At an I.A.S. Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 80 Centre Street, Borough of New York, City and State of New York, on the 27th day of September 2018

PRESENT:

HON. ALEXANDER M. TISCH, A.J.S.C.

ELIZABETH RODRIGUEZ,

Plaintiff,

-against-

308 HULL LLC, et al.,

Defendant(s).

MOTION SEQ. # 1

INDEX NO.:

451200/2018

The following papers read on this motion:	NYSCEF Doc. Nos.
Order to Show Cause, Affirmation, Affidavit, Memorandum of Law & Exhibits	16, 4–13
Affirmation in Opposition & Exhibits	17–20

Alexander M. Tisch, J.:

Upon the foregoing papers, plaintiff moves this Court for an order granting a preliminary injunction staying the leasing or renting of the property known as 3291 Hull Avenue, apartment 45, located in Bronx, New York (the subject apartment). Defendants 308 Hull LLC (the owner), Chestnut Holdings of New York, Inc. (Chestnut), and David Tennenbaum (collectively, defendants) oppose the application (see NYSCEF Doc.Nos. 17–20). For the following reasons, the motion is granted.

Plaintiff commenced the instant action on June 28, 2018 alleging that the defendants discriminated and retaliated against her by refusing to accept her application to rent the subject apartment based on her lawful source of income as a Section 8 voucher recipient in violation of New York City Administrative Code (Admin Code) § 8-107(5)(a)(1) as amended by Local Law No. 10 (2008) of the City of New York (Local Law 10). Plaintiff's complaint seeks declaratory and injunctive relief, and compensatory and punitive damages.

The relevant facts, as alleged in plaintiff's affidavit in support of the motion, and upon the testimony taken at the hearing held on July 13, 2018 (see CPLR Rule 6312[c]), are as follows.

Plaintiff has been a Section 8 voucher recipient from defendant New York City Housing Authority (NYCHA) since January 2011. In August 2011, she moved into the apartment where she currently resides in the Bronx. Her current landlord wants to live in plaintiff's apartment and use the first floor to expand her daycare business. Thus, on or about April 2, 2018, the landlord commenced an action against plaintiff in Bronx Civil Court, Housing Part, in an expiration of term holdover seeking possession of the apartment (NYSCEF Doc. No. 5 [hereinafter Rodriguez aff], ¶¶ 2–4).

Plaintiff processed a move voucher with NYCHA and began looking for a new apartment. Plaintiff was searching for an apartment near her current job and also close to Montefiore Children's Hospital (the hospital), where her disabled son is frequently treated (id. at ¶¶ 4, 8).

On May 16, 2018, plaintiff agreed to move out of her current apartment and consented to a final judgment of possession with execution of the warrant stayed to November 16, 2018 for plaintiff to move out (id. at ¶ 6).

On June 7, 2018, plaintiff saw an online listing for an apartment at 3540 Decatur Avenue in the Bronx, which was half a mile from the hospital. On June 9th, she called Base Realty, Inc. (Base Realty) the broker who listed the apartment, and spoke with one of its agents, Ingrid Medina, about the apartment. During the course of the conversation, plaintiff was advised that the apartment was available and Medina asked about plaintiff's source of income. When plaintiff advised Medina that she has Section 8, Medina allegedly told plaintiff that the landlord only accepts working Section 8, and plaintiff claims she was not invited to view the apartment (Rodriguez aff, ¶¶ 9–10; tr 13–14).

Plaintiff reported the incident to Stephanie Rudolph, Director of the Source of Income Units and a supervising attorney at the New York City Commission on Human Rights (CCHR) (tr 14, 31). Rudolph contacted Medina, who also made the same statement to Rudolph that the landlord only accepts "working Section 8," meaning, that the individual Section 8 recipient is employed and receiving employment income that contributes to paying the rent, and is not dependant on public assistance, or social security income or social security disability income (tr 34–35).

On June 11th, Medina agreed to show plaintiff the apartment and allowed her to submit an application for it. The next day, on June 12th, plaintiff was shown an apartment (albeit a different one, located at 3539 Decatur Avenue), and plaintiff went to Base Realty's office to fill out their application, other paperwork, and submit supporting documents for the apartment she saw (Rodriguez aff, ¶13; tr 15–16).

Later that day, plaintiff e-mailed more documents, including, inter alia, a reference letter from her current landlord, which explained why plaintiff has to leave her current apartment and that the landlord had to commence an action against her; the letter also noted that plaintiff was an excellent tenant (tr 16, plaintiff's exhibit A).

