

Comm'n on Human Rights v. Shahbain

OATH Index No. 2439/13 (Feb. 3, 2014)

Petitioner failed to establish that respondents refused to rent an apartment based on the lawful presence of a child. Dismissal of petition recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COMMISSION ON HUMAN RIGHTS
EX REL. ADAM DILEO
Petitioner
-against-
MOHAMED SHAHBAIN and
MOJEEB SHAHBAIN
Respondents

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORNIOTTI, *Administrative Law Judge*

This action was commenced by petitioner, the New York City Commission on Human Rights (“Commission”), pursuant to section 8-109(c) of the Administrative Code of the City of New York (“Human Rights Law”). Petitioner alleges that respondents, Mohamed Shahbain and Mojeeb Shahbain, refused to rent an apartment based on the lawful presence of a child, in violation of section 8-107 of the Human Rights Law (ALJ Ex. 1).

At a hearing conducted before me on December 13, 2013, petitioner presented documentary evidence and the testimony of complainant, Adam DiLeo. Respondent, Mohamed Shahbain, appeared with counsel and denied the allegations. Respondents also presented the testimony of two family members and the real estate broker hired to rent the subject apartment, along with documentary evidence. Petitioner seeks \$10,000 in compensatory damages for complainant’s mental anguish, a civil penalty of \$10,000, and affirmative relief in the form of anti-discrimination training for respondents (Tr. 173-75).

For the reasons below, petitioner failed to establish that respondents violated section 8-107(5) of the Human Rights Law. The petition should be dismissed.

BACKGROUND

Respondent Mohamed Shahbain and his son, respondent Mojeeb Shahbain, own the building at 451 11th Street, Brooklyn, New York (“building”) (Tr. 50-51, 61, 94, 143; Pet. Ex. 2). Mohamed Shahbain has lived there for 40 years (Tr. 67-68). Mojeeb Shahbain lives in Michigan and last visited New York five or six years ago (Tr. 61).

The building has a basement and three floors (Tr. 51, 143). Mohamed Shahbain’s daughter, her husband, and their six children live on the first floor (Tr. 51, 59, 66, 68-69, 93, 143). Mohamed Shahbain lives on the second floor (Tr. 51, 94, 143). The third floor is rented to non-family tenants (Tr. 51, 143).

Mohamed Shahbain manages and is responsible for the building (Tr. 86, 103). However, he leaves his son, Abraham Shahbain, in charge when he travels to Yemen to visit family (Tr. 58-59, 60-61, 69-74, 87, 94-95, 103). Abraham Shahbain works and lives in the Bronx (Tr. 59, 74, 87, 106, 142, 156-57). He has a key to the building and travels there by car (Tr. 59, 158). His duties include taking out the garbage on Monday nights, shoveling snow when needed, and responding to any problems raised by the third floor tenants (Tr. 145, 156, 158-59, 162).

Mohamed Shahbain’s daughter and her husband, Najmuddin Shahbain, have lived on the first floor since 1994, and their six children were born in the apartment (Tr. 86, 93, 103). According to respondents’ witnesses, the first floor occupants are tenants and do not maintain the building even when Mohamed Shahbain is away (Tr. 59, 60, 68-69, 86, 94, 103, 146). Najmuddin Shahbain does not have a key to any part of the building except the first floor, does not handle any finances, does not take out the garbage or shovel the snow, and has no authority to act on respondents’ behalf in any regard to the building (Tr. 60, 96, 102-03, 104-06, 146). Moreover, he has never been involved with renting the third floor, and does not have authority to show the apartment to prospective tenants (Tr. 60, 95-96, 102, 104, 151, 162).

When Mohamed Shahbain is looking for tenants he contacts Century 21, a real estate company (Tr. 57). When the third floor apartment became vacant in late 2011, Mohamed Shahbain asked his son, Abraham Shahbain, to rent it because he was in Yemen (Tr. 58-61, 145, 148-49). Abraham Shahbain worked with Mr. Toun, a licensed real estate agent at Century 21, to find new tenants (Tr. 57, 73, 110-12, 127, 148-49). Mr. Toun, a recent college graduate, testified that this was the first time he had rented this apartment but that Century 21 had information

about it from prior rentals. He posted photographs and a description of the apartment on Craigslist.com (Tr. 112-13).

