

**Matter of East Riv. Hous. Corp. v New York State
Div. of Human Rights**

2013 NY Slip Op 32623(U)

October 22, 2013

Supreme Court, New York County

Docket Number: 101137/13

Judge: Cynthia S. Kern

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

Index Number : 101137/2013

EAST RIVER HOUSING CORPORATION

vs

NYS DIVISION OF HUMAN RIGHTS

Sequence Number : 001

ARTICLE 78

PART _____

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

is decided in accordance with the annexed decision.

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

RECEIVED
OCT 24 2013
LRS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

FILED

OCT 24 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/22/13

PK, J.S.C.

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

FILED

OCT 24 2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

COUNTY CLERK'S OFFICE
NEW YORK

-----X
In the Matter of the Application of

EAST RIVER HOUSING CORPORATION,

Petitioner,

Index No. 101137/13

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HUMAN
RIGHTS,

Respondent.

RECEIVED
OCT 24 2013
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner East River Housing Corporation (“petitioner” or “East River”) commenced the instant proceeding pursuant to Article 78 of the CPLR seeking to set aside a final determination (the “Challenged Order”) made by respondent the New York State Division of Human Rights (“DHR”), dated June 14, 2013, which dismissed a complaint filed by Stephanie Aaron (the “complainant”), an East River shareholder, alleging housing discrimination because of a disability. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner is a housing cooperative corporation and is

the owner and proprietary lessor of the building located at 573 Grand Street, New York, New York (the “building”). The Complainant is the proprietary lessee of Apartment D1501 (the “Apartment”) in the building pursuant to a proprietary lease, dated November 24, 2003 (the “Lease”). In or around September 2012, Complainant found a stray pit-bull dog (the “dog”) and adopted the dog as her pet. It is undisputed that at no time prior to adopting the dog did Complainant notify East River of the dog’s presence in the Apartment nor did Complainant seek or obtain East River’s consent to harbor the dog in the Apartment, which petitioner alleges was in violation of the Lease.

Due to the alleged violation of the Lease, East River served a Notice to Cure, dated September 14, 2012, upon Complainant. The Notice to Cure notified Complainant that her harboring of the dog in the Apartment was a violation of the Lease and House Rules and advised Complainant that her failure to remove the dog from the Apartment on or before October 2, 2012 would result in the termination of the Lease. By letter dated September 20, 2012, Complainant informed East River for the first time of her belief that she has “a psychiatric disability” which necessitates harboring an emotional support animal. In support of her claim of disability, Complainant provided an unsigned copy of a handwritten note from a psychiatrist alleging that Complainant has depression and anxiety. The letter further requested that East River permit Complainant to keep the dog in the Apartment and that East River modify the prohibition on pets in the Lease and House Rules as a reasonable accommodation to Complainant’s alleged disability.

East River elected to terminate the Lease and served Complainant with a Notice of Termination, dated October 18, 2012, on the ground that Complainant failed to remove the dog

from the Apartment on or before the expiration date set forth in the Notice to Cure. The Notice of Termination required Complainant to quit, vacate and surrender possession of the Apartment on or before November 6, 2012. Notwithstanding East River's service of the Notice of Termination, by letter dated October 24, 2012, Complainant again requested that East River provide her with the reasonable accommodation of allowing the dog to remain in the Apartment with her and stated that she provides "verification from [her] psychiatrist of [her] disability and the functional limitations [she] experience[s], as well as [her] doctor's letter detailing the medical necessity for an emotional support animal to help [her] compensate for [her] disability." However, the second letter did not provide any additional information or include any new supporting documentation of Complainant's alleged disability but merely referenced and attached the first letter. Thus, by letter dated November 5, 2012, East River's then-counsel advised Complainant of East River's denial of her request to keep the dog in the Apartment.

Due to Complainant's failure to quit, vacate or surrender possession of the Apartment by November 6, 2012, on or about November 11, 2012, East River commenced a summary holdover proceeding in New York City Housing Court to regain possession of the Apartment. On or about November 16, 2012, Complainant filed a complaint alleging housing discrimination with the United States Department of Housing and Urban Development ("HUD") (the "HUD Complaint"). The HUD Complaint alleged that East River, by refusing to permit Complainant to keep the dog in the Apartment, failed to provide Complainant with a reasonable accommodation for her purported psychiatric disability. On December 11, 2012, HUD "accepted" the HUD Complaint and referred it to DHR for further investigation and a determination on the ground that "the fair housing law that [DHR] enforces is substantially equivalent to the [Fair Housing]

Act, and it has the authority to address housing discrimination complaints within the area where this complaint arose.”

