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Fair Housing Laws and Brokers' Defamation Suits: The New York Experience

The New York Law Against Discrimination,¹ originally enacted in 1945 to eliminate discrimination in employment because of race, creed, color, or national origin,² has been steadily broadened to encompass discrimination in such areas as public accommodations and private housing. The law was amended in 1961³ and 1963⁴ to enable the State Commission for Human Rights to prevent discrimination by either the owner or the real estate broker in the selling, renting, or leasing of any housing accommodation or commercial space.⁵ Despite the apparently broad protection established by the sweeping language of the statute,⁶ real estate brokers have discovered a novel response that could render these fair housing provisions impotent in their practical application.

The typical pattern of this response begins when a member of a minority group files a written complaint with the Commission alleging that a real estate broker's unlawful discrimination has hampered the complainant's attempt to purchase or rent property.⁷ The complainant is often supported in his efforts by a fair housing group seeking to implement integration in the area. The accused broker retaliates by instituting a defamation suit against the complainant and fair housing group, seeking damages as high as one million dollars and alleging that the complaint has injured his professional status and reputation and has greatly impaired the value of his business.⁸ The complainant's normal reaction is to file a second

1. N.Y. EXECUTIVE LAW §§ 290-301.

2. N.Y. Sess. Laws 1945, ch. 118.

3. N.Y. Sess. Laws 1961, ch. 414.

4. N.Y. Sess. Laws 1963, ch. 481.

5. There are a few minor exceptions from the coverage of the provisions. N.Y. EXECUTIVE LAW §§ 292, 296. Transactions involving land are now within the scope of the prohibition. N.Y. EXECUTIVE LAW § 296(5).

6. N.Y. EXECUTIVE LAW § 296(5)(a): "It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof: (1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color or national origin of such person or persons. (2) To discriminate against any person because of his race, creed, color or national origin in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith. . . ."

7. For the procedure of the Commission, see N.Y. EXECUTIVE LAW § 297.

8. At least three defamation suits have been instituted in this setting. In *Sweeting v. Cristy Realty Co.*, the complaint was filed on December 24, 1963, Case No. CH-10479-64, with the defamation suit being brought in the Supreme Court of Nassau County under Index No. 2940-1964. Letter From Murray A. Miller, Attorney for Defendants, to *Michigan Law Review*, Oct. 22, 1965; Letter From Leonard Brunner, Attorney for State Commission for Human Rights, to *Michigan Law Review*, Sept. 1, 1965. In *Santos v. Desgray*, the complaint was filed on March 23, 1965, Case No. CH-11560-65, and the defamation suit was instituted in the Supreme Court of Westches-

complaint with the Commission, charging the broker with a violation of that portion of the statute which states that it shall be an unlawful discriminatory practice to "retaliate or discriminate" against any person who has filed a complaint.⁹ The Commission has dismissed all such second complaints for lack of jurisdiction, construing the statute as merely prohibiting retaliation by the usual means of unlawful discrimination in housing and employment but not as forbidding any other means of retaliatory action, such as a civil suit.¹⁰ In effect this interpretation merely adds the desire to retaliate to those other motivations declared to be an illegal basis for performing or failing to perform certain acts in employment and housing transactions. However, the disjunctive language of the statute would seem to indicate that "retaliate" was intended to mean something other than "discriminate," and that both are unlawful discriminatory practices. Thus, the Commission's interpretation appears to impose a restriction that is not apparent on the face of the statute.

The Commission advances two principal arguments supporting its construction of the statute.¹¹ First, it argues that a defamation suit sounding in libel is properly determinable by a court of law rather than an administrative tribunal. Since the Commission is not bound by the strict rules of evidence prevailing in a court of law or equity,¹² cannot grant a jury trial, and lacks the power to award the broker damages were he to win, it lacks the necessary procedures to provide a trial for the defamation action. However, if the unjustified filing of a defamation suit were considered to be within the scope of the retaliation provision, the Commission could observe the same statutory procedure in handling the retaliation complaint that it follows with other complaints and could even award compensatory damages to the complainant injured by the defamation suit.¹³ Therefore, the Commission's argument leaves completely un-

ter County. Letter From Leonard Brunner, Attorney for State Commission for Human Rights, to *Michigan Law Review*, Oct. 18, 1965. In *Jackson v. Mentone Realty Co.*, the complaint was filed with the New York City Commission on Human Rights after an attempt to purchase a house in Queens. Letter From Jacob Wittner, Chief of Investigations Division, City of New York Commission on Human Rights, to *Michigan Law Review*, Oct. 25, 1965.

9. "It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he has opposed any practices forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article." N.Y. EXECUTIVE LAW § 296(7).

