**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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SHARON JOHNSON, individually and as the Administrator of the Estate of Ennis Johnson, Deceased

Plaintiffs,

-against-

51 SMITH STREET L.L.C., its members, managers, and/or assigned agent or otherwise in his/her official and individual capacity, and JAY LEVY, in his individual and official capacity.

Defendants.

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**ORDER**
10-CV-3217 (ADS)(AKT)

**APPEARANCES:**

**The Law Offices of Frederick K. Brewington**
*Attorney for the Plaintiffs*
556 Peninsula Boulevard
Hempstead, NY 11550
By: Frederick K. Brewington, Esq., Of Counsel

**Kardisch Law Group, PC**
*Attorney for the Defendants*
585 Stewart Avenue, Suite 740
Garden City, NY 11530
By: Josh H. Kardisch, Esq., Of Counsel

**SPATT, District Judge**.

This case arises from allegations that the Defendants 51 Smith Street L.L.C. ("Smith Street") and its owner Jay Levy ("Levy" and collectively, the "Defendants") violated federal and state housing discrimination laws by denying the Plaintiffs Ennis Johnson and Sharon Johnson (collectively, the "Plaintiffs") the opportunity to rent an apartment because Ennis Johnson was HIV-positive.

On September 20, 2012, the Defendants filed an answer to the Plaintiffs' second amended complaint and asserted two counterclaims against the Plaintiffs for violating the New York State Anti-Strategic Litigation Against Public Participation ("Anti-SLAPP") statute, N.Y. Civil Rights Law § 70-a, and for malicious prosecution.

On June 3, 2014, the Plaintiff Ennis D. Johnson died. On March 4, 2014, the Court granted a motion by Sharon Johnson to substitute as administrator for the decedent Plaintiff Ennis Johnson.

Presently before the Court is a motion by the Defendants pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 56 for summary judgment dismissing the second amended complaint in its entirety.

For the reasons set forth below, the motion by the Defendants is granted in part and denied in part.

## I. BACKGROUND

Unless otherwise specified, the following facts are drawn from the parties' Rule 56.1 statements.

### A. The Underlying Factual Background

#### 1. The Parties

The decedent Plaintiff Ennis Johnson was a resident of Suffolk County who at an unspecified date prior to 2009 was diagnosed as HIV-positive. (Second Am. Compl. at ¶ 6; Defs.' Answer at ¶ 6.)

The Plaintiff Sharon Johnson was married to Ennis Johnson from May 22, 1991 until his death on June 3, 2014. (Kardisch Decl, Ex. N, at Tr. 7:25–8:5.)

Smith Street is a New York limited liability company that owns a residential property located on 51 Smith Street in Merrick, New York. (Answer at ¶ 5.)

Levy is the sole member and manager of Smith Street. (Levy Aff. at ¶ 3.)

**2. The Plaintiffs' Income Status and Prior Employment**

From 2004 to 2005, the Plaintiff Ennis Johnson was a Superintendent at a building located in Hempstead, New York. (Kardisch Decl., Ex. Q, at Tr. 12:7–17.) While employed as a Superintendent, he also received public rent subsidies, which he referred to as "working Section 8." (Id. at Tr. 13:3–25.)

For reasons that are not made clear in the record, Ennis Johnson left his job as a Superintendent in 2005 and remained unemployed until his death. As a result, he no longer received "working Section 8" housing benefits.

From 2005 until 2009, his income consisted solely of Social Security Disability ("SSD") payments of $1,496 per month, public assistance in the form of food stamps, and medical insurance coverage in the form of Medicare and Medicaid. At a July 16, 2010 deposition, he testified that he received SSD payments because he "became disabled," though he did not make clear how he became disabled or if his disability was related to his HIV-positive status. (Id. at Tr. 74:12–22.)

The Plaintiff Sharon Johnson was also unemployed from 2005 to 2009 and relied entirely on her husband's SSD payments and food stamps for her income. As of January 5, 2009, the couple did not have any other assets or savings. (Kardisch Decl., Ex. N, at Tr. 14:19–15:5; Ex. Q, at Tr. 74:24–75:19.)

