To be Argued by:
EMANUEL R. GOLD

New York County Clerk's Index No. 112428/01

New York Supreme Court

Appellate Division—First Department

HISPANIC AIDS FORUM,

Plaintiff-Respondent,

– against –

ESTATE OF JOSEPH BRUNO; THE TRUST UNDER ARTICLE SEVENTH OF THE LAST WILL AND TESTAMENT OF JOSEPH BRUNO; LOUISE HILDRETH, in her official capacity as Trustee; JOSEPHINE JOY GAPE, in her official capacity as Trustee; JOY L. HILDRETH, in her official capacity as Trustee; LOUISE E. GAPE, in her official capacity as Trustee; and DOE DEFENDANTS 1-10,

Defendants-Appellants.

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TABLE OF AUTHORITIES

CASES **Page:**

Chan v. Louis.....10
756 N.Y.S.2d 534, 535 (1st Dept. 2003)

In re Jewish Home and Infirmary of Rochester.....17
84 N.Y.2d 252 (1994)

In re Knight-Ridder Broadcasting, Inc.....20
70 N.Y.2d 151, 157-158 (1987)

In re Richard Bruno.....21, 23, 24
628 N.Y.S.2d 971 (2d Dept. 1995)

Kramarsky v. Stahl Management 21
92 Misc.2d 1030 (Sup. Ct. NY Cty 1977)

Maffei v. Kolaeton Industry, Inc.....15
626 N.Y.S.2d 391 (Sup. Ct NY Cty 1995)

McCoy v. City of New York 21, 22
131 F.Supp.2d 363 (E.D.N.Y. 2001)

Rentos v. Oce-Office Systems 16
No. 95 Civ. 7908, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 23, 1996)

Richards v. U.S. Tennis Association.....16
400 N.Y.S.2d 267 (Sup. Ct. NY Cty 1977)

Riley v. County of Broome.....16
95 N.Y.2d 455, 463 (2000)

Scott v. Bell Atlantic Corp.....10
726 N.Y.S.2d 60, 63 (1st Dept. 2001)

Siegel v. Blair Hall, Inc. 22
207 A.D.2d 539 (2d Dept. 1994)

Tompkins County Support and Collections Unit v. Chamberlain.....16, 17
99 N.Y.2d 328, 335 (2003)

STATUTES

N.Y. Civil Practice Law and Rules, Art. 3211.....2, 9

N.Y. City Local Law No. 3 Int. 34 (2002).....19

New York City Human Rights Law, New York City Admin. Code, § 8-107.....5, 9, 15

New York State Human Rights Law, N.Y. Exec. Law § 296.....5, 9, 15, 18

Sexual Orientation Non Discrimination Act.....18

OTHER CITATIONS

New York State Legislative Digest for the Year 2002 Assembly Bill A-1971, Chapter 2 of the Laws of the Special Session of 2002.....19

"Divide on Gender Continues: Advocates Disagree on the Next Steps for Transgendered Protections,"
Gay City News, December 12, 2002 – January 3, 2003.....18

Merry Christmas to State's Gays, Lesbians – Transgendereds Left Out of Human Rights Protections Press Release from The National Transgender Advocacy Coalition, December 19, 2002. 18

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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HISPANIC AIDS FORUM,

Plaintiff-Respondent, **Index No. 01/112428**

-against-

ESTATE OF JOSEPH BRUNO; THE TRUST UNDER ARTICLE SEVENTH OF THE LAST WILL AND TESTAMENT OF JOSEPH BRUNO; LOUISE HILDRETH, in her official capacity as Trustee; JOSEPHINE JOY GAPE, in her official capacity as Trustee; JOY L. HILDRETH, in her official capacity as Trustee; LOUISE E. GAPE, in her official capacity as Trustee; AND doe defendants 1-10

Defendants-Appellants.

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PRELIMINARY STATEMENT[1]

Defendants Estate of Joseph Bruno, the Trust Under Article Seventh of the Last Will and Testament of Joseph Bruno, Louise Hildreth, in her official capacity as Trustee, Josephine Joy Gape, in her official capacity as Trustee, Joy L. Hildreth, in her official capacity as Trustee, Louise E. Gape, in her official capacity as Trustee, and doe defendants 1-10 (hereafter, "Defendants"), appeal to this Court from the Order of Hon. Marilyn Shafer, J.S.C., New York County, dated October 8, 2003, entered in this action in the office of the Clerk of New York County, on

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[1] References to the Record on Appeal shall appear as (R. ___).

