In the Commonwealth Court of Pennsylvania

No. 293 C.D. 1971

SAMUEL ELGART, TOWN RESIDENCE, INC.
APARTMENT SHOPPERS, INC.,
Appellants

vs.

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,
Appellee

BRIEF OF APPELLEE

Appeal From Order of the Pennsylvania Human Relations Commission, Dated March 29, 1971 *No. H*-1449.

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COUNTER-HISTORY OF THE CASE

Appellee adopts Appellants' history herein with the exception that, in stating the facts adduced at the hearing, Appellants are in error that Complainant filled out a "Memorandum for an Application". The testimony demonstrates that he filled out what he described as, and what he was told was, an "Application" (R. 15a; 19a; 31a; 32a).

ARGUMENT

I. Appellee's Findings of Fact and Conclusions of Law Are Properly Supported by the Evidence

Appellee does not take issue with Appellants' statement of the principles under which Appellee's Findings and Conclusions in this case are to be reviewed. But equally beyond dispute are the propositions that the Court cannot substitute its judgment for Appellee's, nor can it weigh the evidence nor pass on the credibility of witnesses.

Appellants contend that they committed no act of discrimination here because Complainant's activity never reached the point where Appellants could have been said to have refused him an application and that it therefore follows that Complainant himself was to blame for his own exclusion from the rental accommodation he sought. It is urged that the blame here was not Complainant's; that his omission, if relevant, stemmed from Appellant's conduct alone.

There is no evidence in the record that Complainant was ever made aware that he had *not* (emphasis supplied) applied. Testimony regarding Appellants' customary procedure cannot supply the gap in communication in this case. Even if the custom might intimate a usual practice, it is negated here because there is no contradicting of Complainant's testimony that he was told he was filing an application. In

point of fact, the uncontradicted testimony indicates that Complainant did what he was told to do: he had filled out what he thought, and was told, was an application for an apartment at premises 931 Clinton Street, Philadelphia, Pa. There is no evidence whatsoever that Appellants or their employees ever disclosed to him their purported more complex, three-step application process. Appellants, by their own failure, made it reasonable for Complainant to rely on his having complied with Appellants' procedure and that the only thing between that and his occupying a one-bedroom apartment at the premises was Appellants' future notice to him of its availability.

Can it, therefore, be said that Complainant was the victim of self-discrimination because he failed to fill out another application after he had already journeyed on this route? Complainant dealt with two of Appellants' employees, unquestionably agents in the process of procuring tenants for Appellants. The first employee, at Appellants' office, unequivocally told Complainant that the apartment accommodation he was applying for was not available. Complainant's suspicion (and his right to that feeling is to be understood in the climate of our society) led him to the structure for which he was applying to check the information. There, he ascertained from another of Appellants' employees (the Resident Manager on the spot) that such accommodation was available; thus, in fact, justifying the suspicion. This is uncontradicted in the record. Can it be said, when the second employee at the very place of rental accommodation referred Complainant to Appellants' office to fill out an application, that Complainant should have joined in

this tail-chasing gambit. He had just completed what he was told to do again. To Complainant (and to the witness who accompanied him), it is submitted, as it would seem to any other reasonable person in that situation, to have complied with the second employee's reference would have been to have exercised a gesture in futility: to go back to the very source that had hidden from him the availability of the apartment the existence of which he had just had incontrovertible proof.

There was no contradiction of Complainant's (and his witness') testimony that Complainant had filled out an application and that it was to be put in Appellants' file pending the availability of the sought-for accommodation.

The interviewer's assertion to the Negro Complainant that no apartment was available cannot be characterized as mere error. There is no evidence justifying that characterization. Because the interviewer also indicated that there was no accommodation for Complainant's witness, who was white, does not lead to the conclusion that the rebuff was mere error. Two of what is not so does not make it so. For just as obviously it can be concluded that the interviewer made the same statement to both the Negro Complainant and to his white witness because they were an interracial pair and a consistent answer to both would serve as seeming placebo purging the racial discrimination.