Also on December 11, 2012, Complainant filed a separate complaint with DHR alleging East River discriminated against her “relating to housing accommodations because of disability” (the “DHR Complaint”). The HUD Complaint and the DHR Complaint are identical except that the DHR Complaint has a coversheet. On January 25, 2013, East River filed an answer to the DHR Complaint addressing its allegations and setting forth defenses. In March 2013, East River moved for summary judgment against Complainant in the Housing Court action and for the entry of a judgment of possession and issuance of a warrant of eviction against Complainant. In response, Complainant cross-moved for an order staying the Housing Court proceeding pending a final determination of the HUD Complaint and the DHR Complaint. East River and Complainant then agreed to adjourn those motions until April 30, 2013 to permit DHR to conduct its investigation of the DHR Complaint.

On April 23, 2013, DHR issued an order finding that “there is NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of” (the “Dismissal Order”). The Dismissal Order explained that the decision was based on the fact that “[t]he evidence does not support that Complainant’s dog is necessary, as opposed to helpful, to the use and enjoyment of her home” and that “Complainant did not obtain the dog to deal with her disability, but rather found the stray dog and then found the dog to be helpful in alleviating her depression and anxiety.” The Dismissal Order further opined that “[t]he Complainant’s physician indicates the dog is a ‘source of healing and emotional support’ but does not state the animal is necessary for Complainant[’s] use and

enjoyment of her housing.” Thus, the DHR dismissed the DHR Complaint and advised Complainant that she could appeal the Dismissal Order to the Supreme Court within sixty days.

By two separate decisions and orders, each dated April 30, 2013 (the “Summary Judgment Orders”), the Housing Court awarded East River summary judgment and denied Complainant’s cross-motion for a stay. Specifically, the court awarded East River “a final judgment of possession in light of the recently issued decision by Human Rights” and stayed the issuance of the warrant of eviction “through 5/31/13 to afford resp[ondent] an opportunity to cure by permanently removing the dog from the subject premises.” By letter dated May 6, 2013, Complainant’s attorney, Karen Copeland, Esq., wrote to DHR’s General Counsel, Caroline Downey, to request that DHR “review the ‘no probable cause’ determination and correct it, rescind it, or change it to a proper finding of ‘probable cause’ shown by the complainant, without the need for further time consuming and costly litigation....” Petitioner alleges that Ms. Copeland failed to copy it or its counsel on the letter and did not provide a copy of the letter promptly after its transmission to DHR. Petitioner further alleges that at no time after DHR’s receipt of Ms. Copeland’s letter did it notify petitioner that Complainant requested a reversal of the Dismissal Order or that DHR was entertaining such a request.

By letter dated May 22, 2013, Ms. Downey notified East River that the proceeding had been “reopened” and “remanded” to the DHR Regional Director (the “Notice of Remand”). Specifically, the Notice of Remand stated that “[t]he Division, upon its own motion, pursuant to Rule 20(a) of the Rules of Practice of the Division (9 NYCRR § 465.20(a)) has reviewed the determination [and finds that] the proceeding should be reopened and remanded to the Regional Director for reconsideration and for such other or further action as deemed appropriate by the

Regional Director.” On May 28, 2013, Complainant filed an Order to Show Cause in Housing Court seeking an order vacating the Summary Judgment Orders pending a final determination of HUD and DHR. On May 31, 2013, East River’s counsel received a copy of Ms. Copeland’s May 6, 2013 letter along with a cover letter, which states “[a]fter our phone conversation last evening, I realized that you may not have received the letter I had sent to the Division of Human Rights regarding the finding of ‘no probable cause’ in this proceeding. Therefore, I am resending it.” Petitioner alleges that this was the first time it learned of Complainant’s request for reconsideration.

In a letter dated June 4, 2013, HUD notified East River that it was “reactivating” the HUD Complaint after a purported determination by DHR that HUD should investigate the HUD Complaint. Specifically, the letter stated, in pertinent part, that

Pursuant to a Cooperative Agreement...between the Division and HUD, the Division and HUD may mutually agree that an investigation will be completed by HUD. Pursuant to the Agreement, and the Division’s consultation with HUD, the Division has determined that HUD should reactivate the above subject complaint. The reactivation will allow HUD to continue the investigation and pursue remedies under applicable federal statutes.