October 10, 2003, as denying in part and granting in part Defendants' Motion to Dismiss Plaintiff's First Amended Complaint pursuant to CPLR § 3211. (R. 6)

This is a case that is, plain and simply, about the use of public bathrooms...PERIOD! While the Defendants deny the allegations in the complaint, if the allegations are taken as true for the purposes of the dispositive motion, Defendants refused to renew a lease because the tenant supplied services to transgendered people who were using men's restrooms and women's restrooms which were different from what they might used based upon their anatomical structure.

Moreover, regarding transgendered individuals, there is no allegation that defendants would not allow transgendered individuals in the building or in its bathrooms. The only allegation is that defendants wanted people to use bathrooms that were analogous to their anatomical gender.

In a woman's restroom, where there are no "stand-up urinals," traditionally, it is highly disturbing for a woman to see an individual who is anatomically a man walk out of a stall.

The women and the men who are "disturbed" have rights in society just as the transgendered do. Indeed, our laws, while non-discriminatory, allow for there to be men's and woman's restrooms. We do not have solely unisex restrooms throughout America.

A disturbing scenario would be if an individual who is atomically a man, who happened to feel that he was a woman, after a hard workout in a private or public sports club, decided to enter the women's locker room and take a shower. The Civil Liberties Union and the Hispanic AIDS Forum have an absolute right to want to come to this Court and have precedent setting cases for the rights of people. However, this case against the Estate of Bruno (and the two elderly ladies who happen to derive an income from this building) is the wrong defendant to take to the Court of Appeals.

The Plaintiff in its arguments tries to "dress up" this case, but when all is said and done, the facts herein reveal that this case is only about the use of public bathrooms.

In Paragraph "2" of the Amended Complaint, the Plaintiff states that the Defendants prevented the Plaintiff's "transgendered clients from using common areas in the building, including the main entrance and the bathrooms" (R. 27). This reference is in the "Introduction" and the inference that transgendered persons could not use the public entrance to the building is not backed up in any way by the factual allegations in the Complaint which start at Paragraph "4." (R. 2). Anticipating Plaintiff disagreement with this contention, Plaintiff refers to Paragraphs "24" of the Complaint wherein Plaintiff's lawyer states that "HAF could not legally restrict its transgendered clients' use of the building entrance, hallways or bathrooms" (R. 32). But, that is the Plaintiff's lawyer making a

statement of what they cannot do, not the Defendants making any such request. Every single reference to language quoted on behalf of the Defendants refers solely to bathrooms.

QUESTIONS PRESENTED

1. Whether transgendered persons were, as a matter of law, protected under the New York State Human Rights Law, N.Y. Exec. Law § 296 et seq., and the New York City Human Rights Law, New York City Admin. Code, § 8-107 et seq., at times relevant to this litigation?

2. Even if transgendered persons were protected by the New York State and New York City Human Rights Laws, whether it is discriminatory for a landlord to require that anatomical males use men's restrooms and anatomical females use women's restrooms located in the common areas of a commercial building?

STATEMENT OF FACTS

The alleged facts contained in Plaintiff's First Amended Complaint, taken as true for purposes of this appeal, are as follows: Plaintiff Hispanic AIDS Forum is a non-profit organization that provides treatment and education services to Latinos in New York City who are affected by HIV/AIDS, including transgendered individuals; Plaintiff operates a total of three community-based offices in Lower Manhattan, Western Queens, and the South Bronx; and Defendants own, operate and manage a building in Jackson Heights in which Plaintiff rented commercial office space.[2]

Plaintiff and Defendants had enjoyed a peaceful and problem-free landlord-tenant relationship beginning in March 1991, when Plaintiff first leased office space from Defendants at 74-09 37th Avenue in Jackson Heights (the "Bruson Building"). That initial two-year lease was later renewed without dispute. (See R. 29, et esq.)

