

M E M O R A N D U M

SUPREME COURT : QUEENS COUNTY
IAS PART 17

<hr style="border: 0.5px solid black;"/> <p>MATTER OF T.K. MANAGEMENT, INC., et al.</p> <p style="text-align: center;">- against -</p> <p>PATRICIA L. GATLING, et al.</p> <hr style="border: 0.5px solid black;"/>	<p>X</p> <p>X</p> <p>X</p>	<p>INDEX NO. 14255/05</p> <p>BY: KITZES, J.</p> <p>DATED: October 19, 2005</p>
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In this special proceeding, petitioners T.K. Management, Inc. (TKM) and K & C Building-35 LLC (K & C) and Tom Kourkoumelis seek a judgment pursuant to Section 8-123 of the Administrative Code of the City of New York, reversing and annulling the amended decision of respondent Patricia L. Gatling, Commissioner, New York City Commission on Human Rights (CCHR) dated May 26, 2005, which requires petitioners to install a ramp, widen doors and install a lift in the lobby of the petitioners' premises, and dismissing the verified complaint filed by CCHR, on behalf of respondent Josip Orlic. The CCHR cross-petitions for a judgment dismissing the petition and for a judgment and order pursuant to Section 8-125 of the Administrative Code of the City of New York enforcing the May 26, 2005 amended order and judgment.

Petitioner K & C is the owner of a residential apartment building located at 28-08 35th Street, Astoria, New York. Petitioner TKM is the managing agent of this building and petitioner Tom Kourkoumelis is a member of K & C. Josip Orlic and

his wife Dinka Orlic, are the tenants of apartment 2D in the subject premises. Josip Orlic suffered a stroke in February 1999, and is wheelchair bound. On April 28, 1999 Josip Orlic granted his son Livio Orlic a durable power of attorney which includes the power to act in matters of claims and litigation. In August 1999, Livio Orlic requested that a ramp be installed and other accommodations be made so that his father could enter and exit the building. No such accommodations were made and on November 17, 1999, a verified complaint against TKM was filed on behalf of Josip Orlic with the CCHR. The complaint was amended on May 15, 2001 to reflect the fact that Livio Orlic possessed a power of attorney. The CCHR determined that there was probable cause for discrimination and referred the matter to an Administrative Law Judge for a hearing. A hearing was held on June 11, and 13, and on July 17, 2003 before Administrative Law Judge (ALJ) Suzanne Christen. TKM asserted that the accommodations sought by Mr. Orlic would create an undue hardship. Tom Kourkouvelis testified that the subject building operated at a loss of \$35,000 in 2001, broke even in 2002, and was expected to operate at a loss of \$53,000 in 2003. Mr. Kourkouvelis, however, acknowledged that the \$35,000 loss in 2001, included a depreciation of \$113,000. TKM did not produce any documentary evidence in support of its claim of undue hardship. ALJ Christen, in a report and recommendation dated October 27, 2003, determined that Mr. Orlic was disabled, that the

physical configurations of the building posed difficulties for Mr. Orlic entry and exit from the building, but that the accommodations requested would have created an undue hardship on the building owner as the building had operated for a loss for two of the past three years, and that the modifications could not be easily absorbed. The CCHR, in a decision dated May 13, 2004, disagreed with ALJ Christen's assessment of the building's solvency, took issue with the ALJ's allowance of "a tax fiction, i.e., depreciation, to affect her recommendation." The CCHR eliminated the depreciation allowance for each year and found that the building operated at a profit of \$78,000 in 2001, \$113,000 in 2002 and \$60,000 in 2003, and determined that it would have no choice but to order the building owner to construct a ramp to the entrance to the building, widen the entrance doors and install a lift in the lobby. However, as Mr. Orlic was residing in a nursing home, the CCHR found that the matter was moot. After an Article 78 proceeding was commenced by Livio Orlic on behalf his father Josip Orlic, the CCHR re-opened the proceeding pursuant to Section 8-212 of the New York City Administrative Code, in order to conduct a hearing to determine whether Josip Orlic's medical condition would permit him to return and reside in the apartment in the subject building. This court in an order dated January 12, 2005 determined that as the matter had been re-opened, the decision of May 13, 2004 could not be considered final and, therefore, was not presently

subject to judicial review. The matter was remanded to the agency, despite the Orlics' objections, and the agency was directed to conduct a hearing on the issue of Mr. Orlic's ability to return to and reside in the building, and to issue a final decision and order within 60 days from the date of service of that order, together with notice of entry.