10. Commission order dismissing retaliation complaint in *Sweeting v. Cristy Realty Co.*, CH-10479-64 (N.Y. Commission on Human Rights, 1964), as set forth in Letter From Leonard Brunner, Attorney for the State Commission for Human Rights, to the *Michigan Law Review*, Sept. 1, 1965.

11. See generally *ibid.* For a third argument advanced by the Commission, see note 16 *infra*.

12. N.Y. EXECUTIVE LAW § 297(2)(b).

13. N.Y. EXECUTIVE LAW § 297(2)(c).

answered the question whether it can find the institution of such a suit to be retaliatory, and thus an unlawful discriminatory practice which it is empowered by statute to prevent.

As an additional reason for its restrictive interpretation of the statute, the Commission states that even if it did have jurisdiction and did find that the broker was retaliating within the meaning of the Law Against Discrimination, it would not have the power to enjoin the broker from continuing to prosecute the civil action. This argument, however, fails to recognize that if a defamation suit were treated as an unlawful discriminatory practice under the retaliation provision, the Commission would then have the authority to halt the discriminatory practice by means of a cease-and-desist order, which would be subject to court enforcement if necessary.¹⁴ Furthermore, it would seem that the complainant could make a motion before the court hearing the defamation suit requesting that court to stay its own proceeding until the Commission had decided whether the defamation suit was properly motivated.¹⁵ Thus, the Commission's arguments leave unanswered the primary question whether the retaliation provision empowers the Commission to prevent brokers from intimidating complainants by means of unjustified civil suits.¹⁶

Despite the apparent weaknesses in its position, the Commission might find some support in the legislative history of the legislative provision. It appears that retaliation by means of a civil suit was not considered in the original enactment of the Law Against Discrimination, which was limited to the area of employment and only prohibited an employer or labor organization from discharging, expelling or otherwise discriminating against an employee for having filed a complaint.¹⁷ Thus, it might be argued that the enactment of the present retaliation provision¹⁸ in 1963 was intended only to extend this same limited protection to housing and other areas in which discrimination is now prohibited by state law.¹⁹ Under this

14. N.Y. EXECUTIVE LAW §§ 297-98.

15. See note 47 *infra* and accompanying text.

16. The Commission also supports its lack of jurisdiction argument by claiming that it would be making a factual determination in a matter already presented to a court of law if it were to consider the complainant's contention that the defamation suit was being used by the broker as a means of retaliation. It may be forcefully argued, however, that the Commission's determinations as to the truth of the allegations in the original complaint are binding upon the court in any event. See notes 43-49 *infra* and accompanying text. Moreover, in the hearing on the complaint of retaliation, the Commission is directly concerned only with the broker's motivation in bringing the defamation suit. This issue is of only tangential interest to the court, which is directly concerned only with the allegedly defamatory content of the complaint. Thus, in the retaliation hearing the Commission would be required to make few, if any, factual determinations on matters also being determined by the court.

17. N.Y. Sess. Laws 1945, ch. 118 (now N.Y. EXECUTIVE LAW §§ 296(1)d, (3-a)c).

18. N.Y. Sess. Laws 1963, ch. 480.

19. In proposing the retaliation provision in his Annual Message to the legislature

view, the only acts envisioned as falling within the new retaliation provision would be the discriminatory practices specifically covered by other sections of the Law Against Discrimination. On the other hand, the addition of the word "retaliate" in the present provision²⁰ seems to indicate that a broader scope was contemplated and that a remedy was intended for methods of "retaliation" more novel than the traditional types of discriminatory practices.

Although no defamation suit against a complainant before the Commission has ever been brought to trial, and any that did go to trial would probably lose on the merits, such suits retain their usefulness as a formidable weapon in defeating the purpose of the fair housing laws. The real significance of these suits lies in the financial and psychological impact on the complainants and fair housing groups of even the mere threat of filing such a suit. The prospect of being compelled to defend a million-dollar suit may effectively deter an aggrieved party from reporting the discriminatory practices of a broker to the Commission. Furthermore, the threat of the defamation suit improves the broker's bargaining position before the Commission in its proceedings concerning the original complaint of discrimination.²¹ The broker may even use the defamation suit to nullify a Commission order to sell the property, by obtaining an agreement from the complainant to abandon his rights secured by

on Jan. 9, 1963, Governor Rockefeller stated: "I recommend that complainants and witnesses in cases before the State Commission for Human Rights be given the same protection against retaliation in all fields in which discrimination is now prohibited by State law as is now afforded in employment discrimination cases." 1963 N.Y. LEGISLATIVE ANNUAL 430. In the Governor's memorandum on bills approved, he stated: "Those who violate State law by discriminating against a person because of race, creed, color or national origin should not be allowed to discriminate against other persons who lawfully try to stop them." *Id.* at 452.