**3. The Plaintiffs' Eligibility for DSS Assistance**

On January 5, 2009, the Plaintiffs were living in an apartment in Baldwin, New York that was destroyed by a fire.

Following the fire, the American Red Cross paid for the Plaintiffs to stay in a motel for seven days. (Brewington Decl., Ex. D, at Tr. 32:9–12.) After seven days, the Nassau County Department of Social Services ("DSS") paid for the Plaintiffs to move into a motel temporarily until the Plaintiffs were able to find a permanent residence. (Brewington Decl., Ex. D, at Tr. 32:9–12; Ex. E, at Tr. 11:2–14.)

The Plaintiffs were assigned to Rene Pierson ("Pierson"), a case worker at DSS. (Brewington Decl., Ex. D, at Tr. 32:12–17.) Pierson informed the Plaintiffs that they were eligible for assistance in securing permanent housing in the form of a check for the first month's rent, a security deposit, and a broker's fee. (Id. at 33:2–20.) It is undisputed that the Plaintiffs were not eligible for ongoing assistance from DSS with regard to their rental obligations. (See The Defs.' 56.1 Statement at ¶ 29; The Pls.' Counter 56.1 Statement at ¶ 29.)

**4. The Plaintiffs' Application to 51 Smith Street**

On January 14, 2009, the Defendants placed an advertisement in Newsday for one bedroom apartments available for monthly rental payments of $1225 or $1325 in their residential property located on 51 Smith Street in Merrick, New York.

On January 14, 2009, the same day, Sharon Johnson contacted the Defendant Levy to inquire about the apartment. Levy gave her the name and phone number of the superintendent of the building so that the Plaintiff could setup an appointment to view the apartment. At 4:00pm on the same day, the Plaintiffs viewed apartment B6, which was available for $1,375 per month.

After viewing the apartment, Sharon Johnson called Levy to tell him that the Plaintiffs were interested in renting the apartment. (Brewington Decl., Ex. D, at Tr. 44:14–16.)

During the call, Levy asked for the "full name, address, date of birth, and social security number of the individual whose name would be on the lease and permission to perform a credit check [on Ennis Johnson]." (Levy Aff. at ¶ 10.) Sharon Johnson provided Ennis's social security number and authorized him to perform a credit check on Ennis.

There is a dispute of fact as to whether the results of the credit check indicated that Ennis Johnson had good credit and was qualified to rent the apartment. The Defendants assert that "based upon [Levy's] review of [the] [P]laintiffs' credit report, and his knowledge of their monthly income," Levy concluded that the Plaintiffs were not financially able to meet their monthly rent obligations without additional support or benefits. (The Defs.' 56.1 Statement at ¶ 37.) According to an affidavit filed by Levy in support of the Defendants' present motion:

> Based upon the credit report, I determined that Mr. Johnson did not meet my criteria to rent an apartment at the subject premises. I told Mrs. Johnson that I could not rent to them and suggested that she could get another person with better credit to sign the lease and guarantee the rent. She then related that they were Working Section 8 participants. At that point, I indicated to her that if she received a rent guarantee from a governmental agency for the duration of the lease term, and two month's security, we could establish a landlord-tenant relationship.

(Levy Aff. at ¶ 13.)

On the other hand, the Plaintiffs dispute that Sharon Johnson told Levy that the Plaintiffs were "Working Section 8 participants." Instead, Sharon Johnson testified that she informed Levy that the Plaintiffs were eligible for public assistance from DSS for the security deposit and the first month's rent and that she needed a letter from him addressed to DSS in order to qualify for it. (The Pls.' Counter 56.1 Statement at ¶ 15; Brewington Decl., Ex. D, at Tr. 46:21–25.)

According to the Plaintiffs' testimony, Levy was satisfied with Sharon Johnson's response and approved them as tenants. (Brewington Decl., Ex. E, at Tr. 85:22–86:9.)