A hearing was held before ALJ John B. Spooner on March 9 and 22, 2005 solely on the issue of Josip Orlic's ability to reside the apartment. The complaint, the respondents and the CCHR were all represented by counsel. Dinka Orlic, Josip Orlic's wife and Dr. Michael Plokamakis, Josip Orlic's treating physician testified at the hearing.

ALJ Spooner issued a report and recommendation dated April 14, 2005 in which he found that Josip Orlic is able to return to and reside in the subject building. AJL Spooner stated in his report that:

"Dr. Plokamakis, Josip Orlic's treating pulmonologist testified that Mr. Orlic is 88 years old, diabetic, hypertensive, partially paralyzed on his left side and has mild memory loss. Mr. Orlic currently resides at the New York Center for Rehabilitation and is confined to a wheelchair, following a stroke approximately one year ago. Dr. Plokamakis stated that Mr. Orlic was able to return home with the assistance of a home attendant to dress, wash and feed him on or about June 1, 2004. Dr. Plokamakis

stated that on March 3, 2005 Mr. Orlic was admitted to the hospital with violent vomiting due to an infection. Dr. Plokamakis anticipated that Mr. Orlic's most recent infection would be treated successfully and that he would be able to return home soon.

Mr. Orlic's 81-year-old wife, Dinka Orlic, testified that she is currently spending about six to seven hours a day visiting and caring for her husband at the nursing home. She believes that having her husband back home will make it much easier for her to manage his care. She stated that she anticipates being able to care for her husband at home, as she did before January 2004 when he had his second stroke. She did indicate that she needs assistance to transfer Mr. Orlic from the wheelchair to his bed and also to help him get dressed. She stated that, if Mr. Orlic were to fall down, she would be unable to get him up by herself."

ALJ Spooner noted in his report that the respondent had intended to call its own expert Dr. William Apkinar to testify that, in his view, moving Mr. Orlic from the nursing home to his apartment would be detrimental to his health. ALJ Spooner stated that Dr. Apkinar had twice failed to appear for the scheduled hearing, due to alleged scheduling conflicts. One day prior to the March 22 hearing, TKM's counsel's request for a continuance was granted until March 31, as Dr. Apkinar was attending a conference in California and was unable to appear and testify. At the March 22 hearing, the parties agreed to a deadline of March 29, 2005 for a conference call

and the submission of Dr. Apkinar's curriculum vitae (CV). In the event that there was no conference call and production of the CV, ALJ Spooner stated the record would be closed on that date, without the testimony of the expert, absent extraordinary circumstances. ALJ Spooner denied TKM's request to have their expert examine Mr. Orlic, as he did not have the jurisdiction to entertain such an application. On March 29, TKM's counsel informed AJL Spooner that Dr. Apkinar was not available to testify and sought a further six day adjournment, which was denied. ALJ Spooner stated in his report that the second request for an adjournment as regards Dr. Apkinar was denied, in part, because the grounds for an adjournment were identical to those for which the prior nine day adjournment was previously granted, and in part because granting the motion would have made it difficult to complete the hearing and decision within the court's 60 day time limit.

ALJ Spooner stated in his report that the respondent's inability to present the testimony of their expert resulted in no prejudice to them as "Dr. Apkinar, a doctor of dentistry with a speciality in 'craniomandibular pain,' had never examined Mr. Orlic and only reviewed his medical records. His view that Mr. Orlic's welfare might be threatened by moving him from a nursing facility back to the apartment where he and his wife have resided for 28 years is of marginal weight in determining the issue of whether Mr. Orlic was able to return to the apartment. Far greater

deference must be given to the opinion of Mr. Orlic's treating doctor, who stated unequivocally that there was no medical need for Mr. Orlic to remain in the nursing home and no medical prohibition against his returning home. Furthermore, Mrs. Orlic made it clear that Mr. Orlic's family wished to bring him home to the Queens apartment." ALJ Spooner found that the uncontroverted evidence established that there was no medical reason preventing Mr. Orlic from returning to his apartment in the premises, and therefore the requested relief that the building owner erect a ramp was not moot.

