, Apartment 4C, Brooklyn, New York (the "1415 Apartment") which was listed for \$1,876 per month (*id.* at ¶ 138). When the tester asked if a CityFHEPS voucher could be used, Boymelgreen allegedly stated "we're not doing CityFHEPS right now." (*Id.*). It is alleged that Boymelgreen was acting as an agent for the property owner at the time of the tester's inquiry (*Id.*).

Moving Defendants filed the instant pre-answer motion to dismiss on September 2, 2022 (NYSCEF Doc. 37). On September 30, 2022, Plaintiff filed opposition to Defendants' motion, asserting that Moving Defendants have not produced any admissible documentary evidence, and even if they had, it does not conclusively contradict Plaintiff's allegations (NYSCEF Doc. 102). Moreover, Plaintiff argues that under New York's liberal pleading standards, they have sufficiently stated a claim for willful and intentional violations of both NYSHRL and NYCHRL (*id.*). Moving Defendants attempted to file a reply to Plaintiff's opposition on December 5, 2022 (NYSCEF Doc. 346). However, on December 6, 2022, Plaintiff rejected Moving Defendants' reply brief as untimely (NYSCEF Doc. 359). Indeed, Defendants' reply brief was due on October 13, 2022.

II. Discussion

A. Standard

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]).

B. Documentary Evidence and CPLR § 3211(a)(1)

Moving Defendants' motion to dismiss based on CPLR § 3211(a)(1) is denied. On a motion to dismiss pursuant to CPLR § 3211(a)(1), an affidavit from an individual, even if the person has no personal knowledge of the facts, may properly serve as the vehicle for the submission of acceptable attachments which provide evidentiary proof in admissible form (*Doe v*

Intercontinental Hotels Group, PLC, 193 AD3d 410, 411 [1st Dept 2021]). However, the affidavit which purports to submit documentary evidence must still lay the proper foundation for the admission of those records (*id.*; *see also HSBC Bank USA, N.A. v Greene*, 190 AD3d 417, 418 [1st Dept 2021]). There is no affidavit in support of Moving Defendants' motion to dismiss. There is merely an affirmation by Moving Defendants' attorney (NYSCEF Doc. 38). Thus, the unauthenticated documentary evidence submitted by the Moving Defendants is inadmissible hearsay, devoid of any evidentiary value, and may not be considered by the Court (NYSCEF Docs. 40-41).

Even if the Court were to consider this documentary evidence, an unlabeled, unauthenticated spreadsheet purporting to show that Moving Defendants rent to CityFHEPS voucher holders in some apartments does not resolve the factual issue of whether Moving Defendants' statements constituted impermissible source of income discrimination pursuant to NYSHRL and NYCHRL in the case at bar. Simply because Moving Defendants may have rented to CityFHEPS voucher holders in other occasions does not mean they have impermissibly refused the potential use of a CityFHEPS voucher in the alleged circumstances. Likewise, the unauthenticated Department of Buildings form which indicates a "failure to notify occupants and/or investigate lead based paint hazards" for the 1405 Apartment does not absolve Abba Realty or Boymelgreen of the allegations related to the 1415 Apartment (*see* NYSCEF Doc. 41). Further, this document does not resolve the factual issue of whether or not Defendant Elgarisi knew about this violation when Elgarisi allegedly refused the use of a CityFHEPS voucher to rent the 1405 Apartment. Indeed, Elgarisi has not even submitted an affidavit in support of this motion to dismiss. As such, even if the Court were to consider this inadmissible documentary evidence, it

still would not be enough to irrefutably contradict Plaintiff's allegations. Moving Defendants' CPLR § 3211(a)(1) motion to dismiss is denied.

C. Failure to State a Claim and CPLR § 3211(a)(7)

Moving Defendants assert that Plaintiff failed to state a claim under the NYSHRL and NYCHRL. Plaintiff alleges that it fits the statutory definition of a "person" under N.Y. Exec. Law §292(1) (NYSCEF Doc. 1 at ¶ 169). Moreover, N.Y. Exec. Law §296(5)(a)(1)(a) makes it unlawful for housing owners and agents to make statements expressing limitations or discrimination based on a prospective tenant's lawful source of income. N.Y. Exec. Law §296(5)(c)(1) imposes the same regulations "for any real estate broker, real estate salesperson or employee or agent thereof." Accepting the allegations as true, it is alleged that Elgarisi and Boymelgreen, who were working as employees of Abba, told Plaintiff's testers that CityFHEPS vouchers could not be used to pay for rent at the 1405 and 1415 Apartments (NYSCEF Doc. 1 at ¶¶ 137-138).