Mr. Toun testified that he worked only with Abraham Shahbain in renting out the apartment (Tr. 120, 124-25). When someone was interested he would call Abraham Shahbain to let him know the day and time he wanted to show it (Tr. 115, 120, 146, 150). Mr. Toun would usually accompany the prospective tenant. He would ring the first floor bell, as instructed by Abraham Shahbain, and someone would let him in (Tr. 57-58, 114-16, 121, 130, 149, 162). Mr. Toun did not have a key to the third floor apartment but the door was usually unlocked (Tr. 114, 120-21). Abraham Shahbain was never present for the showings (Tr. 115).

On January 31, 2012, at 8:41 p.m., Mr. DiLeo e-mailed Mr. Toun, expressing interest in the apartment after spotting it on Craigslist.com (Pet. Ex. 3A; Tr. 13). Since 2007, Mr. DiLeo has been a licensed attorney in New York and New Jersey but recently gave up law to be a freelance journalist. At the time of the alleged incident, his wife was pregnant (Tr. 11-12).

In his e-mail to Mr. Toun, Mr. DiLeo volunteered that he and his wife had stable jobs, excellent credit, made several times more than the rent, had no pets, and were non-smokers. He asked to schedule an appointment for the following day (Pet. Ex. 3A; Tr. 13). Mr. Toun responded that, "the apartment is still available and can be show [sic] tomorrow." Mr. DiLeo asked to see the apartment at 9:00 a.m., before he went to work (Pet. Ex. 3B; Tr. 14).

Mr. Toun testified that he had a conflict but wanted to help Mr. DiLeo (Tr. 121). He e-mailed, "Thats [sic] possible, I wont [sic] be able to make it but ill [sic] have the tenant open for you [sic]." He asked Mr. DiLeo to let him know what he thought after seeing the apartment (Pet. Ex. 3C; Tr. 14). Mr. Toun sent another e-mail stating, "Ring 1st fl bell" (Pet. Ex. 3C). Mr. DiLeo answered, "Will do. Is that the owner? Does he occupy both first and second floor [sic]?" (Pet. Ex. 3D). Mr. Toun responded, "Yes" (Pet. Ex. 3E; Tr. 15).

Mr. Toun testified that he never informed Mr. DiLeo that the door to the third floor would be unlocked; he figured Mr. DiLeo would go up to the apartment (Tr. 130-31). He called Abraham Shahbain to ask if he could show the apartment the next morning (Tr. 120). Abraham Shahbain testified Mr. Toun did not mention that he was sending the client alone and that he expected Mr. Toun to be there (Tr. 1147, 50-51). Mohamed Shahbain testified that he was unaware that someone was viewing the apartment that day (Tr. 65, 67).

On February 1, 2012, Mr. DiLeo arrived at the building around 9:00 a.m., and rang the first floor bell (Tr. 16-17, 37). Mr. DiLeo testified that he had to wait a few minutes until a “scruffy” man in his pajamas came to the door (Tr. 17, 38). Mr. DiLeo now knows the man to be Najmuddin Shahbain, Mohamed Shahbain’s son-in-law (Tr. 39). Mr. DiLeo told Najmuddin Shahbain he was there to see the apartment. Mr. DiLeo testified that Najmuddin Shahbain “kind of reacted, kind of unusually, kind of with suspicion” and asked who sent him (Tr. 18, 38-39). Mr. DiLeo answered Mr. Toun and there “was an immediate recognition” (Tr. 18, 39). Najmuddin Shahbain began to let Mr. DiLeo enter, paused, and asked, “Is it just for you?” (Tr. 18-19, 47).

Mr. DiLeo testified that he was “pretty eager to tell, pretty much anyone who asked and even if they didn’t ask” that he was expecting his first child, to which he usually “universally receive[d] congratulations” (Tr. 19). But when Mr. DiLeo said the apartment was for him, his wife, and their first child on the way, Najmuddin Shahbain looked at him and said, “No, no babies” (Tr. 19-20). Mr. DiLeo “got indignant” and told Najmuddin Shahbain that it was illegal not to show the apartment because he has a child (Tr. 20, 28). According to Mr. DiLeo, Najmuddin Shahbain “kind of hung his head and, sort of half smiling, half apologetically mumbled something about dust,” which Mr. DiLeo interpreted to mean that dust is bad for babies (Tr. 20). Najmuddin Shahbain closed the door in Mr. DiLeo’s face (Tr. 20, 41, 49).