The next day on June 13th, Medina e-mailed plaintiff the application for Chestnut. Defendant Chestnut manages the Decatur Avenue apartments, as well as the subject apartment, for the owner, defendant 308 Hull LLC (tr 18, 61). Plaintiff printed the application, filled it out, scanned and e-mailed it back to Medina the next day (tr 18). Concerning the question "Have any of the proposed residents ever been sued for an eviction or nonpayment of rent?" plaintiff answered "yes" but did not write anything in the applicable space to elaborate or provide details of the same (tr 20). Plaintiff testified at the hearing that she believed the reference letter from her current landlord was self

explanatory (tr 20).

Meanwhile, on June 12th, Rudolph at the CCHR spoke with David Tennenbaum from Chestnut about whether the Decatur Avenue apartment was still available (tr 35–36). He suggested it had already been rented but that he would confirm the same (tr 36–37). According to Rudolph, Tennenbaum "also explained to [her] that on at least two occasions during the conversation, which lasted approximately 40 minutes, that he was not inclined and his client was not inclined to rent to someone like [plaintiff] who had made complaints to a City agency" (tr 37). Rudolph advised him that under the New York City Human Rights Law (NYC HRL), "there is a special protection against retaliation and that an owner cannot make a decision to not rent an apartment to someone based on their complaint to [the CCHR]" (tr 37).

On June 14th, Tennenbaum e-mailed Rudolph advising her that the Decatur Avenue apartment that plaintiff was shown had been rented. Tennenbaum advised Rudolph about an apartment on Hull Avenue (the subject apartment) that was available, located in a similar area, near the hospital, also a two-bedroom and within plaintiff's price range (tr 40). Rudolph sent an e-mail to plaintiff to advise her of the same, and copied Medina and Tennenbaum on the e-mail (tr 21). Plaintiff viewed the apartment on June 18th and she e-mailed Medina to let her know that she was interested. She was not asked to submit a new application for that apartment (tr 21–22).

Rudolph and Tennenbaum spoke again on June 20th regarding the subject apartment. According to Rudolph, Tennenbaum advised Rudolph that he had two concerns with plaintiff's application for the subject apartment. First, Tennenbaum claimed that someone from his office reached out to the customer contact center (CCC) at NYCHA to see if rent would be approved at $1,825 and his office was allegedly advised by NYCHA that the reasonable rent would be approved

at no more than $1,719 (tr 41). Second, he was concerned about plaintiff's prior history in Housing Court. Rudolph stated that she believed the Housing Court proceeding was a no-defense holdover but she would follow up with him with respect to both issues (tr 41).

Rudolph asked Melissa Renwick, an attorney at NYCHA, whether rent at $1,825 per month for a two bedroom at the Hull Avenue apartment would be approved. She explained what Tennenbaum told her. Renwick allegedly advised Rudolph that whether the rent would only be approved at $1,719 is a determination that would not be made at this stage in the process. Also, according to plaintiff's file, no call was ever made to the CCC about that apartment. Additionally, a reasonable accommodation request could be made if the apartment was not considered rent reasonable because plaintiff's son is disabled (tr 42).

Renwick memorialized the same information in an e-mail to Rudolph which was forwarded to Tennenbaum. Regarding plaintiff's prior history in Housing Court, Rudolph explained in the e-mail that, given the recommendation letter from plaintiff's current landlord that plaintiff is an excellent tenant and that the proceeding between them was a no defense holdover, Tennenbaum's concerns should be sufficiently allayed (tr 44–46; plaintiff's exhibit 3).

After that e-mail, she also sent Tennenbaum another e-mail from NYCHA stating that NYCHA would likely approve the $1,825 as rent reasonable, without the reasonable accommodation request. Rudolph did not hear back from him (tr 46).

On or about June 21st, Rudolph called Tennenbaum and sent him a cease and desist letter with the aforementioned e-mails, asking him to accept plaintiff's application and refrain from renting or leasing the apartment to anyone else pending the CCHR's investigation. She asked him to get back to her by June 22, 2018 at 5:00 PM (tr 46).

It is unclear when, but plaintiff testified that Medina e-mailed her stating that the landlord denied her application for the apartment because the amount of rent, $1,825 per month, was not covered by her voucher (tr 22). Medina suggested another apartment, located at 1288 Washington Avenue. Plaintiff was not interested in that apartment because it was approximately an hour away from the hospital (tr 22).

Plaintiff withdrew her CCHR complaint on June 28th so that she could pursue the instant action, which was commenced on the same date. Plaintiff's complaint alleges discrimination and retaliation, and seeks declaratory and injunctive relief, as well as compensatory and punitive damages.

The instant motion for a preliminary injunction was brought by order to show cause dated July 5, 2018, seeking to prevent defendants from renting the subject apartment to anyone else during the pendency of this action. The Court declined to sign the request for emergency injunctive relief at the time the order to show cause was signed, but granted the request at the hearing held on July 13, 2018, pending the determination of this motion (tr 116; NYSCEF Doc. No. 32).