20. See note 9 *supra* and accompanying text.

21. Following its normal statutory procedure, the Commission conducts an investigation to determine whether there is "probable cause" to believe the original allegation of discrimination against the complainant in his attempt to purchase property. If probable cause is found, an investigating commissioner holds a conciliation conference with the broker and attempts to persuade him to end his discriminatory practices. If the conciliation procedure proves futile, a formal public hearing can follow in which the broker may agree to drop the defamation suit, as was done in the *Cristy Realty* case, see note 8 *supra*, and a Commission order can be issued requiring him to sell or rent the property to the complainant and to cease and desist from any further discrimination. However, the vast majority of cases are usually settled; less than one per cent of those cases where probable cause is found ever result in a hearing. Letter from F. William Guma, Deputy Secretary of State, to Professor Robert J. Harris, University of Michigan Law School, April 30, 1965, on file with the *Michigan Law Review*. The statute governing the Commission's procedure is N.Y. EXECUTIVE LAW § 297. For a discussion of the procedures of various civil rights commissions in the United States, see Note, 74 HARV. L. REV. 526 (1961). An ordinance which granted powers of conciliation and persuasion to a municipal civil rights agency without delineating specific standards for conciliation has recently been invalidated by the Ohio Supreme Court. See *Porter v. City of Oberlin*, 1 Ohio St. 2d 143, 205 N.E.2d 363 (1965), criticized in 64 MICH. L. REV. 710 (1966).

the Commission order and to look elsewhere for housing, in return for the broker's discontinuance of his libel suit.

There are at least three possible civil proceedings available to complainants that might be used to prevent or neutralize these broker's defamation suits. The first of these is a judicial review of the Commission's interpretation of the retaliation provision. Section 298 of the Law Against Discrimination gives the New York Supreme Courts the power to enforce, modify or set aside in whole or in part a Commission order.²² Since the statute does not deal specifically with the institution of a civil suit as a discriminatory practice, the complainants may have difficulty persuading the reviewing court that a defamation suit falls within the scope of the retaliation provision. However, the court might be persuaded to read the word "retaliate" more broadly than has the Commission, since section 300 of the Law Against Discrimination directs that the provisions of the law are to be construed liberally.²³ On the other hand, the court might well be reluctant to uphold a power in the Commission to prevent direct access to the courts by the broker, regardless of his motive in bringing suit against the complainant. Thus, there is no clear indication of how broadly the reviewing court would interpret the retaliation provision.

The second possible approach available to the complainant is to contest and defeat the broker's defamation suit on its merits. One valid defense could be established by showing that the original complaint of discrimination filed with the Commission was privileged. If a communication is deemed to be of such social importance as to require complete freedom of expression without fear of prosecution, as in a judicial hearing, the privilege is absolute.²⁴ On the other hand, if the interest the defendant seeks to vindicate is of less social importance, as in some administrative proceedings, the

22. Since N.Y. EXECUTIVE LAW § 298 provides only for the review of a Commission order, a determination not in the form of an order but with conclusive effect is reviewable only under N.Y. CIV. PRAC. LAW §§ 7801-03, which has a narrower scope of review. On the grounds that the dismissal of a complaint is not an "order," it has been held that the dismissal was not reviewable under § 298, although it could still be reviewed by an art. 78 proceeding. *American Jewish Congress v. Carter*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961); *Jeanpierre v. Arbury*, 4 N.Y.2d 238, 149 N.E.2d 882, 173 N.Y.S.2d 597 (1958). However, since recent amendments provide that the dismissal of a complaint shall now be in the form of an order, the obstacle to a review under N.Y. EXECUTIVE LAW § 298 has been removed. See N.Y. Sess. Laws 1965 (*Metcalf-Baker Law*), ch. 851, § 7.

23. "The provisions of this article shall be construed liberally for the accomplishment of the purposes thereof." N.Y. EXECUTIVE LAW § 300.