By 1995, Plaintiff needed more space, so the parties – without incident – entered into a lease on March 15, 1995 for suite 306 in the Bruson Building, and later a second lease on December 15, 1995 for suite 305. Both suites

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[2] The court's decision below cited the Diagnostic and Statistical Manual of Mental Disorders for its definition of "transgendered" persons, which reads in relevant part: "Transgendered people are those who have a strong and persistent cross-gender identification, and experience persistent discomfort about their assigned sex. Transgendered individuals include people who present as the other sex but take no hormones and have no surgery, people who take hormones to change their secondary sex characteristics but have no surgery, and people who have a range of surgical procedures to alter their anatomical sex" (R. 7).

are located on the third floor of the Bruson Building, and both leases expired April 30, 2000. (R. 29)

In addition to Plaintiff, there were several other small businesses located on the third floor, and all the third floor tenants shared common areas, including the bathrooms located in the main hallway on the floor. Although the third floor bathrooms were often left unlocked, each tenant had keys to both the women's and men's bathrooms.

In November or December 1999, one of Plaintiff's transgendered clients –an anatomical male – was approached in the women's bathroom by an employee of another third floor tenant, Carboni Travel Agency, who wanted to know why that person was using the women's bathroom. Shortly thereafter, a Carboni employee told one of Plaintiff's employees that she did not "like those men that look like women using the bathroom." (R. 30)

In spring 2000, Plaintiff and Defendants negotiated a new five-year lease for suite 306.[3] On March 31, 2000, Defendants sent Plaintiff a renewal lease for suite 306, to commence on May 1, 2000. Plaintiff signed and mailed the lease to defendants on April 24, 2000. On or about May 5, 2000, Plaintiff hand-delivered to Defendants' office manager a rent check for the first month's rent, supplemental security deposit, and the required insurance documents, which the office manager accepted. Plaintiff alleges that the office manager mentioned at

[3] Plaintiff had decided at that time not to request a renewal lease for suite 305.

that time that other tenants were complaining because "men who think they're women are using the women's bathroom." (R. 30-1)

Toward the end of May 2000, Plaintiff alleges that it was told by the Defendant office manager that Defendants were not going to sign the renewal lease because they had received complaints from other tenants who had "issues" with "men who think they're women using the women's bathrooms and women who think they're men using the men's bathrooms." (R. 31)

Sanchez Soto, Plaintiff's Executive Director, later spoke with Jeff Henry, Defendants' property manager and agent, who explained that there were "problems" with Plaintiff's clients using the wrong bathrooms on the third floor of the Bruson Building. (R. 31) Plaintiff's lawyer, Leon Quintero, had several subsequent conversations with Henry during which time Henry said that Defendants' other tenants were complaining about Plaintiff's clients using the wrong third floor bathrooms. (R. 32) When Quintero asked whether Henry was referring to Plaintiff's transgendered clients, Henry allegedly said, "I don't care what they are. They can't use the wrong bathrooms." (R. 32) During these conversations, Henry also allegedly "ridiculed" Plaintiff's clients, stating that he needed to "get rid of 'all these Queens.'" (R. 32)

On June 30, 2000, Plaintiff received an eviction notice demanding that suite 306 be vacated by July 31, 2000. Defendants later commenced an eviction proceeding in housing court, but the parties entered into a stipulation whereby

Plaintiff agreed to vacate the premises by January 31, 2001, which Plaintiff did. (R. 33)

Plaintiff thereafter commenced the instant suit against Defendants, alleging discrimination under the State and New York City Human Rights Laws in refusing to rent to Plaintiff purportedly "because of" its transgendered clients. Plaintiff's complaint alleges four causes of action: discrimination on the basis of sex in violation of the New York State Human Rights Law (hereafter, "State HRL"), N.Y. Executive Law §296 et seq.; discrimination on the basis of sex in violation of the New York City Human Rights Law (hereafter, "City HRL"), New York City Administrative Code § 8-107 et seq.; discrimination on the basis of disability or perceived disability in violation of the State HRL, N.Y. Executive Law §296 et seq., and discrimination on the basis of disability or perceived disability in violation of the City HRL, New York City Administrative Code § 8-107 et seq. Plaintiff seeks, *inter alia*, compensatory and punitive damages. (R. 26)

On February 7, 2003, Defendants moved pursuant to CPLR §3211 to dismiss Plaintiff's amended complaint for failure to state a cause of action. (R. 13) On October 8, 2003, Judge Shafer denied the motion with respect to the first two causes of action, finding that the State and City HRLs apply to transgendered persons. The court granted the motion with respect to Plaintiff's third and fourth causes of action because Plaintiff failed to specifically allege the exact impairment or condition allegedly suffered by or perceived to be suffered by its clients. (R. 6)

However, the court's decision on the third and fourth cause of action was without prejudice, and Plaintiff thereafter filed a second amended complaint.

