

Housing Discrimination Plaintiffs Now Have Two Bites at the Apple

By Andrew Lieb

Starting in 2021, every New York state housing discrimination plaintiff should bring an administrative complaint at the Division of Human Rights before even considering filing a lawsuit in state Supreme Court or federal District Court. Effective on Jan. 5, 2021, Executive Law §§ 297(9) and 298 are amended to provide that following an administrative dismissal of a housing discrimination case, for lack of probable cause or lack of jurisdiction, a plaintiff is able to bring a de novo action in court.

For claims instituted in the Division of Human Rights, a probable cause determination is made as a threshold issue pursuant to Executive Law §297(2)(b), to wit: “with respect to housing discrimination only, after the filing of any complaint, the division

shall, within 30 days after receipt, serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within 100 days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an



ANDREW LIEB

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order dismissing such allegations of the said complaint as to such respondent.”

Previously, a plaintiff who received a no probable cause determination from the Division of Human Rights was only afforded a limited appeal pursuant to Executive Law §298 and 22 NYCRR 202.57. In this limited appeal, the cards were stacked against the plaintiff, who was known as the petitioner when proceeding thereunder. The procedure was that the Division of Human Rights filed a “written transcript of the record of all prior proceedings” and “[t]he findings of facts on which such order is based [were] conclusive if supported by suf-

ficient evidence on the record considered as a whole.” Clearly, an appeal under Executive Law §298 was an uphill battle, at best, for a plaintiff/petitioner because of this sufficient evidence standard and case law that held that “[c]ourts [were required to] give deference to [the Division of Human Rights] due to its experience and expertise in evaluating allegations of discrimination, and will only disturb a determination of no probable cause if it is arbitrary, capricious or lacks a rational basis,” as explained by the Appellate Division in *Curtis v. NYSDHR*.

Now, a plaintiff can forgo this difficult appeal and, instead, proceed de novo in court following a dismissal of their administrative claim based upon a no probable cause or no jurisdiction finding. Under a de novo review,

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a plaintiff can start again and have a court rather than the Division of Human Rights review the facts generally, as to weight of the evidence and credibility of the witnesses. This is a completely independent determination from the prior determination of the Division of Human Rights. Stated otherwise, a prior no probable cause determination or no jurisdiction by the Division of Human Rights has no bearing on the subsequent court case for housing discrimination afforded by the

amendments to Executive Law §§ 297(9) and 298. It is like a plaintiff can start anew and obtain a superseding result. Therefore, housing discrimination victims no longer must make an election of remedies and can instead get two bites at the apple. However, this is not afforded for a housing discrimination plaintiff who initially elected to proceed in

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court and thereafter wants a de novo review before the Division of Human Rights in an administrative proceeding. Therefore, all housing discrimination victims should start by bringing their matter before the Division of Human Rights in an administrative proceeding and plan to be meritorious. If a finding of no probable cause or no jurisdiction is

made, then the victim should bring an action in court.

Note: Andrew M. Lieb is the managing attorney at Lieb at Law, P.C., a law firm with offices in Smithtown and Manhasset. He is a past co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property for The Suffolk Lawyer for years.