24. *E.g.*, *Seltzer v. Fields*, 20 App. Div. 2d 60, 244 N.Y.S.2d 792 (1963), *aff'd*, 14 N.Y.2d 624, 198 N.E.2d 368, 249 N.Y.S.2d 174 (1964); *Rager v. Lefkowitz*, 20 App. Div. 2d 867, 249 N.Y.S.2d 486 (1964); *Marson v. Darrow*, 8 App. Div. 2d 307, 187 N.Y.S.2d 611 (1959). Once the existence of an absolute privilege is established, the defendant is entitled to a summary judgment. *Kurat v. County of Nassau*, 47 Misc. 2d 783, 264 N.Y.S.2d 126 (Sup. Ct. 1965).

privilege is only a qualified immunity from prosecution which may be defeated by showing that the allegedly defamatory communication was made with malice.²⁵ The absolute privilege granted communications made in the course of a judicial proceeding has been extended to communications connected with the judicial or quasi-judicial proceedings of an administrative body.²⁶ It is at least arguable from previous case authority in New York that the Commission has a sufficient amount of traditional judicial power²⁷ to justify bringing its proceedings under the umbrella of this absolute privilege.²⁸ Having the power to award compensatory damages²⁹ and to issue cease-and-desist orders enforceable by the courts,³⁰ the Commission has much broader judicial powers than those administrative agencies before which complaints and other proceedings have been denied an absolute privilege.³¹ Indeed, the courts have often referred to the Commission as a quasi-judicial body.³²

25. *E.g.*, *Pecue v. West*, 233 N.Y. 316, 135 N.E. 515 (1922); *Ellish v. Goldman*, 117 N.Y.S.2d 867 (Sup. Ct. 1952). See also PROSSER, *TORTS* 795-800, 805 (3d ed. 1964).

26. The following cases have found the communication to the administrative body to be absolutely privileged: *Bleeker v. Drury*, 149 F.2d 770 (2d Cir. 1945) (complaint to N.Y. Industrial Commission); *Loudin v. Mohawk Airlines, Inc.*, 44 Misc. 2d 926, 255 N.Y.S.2d 302 (Sup. Ct. 1964) (hearing before Civil Aeronautics Board); *Coyne v. O'Connor*, 204 Misc. 465, 121 N.Y.S.2d 100 (Sup. Ct. 1953) (letter to N.Y. Industrial Commission); *Brown v. Central Sav. Bank*, 64 N.Y.S.2d 551 (Sup. Ct. 1946) (landlord's application to Office of Price Administration for eviction certificate absolutely privileged on grounds it was part of law suit ultimately instituted); *Alagna v. New York & Cuba Mail S.S. Co.*, 155 Misc. 796, 279 N.Y.S. 319 (Sup. Ct. 1935) (complaint to Federal Radio Commission); *Annot.*, 45 A.L.R.2d 1296 (1956).

27. The power of an administrative agency to conduct hearings, to subpoena and examine witnesses, to subpoena documents, to rule on the admissibility of evidence, to make full and conclusive judgments or orders, and generally to observe procedures similar to those of the state courts have been referred to as factors supporting the conclusion that the administrative body was exercising enough judicial functions for application of the absolute privilege. See cases cited note 26 *supra*. *But cf.* cases cited note 31 *infra*. It has been suggested, however, that these factors are merely a statement of a conclusion reached and are not the reasons for that conclusion. *Annot.*, 45 A.L.R.2d 1296, 1299 & n.8 (1956). In considering the possible application of the absolute privilege to complaints filed with the State Commission for Human Rights, it would seem relevant that the Commission is dependent on complainants to report violations of the law, and that the threat of a defamation suit may prevent a potential complainant from reporting such violations. On the other hand, the extent to which the real estate broker might be harmed by a malicious complainant during the interval between the filing of the complaint and the time when its malicious nature is revealed also appears relevant.

28. See cases cited note 26 *supra*.

29. N.Y. EXECUTIVE LAW § 297(2)(c).

30. N.Y. EXECUTIVE LAW § 297.

31. The following cases have held the communication to be entitled to a qualified privilege only: *Andrews v. Gardiner*, 224 N.Y. 440, 121 N.E. 341 (1918) (petition to governor for pardon); *Leganowicz v. Rone*, 240 App. Div. 731, 265 N.Y.S. 703 (1933) (hearing before division of licenses may have qualified privilege); *Ellish v. Goldman*, 117 N.Y.S.2d 867 (Sup. Ct. 1962) (hearing before Zoning Board of Appeals); *Longo v. Tauriello*, 201 Misc. 35, 107 N.Y.S.2d 361 (Sup. Ct. 1951) (application to Temporary State Housing and Rent Commission); *Roberts v. Pratt*, 174 Misc. 585, 21 N.Y.S.2d 545 (Sup. Ct. 1940) (complaint before bar association of illegal practice of law).