Defendants now appeal the lower court's ruling to the extent that it found that the State and City Human Rights Laws applied to transgendered persons at the time of Defendants' complained-of conduct.

ARGUMENT

1. Transgendered Individuals Were Not Protected By The State And City HRLs At Times Relevant To This Litigation

When ruling on a motion to dismiss made pursuant to CPLR §3211, the courts accept as true the factual allegations contained in the complaint, and draw all references in favor of the plaintiff. Chan v. Louis, 756 N.Y.S.2d 534, 535 (1st Dept. 2003); Scott v. Bell Atlantic Corp., 726 N.Y.S.2d 60, 63 (1st Dept. 2001). We have no problem with this standard and urge that the factual (versus the argumentative) allegations in the Amended Complaint, even when given their "best," do not state a cause of action.

As indicated in the Preliminary Statement, this case is about "bathrooms." The passing reference in Paragraph "2" of the Amended Complaint in the section titled, "Introduction," to other common areas of the building and the gratuitous statement by Plaintiff's own attorney in Paragraph "24" of the Amended

Complaint, about the use of hallways and entranceways, do not bind the Defendant or change the nature of this case. (R. 27 and R. 32)

The first reference to any conduct relevant to this action comes in Paragraph "15" of the Amended Complaint wherein an employee of another tenant in the building (not Defendants) is alleged to have approached someone in the women's bathroom who was a transgendered client of Plaintiff. (R. 30)

In Paragraph "16" of the Amended Complaint an employee of Carbone Travel, another tenant in the building, allegedly told someone that Carbone employees "did not like those men who look like woman using the bathroom." Thereupon, an employee of the Plaintiff "explained why transgendered Latinas used the women's bathrooms." (R. 30)

The next reference comes in Paragraph "20" of the Amended Complaint wherein it is alleged that an employee of Defendant "mentioned that other tenants were complaining because "men who think they're women are using the women's bathroom." (R. 31)

In Paragraph "21" it is alleged that the Defendants "had received Complaints from other tenants and had issues with "men who think they're women using the women's bathroom" and "women who think they're men using the men's bathrooms." (R. 31)

In Paragraph "22" it states "When Henry (an employee of Defendant) continued to assert that transgendered women could not use the women's bathroom..." (R. 31)

In Paragraph "23" it alleges that the attorney for the Plaintiff spoke to Mr. Henry and had "several conversations in which Henry insisted that HAF agree in writing that clients would no longer use the public bathrooms in the building. Henry told Quintero that the landlord needed such an agreement because tenants were complaining about the 'type of clientele' coming in and out of the building and using the bathroom. Specifically, Henry complained about 'men dressed as women coming into the building and using the bathrooms.' When Quintero asked whether Henry was referring to transgendered clients, Henry responded, "I don't care what they are. They can't use the wrong restrooms." (R. 32)

It is important at this point to point out that in Paragraph "23" of the Amended Complaint it alleges that Mr. Henry asked for a writing "that its (HAF's) clients would no longer use the public bathrooms in the building" (R. 32). There is no allegation that Mr. Henry insisted that HAF no longer service transgendered individuals; Mr. Henry is not alleged to have asked that transgendered individuals do not enter the building or exit the building. The only thing asked by Mr. Henry, allegedly, is that the writing guaranteed the use of bathrooms. <u>This language from the Plaintiff's own pleadings belies any suggestion that transgendered people were being barred from the use of the Defendants' building</u>.

In Paragraph "24" of the Amended Complaint, it alleges that Plaintiff's attorney stated that "transgendered clients were not using the "wrong restrooms-they were using the appropriate restrooms for the gender identities" (R. 32). Quintero also allegedly told Henry that HAF could not legally restrict its transgendered clients' use of the building entrance, hallways or bathrooms. Henry allegedly told Quintero that the landlord would not renew HAF's lease unless HAF agreed that transgendered clients would not be permitted to use the bathrooms. Here again, the Court can see that while Mr. Quintero speaks of hallways and entrances, the only quote attributed to Mr. Henry, the alleged employee of the Defendants, is to "bathrooms."