There is no dispute that following the January 15, 2015 call, Levy faxed a letter to the Plaintiffs at their hotel, which confirmed that Levy was offering the Plaintiffs a one-year lease for a monthly rental rate of $1,375 and that the "conditions" for the lease were "two months security and the first month's rent must be paid at the lease signing and the rent must be guaranteed by a governmental agency." (See The Defs.'56.1 Statement at ¶ 40; The Pls.' 56.1 Statement at ¶ 40) (emphasis added).

On an unspecified date after receiving the fax, the Plaintiffs gave the letter to Pierson at DSS. (See Brewington Decl., Ex. D, at Tr. 51:15–19.) After reviewing the letter, DSS denied the Plaintiffs' request for assistance with their first month's rent check and security deposit because the monthly rental rate of $1,375 was too high relative to the Plaintiffs' total monthly income. (Id.; see also Brewington Decl., Ex. E, at Tr. 24:16–20.)

After being denied assistance by DSS, Ennis Johnson called Levy to ask if he had any apartments available that were less expensive. On that call, Levy responded that apartment C3 was available in the same building for $1,275 per month.

On January 26, 2009, Levy sent an amended offer letter via fax addressed to the Plaintiffs, which stated the following:

> This is to confirm that I will provide you [sic] one year lease for apartment C-3 at 51 Smith Street, Merrick, NY at the monthly rental of $1,275. The conditions are two months security and the first month's rent must be paid at the lease signing and the rent must be guaranteed by a governmental agency.

(Kardisch Decl., Ex. H) (emphasis added). On January 27, 2009, Levy sent an identical letter to Pierson. (Id.)

On February 4, 2009, Pierson called Sharon Johnson and informed her that the proposed rent of $1,275 per month was low enough to satisfy DSS Guidelines, and the Plaintiffs were thus eligible to receive two checks from DSS for their first month's rent and the security deposit. (Brewington Decl., Ex. D, at Tr. 35:15–17; Kardisch Decl., Ex. W, at Tr. 31:10–17.) Pierson told Johnson that she could pick up the checks the following day at the Hempstead office of DSS. (Brewington Decl., Ex. D, at Tr. 35:15–17.)

On February 4, 2015, after speaking with Pierson, Sharon Johnson called Levy to inform him that she was picking up the checks for the first month's rent and the security deposit from DSS the following day. (Id. at Tr. 35:20–22; Levy Aff. at ¶ 21.) At the time, Levy was in Florida and asked Sue Campbell ("Campbell"), his assistant, to meet Sharon Johnson at DSS to sign the lease agreement and obtain the checks. (Levy Aff. at ¶ 21; see also Brewington Decl., Ex. D, at Tr. 36:4–5.)

**5. The February 5, 2009 Meeting at DSS**

The Plaintiff Sharon Johnson offered different versions at her deposition of what occurred at the DSS office on February 5, 2009. At her December 14, 2010 deposition, she testified that on February 5, 2009, she went to the Hempstead Office of DSS without her husband who was at a doctor's appointment. (Brewington Decl., Ex. D, at Tr. 58:8–12.) There, she met with Pierson for forty-five minutes to go over the paper work that she needed to sign. (Id.) During the conversation, Pierson informed Sharon Johnson that she had to go to Western Bank in Hempstead to "get a paper notarized." (Id. at Tr. 59:8–17.) It is not clear from her testimony, nor do the parties explain, why her "paperwork" needed to be notarized.

After her meeting with Pierson, Sharon Johnson testified that she met Campbell in the lobby of DSS, and Campbell agreed to take her to Western Bank to get her "paperwork

notarized" because Johnson did not own a car. (Id. at Tr. 59:8–10.) During the fifteen minutes that they were in the car together, Johnson testified that she told Campbell that her husband was at a doctor's appointment. (Id. at Tr. 61:8–12.) However, she stated that she did not tell Campbell during the car ride why her husband was at a doctor's appointment, nor that her husband was diagnosed as HIV-positive. (Id. at Tr. 61:13–15.)