32. *Lake Placid Club, Inc. v. Abrams*, 6 App. Div. 2d 469, 473, 179 N.Y.S.2d 487, 492 (1958); *Marrano Constr. Co. v. State Comm'n for Human Rights*, 45 Misc. 2d 1081,

If the complainant is unable to persuade the court that his complaint was protected by an absolute privilege, he would clearly be entitled to a qualified privilege, since the Commission is an administrative agency.³³ The case for a qualified, rather than an absolute, privilege is buttressed by the Commission's status as an arm of the police power of the state,³⁴ since complaints to the police or district attorney are entitled only to a qualified privilege.³⁵ The qualified privilege may be defeated, however, by proof that the complainant acted without a bona fide belief in the truthfulness of the complaint of discrimination or acted maliciously for the purpose of injuring the real estate broker rather than protecting his own interest.³⁶ The ability of the broker to prove improper motivation of course depends upon the particular situation. If the complainant had a bona fide desire to purchase property, it would probably be difficult to defeat the qualified privilege. In one recent case,³⁷ a white person had negotiated with a broker for the purchase of a house and then revealed that he was not a bona fide applicant but was representing a Negro purchaser. When the broker subsequently refused to sell the house to the Negro, the Commission ordered the broker to cease and desist from his discriminatory practices. Although the reviewing court described the Negro's attempt to purchase property in this manner as "offensive to [its] concept of fair play,"³⁸ it upheld the Commission order based on the evidence of discrimination thus obtained, stating that many charges of discrimination could never be sustained without such a procedure.³⁹ On the other hand, if the complainant was merely testing the practices of the broker and was neither interested in purchasing the property nor injured by the alleged discrimination,⁴⁰ it is possible that a jury could find that the

259 N.Y.S.2d 4, 10 (Sup. Ct. 1965); *Castle Hill Beach Club, Inc. v. Arbury*, 208 Misc. 35, 142 N.Y.S.2d 432 (Sup. Ct. 1955). See also *Holland v. Edwards*, 232 App. Div. 353, 122 N.Y.S.2d 721 (1953).

33. See cases cited note 31 *supra*.

34. N.Y. EXECUTIVE LAW § 290 states that the Law Against Discrimination shall be deemed an exercise of the police power of the state.

35. *E.g.*, *David J. Hodder & Son, Inc. v. Pennetto*, 32 Misc. 2d 764, 223 N.Y.S.2d 685 (Sup. Ct. 1961); *Campbell v. Cunningham Nat. Gas Corp.*, 164 Misc. 1, 298 N.Y.S. 200 (Sup. Ct. 1937).

36. See *Teichner v. Bellan*, 7 App. Div. 2d 247, 181 N.Y.S.2d 842 (1959). See also *Pecue v. West*, 233 N.Y. 316, 135 N.E. 515 (1922); *Calore v. Powell-Savory Corp.*, 21 App. Div. 2d 877, 251 N.Y.S.2d 732 (1964) (false accusation of discrimination made against union held libelous per se); *Clarence P. Davis, Inc. v. Dun & Bradstreet, Inc.*, 9 App. Div. 2d 796, 192 N.Y.S.2d 674 (1959). The evidence of malice is insufficient if based only on surmise, conjecture or suspicion. *Bank for Sav. v. Relim Constr. Co.*, 285 N.Y. 708, 34 N.E.2d 485 (1941).

37. *Kindt v. State Comm'n for Human Rights*, 44 Misc. 2d 896, 254 N.Y.S.2d 933 (Sup. Ct. 1964), *aff'd*, 16 N.Y.2d 1001, 265 N.Y.S.2d 662 (1965).

38. *Id.* at 898, 254 N.Y.S.2d at 936.

39. *Ibid.*

40. A recently enacted Ohio statute prevents the Ohio Civil Rights Commission from even considering a complaint based on information obtained by those testing the broker's practices without a bona fide desire to purchase property. OHIO REV. CODE ANN. § 4112.05 (Page Current Material 1965).

complaint was motivated by malice toward the broker.⁴¹ However, when the evidence clearly shows that the complainant had no actual malice toward the broker but was merely testing the broker's compliance with the law, it would seem that the judge should prevent the jury from finding malice.⁴²

Even if the real estate broker is successful in defeating the qualified privilege by proving malice, his recovery is by no means assured. It is well established in a majority of states, including New York, that the defendant in a defamation suit may avoid liability by showing that the allegedly libelous communication was true.⁴³ In this regard, a strong argument might be made that a determination by the Commission that the allegations of discrimination in the complaint are true is binding upon the court in the defamation suit.⁴⁴ At the time the defamation suit is instituted, the validity of the complaint of discrimination is already an issue pending before the Commission. Since the court cannot try the defamation suit without examining the truth or falsity of the factual allegations of the complaint, any court action would involve elements of the same issues to be dealt with in the administration proceeding. Under the doctrine of exhaustion of administrative remedies, a court may not adjudicate an issue which is being determined in a proceeding properly before an administrative tribunal.⁴⁵ Thus, while the com-

41. In one recent hearing, the Secretary of State suspended the licenses of four salesmen because of their discriminatory practices but dismissed the complaint against a fifth salesman on the grounds that there was a "preconceived plan by the Negro witnesses to create contentions of discriminatory practices by him." *Yonkers Herald Statesman*, Oct. 7, 1965, p. 1.