In support of her motion, plaintiff argues that she will be irreparably harmed without injunctive relief because she faces losing this suitable, available apartment, and faces the real risk of eviction and homelessness. Plaintiff also claims that she has established the likelihood of success on the merits and refers to the statements made by Medina at Base Realty, the defendants' agent, that the landlord only accepts "working Section 8," and Tennenbaum's statements about not wanting to rent to people that have made complaints to City agencies. She argues that there is no legitimate reason for denying plaintiff's application for the apartment other than her complaint and her lawful source of income. Tennenbaum's concerns that were raised to Rudolph (regarding whether NYCHA

would approve the rent as reasonable, and the current Housing Court litigation) were sufficiently resolved and adequately explained. After Tennenbaum was advised that NYCHA considered the rent at $1,825 as reasonable, he simply ignored further requests about the status of the apartment and plaintiff's application (tr 107). Tennenbaum stated at the hearing that plaintiff's application was denied because a standard background credit search was conducted and the search revealed prior Housing Court litigation — not just in 2018, but 2013 as well — and her application was incomplete (tr 72). Regarding the prior Housing Court history Tennenbaum admitted that the letter from plaintiff's current landlord was in his possession when reviewing plaintiff's application (tr 96); thus, plaintiff argued at the hearing that a reasonable person acting in good faith would have reviewed the documentation plaintiff submitted, and would see that there was a reasonable explanation for the 2018 suit (tr 107–08). Additionally, a reasonable person would also have realized that she was not a party to the 2013 Housing Court action because her application showed that she was not living in Brooklyn in 2013 (tr 107–08). Plaintiff also argued that the excuse that her application was incomplete was not even at issue until "Tennenbaum's other reasons for denying her were proven false, as [the] testimony has shown" — since it was not raised as the reason for denying her when defendants submitted their opposition papers (tr 107). Ultimately, however, plaintiff points to Tennenbaum's statements to Rudolph that he did not want to rent to someone who made complaints about his employer to a government agency, which show the real reason for denying plaintiff's application (tr 108–09). Plaintiff also argues that the balance of equities favors plaintiff, in that the preliminary injunction would maintain the status quo. Further, defendants own or manage thousands of apartments, but only this specific apartment meets plaintiff's needs because it is close to her son's hospital (tr 109).

The Court notes that the only written opposition received to the motion was from defendants (the owner, Chestnut, and Tennenbaum), and NYCHA did not oppose the application (see NYSCEF Doc.Nos. 17–20). The defendants' papers contested the "emergency" nature of the relief sought, and set forth a nondiscriminatory and/or nonretaliatory reason for denying plaintiff's application: plaintiff's incomplete paperwork and failure to explain the circumstances involved in a 2018 Housing Court lawsuit, and her failure to mention another Housing Court lawsuit in 2013. They argue that plaintiff's failure to submit a full application is an adequate reason for denying the plaintiff's application, and they have no obligation to track people down to make them cure the deficiencies in their applications (112–13). Further, as to the likelihood of success on the merits, defendants argued at the hearing that the unlawful statements, if any, were made by Medina at Base Realty, who is not the agent of defendants. Tennenbaum denied making any discriminatory or otherwise unlawful remarks on behalf of himself, Chestnut and the owner. They also argued that there is no evidence that this was a unique apartment, that this the only apartment suitable for plaintiff, or that there is a shortage of housing (tr 113).

New York Civil Practice Laws and Rules ("CPLR") § 6301 provides that a preliminary injunction may be granted

> in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its

favor" (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]). "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the [trial court]" (Doe v Axelrod, 73 NY2d 748, 750 [1988]). Additionally, because a preliminary injunction is a "drastic remedy," the movant "must establish a clear right to that relief under the law and the undisputed facts" (Omakaze Sushi Rest., Inc. v Ngam Kam Lee, 57 AD3d 497, 497 [2d Dept 2008]).

For purposes of this motion, "all that must be shown is the likelihood of success [on the merits]; conclusive proof is not required" (Ying Fung Moy v Hohi Umeki, 10 AD3d 604, 605 [2d Dept 2004]; J. A. Preston Corp. v Fabrication Enters., 68 NY2d 397, 406 [1986] ["a preliminary injunction . . . depends upon probabilities, any or all of which may be disproven when the action is tried on the merits"]). Indeed, this decision is not considered as "the law of the case," "so as to preclude reconsideration of [the issues] at a trial on the merits" (Icy Splash Food & Beverage, Inc. v Henckel, 14 AD3d 595, 596 [2d Dept 2005], quoting Peterson v Corbin, 275 AD2d 35, 40 [2d Dept 2000], citing J. A. Preston Corp., 68 NY2d 397).