The purpose of the investigation is to determine whether or not reasonable cause exists to believe that discrimination occurred or is about to occur.

On June 6, 2013, HUD requested that the Housing Court action be stayed. However, petitioner alleges that neither it nor the Housing Court was made aware of the letter requesting the stay until Complainant attached it as an exhibit in support of her Order to Show Cause brought in Housing Court in June 2013.

On or about June 14, 2013, DHR issued a new order (the “Challenged Order”), which

provides, in pertinent part, the following:

Pursuant to Section 297.3 of the Human Rights Law, the Division finds that noticing the complaint for hearing would be undesirable and the complaint, therefore, is ordered dismissed on the grounds of administrative convenience.

In this case, Complainant's allegations were dually asserted in her Division complaint and a complaint filed with [HUD]. Pursuant to a cooperative agreement...between the Division and HUD, the Division and HUD may mutually agree that an investigation will be completed by HUD.

Pursuant to the Agreement, and the Division's consultation with HUD, the Division has determined that the interests of justice will best be served by HUD reactivating Complainant's HUD complaint, which HUD has agreed to do. The reactivation will allow HUD to continue the investigation and pursue Complainant's remedies under applicable federal statutes.

Petitioner then commenced the instant Article 78 proceeding seeking to annul the Challenged Order.

In an Article 78 proceeding brought against the DHR where, as here, no hearing has taken place, "the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis." *McFarland v. New York State Division of Human Rights*, 241 A.D.2d 108, 111 (1st Dept 1998). Here, the court finds that the Challenged Order had a rational basis. As an initial matter, DHR properly "reopened" the DHR Complaint. Pursuant to 9 NYCRR § 465.20(a)(1), "[t]he commissioner, or any designee of the commissioner including, but not limited to, those specifically referred to in these rules, may, on his or her own motion, whenever justice so requires, reopen a proceeding, determination or record, and take such action as may be deemed necessary." 9 NYCRR § 465.20(a)(1). Pursuant to this grant of discretion, DHR reopened the DHR Complaint and remanded it "to the Regional Director for

reconsideration and for such other or further action as deemed appropriate by the Regional Director.”

Petitioner’s assertion that DHR did not reopen the complaint on its own motion but rather on account of Ms. Copeland’s May 6, 2013 letter requesting reconsideration, which it alleges constituted an “Ex Parte Motion,” is without merit. Although DHR does not dispute receiving Ms. Copeland’s May 6, 2013 letter, it affirms that the reopening of the DHR Complaint was motivated by HUD’s interest in Complainant’s case and DHR’s agreement with HUD that HUD would reopen and investigate the HUD Complaint. Further, 9 NYCRR § 465.20(b)(2) requires only that a *respondent’s* application for a reopening upon issuance of a determination of *probable cause* be served upon all parties. As an initial matter, in the DHR proceeding, East River was the respondent, not the petitioner. Thus, only an application to reopen the proceeding brought by East River had to be served upon all parties pursuant to DHR’s rules. Additionally, Complainant’s application for reconsideration was based on the issuance of a determination of *no probable cause*. Thus, the rules do not require that such application be served upon all parties.

Petitioner’s assertion that DHR’s decision to reopen the DHR Complaint violated the State Administrative Procedure Act (“SAPA”) § 307(2) on the ground that it conducted ex parte communications with Complainant’s counsel is also unavailing. Pursuant to SAPA § 307(2),

Members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

However, such prohibition against ex parte communications does not apply here as DHR never

conducted any “adjudicatory proceedings” with regards to the DHR Complaint. As the First Department explained in *Matter of Vector East Realty Corp. v. Abrams*, 89 A.D.2d 453 (1st Dept 1982), SAPA § 102(3) “defines an adjudicatory proceeding as ‘any activity...in which a determination of legal rights...of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing.’” *Matter of Vector*, 89 A.D.2d at 456. The investigation and reopening of the DHR Complaint did not involve an administrative hearing on a record. Thus, DHR’s reopening of the DHR Complaint was proper.