42. When the defendant has established that his remarks are entitled to a qualified privilege, the court will grant a summary judgment if there is insufficient evidence of malice to warrant submitting that issue to the jury. *Chiapinelli-Marx, Inc. v. Pacitto*, 46 Misc. 2d 611, 260 N.Y.S.2d 355 (Sup. Ct. 1965).

43. See, e.g., *Ashcroft v. Hammond*, 197 N.Y. 488, 495-96, 90 N.E. 1117, 1120 (1910); *Sondak v. Dun & Bradstreet, Inc.*, 39 Misc. 2d 13, 239 N.Y.S.2d 697 (Sup. Ct. 1963). Ten states have changed this rule with statutes which require that the publication must have been made without malice in order for truth to be a defense. See PROSSER, *TORTS* 824-25 (3d ed. 1964); 56 *Nw. U.L. Rev.* 547 (1961). The majority rule has been criticized on the ground that it awards a needless immunity to malicious slander. See 16 *MINN. L. REV.* 43 (1931); 35 *VA. L. REV.* 425 (1949).

44. An analogy may be drawn to the rule in New York and several other states that the order of an examining magistrate who finds there is probable cause and binds the defendant over for trial is prima facie evidence in a subsequent malicious prosecution suit. Since the plaintiff bringing the malicious prosecution action must sustain the burden of proving that the proceeding was initiated by the defendant without probable cause, the action will be dismissed unless the plaintiff can show the magistrate's order was obtained by fraud, perjury, or undue influence. *Gallucci v. Milavic*, 100 So. 2d 375 (Fla. 1958); *Graham v. Buffalo Gen. Laundries Corp.*, 261 N.Y. 165, 184 N.E. 746 (1933); *Horowitz v. Goldberg*, 124 N.Y.S.2d 237 (Sup. Ct. 1953). In many other states, the magistrate's order is only considered as "some evidence" that there was probable cause. See, e.g., *Stidham v. Diamond State Brewery, Inc.*, 41 Del. 330, 31 A.2d 283 (1941); *Annot.*, 65 *A.L.R.2d* 1164 (1959).

45. See *Public Serv. Comm'n v. Norton*, 304 N.Y. 522, 109 N.E.2d 705 (1952); *Matter of Amigone*, 47 Misc. 2d 809, 263 N.Y.S.2d 363 (Sup. Ct. 1965); *Hutchins v. McGoldrick*, 200 Misc. 964, 108 N.Y.S.2d 498 (Sup. Ct. 1951); *Liebman v. Van Denburg*,

plaint of discrimination is pending, the Commission has exclusive jurisdiction to determine its validity.⁴⁶ To avoid by-passing the Commission's finding concerning the validity of the complaint, and to prevent the litigation of issues already raised in the proceeding before the Commission, it would appear that the defamation suit must be stayed until the Commission has concluded its investigation.⁴⁷ Furthermore, a Commission finding that the complaint alleged an actual incident of discrimination would apparently be protected from collateral attack in the defamation suit. Although the validity of an administrative determination may be challenged by direct review, the administrative finding is *res judicata* in any subsequent collateral judicial or administrative proceeding.⁴⁸ Thus, where the Commission has found the allegations of discrimination to be valid, the truth of the complaint would be a valid defense to a subsequent defamation action by the broker.⁴⁹

A third civil deterrent to the filing of defamation suits by brokers in this setting might be an action for abuse of process.⁵⁰ If the broker is using the defamation suit for the immediate purpose for which it was intended—recovery of damages for injury to reputation—an action for abuse of process will of course fail. Furthermore, the mere existence of ulterior or vindictive motives, such as a desire to retaliate against the complainant, will not support the action.⁵¹ Thus, it would

168 Misc. 155, 6 N.Y.S.2d 428 (Sup. Ct. 1958). The Commission proceeding does not come under any of the exceptions to the exhaustion rule, such as allowing immediate application to the courts in order to prevent irreparable harm. *Romanisky v. Siglon Realty Corp.*, 122 N.Y.S.2d 171 (Sup. Ct. 1953).

