Supreme Court of the State of New York
County of New York

Bibliotechnical Athenaeum, Plaintiff, - against - National Lawyers Guild, Inc., & The National Lawyers Guild Foundation, Inc. Defendants.	Index No. 653668/2016

PLAINTIFF'S REPLY TO DEFENDANT NATIONAL LAWYERS GUILD'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION

Plaintiff Bibliotechnical Athenaeum ("Bibliotechnical" or "Plaintiff") by its attorney, Benjamin Ryberg, respectfully submits this reply to Defendant National Lawyer's Guild's (the "Guild" or "Defendant") Memorandum of Law in Opposition to Plaintiff's Summary Judgment Motion (the "Opposition memorandum").

Introduction

Despite the Guild's assertions to the contrary, the relevant facts in this case are undisputed. These facts unequivocally show that the Guild discriminated against Plaintiff by refusing to sell Plaintiff advertising space in the Guild's Dinner Journal on the basis of Plaintiff's Israeli national origin and citizenship. The violations of New York City and State Human Rights Laws could not be more apparent. In its Opposition memorandum, the Guild raises several supposedly "disputed fact issues", but these issues are all either totally irrelevant to Plaintiff's claims; relevant only to the issue of damages (which

Plaintiff is offering to waive); questions of law rather than fact; or, indeed, wholly undisputed.

Perhaps most importantly, the Guild now claims that it does not discriminate on the basis of national origin or citizenship. Taking this claim at face value, the Guild should have no objection at all to the limited relief Plaintiff is seeking—an injunction against such discrimination. Indeed, it is a mystery why the Guild refuses to simply apologize for its conduct and offer to accept an injunction.

Argument

Point One

The Facts Claimed to be in Dispute by the Guild Are Irrelevant to Establishing the Guild's Liability

In its Opposition memorandum, the Guild argues that there exists a dispute as to whether Guild employee Tasha Moro correctly expressed Guild policy in her email to Plaintiff rejecting its advertisement. Neither the Guild's policy nor the accuracy of Moro's statement of such policy have any bearing whatsoever on the Guild's liability. In that email, which was signed "NLG National Office", Moro stated explicitly that the refusal to sell Plaintiff advertising space was based on the fact that Plaintiff is an Israeli organization. That is, no basis was given for the refusal other than Plaintiff's Israeli national origin and citizenship. The undisputed nature of the fact that the advertisement was rejected because of Plaintiff's national origin and citizenship does not hinge on the content (or existence) of any Guild policy.

Indeed, every week in the United States, courts award substantial discrimination judgments and injunctions against employers, public accommodations, and landlords who have written anti-discrimination policies. Common sense would dictate that the existence

of such a policy does not immunize anyone from liability; if one acts against that policy, then he or she has violated the law.

Even the existence of a clear *anti*-discrimination organizational policy—which has not been alleged in this case—would not make it impossible for an organization to commit a discriminatory act, nor would it immunize the organization from liability after discrimination occurs. Indeed, if the Guild's policy is *not* to refuse to sell advertising space to or otherwise boycott Israelis, and Moro's refusal ran afoul of the Guild's policy, then the Guild should have no problem accepting liability and Plaintiff's requested injunction against future discrimination. Instead, the Guild continues its attempts to bring its policy into the equation, erroneously arguing that the policy is somehow relevant to Plaintiff's causes of action when it plainly is not. In other words, the Guild has concocted an illegitimate issue of immaterial fact.