When they arrived at the Western Bank, Campbell stepped outside to call Levy. (Id. at Tr. 62:20–21.) While Johnson was speaking to a notary at Western Bank, Johnson testified that Campbell came back inside of the bank and stated:

> Jay Levy doesn't want to rent to me I asked her why. She said because my husband has HIV and I'm an alcoholic and on drugs. I call [Levy] back and he told me the same thing. He said he doesn't want to rent to a person that has HIV because he worries about his tenants that's in the building.

(Id. at Tr. 64:4–8.) It is not clear from her December 14, 2010 testimony how Levy found out that her husband was HIV-positive.

At a subsequent January 8, 2014 deposition, Johnson denied needing a notary and also denied having gone to Western Bank with Campbell. Specifically, when asked if Pierson told her to get her signature notarized, Johnson responded, "No. [Pierson] said she would notarize it because they have notaries in Social Services." (Brewington Decl., Ex. E, at Tr. 39:14–16.) Instead, she testified that she signed the paper work and gave it back to Pierson. (Id. at 39:24–25.) While she was waiting in the lobby of DSS for Pierson to come back with the checks, Johnson testified that Campbell "made a phone call to Jay [Levy], saying the papers were filled out[,] and he told her he didn't want to rent to me and my husband because my husband had HIV." (Id. at Tr. 40:8–12.)

The Defendants dispute that Ennis Johnson's HIV-positive status had anything to do with the decision not to rent to the Plaintiffs. According to an affidavit filed by Levy, on February 5, 2009, Campbell called him to tell him that:

> a) [the] [P]laintiffs were not receiving any ongoing housing subsidy from any governmental agency; b) [the] [P]laintiffs did not have a lease with a governmental rent guarantee; c) that if Mr. Johnson signature was required, that she would have to taxi Mrs. Johnson to Nassau County Medical Center where Mr. Johnson was a patient; and d) [the] [P]laintiffs had a cat that they wanted to move into the subject premises as soon as possible.

(Levy Aff. at ¶ 21.) In response, Levy purportedly told Campbell to call off the deal and to "cease interaction with [the] [P]laintiffs." (Id.) According to his affidavit, Levy made the decision not to rent an apartment to the Plaintiffs because "they had lied about the rent being guaranteed by a governmental agency," not because Ennis Johnson was HIV-positive, as the Plaintiffs contend. (Levy Aff. at ¶ 22.)

Levy further stated that after his call with Campbell:

> Mrs. Johnson called me and accused me of refusing to rent to her husband and her because Mr. Johnson had AIDS and/or was HIV positive . . . . I was shocked at Mrs. Johnson's accusation. I repeatedly advised Mrs. Johnson that the only reason that I was ceasing the interaction with them at the time was because they had lied about the rent being guaranteed by a governmental agency.

(Id.)

Campbell offered another version of what transpired on February 5, 2009. At her deposition, Campbell testified that she did take Sharon Johnson to Western Bank to get a document notarized. (Brewington Decl., Ex. C, at Tr. 36:5–17.) Campbell testified that during the car ride, Johnson told her that her husband was in the hospital receiving "AIDS treatment." (Id. at Tr. 40:3–12.) According to Campbell, upon arriving at the bank, she called Levy and told him:

> [T]here were a lot of things going on that were not what I expected. I expected to meet with a DSS worker. I didn't expect to drive her someplace. I expected both the husband and the wife to be there, and that she wanted to move her cat in, that she wanted me to go to the hospital to get her husband's signature. And I expected to go back to DSS, and I was not receiving a check from DSS. I was only receiving money from her. That's not what I expected.

(Id. at Tr. 41:20–42:7.) When asked if she told Levy that Ennis Johnson had "AIDS," Campbell responded, "I believe I did mention it, because she wanted me to drive her [to the hospital]." (Id. at Tr. 42:8–13.)

Campbell testified that in response, "[Levy] told me to go into the bank and tell her that we weren't going to sign the lease today and that she needed to call him if she wanted . . . an explanation." (Id. at Tr. 43:25–44:5.) After the call, Campbell testified that she found Sharon Johnson in the bank and told her that:

> We weren't going to be signing the lease today. And [Johnson] got very upset, and she wanted to know why, and I told her she needed to call Mr. Levy . . . . And she kept yelling at me. So then she took out her cell phone, and she began to call him, and that's when I walked out of the bank.

