UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Grace Colon, and her minor child,
George Colon,

Charging Party,

v.

Senator Realty, Nat Barr, Joseph Luca,
Sr., Joseph Luca, Jr., 15 Mackay Place
Realty Corp., and Amad Ghassebeh,

Respondents.

HUDALJ 02-92-0280-8
Decided: March 20, 1997

Albert Angeloro, Esquire
Anthony P. Mennella, Esquire
For the Respondents

Arlene C. Vasquez, Esquire
For the Charging Party

Before: WILLIAM C. CREGAR
Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arose as a result of a complaint filed by Grace Colon ("Complainant") on March 26, 1992, alleging discrimination based on her son's race and her sex, national origin, and familial status, in violation of the Fair Housing Act, as amended, 42 U.S.C. § 3601, *et seq.* ("the Act"). *See* Charge of Discrimination (May 29, 1996). Around February 3, 1994, Ms. Colon filed an amended complaint to include her son, George, as an aggrieved person. On May 29, 1996, following an investigation and a determination

that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued its charge against Senator Realty, Nat Barr, Joseph Luca, Sr., Joseph Luca, Jr., 15 Mackay Place, and Amad Ghassebeh ("Respondents"), alleging that they had engaged in discriminatory housing practices based on race, national origin, and familial status, in violation of 42 U.S.C. §§ 3604 (a), (b), (c), and (d); and 24 C.F.R. §§ 100.60, 100.65, 100.75, 100.80.

A hearing was held in New York, New York, on October 9, 1996. At that time, instead of calling certain witnesses at hearing, the parties agreed to include their prior deposition testimony (and accompanying exhibits) in the record. Tr. 166-67.[1] Because the parties did not waive signatures, all deponents reviewed, and two deponents, Harry Horowitz and Joseph Luca, Jr., corrected their deposition transcripts. Tr. 166-67. Prior to submission of the depositions into the record, the Charging Party objected to the corrections. Accordingly, I scheduled an additional proceeding for further examination of these witnesses. Respondents then withdrew the corrections made by the deponents; all depositions were entered into the record without any corrections; and the additional proceeding was canceled. I also granted the Charging Party's unopposed request for an extension of time to file post-hearing briefs to January 10, 1997. The Charging Party requested and was granted another extension until January 17, 1997; Respondents requested and were granted an extension until January 27, 1997. Post-hearing briefs were timely submitted by January 27, 1997. Respondents' post-hearing brief referred to exhibits not in evidence. On January 29, 1997, the Charging Party filed a Motion to strike these references. The Charging Party's Motion is granted, and I have not considered either the references or their exhibits in rendering this decision.

During the hearing, Respondents moved to dismiss the charge as concerns Complainant's son, George, on two grounds: untimeliness of the amended complaint and failure to appoint a *guardian ad litem.* Tr. 13-15. I ordered the parties to brief these issues. Tr. 19. The Charging Party addressed the issues in its brief; however, Respondents declined to do so. Accordingly, I conclude that Respondents have abandoned their contentions, and I deem these issues waived.

Statement of Facts

1. Grace Colon, a New York City teacher, is of Santo Domingan and Puerto Rican

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[1]The following abbreviations are used in this decision: "Tr." followed by a number for the hearing transcript and page; "C.P. Ex." for the Charging Party's exhibit; "Dep." preceded by a deponent's name and followed by a number for that individual's deposition transcript and page number; and "Dep. Ex." preceded by a deponent's name and followed by a number for that individual's deposition exhibit.

descent. She is bilingual in Spanish and English. She holds an advanced educational degree. Her son, George, is Black. Tr. 26-28, 64. In March of 1991, she and George who was five years old, sublet a friend's one-bedroom condominium at a state subsidized housing cooperative. Tr. 65-67. Ms. Colon's friend allowed her to sublet the apartment, provided she move out by the end of 1991. Tr. 67-69.

2. 15 Mackay Place Realty Corp. ("Mackay Corp.") owns an apartment building located at 15 Mackay Place, Brooklyn, New York. Horowitz Dep. 5, 22. Amad Ghassebeh is President and sole stockholder of Mackay Corp. Horowitz Dep. 5-7.

3. Nat Barr, a real estate broker, has owned Senator Realty ("Senator"), a real estate brokerage firm, since about 1976. Barr Dep. 4-5. In the Spring of 1991, Joseph Luca, Sr., a licensed broker, was the managing real estate agent at Senator. Barr Dep. 10, 12; Luca Dep. 5;[2] Scala Dep. 19-20. His son, Joseph Luca, Jr., a licensed real estate agent, was a part-time sales agent at Senator. Luca Dep. 5.

4. As early as 1981, Mackay Corp. retained Senator as its exclusive agent for renting the apartments at 15 Mackay Place. Horowitz Dep. 7-9; 14-15, 27, 29; Tr. 131. Pursuant to that agency, only licensed Senator salespeople showed those apartments. Horowitz Dep. 14-15, 32-33; Scala Dep. 17. Mackay Corp. pays no direct fee to Senator; rather, when a salesperson rents an apartment, the successful applicant pays a fee to Senator. Horowitz Dep. 28-29.

5. Senator requires clients interested in renting apartments to complete informational index cards. The cards require the client's name, address, and telephone number; the number of rooms sought; and the vicinity in which the client wishes to live. Scala Dep. 9-10; Tr. 29. Senator requires a rental application when an applicant applies for a specific available apartment. Scala Dep. 9.

6. Whenever Senator's office manager, Marge Grasso, learned that an apartment would become available at 15 Mackay Place, she contacted Harry Horowitz, Secretary of Mackay Corp., who would set the new rent using New York City rent stabilization guidelines. Horowitz Dep. 10-11; Grasso Dep. 5.

7. After Mr. Horowitz set the rent for an apartment, Ms. Grasso provided the listing to Mr. Luca, Sr. Horowitz Dep. 9-11; Grasso Dep. 5. A prospective tenant would then

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[2]"Luca Dep." is the deposition of Joseph Luca, Jr. Joseph Luca, Sr. died on July 21, 1994, prior to the depositions that were taken in this case. *See* Charging Party's Revised Post-Hearing Brief (Jan. 23, 1997) at 3 n.3.

complete a rental application and leave a deposit. A Senator rental agent would provide the completed application and the attached deposit to Ms. Grasso. Grasso Dep. 7-9; Barr Dep. 6; Scala Dep. 25-26. Ms. Grasso would then verify the applicant's credit and rental history to determine whether the applicant was financially qualified and had a suitable tenant history. Once the application was approved, either Mr. Horowitz, or Ms. Grasso on his behalf, would sign the lease for Mackay Corp. Horowitz Dep. 11, 17-18, 74, 81; Grasso Dep. 6, 12-13; Barr Dep. 7. Payment of the first month's rent was required prior to commencement of a tenancy. Horowitz Dep.
77-78.

8. In mid-March of 1991, Mr. Horowitz received a telephone call from Dino Tomassetti, the owner of a construction company with which Mr. Horowitz had done business since 1988. Mr. Tomassetti was calling on behalf of one of his employees, Luz Elena Verges, who had asked him for assistance in finding an apartment. Mr. Tomassetti vouched for her character and financial qualifications. At Mr. Horowitz's suggestion, Mr. Tomasetti directed Ms. Verges to Senator Realty. Verges Dep. 6-7; Horowitz Dep. 71-72; Tomasetti Dep. 6-7, 11-12, 16-19, 22.

9. Within a few days, Ms. Verges was shown studio apartment 3E at 15 Mackay Place. She wanted to rent the apartment and the Senator agent told her that she would be contacted. Verges Dep. 10-11, 13, 18, 19; Tomassetti Dep. 22-23. Later that week, the agent called to inform Ms. Verges that the apartment was hers, but that a security deposit was necessary. Verges Dep. 17-20.

10. Because Ms. Verges's first language is Spanish and all of her conversations with Senator's agents were in English, she asked Mr. Tomassetti to confirm that she could move in and to inquire about waiver of the deposit. Verges Dep. 17-21; Tomassetti Dep. 17, 23. By personally guaranteeing Ms. Verges's rent payments, Mr. Tomassetti arranged with Mr. Horowitz for waiver of the deposit. Tomassetti Dep. 7, 11-12, 13, 17, 22; Verges Dep. 21-22; Horowitz Dep. 88. Senator informed Ms. Verges that the apartment was hers in mid-March and by the end of March, she had received the keys. She moved in sometime thereafter.[3] Verges Dep. 17-18, 23-25, 33; Grasso Dep. 10-11. Prior to moving into the apartment, Ms. Verges completed an application and paid the first month's rent. Verges Dep. 13; Grasso Dep. 19; Horowitz Dep. 75.

11. On Thursday, March 28, 1991, Ms. Colon went to Senator's office in search of an

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[3]Although her husband, Alberto Verges's, name and signature appear on the lease, he never lived at 15 Mackay Place. Because of marital problems, Mr. Verges left for Puerto Rico prior to his wife's occupancy. Verges Dep. 28, 39; Verges Dep. Exs. 1-2.

apartment. She spoke with Mr. Luca, Sr., who informed her that they had nothing

available, but told her to fill out an informational index card (which she did), and they would contact her. Tr. 29, 38, 73.

12. Later that evening Ms. Colon returned to Senator's office with her friend Diana LaRosa.[4] Grace Scala, a sales agent, told Ms. Colon to fill out an information card, which she again did. Ms. Colon expressed an interest in either a one-bedroom or a studio apartment. Tr. 52. Joseph Luca, Jr. then took Ms. Colon and her friend to view two empty studio apartments at 15 Mackay Place, one on the fourth floor and the other, apartment 3E. Tr. 31-32, 55. Ms. Colon wanted to rent 3E. Tr. 56. However, Mr. Luca Jr. never told Ms. Colon that either apartment was available for rent and she left without filling out an application or leaving a security deposit, payment, or fee. Tr. 31-32, 39, 51-52, 55-56, 78; Scala Dep. 9-10.

13. On Friday, March 29, 1991, Ms. Colon returned to Senator with her son and attempted to pay a security deposit, the first month's rent for 3E, and Senator's fee. Messrs. Luca Jr. and Sr. declined to accept her check, telling her that there was a pending application. Luca Dep. 14, 17-19; Tr. 32-33, 58. Office procedures precluded them from accepting checks when Ms. Grasso was not working.[5] Luca Dep. 6-7, 14, 17-19.

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[4]According to Ms. Colon and Ms. La Rosa, they drove around the neighborhood and upon seeing a "For Rent" sign in the window, they stopped at 15 Mackay Place to inquire about vacancies. Tr. 30, 83. They claim that the building superintendent's wife referred Ms. Colon back to Senator. Tr. 30, 47-48, 83. However, Mr. Quinones, the building superintendent, testified that such signs were not allowed. Tr. 123-24. Regardless of whose testimony is to be credited, the existence of a "For Rent" sign is not determinative of whether there was in fact an available apartment. If there was a sign, there could have been a delay in removing it after an apartment was rented, or it could have been a general notice that apartments became available from time to time.

[5]Ms. Colon testified that the Lucas told her that they could not accept her money because it was Good Friday. She testified that they "implied that it was a religious thing." Tr. 62. I credit Mr. Luca Jr.'s testimony that he did not accept the check because 1) there was a pending application and 2) Ms. Grasso was not working at the time. Ms. Verges, corroborates his testimony on the first point. She applied for the apartment in mid-March. *See supra* Finding of Fact Nos. 8, 9. In addition, Ms. Grasso stated that the apartment was already spoken for by Ms. Verges and that during the Spring of 1991, she did not work on Fridays. Grasso Dep. 6-8, 11; *see also* Barr Dep. 6. Indeed, Ms. Colon acknowledged that besides the Lucas, no one else was in the office. Tr. 62. Moreover, Grace Scala, stated that if there was already a pending application and deposit on an apartment, she would discourage the second applicant from leaving a deposit. Scala Dep. 31-32.

14. Ms. Colon called Senator on Monday and Tuesday, leaving messages for either Mr. Luca. On Wednesday, Ms. Colon returned to Senator, where Mr. Luca, Sr. informed her that apartment 3E had already been rented to another woman. Tr. 35-36.

15. Ms. Colon discussed her failure to obtain apartment 3E with Ms. LaRosa, who believed that Ms. Colon had been the victim of race discrimination after the Senator agents saw her son. Tr. 103-04. Ms. Colon requested that Ms. LaRosa call Senator to inquire about vacancies at 15 Mackay Place. Tr. 80, 84, 93.[6] Ms. Colon filed a housing discrimination complaint with the New York City Commission of Human Rights ("NYCCHR"). Tr. 153. The complaint was transferred to HUD after the City failed to become "substantially equivalent," as defined in 42 U.S.C. § 3610(f). Tr. 159; C.P. Ex. 1.

16. In June of 1991, Ms. Colon rented a one-bedroom apartment in the same neighborhood as 15 Mackay Place. Tr. 41. Prior to renting the apartment, Ms. Colon paid the first month's rent and a security deposit. In addition, the owner of the apartment verified her employment. Tr. 74, 76.

Discussion

I. Applicable Law

The Charging Party alleges that Respondents violated sections 804 (a) and (d) of the Act. These sections make it illegal to: (1) "refuse to. . . rent. . . or. . . negotiate for the. . . rental" of a dwelling and (2) "represent to any person. . . that any dwelling is not available for. . . rental when such dwelling is in fact so available. . .because of race. . . familial status, or national origin." 42 U.S.C. §§ 3604 (a) and (d). The Charging Party also alleges a violation of 42 U.S.C. § 3604© which makes it unlawful to "make [a] statement. . . with respect to the. . . rental of a dwelling that indicates any preference, limitation, or discrimination based on. . . familial status."

First, the Charging Party must establish a *prima facie* case of housing discrimination. *See HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir.), *cert. denied*, 498 U.S. 983 (1990). Elements of a *prima facie* case "are not fixed;" they vary depending on the

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[6]Ms. LaRosa testified that Senator informed her that there were apartments available and that she was shown apartment 3E. I do not credit her testimony. *See infra* pp. 8-10.

circumstances of each individual case. *Pinchback*, 689 F. Supp. 541, 549 (D.Md. 1988). Under the circumstances of this case, the Charging Party must prove, *inter alia*, that there was an available apartment for rent at 15 Mackay Place at the time Ms. Colon visited Senator. By failing to establish that element, the Charging Party did not carry its initial burden and, therefore, is unable to prove that Respondents violated 42 U.S.C. §§ 3604 (a) and (d).

To prove a violation of 42 U.S.C. § 3604(c), a statement must suggest to an "ordinary listener" that a particular protected class is preferred or "dispreferred" as tenants. *Soules v. HUD*, 967 F.2d 817, 824 (2d Cir. 1992); *see also HUD v. Gwidz*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,086, 25,793 (HUDALJ Nov. 11, 1994). Because the Charging Party failed to prove by a preponderance of the evidence that any such statement was made, it also failed to prove a violation of 42 U.S.C. § 3604(c).

Finally, the Charging Party alleges a violation of 42 U.S.C. § 3604 (b) which makes it illegal to "discriminate against any person in the terms, conditions, or privileges of. . . rental." Because the Charge of Discrimination does not allege that Complainant was offered lease terms which differed from those offered others or that she resided in the premises, this section does not apply to the facts as alleged. *See generally* Robert G. Schwemm, *Housing Discrimination: Law and Litigation* § 14.1 (1996).

II. Credibility of Witnesses

The Charging Party's case depends upon the credibility of the Complainant and Ms. LaRosa who testified at the hearing, while Respondents' defense is based primarily upon seven deponents who did not testify at that hearing. I have credited these deponents rather than accept the incredible testimony of Complainant and Ms. La Rosa.

A. Grace Colon

Ms. Colon visited Senator twice on Thursday, March 28, 1991. On her first visit, she was told that nothing was available. That evening, she was shown two empty apartments, but she was never told that either was, in fact, available for rent. She never filled out a rental application or attempted to put down a deposit on either apartment that day. However, she testified that she attempted to put down a deposit on apartment 3E the next day, but that the Lucas refused to accept it because it was Good Friday. Not having filled out an application, not having had a deposit accepted, nor having had credit or employment references checked, she testified that she contracted with a mover, packed her belongings, and registered her son in a new school. *See* tr. 43, 45, 58. That testimony is patently incredible. It comes from an educated, articulate professional, not from a naif. She had no basis for concluding that she was the successful applicant for an apartment.

She had not fulfilled Senator's requirements that an application be completed, that credit and employment references be checked, and that a deposit be made. Indeed, Ms. Colon conceded that when she rented her present apartment, she did so only after filling out an application, leaving a deposit, and having her employment verified.

Ms. Colon's testimony was also contradicted in relevant parts by Ms. Scala, the sales agent. Ms. Scala specifically recalled Ms. Colon and was "positive" that she was only interested in a *one-bedroom* apartment in *one* particular apartment building, another building managed by Senator located at 315 Ovington. Indeed, the apartment that Ms. Colon was living in at the time of her visit to Senator was a one-bedroom and the apartment she eventually moved into was also a one-bedroom. Ms. Colon wanted to live in that building because it was near the school where she worked. Ovington was so desirable that tenants in studio apartments were already on a waiting list for one-bedroom apartments. Therefore, there were never any one-bedrooms available to new applicants. Accordingly, Ms. Scala offered Ms. Colon other apartments on the same block, to which Ms. Colon replied, "Absolutely not, I'm not interested, I only want to move into 315 Ovington, that's the building I want to live in." Scala Dep. 14. During cross examination, however, Ms. Colon specifically denied ever expressing an interest in 315 Ovington. In view of Ms. Colon's purported specific recollection of other events which occurred at this time, and her evasive and nonresponsive testimony during cross examination, I do not credit her assertion that she merely forgot about her interest in Ovington.[7] *See* tr. 68-69, 72, 74-76; Scala Dep. 7-8, 11-14, 17, 23-24; Luca Dep. 13, 15.

Ms. Colon testified that Mr. Luca Jr. never actually told her that 3E was available. Her testimony contradicts her statements in the complaint and amended complaint of discrimination. *Compare* tr. 31-32, 39, 51-52, 55-56 *with* C.P. Ex. 1. Finally, although Ms. Colon testified that she preferred 3E over the fourth floor apartment because it was larger, the record demonstrates otherwise. Mr. Luca testified that all the studio apartments at Mackay Place were "identical." Tr. 32; Luca Dep. 18. Moreover the Charging Party's own exhibit belies Ms. Colon's assertions. Charging Party's Exhibit 9 lists the dimensions of all the studio apartments as "20 x 19."

B. Diana LaRosa

Ms. LaRosa testified that after Ms. Colon was denied the apartment, she asked Ms. La Rosa to act as a "tester" to ascertain whether, as a white woman, she would be offered a studio apartment. Ms. LaRosa stated that when she called Senator, she was informed that there were available studios at 15 Mackay Place; and that she met a Senator

[7]Indeed, she knew that Senator managed that building. Tr. 82.

agent, Violet or Vicki Carpecci, and the superintendent's wife, Ms. Quinones, outside of the building. Tr. 84. At the hearing neither side asked Ms. La Rosa to provide a physical description of Ms. Carpecci. However, from deposition questions posed by attorneys for the Charging Party, I infer that she described Ms. Carpecci as a "well-endowed," heavy smoker, with long bleached blond hair and long nails, in her late 40s or mid-50s, and of Lebanese, Syrian, or Armenian descent. *See, e.g.*, Horowitz Dep. 89; Barr Dep. 10; Grasso Dep. 21. Ms. LaRosa testified that she was shown only one apartment, 3E, by Ms. Carpecci and Ms. Quinones. Tr. 85, 87. She claimed that after spending less than an hour in the apartment, Ms. Carpecci offered Ms. LaRosa the apartment. Tr. 84-85. Ms. LaRosa also testified that while they were in the elevator, she asked Ms. Carpecci if there were a lot of Hispanic residents, and Ms. Carpecci's response was "not too many, thank God." Tr. 87-88, 94. She testified that after they returned to Senator's office, she was again offered the apartment, and Ms. Carpecci asked her if she had any money or identification with her. Ms. LaRosa testified that she only had car fare and her school identification card, and Ms. Carpecci responded, "All right, when you come in tomorrow with the deposit, we'll take care of everything else." Tr. 85. Ms. LaRosa also stated that Ms. Carpecci said that she could move in within a week. Tr. 89.

For the following reasons, I also find Ms. LaRosa's testimony incredible. Ms. LaRosa, like Ms. Colon claimed that she was offered an apartment by a Senator agent despite the fact that she did not fill out an application, leave a deposit or fee, produce any identification other than a school identification card, and had just admitted that she had no means with her to make a deposit. As discussed *supra*, the record establishes that Senator does not do business as described by Ms. LaRosa. I also conclude that there is in fact no "Carpecci." No other witness had any knowledge of a Ms. Carpecci.[8] Nor was anyone able to identify anyone by the picturesque and

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[8]Although the Charging Party argues that Mr. Luca, Jr. corroborates the existence of a Ms. Carpecci, I do not agree. The Charging Party refers to the following transcription in Mr. Luca's deposition:

Q: Between March and April of 1991, was there a worker named Vicki or Violet Carpecci at Senator Realty?
A: At that time - - I know that there was at one time; I don't know if she was working there then. It's possible, it's possible.
Q: Who would know if there was such a person working at Senator Realty?
A: My father, and Violet, I guess, or you know, any of the other brokers; Nat [Barr], you know.

Luca Dep. 12-13. In his sworn answer to an interrogatory, Mr. Luca stated that he never knew any Senator agent by the name of Ms. Carpecci. Luca Dep. Ex. 7. In view of his interrogatory response and the flat denials by those who would have known whether a Ms. Carpecci worked for Senator, I conclude that Mr. Luca was either confused or that he misspoke when he stated "I know there was at one time." *See* Grasso Dep. 20-22; Scala Dep. 18-19. In the absence of cross-examination, his deposition testimony, at best, remains ambiguous.

memorable description provided by Ms. LaRosa. Moreover, although the Charge alleges, upon information and belief, that Ms. Carpecci was a *licensed* salesperson for Senator, there was no documentary evidence that a license had ever been issued by the State of New York to a Violet or Vicki Carpecci, that Senator had ever paid any moneys to such a person, or that it had any other records listing such a person as working under any of its licensed brokers. There were no unlicensed agents working for Senator. Scala Dep. 17. Therefore, the Secretary failed to prove the existence of a Ms. Carpecci.

C. Respondents' Witnesses

I find Respondents' witnesses to be credible. Ms. Grasso and Ms. Scala had no apparent motive for prevarication. Neither was a named or interested party in this action. Their depositions were taken in September of 1996, well after they had left Senator's employ in 1993 or 1994. Grasso Dep. 20; Horowitz Dep. 81; Scala Dep. 5-6.

I find Ms. Verges, the successful tenant, to be credible. Although she was unable to remember some details of events which transpired during one of her multiple residencies over five years ago,[9] her deposition is consistent, straightforward, and does not strain credulity. She recalled her inquiries of Mr. Tomassetti and how he arranged waiver of the deposit. She remembered that her initial inquiry was in mid-March, even though she was unable to specify an exact date; and while she was unable to remember when she moved in, she knew by mid-March that the apartment was hers as of April 1st.[10]

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[9]Ms. Verges moved into 3E in April 1991; her deposition was September 1996. At the time of her deposition, she had moved at least twice since living at Mackay Place. Verges Dep. 28.

[10]Although Ms. Verges no longer resides at Mackay Place, the Secretary argues that her testimony is "tainted by her obvious and stated inclination to assist" her current employer, Mr. Tomassetti. Secretary's Brief at 22. While Ms. Verges was obviously grateful for his assistance in finding her an apartment, I do not conclude from this that she perjured herself. Indeed, Ms. Verges cogently explained that she had no reason to fabricate. Her deposition is as follows:

Q: You said earlier that. . . Dino Tomassetti helped you find an apartment, do you feel thankful to him?
A: Yes.

* * *

Q: If given the opportunity, would you assist Mr. . . Tomassetti?
A: Yes. Can I ask a question?
Q: Sure.
A: Like, for instance, in what sense is that question posed. . .? [B]ecause this is the way it is, I'm thankful to him, he is my boss. At that time when I needed the apartment he helped me look for it, and I'm grateful to him, he is my boss, but in certain extreme cases where I would be required to help him I would not be

Although Mr. Luca Jr. is a named party with an obvious interest in the outcome, I find his testimony also to be credible. As one would expect, he was not totally conversant with events involving Ms. Colon, one of many applicants with whom he dealt with over five years ago. Nonetheless, his testimony was consistent, reasonable, and corroborated by others, particularly by Ms. Grasso and Ms. Scala.

III. The Charging Party failed to prove that Respondents violated the Act.

A. No *Prima Facie* Case under 42 U.S.C. § 3604(a) and (d)

The Charging Party failed to prove by a preponderance of the evidence that studio 3E, or any other apartment was available on March 28, 1991, the day of Ms. Colon's initial visit. Because HUD failed to prove the second element of the *prima facie* case, I need not discuss the remaining elements.

The Charging Party attempted to prove the availability of apartment 3E by: 1) Ms. Colon's and Ms. LaRosa's testimony, 2) Con Edison records, and 3) the existence of two different leases signed by the Vergeses and Ms. Grasso. I have already rejected the Charging Party's first theory because neither Complainant nor her friend were credible. In contrast, I found Ms. Verges credible. She testified that she initially inquired about an apartment in mid-March 1991. Within a few days she inspected 3E, and the

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capable. . . . I would like you to explain it to me.

Q: [W]ould you assist one of Mr. . . Tomassetti's friends such as . . . Harry Horowitz?

* * *

A: Who is that person who you are speaking of, Harry?
Q: He is one of the managers of 15 Mackay Place.
A: Is that the question that you are posing, if I would help or assist?
Q: Yes.
A: It's strange because what would these people need from me.
Q: Is there a financial incentive for you to be here today?
A: No, I'm really wasting my time because I should be at work now.

* * *

Q: Would you assist [the owners of 15 Mackay Place because] they allowed you to break a two-year lease?

* * *

A: . . . I wouldn't do it, why would I, I went in, I paid the months I was there.

Verges Dep. 36-39.

Finally, Ms. Verges's testimony was corroborated in whole or in part by Mr. Tomassetti, Mr. Horowitz, Mr. Barr and Ms. Grasso. *See* Tomassetti Dep. 7-18; Horowitz Dep 70-76; Barr Dep. 15: Grasso Dep. 10-12.

same week that she inspected the apartment, she was informed that 3E was hers to rent. She also testified that she was given the keys by the end of March. Although she was unable to recall the exact date of occupancy, she stated that she was informed in mid-March that the apartment was hers and that she could move in as early as April 1st. Verges Dep. 7-18, 20-21, 23-24, 33.

Furthermore, a portion of Ms. Colon's own testimony supports the fact that there were no available apartments. According to Ms. Colon, when she first visited Senator by herself during the day on Thursday, March 28, 1991, Mr. Luca, Sr. informed her that there were no available apartments. In addition, when she returned later that evening with Ms. LaRosa, although they were shown vacant apartments by Mr. Luca Jr., by Ms. Colon's own admission, he never stated that the apartments were "available." *See* tr. 31-32, 39, 51-52, 55-56.

The Charging Party's reliance on the two latter theories is equally unpersuasive. The Secretary called a senior customer service representative from Con Edison, who testified that on April 19, 1991, the Vergeses requested electricity for 3E effective April 20, 1991. The prior tenant closed her account on April 11, 1991. Con Edison responded to the Vergeses' request by providing electricity to the apartment on April 24, 1991. Tr. 106, 109, 111; C.P. Ex. 2. In other words, there was no electricity in apartment 3E from April 11th through the 24th. Tr. 111-12. However, it is irrelevant when Ms. Verges took up residency. The apartment was hers as of mid-March; she was given the keys by the end of March; and her application was pending prior to Ms. Colon's interest in the apartment. Accordingly, 3E was not available. Moreover, by the Secretary's own reasoning, if residency is demonstrated by Con Edison service, there would have been a tenant in 3E until April 11th, when the prior tenant closed her Con Edison account. However, by Ms. Colon's own testimony, the apartment was vacant as early as the very end of March.

In response to a document request from NYCCHR, Respondents submitted a lease signed by both Luz Elena and Alberto Verges. Verges Dep. 14, 28, 31. The lease was a standard form with dates, names, and dollar amounts typed in by Senator. Verges Dep. Ex. 2. This lease was for a two year term beginning April 1, 1991, and ending March 31, 1993; the date of the landlord's and tenants' agreement was April 1, 1991; and the security deposit was "0." Horowitz Dep. Exs. 5-6; Verges Dep. Ex. 2. In response to the Secretary's document request, Respondents provided another lease signed by the Vergeses, similar in all respects to the document sent to NYCCHR, with the following exceptions: the start of the lease term had been changed from April 15th to April 1st by a handwritten "1" replacing a typed "15"; the lease term ended April 14, 1993; the date of the landlord's and tenants' agreement had been changed from April 9th to April 1st by a handwritten "1" replacing a typed "9"; and next to the "0" security deposit was a

handwritten "?". Verges Dep. Ex. 1. Ms. Verges identified her signature on both leases, but remembered signing only one. Verges Dep. 33. The only deponent able to provide an explanation for the two leases was Ms. Grasso who identified her signature (signing for Mr. Horowitz) on both leases. She stated, "[o]ther than it [was correcting] a clerical error by one of the [typists], no, I cannot explain it." "Office procedure" required that the leases start as of the first of the month because immediately thereafter the rents were deposited into the bank. Grasso Dep. 15-16; Grasso Dep. Ex. 1-2.[11]

The question of why there were two leases was not explored at the hearing. Perhaps one of the leases was "doctored" in an attempt to prove that the start date for the Vergeses' lease was April 1st when it was not. Perhaps, one of the leases contained a "clerical error" which was subsequently corrected, or perhaps the question mark was a notation made to reflect that the Vergeses might not have to pay a security deposit because Mr. Tomasetti had interceded for them. While one can advance either a sinister or benign explanation for the existence of these two leases, based on the insufficiency of this record, I am unable to conclude which it is. Accordingly, I attribute no significance to these two leases. In any event, after having been shown both leases, Ms. Verges and Ms. Grasso, both of whom I credit, maintained that the apartment was spoken for by Ms. Verges prior to March 28th when Ms. Colon visited Senator. Verges Dep. 33; Grasso Dep. 15.

B. No violation of 42 U.S.C. 3604©

The Secretary alleges that Respondents violated 42 U.S.C. § 3604© by making a statement concerning the rental of apartment 3E indicating a preference based on Ms. Colon's family status. Specifically, Ms. Colon testified that while viewing 3E, she told Mr. Luca Jr. that she had a son, to which he replied that "they usually do not rent studios to people who have children because of space limitation." Tr. 32, 55. Ms. Colon testified that they discussed resolving the space limitations by using "lock beds." Tr. 32. Mr. Luca denied making the statement. Luca Dep. Ex. 2, 3, and 7; Secretary's Brief at 48. Because Ms. Colon is not credible, the Charging Party failed to prove that Mr. Luca Jr. made the statement. Thus, it failed to prove that Respondents violated 42 U.S.C. 3604(c).

[11]The Secretary challenges this "office procedure" by the existence of one other lease with an agreement date between the landlord and tenant of March 25, 1991. However, although the agreement date is March 25, the lease date begins April 1, 1991. Horowitz Dep. Ex. 6, attachment (Eric Berger lease). Mr. Horowitz corroborated Ms. Grasso's testimony that the leases began the first of the month, which is the date reflected as rental receipts in the computer. Horowitz Dep. 85-87.

Conclusion and Order

The Charging Party has failed to prove by a preponderance of the evidence that Respondents engaged in discriminatory housing practices in violation of the Fair Housing Act. Accordingly, it is

ORDERED, that the charge of discrimination is *dismissed.*

This **ORDER** is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. § 104.910, and will become final upon expiration of 30 days or the affirmance, in whole or in part, by the Secretary of HUD within that time.

_____/s/_____
WILLIAM C. CREGAR
Administrative Law Judge