46. *Gaynor v. Rockefeller*, 21 App. Div. 2d 92, 248 N.Y.S.2d 792 (1964); *Holland v. Edwards*, 282 App. Div. 353, 122 N.Y.S.2d 721 (1953); *Redd v. Zier*, 229 N.Y.S.2d 582 (Sup. Ct. 1962); *Castle Hill Beach Club, Inc. v. Arbury*, 208 Misc. 622, 144 N.Y.S.2d 747 (Sup. Ct. 1955), *aff'd*, 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957).

47. See N.Y. CIV. PROC. LAW § 2201; 74 HARV. L. REV. 526, 573-74 (1961).

48. See *Brandt v. Winchell*, 3 N.Y.2d 628, 148 N.E.2d 160, 170 N.Y.S.2d 828 (1958); *Golden v. Joseph*, 307 N.Y. 62, 120 N.E.2d 162 (1954); *Evans v. Monaghan*, 306 N.Y. 312, 118 N.E.2d 452 (1954); *Levy v. 1165 Park Ave. Corp.*, 305 N.Y. 607, 111 N.E.2d 731 (1953); *Infante v. Donohue*, 42 Misc. 727, 249 N.Y.S.2d 100 (Sup. Ct. 1964); DAVIS, ADMINISTRATIVE LAW §§ 18.01, .10 (1959).

49. In the three complaints that have been attacked by defamation suits, the Commission has found that the allegations of discrimination were supported by the facts. See note 8 *supra*.

50. While the similar action for malicious prosecution could be used in some states, such a proceeding is not available in New York and many other states where the action can be brought for the malicious prosecution of a criminal suit but not for a civil suit resulting in a money judgment. See *Rappaport v. Rappaport*, 44 Misc. 2d 523, 254 N.Y.S.2d 174 (Sup. Ct. 1964). Even in those states allowing the action based on any civil suit, its potential viability in the present context seems remote. When the original suit has been terminated without regard to its merits as a result of an agreement or settlement between the parties, the prerequisite that the prosecution complained of shall have terminated in favor of the party bringing the malicious prosecution suit and shall have actually injured him is missing. See *Levy's Store, Inc. v. Endicott-Johnson Corp.*, 272 N.Y. 155, 5 N.E.2d 74 (1936); *Pelella v. Pelella*, 13 Misc. 2d 260, 176 N.Y.S.2d 862 (Sup. Ct. 1958) (applying Georgia law).

51. See, e.g., *Hauser v. Bartow*, 273 N.Y. 370, 7 N.E.2d 268 (1937) (seeking to have relative declared incompetent in order to gain control of his money held not an abuse

appear that in order for the complainant to succeed he would be required to show that the broker's *primary* motive was to use the defamation action as a lever in his negotiations before the Commission or as a weapon in coercing the complainant.

Even if the complainant is able to make the requisite showing, however, he may as a practical matter be pressured into discontinuing his abuse-of-process action. After the defamation suit has had the desired economic and psychological impact upon the complainant, the broker may offer to drop the suit in return for the complainant's discontinuance of his abuse-of-process suit. Such an offer would present the complainant with the dubious choice of agreeing to terminate all civil suits by an exchange of general releases⁵² or facing a million dollar defamation suit in order to bring his action for abuse of process. It would seem likely that the complainant would in most cases yield to the pressure exerted by even the remote chance that the defamation suit might succeed, and would agree to the exchange of releases.

The Department of State could also provide an effective deterrent to the institution of defamation suits through the use of its power to regulate real estate brokers. The Department has the power to revoke or suspend the license of any real estate broker or salesman who has "demonstrated untrustworthiness."⁵³ The Secretary of State has recently interpreted this language as including a violation of the Law Against Discrimination.⁵⁴ On June 3, 1965, a Civil Rights Unit was established in the Department of State to deal exclusively with discriminatory violations. By September 13, 1965, thirty-two hearings had been completed, resulting in the suspension or revocation of twelve licenses.⁵⁵ Although the unjustified use of a defamation suit as a means of retaliation is not now considered grounds for the revocation or suspension of a broker's license,⁵⁶ there is no apparent reason why the Department of State should not furnish the complainants with needed protection by regarding this means of re-

of process); *Lader v. Benkowitz*, 188 Misc. 906, 66 N.Y.S.2d 713 (Sup. Ct. 1946) (bringing suit for disorderly conduct in order to compel defendant to pay hotel bill held an abuse of process). The allegation of an improper motive is not sufficient; there must be an actual misuse of process. See *Goldstein v. Siegel*, 19 App. Div. 2d 489, 244 N.Y.S.2d 379 (1963). The mere institution of a civil suit that has caused the party trouble, inconvenience, and expense will not support an action for abuse of process. See *Miller v. Stern*, 262 App. Div. 5, 27 N.Y.S.2d 374 (1941).