Under the NYC HRL, it is an "unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee, or managing agent of, . . . a housing accommodation . . ., or any agent or employee thereof" to "refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any such person or group of persons such a housing accommodation or an interest therein" "because of any lawful source of income of such person or persons" (Admin Code § 8-107[5][1][a]). It is also an "an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has" engaged in certain protected conduct, such as "oppos[ing] any practice

forbidden under this chapter," filing a complaint or assisting the CCHR in its investigation into discriminatory practices, among others (Admin Code § 8-107[7]).

"The courts have consistently held that a landlord's refusal to accept a legitimate Section 8 voucher constitutes unlawful discrimination under Local Law 10" (Florentino v Nokit Realty Corp., 29 Misc 3d 190, 196 [Sup Ct, NY County 2010]; citing Timkovsky v 56 Bennett LLC, 23 Misc 3d 997, 1004 [Sup Ct, NY County 2009] [Local Law 10 "is violated when a landlord refuses to accept a Section 8 voucher"]).

Plaintiff and Rudolph credibly contend that Medina specifically told them that the owner only accepts working Section 8; therefore, a refusal to accept Section 8 alone would be an unlawful discriminatory practice. At the hearing, Tennenbaum testified that there is no relationship between the defendants and Base Realty (64–65), and he denied taking part in any statements made by Medina from Base Realty (tr 68). It is true that the exact nature of the defendants' relationship to Medina and Base Realty, whether they acted as defendants' agent, or otherwise instructed them on the type of applicants that should be considered, has not been established. Thus, it could be argued that Medina's discriminatory statements could not be attributed to the defendants. However, where, as here the "denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced" (Republic of Lebanon v Sotheby's, 167 AD2d 142, 145 [1st Dept 1990]). Here, the Court finds that plaintiff sufficiently established a prima facie case of discrimination. It is not enough for the defendants to try and distance themselves from Medina and Base Realty under these circumstances, when it is apparent that Medina and Base Realty were acting as the defendants' agent in listing the apartment and finding prospective tenants.

In any event, plaintiff established a clear right to the relief as it concerns her retaliation claim. Defendants cannot escape the credible allegations that Tennenbaum stated that he did not want to rent to anyone who made complaints about the defendants to a City agency. Tennenbaum's mere denial of being involved in any unlawful conduct, on behalf of himself, Chestnut and the owner, does not create such a sharp factual dispute warranting denial of the motion (cf. Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd., 53 AD3d 612, 612–13 [2d Dept 2008] [noting that "the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction"]).

As it concerns the balance of equities, courts will generally favor maintaining the status quo (see, e.g., Republic of Lebanon, 167 AD2d at 145), which would lean in favor of granting the injunction. The Court is also persuaded by the argument that the defendants own and manage potentially thousands of properties, and they would be refrained from letting just this one subject apartment.

The issue of irreparable harm is questionable. Defendants point out that there is no evidence as to the uniqueness of this particular apartment, or that, in other words, there aren't any other two-bedroom apartments in that area close to the hospital and within plaintiff's price range. However, this type of scenario is the ideal candidate for injunctive relief because, without it, a remedy at law would be inadequate (see Board of Higher Educ. of City of N.Y. v Marcus, 63 Misc 2d 268, 272 [Sup Ct 1970] ["The prevailing rule is that where the rights of parties are clear, the courts should interfere to prevent a violation of the rights, instead of allowing the rights to be violated and the wrong committed, and then remitting the party injured to a remedy at law, many times uncertain at best"]; see Florentino, 29 Misc 3d at 198 [where the appropriate remedy for a discrimination claim based upon the refusal to accept a Section 8 voucher was injunctive relief directing defendants to accept

plaintiff's voucher]). She'd be without a home, and lose interest in an apartment that she would have received but for the unlawful discrimination and/or retaliation.

Plaintiff's strong showing on the first two requirements and the Court's desire to maintain the status quo, warrant the issuance of a preliminary injunction (see, e.g., Danae Art Intern. Inc. v Stallone, 163 AD2d 81 [1st Dept 1990]).

Accordingly, it is hereby ORDERED that defendants 308 Hull LLC, Chestnut Holdings of New York, Inc., and David Tennenbaum are refrained from renting or leasing the subject apartment, 3291 Hull Avenue, apartment 45, located in Bronx, New York, pending the conclusion of this litigation; and it is further

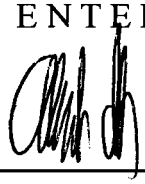
ORDERED that plaintiff shall given an undertaking in an amount to be fixed by the Court that the plaintiff, if it is finally determined that she was not entitled to an injunction, will pay to the defendants; and it is further

ORDERED that the parties appear at a preliminary conference on **October 11, 2018** in Room 289 of 80 Centre Street at 10:00 AM to discuss the amount of such undertaking; and it is further

ORDERED that the temporary restraining order issued at the July 13, 2018 hearing remain in effect until such undertaking is made.

This shall constitute the decision and order of the Court.

ENTER,



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A.J.S.C.

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