For accuracy's sake, it is to be noted that it was not Complainant but Complainant's witness who was told by Appellants' interviewer that there was no rea-

son to fill out another paper since there were no accommodations available. It is to be recalled, concerning Complainant's matter, that he had already filled out what he thought, and reasonably thought, was an application for the accommodation he sought. If the interviewer's purpose was to discriminate she would have done exactly what she did: have Complainant fill out the form and bury it in the file. What was not counted on was that Complainant would, by his own investigation, give the lie to the information he received from Appellants' office.

It is not irrelevant to note that the premises in question were Negro tenant-free. The act of discrimination charged here is with reference to the Negro race of Complainant. Although there may have been a few tenants of Oriental extraction, this cannot be used to indicate the absence of discrimination against members of Complainant's race which was Negro.

II. Appellee's Order Is Properly Related to Appellants' Applying the Application Process Differently to Negroes and Whites

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The application process which Appellee ordered Appellants to cease is the permitting information as to availability of rental accommodations and rent thereof to be supplied Negro applicants at its headquarters' office different from information in those regards supplied at the premises to be rented.

No issue is here being taken with the mechanics of Appellant's application procedure as long as the

procedure is equally applicable to and used for all applicants without discrimination as to their race (as here, Negro) or as to the other factors proscribed by the Pennsylvania Human Relations Act.

III. Appellant Samuel Elgart, in His Own Right, Was Properly Encompassed in Appellee's Final Order

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Appellee concedes that Appellant Samuel Elgart is only legal owner of the premises in question as trustee for his children. But the record established without contradiction that there exists a committee which decides who are and who are not to become tenants of Appellants' accommodations. Appellant Elgart sits on that committee (which apparently has a life of its own) and is neither a creature of the ownership of 931 Clinton Street or of the two corporate Appellants.

This committee sets the policy regarding, and makes decisions on, acceptance and refusal of applicants. For that reason the Order herein includes Elgart in his personal capacity. The evidence (and the finding) was that he sits on that committee in his personal capacity. How else can his conduct thereon be circumscribed without the Order encompassing him personally?

IV. Appellee's Final Order Is Within Its Power and Authority, Properly Effectuating the Purpose of the Pennsylvania Human Relations Act

The Pennsylvania Human Relations Act provides that:

> ". . . the Commission shall . . . issue . . . (an Order requiring such respondent) to cease and desist from such unlawful discriminatory practice *and to take such affirmative action* [emphasis supplied] . . . as, in the judgment of the Commission, will effectuate the purposes of this act . . ." (43 P.S. 959)

The sections of the instant Final Order questioned by Appellants mandate them to maintain a written record for all applicants for apartments at 931 Clinton Street, Philadelphia, Pa. (3d, R. 117a), and for a period of one year from the date of the Final Order to . . . notify the Commission, within two days, each time a vacancy exists at 931 Clinton Street, Philadelphia, Pa. (3e, R. 117a).

Both of these mandates are in effectuation of the purpose of the Act: to see to it that the rental operation of Appellants' apartment house is conducted on a racially nondiscriminatory basis and to safeguard against the possibility that Complainant will be euchered out of an accommodation therein because of his race. Appellee is requiring Appellants to keep records of applicants, and, for one year, a reporting of vacancies. These requirements are to allow the

Commission to have preserved for its staff records from which treatment of applicants can be gleaned and as a means to determine whether Appellants fail to offer a vacant accommodation to Complainant. It is a monitoring technique without which the Act cannot be effective.

Appellee's mandate is not that required in the *Brucker* case, which was modified by the Court. It is urged that the Court struck down that part of the Final Order there that required a reporting as to *all* (emphasis supplied) properties owned by Respondent, and considered such requirement unnecessary for scrutiny of the particular premises involved there (*Pennsylvania Human Relations Commission v. Brucker*, 51 D. & C. 2d 369 (1970)). Here the reporting requirement is confined to the premises in question and, therefore, a relevant and feasible tool in aid of the Commission's decision.

CONCLUSION

It is urged that Appellee properly found that an act of racial discrimination was committed here against Complainant; that Appellant Samuel Elgart was properly included in Appellee's Final Order and that the requirements of the Order properly effectuate the purposes of the Pennsylvania Human Relations Act and that, therefore, Your Honorable Court should dismiss Appellants' Exceptions and uphold Appellee's

Findings of Fact, Conclusions of Law and Final Order.

Respectfully submitted,

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