The Guild next questions whether or not Plaintiff was set up for purposes of testing for anti-Israel discrimination. Again, this would-be issue is irrelevant to establishing the Guild's liability for its discriminatory act. Oliver Brown—in *Brown v. Board of Education of Topeka*, 347 U.S. 4834 (1954)—applied for his black daughter to enroll in an all-white school purely so that she could be rejected, and the school district's policy of racial segregation could be challenged in court. Since the civil rights movement of the 1950s and 1960s, it has been completely acceptable to file lawsuits to test for civil rights violations, and the courts have long held that civil rights testers have causes of action against discriminators. This point is addressed clearly and unequivocally in the EEOC enforcement manual:

> The civil rights movement has a long history of using testers to uncover and illustrate discrimination. In *Pierson v. Ray*, 386 U.S. 547 (1967), the Supreme Court held that a group of Black clergymen who were removed

> from a segregated bus terminal in Jackson, Mississippi, had standing to seek redress under 42 U.S.C. § 1983. The Court ruled that plaintiffs had been discriminated against by being ejected from the terminal, *despite the fact that the plaintiffs' sole purpose was to test the law rather than to actually use the terminal.*

EEOC Notice Number 915.002 (III)(A)(1) (1996) (emphasis added).

The Guild's hallucinatory, evidence-free insinuation that Plaintiff accepts Israeli government money is similarly immaterial to determining the Guild's liability. Even if it were true that Plaintiff *did* receive funding from the Israeli government (which it does not), this would not impact Plaintiff's right to challenge unlawful discrimination, nor the Court's ability to decide this case based on the undisputed *relevant* facts. In another attempt to characterize Plaintiff as having "unclean hands", the Guild is merely distracting from its own wrongdoing and introducing an extraneous issue to muddy the waters.

Finally, the Guild questions Plaintiff's contacts or activities that would allow it to invoke New York jurisdiction or the Human Rights laws. The issue of standing was already addressed by this Court when it rejected the arguments put forth by the Guild in its first motion to dismiss, ruling that "[t]he uncontroverted evidence submitted by Plaintiff shows that it was qualified in New York State on March 11, 2016 under its Israeli name, Bibliotechnical Blue & White, Ltd., and on March 17, 2017 received permission from the New York Secretary of State to use the name Bibliotechnical Athenaeum in New York County". Also misguided is the Guild's suggestion that David Abrams cannot assert discrimination against persons of Israeli national origin or citizenship because Abrams has not asserted that he is himself of Israeli national origin or citizenship. Abrams is not the plaintiff in this action, nor has he ever alleged that the

Guild discriminated against him in his personal capacity. Plaintiff is an organization incorporated in Israel, a protected "person" under the Human Rights laws (as held by the Court in its rejection of the first motion to dismiss) and, as such, has every right to pursue legal action to enforce its civil liberties when faced with unlawful discrimination.

Point Two

The Existence of Multiple or Mixed Motives for the Guild's Rejection of Plaintiff's Advertisement Does Not Limit Its Liability for Discrimination

The Guild's assertions that it would have rejected Plaintiff's advertisement for reasons other than Plaintiff's Israeli national origin and citizenship does not affect the Guild's liability on the merits. The email from NLG's National Office rejecting the advertisement stated outright that the rejection was based on Plaintiff's protected status, and the existence of an additional, non-discriminatory motivation for the rejection could only be relevant to the measure of damages. Even in the "mixed motive" context, liability should be found where "discrimination was one of the motivating factors for the defendant's conduct." *Williams v. New York City Hous. Auth.*, 61 A.D. 3d 62, 78 (1st Dep't 2009). "Under Administrative Code § 8–101, discrimination shall play no role in decisions relating to employment, housing or public accommodations." *Id*; *see also Weiss v. JPMorgan Chase & Co*., 2010 WL 114248, 1 (S.D.N.Y. 2010) ("[T]he NYCHRL requires only that a plaintiff prove that age was 'a motivating factor' for an adverse employment action."). Similarly, the New York State Human Rights Law has been applied broadly in furtherance of its purpose to eliminate all forms of discrimination within the state, and there is no indication, nor has the Guild argued, that multiple or mixed motives for an action limits the liability that attaches when one motive is discriminatory. Here, Plaintiff's national origin and citizenship was unarguably "*a*

motivating factor". Even if it was not *the only* motivating factor, it is still a violation of the Human Rights laws. To find otherwise would greenlight future discrimination by enabling parties to evade liability merely by inventing additional, non-discriminatory motivations for their conduct.