Najmuddin Shahbain testified that he could not recall when the doorbell rang but it was early and he was sleeping. He works nights for a company that provides sanitary services (Tr. 93). Najmuddin Shahbain stated that he was unaware that the third floor was vacant. Also, he did not know Mr. Toun or that he was showing the apartment (Tr. 96, 98-99). He answered the door in his pajamas (Tr. 98). The person asked to see the apartment. Najmuddin Shahbain responded that he does not show the apartment and went back inside to sleep (Tr. 98, 99, 100). Najmuddin Shahbain denied that he asked who the apartment was for, or said anything about babies or dust (Tr. 96-100, 102, 107).

Mr. DiLeo testified that he immediately called Mr. Toun to tell him that the person who answered the door would not let him in to see the apartment because no babies were allowed (Tr. 21). He told Mr. Toun that he was “kind of outraged” (Tr. 21). Mr. Toun said he knew who Mr. DiLeo was talking about and would take care of it (Tr. 21-22, 41-42). Mr. Toun testified that he

could not remember the phone conversation with Mr. DiLeo and that he did not know Najmuddin Shahbain at the time or anyone from the first floor (Tr. 114-15, 116, 123).

At about 10:00 a.m. Mr. DiLeo e-mailed Mr. Toun and reiterated that the morning appointment “did not go well” (Pet. Ex. 3F; Tr. 22, 27, 122). According to the e-mail, Mr. DiLeo rang the first floor bell and when someone answered he told that person he was there to see the apartment. About five minutes later a man wearing pajamas came to the door. Mr. DiLeo indicated he “didn’t get the impression that [the man] was the owner” and was “obviously unaware” of the appointment (Pet. Ex. F; Tr. 38, 49). Mr. DiLeo concluded, “You need to make this right” and asked Mr. Toun to provide alternate properties in the same price range and area by the end of the day (Pet. Ex. 3F; Tr. 23).

Mr. DiLeo testified that he did not ask Mr. Toun to see the apartment again because he is “not nearly as assertive in situations like that” (Tr. 22, 42). Mr. Toun testified that since he did not have any other properties, he had no further communications with Mr. DiLeo (Tr. 123-27).

Mr. Toun testified that after he received Mr. DiLeo’s e-mail, he called Abraham Shahbain to ask whether there was a policy against children in the building. Abraham Shahbain said that he did not know what had happened and there was absolutely no such policy (Tr. 125, 132). Abraham Shahbain testified that Mr. Toun called and told him that Mr. DiLeo did not see the apartment (Tr. 154-55). Mohamed Shahbain testified that he had no idea that Najmuddin Shahbain would be opening the door for Mr. DiLeo and that he never told his son-in-law not to allow people with children into the building (Tr. 66-67).

Later that day Mr. Toun received another e-mail inquiry about the apartment. Mr. Toun asked how many people would be living there and the prospective tenant stated he was looking for himself, his wife, and his child. Mr. Toun set up an appointment for later that day (Resp. Ex. B). Mr. Toun testified that he met the client at the building and showed him the apartment after ringing the first floor bell (Tr. 136-37, 139-40).

Mr. DiLeo claimed that the alleged discrimination was particularly upsetting because his brother’s newborn baby had died the previous day. Moreover, he and his wife had chosen to give up their rent-stabilized apartment in Manhattan and move to Brooklyn, which was Mr. DiLeo’s idea. His wife was unfamiliar with Brooklyn and was nervous about the move. However, the photographs of the apartment looked great and it was in a nice neighborhood in Park Slope, close to the park and subway, and was within their price range. He and his wife

were confident that the apartment was theirs and “for this guy to . . . take this apartment away from [them] . . . and then to cite the very tragedy that [his family] had just suffered” was really upsetting (Tr. 28-30). They moved later to an apartment in nearby Sunset Park. However, the apartment “has been a nightmare” because it is situated on a loud street, the neighbor runs a banquet hall with loud parties at night, and Mr. DiLeo and his wife have fought with him. A week after they moved in, their air conditioner was stolen from the hallway (Tr. 30-32). Mr. DiLeo doubted that the things they suffered in the Sunset Park apartment would have occurred in respondents’ apartment (Tr. 32).

Mr. DiLeo filed a verified complaint with the Commission on June 5, 2012. He testified that he did not file a complaint until a few months after the incident because he was busy (Tr. 32, 42). The Commission served respondents with the complaint alleging that either Mohamed Shahbain or Mojeeb Shahbain refused to show Mr. DiLeo the apartment when Mr. DiLeo said that his wife was expecting a child (ALJ Ex. 1).