(Id. at Tr. 44:10–16.) When asked if Johnson said anything to her about "AIDS," Campbell responded, "No." (Id. at 46:10–13.)

**6. The News 12 Interview and the State Court Defamation Suit**

On February 10, 2009, Stephanie Ovadia, Esq., the Plaintiffs' original counsel, set up an interview for the Plaintiffs with News 12, a local news station. (See Brewington Decl., Ex. D, at Tr. 136:24–138:3.) During the interview, Ennis Johnson told a reporter that Levy "wasn't going to rent to us because I was HIV positive." (Id. at 142:12–19.)

The report also contained a response by Jamie Izarati, Esq., the Defendants original counsel:

> [T]here was absolutely no discrimination involved in the case. My client only leases to governmentally insured working Section 8 tenants. In this case, the

> prospective tenants advised my client that they were working Section 8 tenants. When it was found to be a lie, of course the tenants screamed discrimination.

(Id. at Tr. 144:12–25.)

On February 18, 2009, Levy commenced an action against the Plaintiffs in the Supreme Court of Nassau County for defamation.

On August 15, 2012, after discovery had commenced, Levy voluntarily dismissed his state court claims against the Plaintiffs. It is not clear what prompted the dismissal.

**B. The Procedural History**

On July 14, 2010, the Plaintiffs commenced this action against Jay Levy, Diane Levy, Campbell, and Smith Street.

On September 30, 2010, the Defendants collectively moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b).

In opposition, the Plaintiffs voluntarily withdrew their claims against Campbell and certain other counts, leaving the following causes of action: (1) Levy and Smith Street were liable for housing discrimination based on disability in violation of the Fair Housing Amendments Act ("FHA"), 42 U.S.C. §§ 3604(f)(2)(a), 3604(f)(1), & 3617; Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12182; § 504 of the Rehabilitation Act of 1973 (the "Rehabilitation Act"), 29 U.S.C. § 794; and the New York Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 296(2-a); (2) Levy and Smith Street violated the New York State Anti-SLAPP statute, N.Y. Civil Rights Law §§ 70-a & 76-a by commencing the Defamation Action; and (3) Levy was liable for breach of contract.

On September 19, 2011, the Court issued a memorandum of decision and order ("the September 19, 2011 Order") (i) dismissing with prejudice the claims against Diane Levy; (ii) dismissing without prejudice the Plaintiffs' state and federal housing discrimination claims

against the Defendants; and (iii) dismissing without prejudice the Plaintiffs' state law breach of contract and Anti-SLAPP claims for lack supplemental jurisdiction. (September 19, 2011 Order, Dkt. No. 22, at 26–27.)

With regard to the Plaintiffs' housing discrimination claims, the Court analyzed the elements of the ADA, FHA, Rehabilitation Act, and the NYSHRL, and found that "common to all housing discrimination claims under the FHA, NYSHRL, ADA, and the Rehabilitation Act is the requirement that 'a plaintiff show that he was qualified for an available benefit and was denied that benefit.'" (Id. at 17) (quoting Passanante v. R.Y. Mgmt. Co., Inc., No. 99-CV-9760, 2001 WL 123858, at *5 (S.D.N.Y. Feb. 13, 2001). In addition, the Court noted that:

> 'To satisfy the 'qualified' element for a *prima facie* [housing discrimination claim], the renter must satisfy the applicable criteria that the owner established.' Kennedy v. Related Mgmt., No. 08-CV-3969, 2009 WL 2222530, at *4 (S.D.N.Y. July 23, 2009), aff'd 403 F. App'x 566 (2d Cir. 2010) (citing Mitchell v. Shane, 350 F.3d 39, 47–48 (2d Cir. 2003)); see also Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979) (stating that the qualification element of a *prima facie* case of housing discrimination is met where the applicant 'meets the objective requirements of a landlord'); Passanante, 2001 WL 123858, at *5 (holding that a plaintiff was not qualified to rent an apartment where he did not meet the requirement of having a Section 8 rent subsidy); cf. See Mitchell v. Century 21 Rustic Realty, 233 F. Supp. 2d 418, 434 (E.D.N.Y. 2002) (noting in the context of a housing discrimination claim that '[c]ontract law permits offerors to set the terms of acceptance[.]').