52. In *Sweeting v. Cristy Realty Co.*, CH-10479-64 (N.Y. Comm'n on Human Rights 1964), the Commission incorporated such an exchange of releases in its final order.

53. N.Y. REAL PROP. LAW § 441-c(1).

54. Press Release From State Commission for Human Rights, Jan. 21, 1965, on file with *Michigan Law Review*.

55. Letter From F. William Guma, Deputy Secretary of State, to *Michigan Law Review*, Sept. 13, 1965. See also N.Y. Times, Sept. 12, 1965, § 8, p. 1, col. 8.

56. Letter From F. William Guma, Deputy Secretary of State, to *Michigan Law Review*, Oct. 14, 1965.

taliation as a demonstration of "untrustworthiness," just as it does other discriminatory conduct.

The risk and uncertainty surrounding these possible methods of preventing the use of unjustified defamation suits reinforces the argument that the Commission should conduct an investigation to determine whether the defamation suit is based on a bona fide grievance or is being employed to harass the complainant.⁵⁷ Having examined the incident originally alleged to be discriminatory and having available the records of any past misconduct by either party, the Commission is well equipped to make a determination of the motivation of the defamation suit. The authority for the making of such a determination could be based upon either a broader interpretation of the present statute by the Commission⁵⁸ or upon new legislation specifically granting the Commission such power. If the Commission did undertake such an investigation, the complainant could secure a stay of the court proceedings pending the outcome of the Commission's hearing on the alleged discriminatory retaliation.⁵⁹ If the defamation suit were found to be justified, the Commission would dismiss the retaliation complaint, and the prosecution of the suit could continue. Thus, the legitimate interest of the broker to be free from spurious accusation would not be impinged. If the suit were found to be retaliatory, the Commission could order the broker to cease and desist from his unlawful practice, seeking court enforcement of the order if the broker refused to discontinue the suit. Since the administrative retaliation hearing would be exclusive while pending, there would be no danger that the complainant could launch a two-pronged attack against the broker by filing both a retaliation complaint with the Commission and an abuse-of-process action with the court.⁶⁰

57. If the Commission conducted a hearing on the retaliation complaint, the broker could seek a court injunction, alleging that the Commission lacked jurisdiction. Since the exhaustion of administrative remedies is not required when the question involved is a purely legal one, *Public Serv. Comm'n v. Norton*, 304 N.Y. 522, 109 N.E.2d 705 (1952), or when the suit involves a challenge of the constitutionality of the statute on which the administrative action is based, *Levitt & Sons, Inc. v. State Div. Against Discrimination*, 31 N.J. 514, 158 A.2d 177, *appeal dismissed*, 363 U.S. 418 (1960), the court might grant the injunction. On the other hand, the court might regard the issue as a factual dispute within the Commission's competence and deny the injunction. *School Dist. of Royal Oak v. State Tenure Comm'n*, 367 Mich. 689, 117 N.W.2d 181 (1962); see Cramton, *The Doctrine of Exhaustion of Administrative Remedies in Michigan*, 44 Mich. S.B.J., July 1965, p. 10. However, the mere possibility that the Commission's jurisdiction over the retaliation complaint might be challenged in court should not prevent the Commission from attempting to protect the complainants.

58. See text accompanying note 10 *supra*.

59. N.Y. Civ. Prac. Law § 2201. See note 47 *supra* and accompanying text. In order to protect the complainant from the financial burden of appearing in court before the Commission had determined whether the suit was justified, the Commission could either seek the stay on behalf of the complainant or could award the complainant compensatory damages if it ultimately found the suit to be unjustified. See note 13 *supra*.

60. See cases cited note 46 *supra* and accompanying text.

The continued effectiveness of these defamation suits could greatly reduce the capacity of the fair housing laws to deal with discrimination both in New York and other states having fair housing laws.⁶¹ The public policy of ending racial discrimination is best served by allowing those who feel themselves to be the victims of discrimination to bring their complaints to the State Commission for Human Rights, as was originally contemplated by the Law Against Discrimination. This can be accomplished only if the complainants are protected from the harassment of retaliatory defamation suits.⁶²

61. The following twenty states have fair housing laws: Alaska, California, Colorado, Connecticut, Delaware, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin.

62. In *Habib v. Edwards*, 34 U.S.L. WEEK 2242 (D.C. Civ. Ct. Oct. 29, 1965), the court held that a landlord cannot evict a tenant for reporting building code violations to the proper authorities, on the ground that the Constitution prohibits even a private party from interfering with a citizen's right to report the violation of a federal law to the federal government.