When respondents received the complaint neither was in New York and they each responded by letters dated June 25, and 30, 2012 (Pet. Exs. 1, 2; Tr. 77-78). They stated that on February 1, 2012, Mohamed Shahbain was in Yemen and Mojeeb Shahbain was in Michigan (Pet. Exs. 1, 2; ALJ Ex. 3; Tr. 65, 75, 147). Mohammed Shahbain stated that neither he nor his son, or anyone having to do with the building, denied the apartment to Mr. DiLeo because he had a child (Pet. Ex. 2; Tr. 89). He suggested that the Commission speak to the real estate broker because this was the first time he had heard about this. Mohammed Shahbain stated that he never told the broker not to show the apartment to people with children (Pet. Ex. 2).

At the hearing, Mohamed Shahbain and Abraham Shahbain testified that they had no problem renting to families with children (Tr. 52, 65-66, 80, 125, 152-53). Mohamed Shahbain raised eight children in the building, his six grandchildren live on the first floor, and he has 30 grandchildren (Tr. 65-66). Moreover, the third floor has been rented to people with children. The most recent tenants were expecting a child when they moved in. They lost the child during the pregnancy and the wife became pregnant again before they moved out (Tr. 52-53, 56, 80, 153, 159-61; Resp. Ex. A).

ANALYSIS

The Human Rights Law prohibits discrimination based on the lawful presence of a child. Section 8-107(5)(a)(1) states that it is “unlawful discriminatory practice for the owner . . . or other person having the right . . . 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 person or group of persons such a housing accommodation or an interest therein . . . because children are, may be or would be residing with such person or persons.” Admin. Code § 8-107(5)(a)(1) (Lexis 2013).

Petitioner bears the burden of establishing a *prima facie* case of discrimination. *Comm’n on Human Rights ex rel. Manning v. HealthFirst, LLC*, OATH Index No. 462/05 at 9-10 (Mar. 15, 2006), *adopted*, Comm’n Dec. (May 10, 2006); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). Here, there was insufficient evidence to demonstrate that Najmuddin Shahbain was respondents’ agent with actual or apparent authority to act on respondents’ behalf regarding the third floor apartment.

Agency is the fiduciary relation which “results from the manifestation of consent by one person to another that the other shall act on his behalf . . . and consent by the other” to so act. *L. Smirlock Realty Corp. v. Title Guarantee Co.*, 70 A.D.2d 455, 464 (2d Dep’t 1979) (citing Restatement (Second) of Agency § 1 (1958)). A principal is subject to liability upon a transaction conducted by an agent, whom he has authorized or apparently authorized, as if he had personally entered into the transaction. Restatement (Second) of Agency § 1 (1958); *see also Warsaw v. Mendelow*, 2011 N.Y. Misc. LEXIS 7015 at *21 (N.Y. Sup. Ct. Dec. 13, 2011) (an agent must have authority, whether apparent, actual or implied to bind the principal).

The burden of proving agency rests with petitioner. *Michaels v. Agricultural Ins. Co.*, 38 N.Y.2d 793, 794 (1975) (citing *Dudley v. Perkins*, 235 N.Y. 448, 455 (1923) (“The burden is on the person dealing with the agent to show that the agent had the authority, real or ostensible, which he assumed to exercise.”); *Warren v. Commercial Casualty Ins. Co.*, 241 A.D. 913 (4th Dep’t 1934) (“The burden rested upon the plaintiff to establish the agency.”)).

Actual authority to act is created by written or spoken words or other conduct which reasonably causes the agent to believe that the principal desires him to so act on the principal’s account. Restatement (Second) of Agency § 26 (1958); *see also Warsaw*, 2011 N.Y. Misc. LEXIS 7015 at *21 (actual authority arises from a principal’s direct manifestations to the agent

and may be express or implied when the agent reasonably infers that the principal has consented to the agent's performance of an act).

There was no dispute that neither respondent (principal) was present when Mr. DiLeo went to the see the third floor apartment and that they had no interaction with Mr. DiLeo prior to or after the visit. The record supports a finding that respondent, Mohamed Shahbain hired Century 21 to act as the real estate agency for the rental of the third floor apartment and that he asked his son, Abraham Shahbain, to work with the broker in his absence. From the very nature of the owner-real estate broker relationship, Mr. Toun had actual authority to manage the process of finding a tenant to rent the third floor apartment for respondents. Moreover, there can be no doubt that Abraham Shahbain was respondents' agent with full authority to stand in their shoes and to act on their behalf.