The CCHR issued an amended decision and order dated May 26, 2005, pursuant to Section 8-120 of the Administrative Code of the City of New York, in which it found that Josip Orlic is disabled and that he is medically fit to return to the subject building, if the entrance and lobby were made accessible. The CCHR further found that providing the requested accommodation would not impose an undue hardship on TKM. The CCHR ordered TKM to make the building "accessible by installing a code compliant ramp at its entrance; adjusting the foyer and entrance doors, including the widening of the space between the two sets of vestibule doors to 48 inches, widening the inner set of doors to 32 inches, reducing the force required to open both sets of entrance doors(outer doors of 8.5 lbf and the inner doors of to 5 lbf); and installing of a lift in the lobby."

Petitioners TKM, K & C and Kourkoumelis thereafter commenced this proceeding for judicial review pursuant to Section 8-123 of the Administrative Code of the City of New York, and seek a judgment reversing and annulling the CCHR's amended decision dated May 26, 2005, which requires them to install a ramp, widen doors and install a lift in the lobby of the subject premises, and dismissing the verified complaint filed by the CCHR on behalf of respondent Josip Orlic. Petitioners in their first cause of action assert that the CCHR's finding that they discriminated against Mr. Orlic and are required to construct a code compliant ramp is arbitrary and capricious and not supported by substantial evidence in the record. The second cause of action asserts that the CCHR's rejection of ALJ's Christen's finding of undue hardship is arbitrary and capricious and not supported by substantial evidence in the record. The third cause of action asserts that the CCHR's decision was based upon facts adduced at the second reopened hearing that were not before the original trier of fact and did not exist at the time of the original hearing, and therefore the determination was arbitrary and capricious, and not supported by substantial evidence. The fourth cause of action alleges that the failure to allow petitioners to call Dr. Apkinar at the hearing was prejudicial and was not based upon substantial evidence.

Respondent CCHR cross-petitions for a judgment dismissing the petition and for a judgment and order pursuant to Section 8-125

of the Administrative Code of the City of New York enforcing the May 26, 2005 amended order and judgment. It is asserted that its determination of May 26, 2005 is neither arbitrary nor capricious and that it is supported by substantial evidence in the record and therefore should be enforced.

The scope of judicial review under Section 8-123 of the Administrative Code is extremely narrow and is confined to the consideration of whether the CCHR's determination is supported by sufficient evidence on the record considered as a whole. (Administrative Code of the City of New York § 8-110.) Sufficient evidence in this context has been interpreted to mean "substantial evidence" (Burlington Industries v New York City Human Rights Commission, 82 AD2d 415 [1981], affirmed 58 NY2d 983 [1983]; Matter of 119-121 E. 97th St. Corp. v New York City Comm'n on Human Rights, 220 AD2d 79, 82 [1996]; see also Administrative Code of the City of New York § 8-123[e]).

The court finds that there is substantial evidence in the record to support the CCHR's determination as a whole. It is undisputed that Mr. Orlic suffered a stroke in February 1999, that he is disabled, and uses a wheelchair, and that he cannot enter and exit the building on his own. In August 1999, Mr. Orlic requested a special accommodation at his place of residence based upon his disability, and it is undisputed that petitioners failed to accommodate his needs. Mr. Orlic continued to reside in the

building until he suffered a second stroke in February 2004, when he was hospitalized and thereafter resided in a nursing home. By not providing Mr. Orlic with the requested accommodation, petitioners treated this tenant differently from other tenants who can enter and exit the building without difficulty.

In its first determination, the CCHR found that Mr. Orlic was disabled and that petitioners were required to construct a ramp in order to accommodate Mr. Orlic's needs. The court finds that contrary to petitioners' assertions, the CCHR's rejection of ALJ Christen's finding of undue hardship, was neither arbitrary nor capricious, and is supported by substantial evidence in the record. The CCHR has "fact-finding responsibility" and is not bound by an ALJ's determination (see Matter of Freidel v New York State Division of Human Rights, 219 AD2d 547, 548 [1995], appeal denied 91 NY2d 802 [1997]). Therefore the CCHR was not bound by the ALJ's findings of fact and was free to reach its own determination, so long as that determination was supported by substantial evidence (see generally Matter of Cold Spring Harbor Teacher's Association v New York State Public Employment Relations Board, 12 AD3d 442 [2004]; Matter of Maggiore v Department of Buildings, 294 AD2d 304 [2002]). A landlord is required to provide a disabled tenant with a reasonable accommodation. A reasonable accommodation is one that can be provided without causing undue hardship to the landlord. The

landlord bears "the burden of demonstrating undue hardship" (Administrative Code of the City of New York § 8-102).