It is respectfully urged upon the Court that the decision in this case could have very serious consequences. Throughout the City of New York there are public golf courses with public bathrooms, locker rooms and shower facilities. The affect of Justice Shafer's decision is that individuals with male organs could, if they so chose and if they are determined to be transgendered, use a ladies' restroom. Why then would that individual not be permitted to use the women's shower at Kissena Golf Course? Why then could that individual not use a ladies' restroom in this very Courthouse? Why not, continuing the thought, use the ladies' restroom at the Metropolitan Opera, Lincoln Center or any Broadway Show? It is also easy to imagine the reaction from the public if there were children in those ladies' rooms at the time of the transsexual's use.

It is not the position of the Defendants that transsexuals or transgendered persons are persons who should be discriminated against. Discrimination in any sense is abhorrent to the Defendants and their counsel. Turn it, twist it, bring it inside out, this case is about the use of bathrooms and whether or not at the time of the alleged incidents; (1) a landlord had the right to make rules and regulations concerning the use of bathrooms in its building; (2) and whether or not the conduct complained of was covered by City and State statutes so as to define a discriminatory practice which could be the basis of this cause of action.

It is urged upon the Court that when the Amended Complaint itself is "undressed" and brought down to its simplest terms, it does not state a cause of action under the law as it existed at the time of the events, nor, should it cover the use of men's and women's bathroom facilities, locker rooms, dressing rooms, etc.

Nonetheless, the lower court's ruling must be reversed, Defendants' motion to dismiss granted and the amended complaint dismissed, because the State and City HRLs did not cover transgendered individuals at the time of Defendants' alleged discriminatory conduct.

The State HRL provides, in relevant part, that:

> It shall be an unlawful discriminatory practice to refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons land or commercial space because of the race, creed, color, national origin, sex, age, disability of such person or persons.

New York Executive Law § 296(5)(b)(1).

The City HRL contains a similar provision except that the term "gender" is used instead of "sex":

> It shall be an unlawful discriminatory practice to refuse to sell, rent, lease, approve the sale, rental, lease or otherwise deny to or withhold from any person or group of persons, land, such a housing accommodation or an interest therein because of the actual or perceived race, creed, color, national origin, gender, age, disability of such person or persons.

N.Y. City Administrative Code § 8-107(5)(b)(1).

Notably absent from the State Human Rights Law § 296(5)(b)(1) is any reference to "transgendered" or "perceived gender" or any other phrase which would apply that section at the time of the alleged incidents to transgendered individuals. Similarly, it is a stretch to use language as it existed at the time, the New York City Administrative Code and apply it to transgendered individuals. Despite this, Justice Shafer found that the two statutes protect transgendered persons. In so finding, Justice Shafer relied on two lower court cases from the New York County Supreme Court and from one case in the Southern District of New York: Maffei v. Kolaeton Industry, Inc., 626 N.Y.S.2d 391 (Sup. Ct NY Cty

1995); Richards v. U.S. Tennis Association, 400 N.Y.S.2d 267 (Sup. Ct. NY Cty 1977), and Rentos v. Oce-Office Systems, No. 95 Civ. 7908, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 23, 1996). With all due respect to Justice Shafer, those three decisions are neither binding on this Court, nor should they even be persuasive. In particular, all three cases involved post-operative transsexual plaintiffs, not transgendered persons, as in the case at bar. Moreover, those decisions do not rely upon or thoroughly analyze the important legislative developments discussed below.

2. Standard Rules Of Statutory Interpretation Require A Finding That The State And City HRLs Did Not Protect Transgendered Persons At Times Relevant To This Litigation

"The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the legislature." Riley v. County of Broome, 95 N.Y.2d 455, 463 (2000). In so doing, the courts should first look to the statute's plain language, as "that represents the most compelling evidence of the legislature's intent." Tompkins County Support and Collections Unit v. Chamberlain, 99 N.Y.2d 328, 335 (2003). Indeed, as a general rule, the "unambiguous language of a statute is alone determinative." Riley, 95 N.Y.2d at 463. Even where the language of a statute is clear, however, the courts may consider the statute's legislative history. Id.