However, there was no evidence to support a finding that Mohamed Shahbain's son-in-law, Najmuddin Shahbain, had actual authority to act on respondents' behalf. To the contrary, respondents' witnesses gave unrebutted, consistent, and credible testimony that Najmuddin Shahbain was never entrusted with any aspect of caring for the building and that he was not responsible for renting the third floor unit.

The record also supports a finding that Mr. Toun normally accompanied prospective tenants to the building after notifying Abraham Shahbain of the appointment. Mr. Toun would gain access to the building by ringing the first floor bell as directed by Abraham Shahbain. In this case Mr. Toun did not accompany Mr. DiLeo to the building but instead directed him to ring the bell to gain access to the third floor apartment. It was undisputed that Najmuddin Shahbain answered the bell, spoke to Mr. DiLeo, and did not allow him to see the apartment.

To establish apparent authority, petitioner pointed to Mr. Toun's e-mail wherein he answered, "Yes" to Mr. DiLeo's question whether the owner occupied the first and second floors.

Apparent authority "is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second) of Agency § 27 (1958); *see also Hallock v. State*, 64 N.Y.2d 224, 231 (1984) (for apparent authority there must be "words or conduct of the principal,

communicated to a third party, that give rise to the appearance and belief that the agent possesses authority” to act).

According to the Restatement of the Law on apparent authority:

The information received by the third person may come directly from the principal by letter or word of mouth, *from authorized statements of the agent*, from documents or other indicia of authority given by the principal to the agent, or from third persons who have heard of the agent’s authority through authorized or permitted channels of communication.

Restatement (Second) of Agency § 27 (1958) (emphasis added). “[A] third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable.” *Hallock*, 64 N.Y.2d at 231.

Mr. Toun’s e-mail was insufficient to establish apparent authority. First, Mr. Toun had no authority to designate Najmuddin Shahbain as an agent without the owners’ consent. Moreover, Mr. Toun’s claim that he mistakenly stated the first floor was occupied by the owner was credible (Tr. 119, 128). There was no dispute that only one owner, Mohamed Shahbain, lived in the building and that he lived on the second floor. The first floor apartment was a separate unit occupied by the owner’s daughter’s family. Mr. Toun and Najmuddin Shahbain credibly testified that they did not know each other. In an earlier e-mail Mr. Toun told Mr. DiLeo to ring the first floor bell and that “the tenant” will open the door. Mr. DiLeo acknowledged that this was a quick e-mail exchange in the evening hours and that Mr. Toun was responding from his mobile phone (Tr. 15). It is apparent that Mr. Toun’s responses were hastily written and filled with grammatical errors.

Also, there was no evidence that respondents’ agent, Abraham Shahbain arranged for Najmuddin Shahbain to act in the broker’s absence. Abraham Shahbain’s testimony that he expected the broker to accompany a prospective tenant was credible and reasonable. Had Mr. Toun been present, it seems highly unlikely that Najmuddin Shahbain and Mr. DiLeo would have spoken to each other.

Finally, the fact that Abraham Shahbain arranged for the first floor occupants to open the front door when the broker rang the bell did not create an agency relationship. Indeed, Mr. DiLeo conceded he had doubts that Najmuddin Shahbain was someone with authority to rent the apartment. Najmuddin Shahbain greeted Mr. DiLeo with suspicion, was in his pajamas, and kept

Mr. DiLeo waiting for five minutes before opening the door. This was not something a prospective tenant would expect from a person responsible for renting an apartment. Mr. DiLeo acknowledged that he expected the man who answered the door to “be more dignified” (Tr. 38) and advised Mr. Toun that he had the impression the man was not the owner and was “obviously unaware” of the appointment.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to establish that Najmuddin Shahbain was an agent of respondents.
2. Petitioner failed to establish that respondents violated section 8-107(5)(a)(1) of the Human Rights Law.

RECOMMENDATION

The petition should be dismissed. *Comm’n on Human Rights ex rel. Bryan v. Memorial Sloan-Kettering Cancer Ctr.*, OATH Index No. 183/06 (July 25, 2006), *aff’d*, Comm. Dec. (Sept. 29, 2006) (Commission adopted ALJ’s recommendation to dismiss discrimination petition); *Comm’n on Human Rights v. Summit Waterproofing & Restoration Corp.*, OATH Index No. 126/98 (Nov. 25, 1997), *aff’d*, Comm. Dec. (Jan. 28, 1998) (same).

Alessandra F. Zorngiotti
Administrative Law Judge

February 3, 2014

SUBMITTED TO:

PATRICIA L. GATLING, ESQ.
Commissioner

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