At the first hearing, TKM relied on the testimony of Mr. Kourkoumelis and Stavros Malliaros, a professional licensed engineer, in order to establish undue hardship. Mr. Kourkoumelis testified that the building was operating at a loss for two years, during a three year period, and that it broke even during the third year. Mr. Kourkoumelis testified that at the time of the hearing that the building's rent roll was \$470,000, and that costs and expenses varied each year. On cross-examination, Mr. Kourkoumelis admitted that the claimed loss of \$35,000 included a depreciation of \$113,000. The landlord's claims regarding the cost of installing an exterior ramp, a lift to the lobby area and the installation of new doors were based upon the testimony of Mr. Malliaros, who provided a wide variety of figures for the installation of new elevators (\$170,000), the installation of a lift in the lobby (\$14,000), new doors (\$10,000), and the installation of a ramp at the building's exterior entrance (\$12,000). He stated that the costs associated with the interior route was \$90,000 or more and that the costs associated with an exterior route was about \$12,000. He also testified that these costs were a "guess."

The court finds that the CCHR was entitled to reject the ALJ's findings as to the claim of undue hardship, as the landlord failed to present any documentary evidence that the building was

operating as a loss. The evidence presented at the first hearing established that the building operated at a profit in each of the three years in question, once the claimed depreciation was eliminated. The court finds that although depreciation may be used to value real property for tax purposes, the CCHR correctly determined that this "tax fiction" was irrelevant to the issue of undue hardship, and that as the property was operating at a profit, the landlord was required to provide the requested accommodations. The court further finds as the landlord was not ordered to install new elevators or an interior ramp, the landlord's present claim of undue hardship which is based upon the alleged costs for such installations is unfounded.

Petitioners' assertion that the CCHR considered issues and events at the second hearing that were not present at the first hearing is disingenuous. The CCHR found that Mr. Orlic was disabled and that he was entitled to the requested accommodations, but found that the matter was moot, as Mr. Orlic was residing in a nursing home, and therefore did not order the landlord to provide the requested accommodations. Mr. Orlic, however, did not move to the nursing home until some time after he suffered his second stroke in January 2004, an event that occurred well after the first hearing was completed. The second hearing was held pursuant to the agency's re-opening of the matter and in compliance with this court's order of January 12, 2005. As directed by this court, the sole issue to

be determined at this hearing was whether Mr. Orlic's medical condition permitted him to live at home. Petitioners' present assertion that the CCHR improperly considered the issue of Mr. Orlic's medical condition thus constitutes an impermissible collateral attack on this court's prior order.

The court finds that there is substantial evidence in the record to support the CCHR's determination that Mr. Orlic's medical condition permits him to live at home. The fact that Dr. Plokamakis testified that Mr. Orlic would need the aid of a home attendant does not establish that Mr. Orlic's medical needs require that he remain in a nursing home. The CCHR was entitled to rely upon the evidence presented by Mr. Orlic's treating physician and it is not the function of this court to re-weigh the evidence presented to the agency (see generally State Division of Human Rights v County of Onondaga Sheriff Department, 71 NY2d 623[1988]). The court further finds that the ALJ's denial of TKM's second request for a further continuance as regards Dr. Apkinar was not prejudicial. The parties were well aware of the time restraints imposed by this court's prior order, and the ALJ adhered to that time frame in a reasonable manner. Dr. Apkinar was attending a conference in California, and presumably counsel was aware of the dates he would be out of state and unavailable to testify. However, as Dr. Apkinar is a dentist, and not a medical doctor, he lacks the requisite credentials, experience and knowledge to present an expert opinion as regards

Mr. Orlic's medical condition. Dr. Apkinar, in a letter submitted with the landlord's post-hearing brief stated that he intended to testify that Mr. Orlic's quality of care at the nursing home was better than that he would receive at home. This amounts to nothing more than a lay opinion. Furthermore, the choice of home care versus nursing home care is a decision to be made by Mr. Orlic and his family, with the advice of his physician, and a landlord has no role in this decision making process.

In view of the foregoing, petitioner's request for a judgment vacating and annulling the CCHR's decision and order of May 26, 2005 is denied, and the petition is dismissed. The CCHR's cross petition to enforce its decision and order of May 26, 2005, pursuant to Section 8-125 of the Administrative Code of the City of New York, is granted.

Settle judgment.

J.S.C.