In the case at bar, the plain language of the State and City HRLs clearly did not included transgendered persons at times relevant to this litigation. This Court should honor the state legislature's and New York City Council's decision to omit transgendered persons from protection under the State and City HRLs, as the absence of the word "transgendered" represents "the most compelling evidence of the legislature[]s[']' intent." Tompkins County, 99 N.Y.2d at 335.

Indeed, under the well-established canon of statutory interpretation, expressio unius est exlusio alterius, the state and city governments' decision to enumerate certain protected classes of persons while not specifying others reflects the intention to exclude such classes of people. See In re Jewish Home and Infirmary of Rochester, 84 N.Y.2d 252 (1994) (noting that "where a statute creates provisos or exceptions as to certain matters, the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned") (internal citations omitted).

While the Court's analysis should properly end with the statutes' plain language, consideration of the State and City HRLs' legislative history further supports the conclusion that neither statute, at times relevant to this case, applied to transgendered persons. Indeed, the obvious non-inclusion of certain persons from protection under the two statutes prompted both the New York State legislature and the New York City Council to act in recent years. While the parties in this case agree that neither of these two legislative developments apply to Defendants'

allegedly discriminatory conduct (which occurred in 2000 and thus predated both developments), the significance of the two developments cannot be ignored by this Court – this legislative history shows that neither the State nor City HRLs covered transgendered individuals at the time of the conduct complained of in this case.

In 2002, the New York State government, seeking to include sexual orientation under the protections of the State HRL, enacted into law the Sexual Orientation Non Discrimination Act ("SONDA"), which amended the already-existing State HRL to add the words "sexual orientation," so as to protect homosexual men and women under the statute. Notably absent from SONDA was the word "transgendered" or any other reference to gender identity. In fact, SONDA's failure to include protections for transgendered persons was not only widely noted and well-documented, but understandably disappointed both the transgendered community as well as sympathetic lawmakers.[4]

Specifically, on December 17, 2002, the New York State Senate voted on a proposal by Assemblyman Sanders, (A-1971), which had been substituted for a proposal by Senator Goodman (S720) to amend, among other laws, HRL N.Y. Exec. Law 296(5)(B)(1) and (2) (which are the basis for Plaintiff's claim), to include the phrase "sexual orientation" regarding prohibition on discrimination.

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[4] See "Divide on Gender Continues: Advocates Disagree on the Next Steps for Transgendered Protections," Gay City News, December 12, 2002 – January 3, 2003; "New York Senate: Merry Christmas to State's Gays, Lesbians – Transgendereds Left Out of Human Rights Protections," Press Release from The National Transgender Advocacy Coalition, December 19, 2002.

That Bill passed the NYS Senate 34 to 26 and it was subsequently signed into law. See, NYS Legislative Digest for the Year 2002 Assembly Bill A-1971, Chapter 2 of the Laws of the Special Session of 2002.

HOWEVER, prior to voting final passage on that Bill, Senator Thomas Duane offered an amendment which would include "gender identity" to that law as well. That amendment to cover transgendered and transsexual individuals was rejected by the Senate 41 to 19. The significance of this is that IF the existing laws covered transgendered and transsexual individuals, there was no need for Senator Duane's fight to amend the proposal by Assemblyman Sanders and Senator Goodman. Id.

It is crystal clear, from that legislative fight and other fights which have occurred legislatively in other bodies, that transsexuals as of the time of the events of this case were not covered by City or State anti-discrimination statutes.

With regard to the City HRL, New York City amended its laws in Spring 2002 specifically to protect transgendered persons. The so-called transgendered rights bill, which was signed into law by Mayor Bloomberg on April 30, 2002, amended the City HRL to include under the definition of "gender," "a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth." N.Y. City Local Law No. 3 Int. 34 (2002).

While the legislative actions of the state and city governments reached different results with respect to whether to include transgendered individuals under the statutes' protections, the conclusion to be drawn by this Court by such conduct is unquestionably the same – that neither the State nor City HRL protected transgendered persons at the time of Defendants' allegedly discriminatory conduct.

Defendants respectfully submit that this Court should resist the desire to "legislate" in interpreting the State and City HRLs to cover transgendered persons when lawmakers on the state and city levels did not intend to do so. Indeed, as the Court of Appeals has warned, "public policy determined by the legislature is not to be altered by a court by reason of its notion of what the public policy ought to be." In re Knight-Ridder Broadcasting, Inc.,70 N.Y.2d 151, 157-158 (1987) (internal citations omitted).

In the absence of the protections for transgendered persons sought by Plaintiff here, the law is clear that Defendants' actions regarding the use of bathrooms, were not unlawful:

> A landlord is free to do what he wishes with his property, and to rent or not rent to any given person at his whim. The only restraints, which the law has imposed upon free exercise of his discretion, is that he may not use, race, creed, color, national origin, sex or marital status as criteria. So, regrettable as it may be, a landlord can employ other criteria to determine the acceptability of his tenants – occupational, physical or otherwise . . . [A] landlord has a right to be selective and to reject a prospective tenant because of his or her failure to meet standards of acceptability other than those which concern

themselves with one's race or color or standards which are otherwise prescribed by law.

Kramarsky v. Stahl Management, 92 Misc.2d 1030 (Sup. Ct. NY Cty 1977).

3. Even If Transgendered Individuals Were Covered By The HRLs, Defendants' Requirement That Plaintiff's Clients Use Restrooms That "Matched" The Client's Anatomical Sex Is Not Discriminatory Under Either Statute

Should this Court somehow determine that the State and City HRLs covered transgendered individuals at the time of Defendants' allegedly discriminatory conduct, Justice Shafter's order must still be reversed and the amended complaint dismissed because Defendants' requirement that Plaintiff's clients use restrooms that "matched" the clients' anatomical sex cannot be deemed discriminatory in light of relevant case law. Indeed, even taking as true the allegations in Plaintiff's amended complaint and construing those allegations liberally, Plaintiff still fails to state a cause of action because of the reasoning of McCoy v. City of New York, 131 F.Supp.2d 363 (E.D.N.Y. 2001) and In re Richard Bruno, 628 N.Y.S.2d 971 (2d Dept. 1995).

Herein, Defendants had leased space to Plaintiff for nearly a decade before Defendants allegedly required that its tenants and their clients use bathrooms in the common area that matched those persons' anatomical sex. Under these cases, Defendants' policy – neutral on its face and enunciated without

animosity toward Plaintiff, its clients or the trangendered community as a whole – was reasonable and nondiscriminatory under the law.

In McCoy v. City of New York, which involved allegations of racial discrimination under Title VII and the New York State HRL, the African American plaintiff was an employee of the New York City Parks Department who alleged discriminatory conduct against the City that included, inter alia, plaintiff and his mostly African American crew being denied use of a bathroom in a Forestry Department facility. 131 F.Supp.2d at 363.

In granting defendants' motion for summary judgment, the court found on the issue of the bathroom that defendant's policy of uniformly excluding all Parks Department employees from the bathroom – regardless of such employees' race – was not discriminatory. The court found that, "absent a showing that this policy was selectively enforced, plaintiff's allegation is insufficient to convert what appears to be an otherwise neutral policy into a racially discriminatory one." Id. at 374. See also Siegel v. Blair Hall, Inc., 207 A.D.2d 539 (2d Dept. 1994) (finding that electric locks on front door of apartment building did not discriminate on the basis of religion against Orthodox Jews who were prohibited by Jewish law from using the locks on certain Jewish holy days; the court noted that while the act of installing electric locks placed an "added burden" on the plaintiffs, "merely because an act creates a burden does not, in a pluralistic society, mean that it is a discriminatory act").

Similarly here, Defendants' alleged discriminatory conduct – requiring that Plaintiff's clients use the common area bathrooms on the third floor of the Bruson Building that "matched" the anatomical makeup of the individual – cannot be discriminatory under the State or City HRLs. Like the uniform exclusion of Parks Department employees from a certain bathroom, Defendants' requirement here that anatomical males use the men's bathroom and anatomical females use the women's bathroom applied to everyone in the Bruson Building and was in no way selectively enforced (e.g., allowing some men to use the women's bathroom or vice versa) or discriminatory.

A similar result was reached in In re Richard Bruno, 628 N.Y.S.2d 971 (2d Dept. 1995). The plaintiff there had from 1978 through 1984 rented space from the defendants in Nanuet Mall to display a Christmas Nativity scene in conjunction with the plaintiff's promotion for fireplaces. The defendants later advised the plaintiff that their lease for commercial space in the mall would not be renewed because, "for business purposes, [defendants] did not wish to have religious symbolism in the mall." Id. at 972 (internal quotations omitted). The plaintiff thereafter brought suit under the New York State HRL. The Second Department, in affirming the dismissal of the case, found that the defendant's decision not to renew the lease did not violate the State HRL as the decision was "not based on [plaintiff's] religion." Id. at 975. Further, the court noted that "the basis for denial of a renewal lease was the nature of the petitioner's display, not his

personal religious beliefs or practices. If [defendants] were aware of the petitioner's religion, his religion was irrelevant to their determination." Id. at 974-975 (emphasis added).

Similarly here, what mattered to Defendants was not the transgendered status of Plaintiff's clients – as was evidenced by the nine-plus years Defendants leased office space to Plaintiff without incident – but rather the fact that anatomical males were using the women's bathroom and anatomical females were using the men's bathroom, to the concern of Defendants' other tenants and their clients. Whether Plaintiff's clients were doing so because of their transgendered status or for any other reason was and is still irrelevant to Defendants – and should be to this Court's analysis. This is so because Defendants here, like the landlord in In re Bruno, decided not to renew Plaintiff's lease for business purposes, i.e., taking into consideration Defendants' many other commercial tenants and their clients that shared common bathrooms with Plaintiff and its clients.

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Similarly here, what mattered to Defendants was not the transgendered status of Plaintiff's clients – as was evidenced by the nine-plus years Defendants leased office space to Plaintiff without incident – but rather the fact that anatomical males were using the women's bathroom and anatomical females were using the men's bathroom, to the concern of Defendants' other tenants and their clients. Whether Plaintiff's clients were doing so because of their transgendered status or for any other reason was and is still irrelevant to Defendants – and should be to this Court's analysis. This is so because Defendants here, like the landlord in In re Bruno, decided not to renew Plaintiff's lease for business purposes, i.e., taking into consideration Defendants' many other commercial tenants and their clients that shared common bathrooms with Plaintiff and its clients.

CONCLUSION

For the foregoing reasons, the order of the Supreme Court denying Defendants' motion to dismiss should be reversed and Plaintiff's Amended Complaint dismissed.

Dated: Queens, New York
March 19, 2004

Respectfully submitted,

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APPELLATE DIVISION – FIRST DEPARTMENT
PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: Forest Hills, New York
Date March 22, 2004

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Attorneys for Defendants-Appellants

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

HISPANIC AIDS FORUM,

Plaintiff(s),

-against-

ESTATE OF JOSEPH BRUNO; THE TRUST UNDER ARTICLE SEVENTH OF THE LAST WILL AND TESTAMENT OF JOSEPH BRUNO; LOUISE HILDRETH, in her official capacity as Trustee; JOSEPHINE JOY GAPE, in her official capacity as Trustee; JOY L. HILDRETH, in her official capacity as Trustee; LOUISE E. GAPE, in her official capacity as Trustee; and DOE DEFENDANTS 1-10,

Defendant(s)

----------X

Index No. 112428/01

CIVIL APPEAL
PRE-ARGUMENT STATEMENT
FIRST DEPARTMENT

Appeal taken from Order entered
on October 10, 1003 of Supreme Court
County of New York
Judge Marilyn Shafer
Date of Entry of the October 21, 2003
Notice of Appeal filed

Full name of original parties: SEE ABOVE

Changes in parties: N/A

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Method of disposition in trial court:

Judgment after *Court-Jury* trial — Article 78 proceeding:
Damages *granted denied*: Amount $..... X Appeal from order: (short description of order)

Order entered on October 10, 2003 denying defendants' motion to dismiss plaintiff's first and second cause of action and dismissing plaintiff's third and fourth causes of action without prejudice.

Brief description of nature of cause of action or special proceeding
(contract, personal services, sale of goods, etc., tort-personal injury, automobile, sidewalk accident, etc., equity, specific performance, injunction, etc.):

Generally, action against landlord for discrimination against a certain organization pursuant to City and State Human Rights Laws.