(Id. at 17.)

The Defendants moved to dismiss the complaint on the ground that the Plaintiffs had failed to sufficiently allege that they had met the requirements established by Levy for renting the apartment — namely, "two months security and the first month's rent must be paid at the lease signing and the rent must be guaranteed by a governmental agency." As the complaint did not allege that the Plaintiffs were qualified for or could obtain a guarantee from a government

agency for ongoing rental payments, the Defendants argued that the complaint failed as a matter of law. (Id. at 19.)

In response, the Plaintiffs asserted that the conditions of the offer letter were ambiguous as to whether a "guarantee[] by a government agency" meant either: "1) the first month's rent and two months security deposit must be guaranteed by a governmental agency or 2) every month's rent and two months security deposit must be guaranteed by a governmental agency." (Id. at 21.)

The Court disagreed, finding that the Plaintiffs' broad interpretation would essentially render the condition that the "rent be guaranteed by a governmental agency" superfluous. (Id. at 23.) As such, the Court held that that "the only reasonable interpretation of the lease conditions provision is that the Plaintiffs were required to obtain a guarantee from a government agency for the remaining rent due for the one-year lease period." (Id. at 24.) The Court that found the allegation that Ennis Johnson was a qualified recipient of SSD payments and of DSS housing subsidies to be insufficient to satisfy this requirement. (Id.) Thus, the Court concluded that the complaint "failed to state valid housing discrimination claims under the FHA, ADA, Rehabilitation Act, and NYSHRL." (Id.) However, the Court granted the Plaintiffs leave to file an amended complaint. (Id. at 25–26.)

On October 11, 2011, the Plaintiffs filed an amended complaint that included one new allegation as to the amount of the Plaintiffs' monthly income from Ennis Johnson's SSD payments.

On December 2, 2011, the Defendants moved to dismiss the amended complaint.

In an August 17, 2012 memorandum of decision and order (the "August 17, 2012 Order") the Court again granted the Defendants' motion to dismiss the amended complaint. The Court

noted that it had already held in the September 19, 2011 Order that the fact that the Plaintiffs received monthly SSD payments was not sufficient to satisfy the condition that they obtain a "guarantee from a governmental agency." (Aug. 17, 2012 Order, Dkt. No. 55, at 11.) As the Plaintiffs had not cured this deficiency in the amended complaint, the Court granted the Defendants' second motion to dismiss the amended complaint but again granted the Plaintiffs leave to amend their complaint. (Id. at 14–15.)

However, the Court rejected "the Plaintiffs' request that the Court permit them an opportunity to amend the complaint to add an alternative cause of action for a source of income and disability discrimination based on the Defendants' alleged policy of only renting to tenants who were 'working Section 8.'" However, the Court granted the Plaintiffs leave to renew their request "in a formal motion that complies with the Federal Rules of Civil Procedure, the Local Rules of the Eastern District of New York, and this Court's Individual Rules and Practices." (Id. at 14–15.)

Finally, the Court denied the Defendants' motion for sanctions, finding that although the Plaintiffs had failed to comply with the Court's September 19, 2011 Order, the Defendants had failed to show that the Plaintiffs had done so in bad faith. (Id. at 21.)

On September 6, 2012, the Plaintiffs filed a second amended complaint. The second amended complaint contained new allegations regarding the Plaintiffs' ability to obtain a governmental guarantee for their rent. (Second Amended Compl. ("SAC") at ¶¶ 22, 25, 37.) In addition, the Plaintiffs added, without seeking leave of the Court, a claim for source of income and disability discrimination in violation of the "Nassau County Administrative Code, Commission on Human Rights, Chapter 21, Title C, § 21-9.2(o)." (Id. at ¶¶130–37.)

As noted earlier, on September 20, 2012, the Defendants filed an answer to the Plaintiffs' second amended complaint and asserted two counterclaims against the Plaintiffs for violating the New York State Anti-SLAPP statute and for malicious prosecution.