If the Guild were able to demonstrate that the advertisement would have been rejected regardless of Plaintiff's national origin and citizenship, such proof would be relevant only to the amount of damages sought. Since Plaintiff is prepared to waive damages, the Guild's argument is irrelevant.

Point Three

The Guild Can Be Held Responsible for Moro's Refusal to Sell Plaintiff Advertising Space

Since 1991, the law in New York City has been that public accommodations are strictly liable for the discriminatory acts of their employees and agents. More specifically, in 1991, the New York City Council adopted section 8-107(13) of the New York City Administrative Code "as part of a major overhaul of the NYCHRL [New York City Human Rights Law]." *Zakrzewska v. New School*, 14 N.Y. 3d 469, 480 (2010). It should be noted that this section was adopted *after* the two court decisions cited by the Guild in support of its argument that the Guild may not be liable for Moro's discriminatory act. Section 8-107(13) provides: "An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions one and two of this section." Plaintiff has asserted violations of sections 8-107(4) and 8-107(18). Hence, the Guild can and should be held liable for Moro's discriminatory act.

Regarding Plaintiff's claims under the New York State Human Rights Law, a "corporate employer may be held directly liable for acts of discrimination perpetrated by a high-level managerial employee." *Father Belle Community Ctr. v. New York State Div. of Human Rights on Complaint of King,* 221 A.D. 2d 44, 54 (4th Dep't 1996). Such situations are readily distinguishable from the cases cited by the Guild, where discriminatory acts were committed by rogue employees who lacked authority to act on behalf of their employers. The case at bar is not of the latter variety. Plaintiff's advertisement was emailed to—and the rejection of the advertisement sent by—the email address dinnerjournal@nlg.org. The rejection email was signed "NLG National Office". As stated in Pooja Gehi's Affidavit in Opposition to Summary Judgment Motion, Moro has been the Guild's Director of Communications for the past four years and is responsible for the acceptance (or rejection) of advertisements in the Dinner Journal. These facts demonstrate that Moro had apparent (or actual) authority to act on behalf of the Guild, such that the Guild can and should be found liable for the discrimination. Indeed, the Guild has never claimed that Moro acted beyond the scope of her authority in refusing to sell Plaintiff advertising space.

Point Four

The Court Has Already Addressed and Rejected the Guild's Remaining Arguments

To the extent the Guild argues for a third time that it had a constitutional right to discriminate or that it is not a public accommodation, such arguments should be rejected for the same reasons as the Court provided in its earlier decisions. The Guild's First Amendment arguments are misplaced and should be denied because, according to the plain language of the June 27, 2016 email from the NLG National Office, Plaintiff's advertisement was rejected not because the Guild objected to its content, but because of

Plaintiff's national origin and citizenship. Further, Plaintiff is requesting an injunction against future discrimination by the Guild, not an injunction that would force the Guild to run the particular advertisement that Plaintiff submitted on June 27, 2016. Most significantly, the Dinner Journal at issue has been attached to the Amended Complaint in this matter (Exhibit 2 to the summary judgment motion) and there is clearly no issue of fact as to whether it qualifies as a public accommodation.

Conclusion

For the foregoing reasons, Plaintiff's motion for summary judgment should be granted. Ultimately, Plaintiff, an Israeli corporation, contacted the authorized representative of the Guild, attempted to purchase advertising space that was offered to the general public without restriction, and was rejected exclusively due to Plaintiff's national origin and citizenship. The undisputed facts establish liability under the causes of action asserted by Plaintiff, and all issues raised by the Guild go to damages. Plaintiff is simply asking for a judgment setting forth that the Guild violated the Human Rights laws and enjoining the Guild from future discrimination. Given the Guild's contention that the advertisement rejection was simply the doing of a rogue supervisor and does not reflect Guild policy, it should have no objection to such a result, disposing of this matter.

Respectfully submitted,

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