Additionally, the determination to dismiss the DHR Complaint was proper. Pursuant to Executive Law § 297(3)(c), “[i]f the division finds that noticing the complaint for hearing would be undesirable, the division may, in its unreviewable discretion, at any time prior to a hearing before a hearing examiner, dismiss the complaint on the grounds of administrative convenience.” Executive Law § 297(3)(c). “[W]here the division has dismissed such complaint on the grounds of administrative convenience,...such person shall maintain all rights to bring suit as if no complaint had been filed with the division.” Executive Law § 297(9). “A dismissal is purely arbitrary if it contravenes statutes, constitutional provisions, or countenances their contravention, or violates the agency’s own regulations.” *Matter of Pan Am World Airways v. New York State Human Rights Appeal Bd.*, 61 N.Y.2d 542, 547 (1984)(citations omitted). However, “an administrative convenience dismissal is not arbitrary when it advances the Division’s interest in conserving its scarce resources and in alleviating its overwhelming caseload in circumstances...in which the complainant has the resources to file a complaint [elsewhere].” *Matter of Arcata Graphics Co. v. New York State Div. of Human Rights*, 175 A.D.2d 663, 663-64 (4th Dept 1991). Here, DHR’s dismissal of the DHR Complaint was not arbitrary as it did not contravene any

statute or constitutional provision nor did it violate DHR's own regulations. Additionally, the DHR Complaint was dismissed on the grounds of administrative convenience with the knowledge that the Complainant would be pursuing her remedy in another forum, HUD.

Petitioner's reliance on *Nat'l Broadcasting Co. v. State Div. of Human Rights*, 1988 WL 241124 (Sup. Ct. N.Y. Cty. 1988) for the proposition that the dismissal of the DHR Complaint on the ground of administrative convenience was improper is misplaced. In *Nat'l Broadcasting Co.*, the complainant brought a complaint before DHR alleging that her employer discriminated against her based on her national origin. Subsequent to DHR commencing an investigation, the complainant advised DHR of her wish to withdraw her charge against her employer in order to commence a direct lawsuit against her employer in state court. Thereafter, DHR dismissed complainant's complaint on the grounds of administrative convenience. After such dismissal was challenged by the complainant's employer, the court reasoned that such dismissal was improper as it was not done to facilitate DHR's own convenience but rather that of the complainant. However, here, DHR did not dismiss the DHR Complaint based on either petitioner's or Complainant's request for dismissal in order to bring a lawsuit elsewhere. Rather, the DHR Complaint was dismissed by DHR on the grounds of administrative convenience based on HUD's request and agreement to pursue Complainant's allegations of discrimination.

Petitioner's reliance on *Boyea v. New York State Executive Dept., Div. of Human Rights*, 178 Misc.2d 398 (Sup. Ct. Saratoga Cty. 1998) is also misplaced. In *Boyea*, the petitioner brought a complaint with the DHR alleging a claim of racial discrimination against the City of Saratoga Springs on the grounds that it did not hire him as a police officer even though he alleged he was more qualified than the two officers hired in his place. DHR issued a

determination concluding that there was probable cause to believe that the City engaged in an unlawful discriminatory practice and recommended that a hearing be held. In response, the City's Commissioner of Public Safety at the time petitioner's employment was denied sent a letter to DHR criticizing the determination and requesting that it be set aside. However, a copy of said letter was not sent to petitioner, petitioner's counsel, the City or the City's counsel. Subsequently, DHR issued a "reopening order" finding that further investigation should be concluded. DHR then issued a final order finding no probable cause to support the allegations of discrimination and petitioner's complaint was dismissed. Petitioner then brought an Article 78 petition challenging the final order. Upon review, the court granted the petition on the ground that "[o]nce the order to reopen the proceeding was made, elemental principles of due process and fair notice were not afforded to petitioner or respondent City." *Id.* at 403. The court based such determination on the fact that any further investigation was improper as the record did not show that new evidence was properly requested, procured or reviewed and that "[n]o explanation was made in the decision explaining why there was a reversal in [DHR's] initial assessment finding probable cause." *Id.* However, *Boyea* is distinguishable from the instant action. Here, DHR did not reverse its determination of no probable cause or fail to properly conduct a further investigation of Complainant's allegations. Rather, pursuant to its discretion, DHR dismissed the DHR Complaint on the ground of administrative convenience so that Complainant could pursue her discrimination claims elsewhere.

Accordingly, the petition is denied and dismissed in its entirety. This constitutes the decision and order of the court.

Date: 10/22/13

FILED

Enter: _____

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J.S.C.

OCT 24 2013

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