Further, although Moving Defendants repeatedly deny that they are not part of a "pattern and practice" of systemic discrimination based on source of income payment, they ignore the fact that even a single instance of source of income discrimination is a violation of the NYSHRL and NYCHRL. N.Y. Exec. Law §296(5)(a)(1)(a) makes it unlawful for housing owners and agents to make statements expressing limitations or discrimination based on a prospective tenant's lawful source of income. N.Y. Exec. Law §296(5)(c)(1) imposes the same requirements "for any real estate broker, real estate salesperson or employee or agent thereof." N.Y. Exec. Law § 296(5)(c) states it is "unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden [by section 296(5)], or attempt to do so." A violation of these

statutory provisions does not require a systemic pattern or practice, it is clear from the plain statutory language that a single instance of discriminatory or limiting statements will suffice.

Moving Defendants assert new arguments, for the first time, in their reply brief which was served approximately two months late (NYSCEF Doc. 346). An argument raised for the first time in a reply brief, when the other party has no chance to respond, should not be considered (*Simon v FrancInvest, S.A.*, 192 AD3d 565 [1st Dept 2021]). At this juncture, the Court will not entertain those arguments. However, even if the Court were to consider those arguments, the Court would find them without merit.

Moving Defendants' assertion that it is not alleged that the Testers were eligible for a CityFHEPS voucher is irrelevant and rests on the incorrect assumption that it is the testers who are asserting claims against Moving Defendants or that Plaintiff is asserting claims on behalf of the testers. Rather, Plaintiff is alleging that Defendants have willfully and intentionally violated N.Y. Exec. Law §§ 296(5)(a)(3), 296(5)(c), and 296(6), and that these violations have caused Plaintiff to suffer injury. The source of the alleged injuries which Plaintiff is purportedly suffering was merely uncovered by the testers, and therefore it is of no import whether the testers qualified for a CityFHEPS voucher.

Indeed, alleged willful and intentional violations of the NYSHRL and NYCHRL brought by housing advocacy non-profits uncovered through the use of testers have survived motions to dismiss under a more stringent FRCP 12(b)(6) standard (*See Fair Housing Justice Center, Inc. v JDS Development LLC*, 443 F.Supp.3d 494 [SDNY 2020]; *Fair Housing Justice Center, Inc. v Silver Beach Gardens Corp.*, 2010 WL 3341907 at *6 [SDNY 2010]). Moreover, Plaintiff's use of fictitious applicants is no bar to Plaintiff's claims because Defendants' complete refusal to deal with any applicants using a CityFHEPS voucher removes the need for Plaintiff to plead specific

violations (*CNY Fair Housing, Inc. v Swiss Village, LLC*, 2022 WL 2643573 [NDNY 2022]). It would be an anomaly and encourage forum shopping if an organizational plaintiff's claims of intentional violations of the NYSHRL and NYCHRL brought in Federal Court would survive under a more stringent standard while being dismissed under the laxer standard in State Court.

Furthermore, although Moving Defendants argue the Complaint fails to allege actions that give rise to an inference of discrimination, the Court disagrees. On a motion to dismiss pursuant to CPLR § 3211(a)(7), the Court is required to give Plaintiff the benefit of all favorable inferences which may be drawn from the allegations (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). Since the tester was told the Apartment was available but a CityFHEPS voucher could not be used, the Plaintiff is entitled on this motion to an inference of source of income discrimination emanating from Boymelgreen's and Elgarisi's alleged statements.

A similar analysis applies to the NYCHRL, which Courts are instructed to interpret independently of state and federal anti-discrimination laws to create an independent body of jurisprudence that is maximally protective of civil rights (*see* New York Local Law 35 § 1). Plaintiff alleges it is an "aggrieved person" under N.Y.C. Admin. Code §8-502(A). Further, Plaintiff alleges that the Defendants, who are owners, real estate brokers, and/or real estate salespeople are "persons" and "covered entities" under N.Y.C. Admin. Code §8-107. N.Y.C. Admin. Code § 8-107(5)(c) makes it an "unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof, to refuse to sell, rent, lease any housing accommodation....to any person or group of persons...because of any lawful source of income of such persons." N.Y.C. Admin. Code § 8-107(6) makes it "unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden [by Section 8-107(5)], or to attempt to do so." Accepting the allegations as true and for purposes

of this pre-answer motion to dismiss, Plaintiff has stated a claim against Moving Defendants for intentional and willful violation of N.Y.C. Admin. Code §§ 8-107(5)(a) and (c). Therefore, the motion to dismiss pursuant to CPLR § 3211(a)(7) is denied.

Accordingly, it is hereby,

ORDERED that Defendants Abba Realty Associates, Inc., Anat Elgarisi, and Mendel Boymelgreen motion to dismiss is denied; and it is further

ORDERED that Defendants Abba Realty Associates, Inc., Anat Elgarisi, and Mendel Boymelgreen shall serve an Answer within 20 days from the entry of this Decision and Order; and it is further

ORDERED that within 10 days of entry, Plaintiff Housing Rights Initiative shall serve with notice of entry a copy of this Decision and Order on all parties to this action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>1/9/2023</u> DATE		<u>Mary V Rosado JSC</u> HON./MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE