

COURT OF APPEALS,  
THE STATE OF NEW YORK

-----X

In the Matter of ROY DEN HOLLANDER

Appellant,

-against-

THE CITY OF NEW YORK COMMISSION  
ON HUMAN RIGHTS,

Respondent.

-----X

**AFFIDAVIT IN  
OPPOSITION TO CITY'S  
MOTION TO DISMISS  
THE APPEAL**

New York County Sup. Ct.  
Index No. 100299/13

STATE OF NEW YORK        )  
                                  ) ss:  
COUNTY OF NEW YORK    )

I, Roy Den Hollander, the Appellant and an attorney admitted to practice in the State of New York, being duly sworn, depose and say:

1. Respondent The City of New York Commission on Human Rights ["City HR"] moves this Court to dismiss its Order granting Appellant leave to appeal, Mo. No. 2014-646.

2. The basis of City HR's argument is a statement made by Corporation Counsel Attorney Ingrid R. Gustafson.

3. Attorney Gustafson affirmed as true under the penalties of perjury that "In its order and judgment, the Supreme Court granted the Commission's cross-motion

to dismiss the [Appellant's] petition on two independent grounds." Gustafson Affirm. ¶ 3.

4. That statement is inaccurate, which is probably why attorney Gustafson did not include the Supreme Court's decision in the exhibits to her motion affirmation.

5. The Supreme Court made its decision on only one ground—that City HR did not have jurisdiction to entertain Appellant's age discrimination complaint because of the election of remedies doctrine:

Controlling case law construes the doctrine of election of remedies to preclude subsequent complaints based on the same alleged incident, same underlying course of conduct, or same operative events. *See Emil v. Dewey*, 49 N.Y.2d 968 (1980); *Benjamin v. New York City Dept. of Health*, 57 A.D.3d 403 (1st Dept. 2008); *Higgins v. NYP Holdings, Inc.*, 836 F.Supp. 2d 182 (S.D.N.Y. 2011). "The facts need not be perfectly identical, and merely adding some additional facts and/or re-labeling the claim will not prevent the application of the doctrine of election of remedies." *Benjamin v. New York City Dept. of Health*, 17 Misc. 3d 1122(A)(NY Sup Ct 2007), citing *Bhagalia v. State of New York*, 228 A.D.2d 882 (3rd Dept. 1996). Petitioner's age discrimination claim "constitutes the same cause of action as the formerly litigated [gender] claim," as it arose out of the same transaction or occurrence from January 9, 2010. *Troy v. Goord*, 300 A.D.2d 1086, 1087 (4th Dept. 2002); *see also Smith v. Russell Sage Coll.*, 54 N.Y.2d 185, 192-194 (1981); *Tsabbar v. Delena*, 300 A.D.2d 196, 197 (1<sup>st</sup> Dept. 2002). Accordingly, petitioner's application for an order reversing the Commission's January 11, 2013 Final Determination is denied pursuant to Admin. Code §§8-502(a); 8-109(f)(iii); and Exec. Law §297(9).

(Exhibit A, Order and Judgment, p. 3, Sup. Ct., Hunter, J., Aug. 6, 2013).

6. In the very next paragraph, Justice Hunter says:

No further review is warranted in this matter, however were this court to review the January 11, 2013 Final Determination, this court would find that the above mentioned determination was rationally based. Contrary to petitioner's contention, Amnesia's decision for requiring \$350 bottle service was based upon a nondiscriminatory, legitimate reason of "limited space and the goal of furthering the image of [Amnesia's] establishment," as determined by the Division. This finding, and the lack of any credible basis in the record before the Commission to find age discrimination, provides a rational basis for this court to affirm the Commission's January 11, 20 13 Final Determination.

(Exhibit A, Order and Judgment, p. 3, Sup. Ct., Hunter, J., Aug. 6, 2013 (emphasis added)).

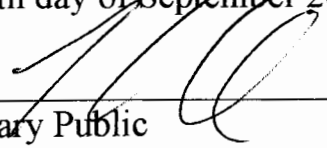
7. A reasonable reading of Justice Hunter's language is that the above quoted paragraph in number 6 is *dicta*. Since *dicta*, are "statements made by a court in an opinion which are unnecessary to the holding . . .," *Chiasson v. N.Y.C. Dep't of Consumer Affairs*, 138 Misc. 2d 394, 396 (N.Y. Sup. Ct. 1988), Justice Hunter made only one holding—that the election of remedies doctrine prevented City HR from having jurisdiction.

8. If City HR's motion is granted, then the result will be that when persons file complaints with the N.Y. State Division of Human Rights believing they were discriminated against because of their race, creed, color, national origin, sex, disability, marital status, sexual orientation, or military status, but the Division finds that the discrimination was based on a type of discrimination over which it does not have jurisdiction—age, partnership status, alienage, or citizenship, but City HR does, those persons will be out of luck because the lower Courts have held

that the election of remedies doctrine prevents them from filing complaints with City HR.

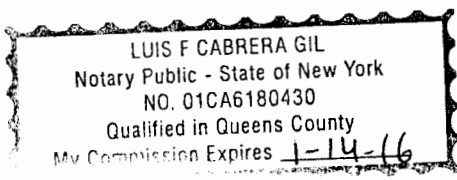
**WHEREFORE**, for the above reasons, respondent's motion should be denied.

Sworn to before me on the  
27th day of September 2014

  
\_\_\_\_\_  
Notary Public



Roy Den Hollander  
Attorney-Appellant  
545 East 14 St., 10D  
New York, N.Y. 10009  
(917) 687-0652  
rdenhollander97@gsb.columbia.edu



## **Exhibit A**

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

----- x  
In the Matter of the Application of

ROY DEN HOLLANDER,

Petitioner,

-against-

THE CITY OF NEW YORK COMMISSION ON  
HUMAN RIGHTS,

Respondent.  
----- x

**NOTICE OF ENTRY**

Index No.: 100299 / 2013

(Part 33; Hunter, J.)

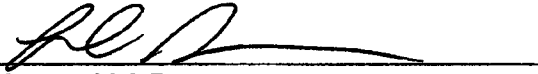
CITY OF NEW YORK DEPT.  
CLERK  
AUG 15 PM 1:30

**PLEASE TAKE NOTICE** that the attached is a true copy of an Order in the above-captioned action dated July 30, 2013 and duly entered in the office of the Clerk, New York State Supreme Court, County of New York, on August 6, 2013.

Dated: New York, New York  
August 6, 2013

MICHAEL A. CARDOZO  
Corporation Counsel of the  
City of New York  
*Attorneys for Respondent New York City  
Commission on Human Rights*  
100 Church Street, Room 20-101  
New York, New York 10007  
(212) 356-2294

By: \_\_\_\_\_

  
Leonard M. Braman  
Assistant Corporation Counsel

To: Roy Den Hollander, Esq.  
*Petitioner Pro Se*  
545 East 14th Street, 10D  
New York, New York 10009

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33

-----X  
In the Matter of the Application of Roy Den Hollander,

Index No.: 100299/13

Petitioner,

-against-

The City of New York Commission on Human Rights

Respondent.  
-----X

Order and Judgment  
**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

HON. ALEXANDER W. HUNTER, JR.

Two separate applications, an Article 78 petition and a motion to dismiss, were filed in this matter under motion sequences #1 and #2. Both applications will be decided herein.

Petitioner's application for an order pursuant to CPLR Article 78, reversing the Final Determination and Order, dated January 11, 2013, of the City of New York Commission on Human Rights, and finding that petitioner was unlawfully discriminated against because of his age by Amnesia J.V. LLC, and David L.N.U., is denied and the proceeding is dismissed without costs and disbursements to either party. Respondent's motion to dismiss the petition is granted.

On or about January 10, 2010, petitioner filed a verified complaint with the New York State Division of Human Rights (the "Division") charging Amnesia J.V. LLC ("Amnesia"), a night club, with an unlawful discriminatory practice relating to public accommodations because of sex in violation of Article 15, Executive Law (the "Human Rights Law"). Petitioner alleged that on January 9, 2010, petitioner and a male friend stood on a line in front of Amnesia but was refused admittance by doorman David Last Name Unknown ("L.N.U."), unless petitioner and his friend agreed to purchase a \$350 bottle of alcohol. Petitioner and his friend declined, stepped out of the line, and subsequently observed women entering the night club without having to purchase a \$350 bottle of alcohol.

On September 16, 2010, the Division issued a Determination and Order After Investigation, dismissing petitioner's complaint and ordering the file closed for lack of probable cause. The Division investigated petitioner's complaint and noted *in dicta* that petitioner "is significantly older than [Amnesia's] patrons, and age discrimination is beyond the jurisdiction of the Division with regards to public accommodation."

On October 22, 2010, petitioner filed a verified complaint with respondent the City of New York Commission on Human Rights (the "Commission") charging that Amnesia discriminated against him based upon his age. On July 27, 2012, respondent issued a Determination and Order After Investigation, dismissing petitioner's complaint concluding that (1) respondent was statutorily barred from considering petitioner's discrimination claim because he had previously filed a discrimination complaint with the Division based on the same incident

and (2) probable cause did not exist to infer that Amnesia had engaged in age discrimination (the "July 27, 2012 Administrative Closure").

On August 17, 2012, petitioner appealed the July 27, 2012 Administrative Closure whereby petitioner raised various legal and factual objections. On January 11, 2013, respondent issued a Final Determination and Order After Review upholding its July 27, 2012 Administrative Closure (the "January 11, 2013 Final Determination").

On February 8, 2013, petitioner commenced the instant special proceeding, seeking an order reversing the January 11, 2013 Final Determination of respondent, and finding that petitioner was unlawfully discriminated against because of his age by Amnesia and David L.N.U. Petitioner avers that (1) respondent's finding of no probable cause was not based on the evidence as a whole or substantial evidence; (2) respondent's July 27, 2013 Administrative Closure relied on misrepresentations in finding no probable cause; and (3) respondent conducted an abbreviated and one-sided investigation. On March 1, 2013, petitioner filed a verified supplement to his petition to add a Fourteenth Amendment procedural due process claim against respondent.

In opposition, respondent moves to dismiss, as petitioner's claims are barred under New York City Administrative Code ("Admin. Code") §8-109(f)(iii) and Executive Law ("Exec. Law") §297(9). Respondent avers that petitioner is prohibited from bringing successive discrimination complaints based upon the same incident.

A court may not disturb an administrative decision unless the agency's action was arbitrary and capricious, was in violation of lawful procedures, or was made in excess of its jurisdiction. See CPLR 7803(3); Pell v. Board of Education of Union Free School District No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222 (1974). The Commission's no probable cause determinations will not be overturned unless they are arbitrary or capricious, or lack a rational basis. See Matter of Soo Ching Wu v. New York City Commn. on Human Rights, 84 A.D.3d 823 (2nd Dept. 2011).

New York City's Human Rights Law (the "City Human Rights Law") contains an election of remedies provision that requires a petitioner to choose between an administrative remedy and a judicial one. "[A]ny person claiming to be aggrieved by an unlawful discriminatory practice... shall have a cause of action in any court of competent jurisdiction... unless such person has filed a complaint with the city commission on human rights or with the state division of human rights..." Admin. Code §8-502(a). Moreover, the City Human Rights Law does not have jurisdiction to entertain a complaint if there was a previous dismissal by either a court of competent jurisdiction or the Division "with respect to the same grievance which is the subject of the complaint." Admin. Code. §8-109(f).

Similarly, the Human Rights Law provides for an election of remedies. See Exec. Law §297(9). Exceptions to the election of remedies bar applies when the complaint was dismissed on the grounds of (1) administrative convenience; (2) untimeliness; or (3) annulment of the election of remedies. Id.



Controlling case law construes the doctrine of election of remedies to preclude subsequent complaints based on the same alleged incident, same underlying course of conduct, or same operative events. See Emil v. Dewey, 49 N.Y.2d 968 (1980); Benjamin v. New York City Dept. of Health, 57 A.D.3d 403 (1st Dept. 2008); Higgins v. NYP Holdings, Inc., 836 F. Supp. 2d 182 (S.D.N.Y. 2011). “The facts need not be perfectly identical, and merely adding some additional facts and/or re-labeling the claim will not prevent the application of the doctrine of election of remedies.” Benjamin v. New York City Dept. of Health, 17 Misc. 3d 1122(A) (NY Sup Ct 2007), *citing* Bhagalia v. State of New York, 228 A.D.2d 882 (3rd Dept. 1996). Petitioner’s age discrimination claim “constitutes the same cause of action as the formerly litigated [gender] claim,” as it arose out of the same transaction or occurrence from January 9, 2010. Troy v. Goord, 300 A.D.2d 1086, 1087 (4th Dept. 2002); *see also* Smith v. Russell Sage Coll., 54 N.Y.2d 185, 192-194 (1981); Tsabbar v. Delena, 300 A.D.2d 196, 197 (1st Dept. 2002). Accordingly, petitioner’s application for an order reversing the Commission’s January 11, 2013 Final Determination is denied pursuant to Admin. Code §§8-502(a); 8-109(f)(iii); and Exec. Law §297(9).

No further review is warranted in this matter, however were this court to review the January 11, 2013 Final Determination, this court would find that the above mentioned determination was rationally based. Contrary to petitioner’s contention, Amnesia’s decision for requiring \$350 bottle service was based upon a nondiscriminatory, legitimate reason of “limited space and the goal of furthering the image of [Amnesia’s] establishment,” as determined by the Division. This finding, and the lack of any credible basis in the record before the Commission to find age discrimination, provides a rational basis for this court to affirm the Commission’s January 11, 2013 Final Determination.

There is no merit to petitioner’s contention that the Commission failed to conduct an adequate inquiry into his complaint, as the Commission has “broad discretion in determining the method to be employed in investigating a claim.” Wu v. N.Y.C. Commn. on Human Rights, 84 A.D.3d 823, 824 (2nd Dept. 2011), *quoting* Matter of Levin v. N.Y.C. Commn. on Human Rights, 12 A.D.3d 328, 329 (1st Dept. 2004); *see also* Stern v. N.Y.C. Commn. on Human Rights, 38 A.D.3d 302, 302 (1st Dept. 2007). It cannot be said that the Commission conducted a one-sided or abbreviated investigation, as it: conducted an intake interview prior to the filing of his complaint; served petitioner’s complaint on his behalf; demanded and obtained a Verified Answer from Amnesia; gave petitioner an opportunity to submit a Rebuttal; obtained and reviewed the Division’s entire file on petitioner’s previous discrimination complaint; attempted to locate David L.N.U.; and attempted to obtain Amnesia’s surveillance video. Consequently, respondent’s investigation was not so one-sided to render it arbitrary or capricious.

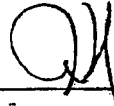
Petitioner’s Fourteenth Amendment procedural due process claim is dismissed, as petitioner was afforded constitutional minimum due process of notice and the opportunity to be heard. See Mathews v. Eldridge, 424 U.S. 319 (1976). Furthermore, petitioner had an adequate post-deprivation opportunity to be heard in this Article 78 proceeding. See Velella v. N.Y.C. Local Conditional Release Commn., 13 A.D.3d 201, 202 (1st Dept. 2004).

Accordingly, it is hereby,

ADJUDGED that petitioner's application pursuant to CPLR Article 78, reversing the Final Determination and Order, dated January 11, 2013, of the City of New York Commission on Human Rights, and finding that petitioner was unlawfully discriminated against because of his age by Amnesia J.V. LLC, and David L.N.U., is denied and the proceeding is dismissed without costs and disbursements to either party. Respondent's motion to dismiss the petition is granted.

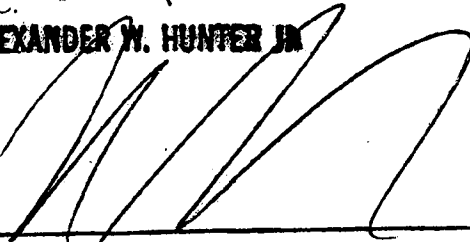
Dated: July 30, 2013

ENTER:



J.S.C.

ALEXANDER W. HUNTER JR



CLERK

**FILED**

AUG -6 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Index No. 100299/2013

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

In the Matter of the Application of

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- against -

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Respondent.

**JUDGMENT**

**MICHAEL A. CARDOZO**  
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*Attorney for Respondent The City of New York*  
*Commission on Human Rights*  
*100 Church Street, Room 20-101*  
*New York, N.Y. 10007*

*Of Counsel: Leonard M. Braman*  
*Tel: (212) 356-2294*  
*Law Manager No. 2013-005235*

**FILED**

AUG - 6 2013  
11:20 A M  
AT  
N.Y., CO. CLK'S OFFICE

**COURT OF APPEALS,  
STATE OF NEW YORK**

N.Y. Sup. Ct. Index No.  
100299/13

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THE CITY OF N.Y.  
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-----X  
**Opposition to Respondent's  
Motion to Dismiss the Court's  
Order of Leave to Appeal**

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