Discovery commenced. On May 13, 2014, the Defendants made their first motion for summary judgment.

On July 3 2014, Frederick Brewington, Esq. ("Brewington"), counsel for the Plaintiffs, notified the Court that the Plaintiff Ennis Johnson had died.

On October 29, 2014, the Plaintiff Sharon Johnson moved pursuant to Fed. R. Civ. P. 25 to be appointed as the successor to the Ennis Johnson's interest in this litigation.

By a December 2, 2014 Order, the Court denied her motion without prejudice because of the unresolved issues regarding the Ennis Johnson's estate. It further denied the Defendants' pending motion for summary judgment without prejudice and granted leave to renew once a proper party was substituted for the decedent.

On February 26, 2015, the Plaintiff Sharon Johnson renewed her motion to be appointed as a successor to Ennis Johnson's interest in this litigation.

On March 4, 2015, the Court granted Sharon Johnson's motion as unopposed.

Presently before the Court is the Defendants' renewed motion for summary judgment dismissing the second amended complaint.

## II. DISCUSSION

### A. Legal Standards

Fed. R. Civ. P. 56(a) provides that a court may grant summary judgment when the "movant shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law."

"Where the moving party demonstrates 'the absence of a genuine issue of material fact,' Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." Brown v. Eli Lilly & Co., 654 F.3d 347, 358 (2d Cir. 2011) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

In that regard, a party "must do more than simply show that there is some metaphysical doubt as to the material facts[.]" Id. (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). Further, the opposing party '"may not rely on conclusory allegations or unsubstantiated speculation[.]"' F.D.I.C. v. Great Am. Ins. Co., 607 F.3d 288, 292 (2d Cir. 2010) (quoting Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998)).

"Where it is clear that no rational finder of fact 'could find in favor of the nonmoving party because the evidence to support its case is so slight,' summary judgment should be granted." Id. (quoting Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994)).

**B. As to the Plaintiffs' Source of Income Discrimination Claim**

As noted, in their memorandum in opposition to the Defendants' second motion to dismiss, the Plaintiffs requested leave to add a cause of action for source of income discrimination against the Defendants.

In its August 17, 2012 Order, the Court denied the Plaintiffs' request as procedurally improper: "the Plaintiffs' request to amend the complaint in this regard is denied, without prejudice to a renewal of this request in a formal motion that complies with the Federal Rules of

Civil Procedure, the Local Rules of the Eastern District of New York, and this Court's Individual Rules and Practices." (Aug. 17, 2012 Order at 14–15.)

On September 6, 2012, the Plaintiffs, without leave of the Court, asserted a cause of action under Chapter XXI, Title C-1, § 21-9.7(c) of the Nassau County Administrative Code ("NCAC") for source of income discrimination because they allege that the Defendants' policy of only renting to "working Section 8" tenants "discriminates against disabled individuals who are unable to work due to their disability or have other sources from which they can satisfy their rental obligations." (SAC at ¶ 133–34.)

The Defendants argue that this claim fails as a matter of law because (i) it is procedurally improper; and (ii) it is time-barred. (The Defs.' Mem. of Law at 13–14.)

The Court finds that the Plaintiffs' source of income discrimination claim fails as a matter of law and is time-barred. Thus, the Court does not address the Defendants' procedural argument.

First, pursuant to Chapter XXI, Tile C, of the NCAC, the Nassau County Legislature established the Nassau County Commission on Human Rights (the "Commission") to "give effect to the guarantee of equal rights for all assured by the Constitution and the laws of this state and of the United States of America." See NCAC, Ch. XXI, Tit. C-1, § 21-9.0, *available at* https://www.nassaucountyny.gov/DocumentCenter/View/1720. One of the Commission's enumerated duties is to "recommend to the County Executive and to the Nassau County Legislature policies and procedures to aid in carrying out the purposes of the title[.]" Id. at § 21-9.4(g).

The "[o]pen [h]ousing" policy statement adopted by the Nassau County Legislature states in relevant part:

> The Nassau County Legislature hereby finds and declares that acts of prejudice, intolerance, bigotry, and discrimination which deny a person the opportunity to lease, rent, or obtain financing for the purchase or lease of housing accommodations because of actual or perceived race, creed, color, gender, disability, age, religion, source of income, sexual orientation, familial status, marital status, ethnicity or national origin threaten the fundamental rights and privileges of the residents of the County of Nassau and undermine the foundations of a free democratic state.

Id. at § 21-9.7(a) (emphasis added).

Source of income is, in turn, defined as "any lawful source of income, including federal, state, local, non-profit assistance or subsidy program." Id. at § 21-9.7(o).

Thus, pursuant to NCAC § 21-9.7(a), the Nassau County Legislature established a policy finding that the failure to lease to an individual based on his or her source of income "undermines the foundations of a free democratic state." Id. at § 21-9.7(a). However, there is no provision of the NCAC which establishes a cause of action for the violation of this policy, or any other policy established by the Legislature and the Commission.

NCAC § 21-9.7(c) establishes certain "unlawful discriminatory practice[s]" which may give rise to a cause of action. However, source of income discrimination is not one of those enumerated "discriminatory practices." Rather, NCAC § 21-9.7(c)(i) makes it unlawful "to refuse to . . . rent or lease any housing accommodation to any person or group of person[s] . . . because of the actual or perceived protected status of such person or persons." See id. at § 21-9.7(c)(i) (emphasis added). As source of income does not relate to the "protected status" of a person, it appears that the NCAC does not, as the Plaintiffs contend, establish a cause of action for failure to rent to a person based on his or her source of income.

The Court's reading appears to be confirmed by the fact that the Plaintiffs do not cite to, nor has the Court been able to identify, a single New York court that has recognized a source of income rental discrimination claim under the NCAC.

Therefore, given the Court's reading of the plain language of the NCAC, and the complete lack of legal authority recognizing a source of income claim under the NCAC for rental discrimination, the Court finds that the Plaintiffs' source of discrimination claim fails as a matter of law.

Second, even if the Plaintiffs could assert a claim under the NCAC for source income discrimination, the Plaintiffs' claim would be time-barred. As the Defendants correctly point out, NCAC § 21-9.7(d)(3)(iv) provides, "A civil action commenced under this section must be commenced within three years after the occurrence of the alleged unlawful discriminatory practice."

Here, according to the second amended complaint, the Plaintiffs were aggrieved by the Defendants' purported discriminatory practice on February 5, 2009, when Levy refused to rent apartment C-3 to the Plaintiffs, allegedly because of the Plaintiffs' source of income and Ennis Johnson's status as HIV-positive. (See SAC at ¶¶ 130–131.) Thus, the Plaintiffs claims became time-barred on February 5, 2012. See NCAC § 21-9.7(d)(3)(iv). However, the Plaintiffs did not assert a "source of income" claim until September 9, 2012, more than seven months later, and therefore, their claim clearly falls outside of the three-year limitations period.

In response, the Plaintiffs claim that the statute of limitations "ran from August 15, 2012, the time when [the] Defendant Levy voluntarily discontinued [the] Defendant's retaliatory S.L.A.P.P. suit against [the] Plaintiffs." (The Pls.' Opp'n Mem. of Law at 17.) The Plaintiffs provide no explanation as to how or why the Defendants' voluntary dismissal of their defamation suit has anything to do with their source of discrimination claim. Thus, the Court finds this argument to be without basis.

The Plaintiffs next contend that the statute of limitation runs, not from the occurrence of the discriminatory act, but rather, when the "complainant learns or should have learned that he or she had been harmed as a result of an actor [sic] acts prohibited under this section." (The Pls.' Mem. of Law at 17.) This contention is clearly belied by the text of NCAC § 21-9.7(d)(3)(iv), which as noted, provides that "[a] civil action commenced under this section must be commenced within three years after the occurrence of the alleged unlawful discriminatory practice." See NCAC § 21-9.7(d)(3)(iv) (emphasis added).

The Plaintiffs further argue that the Defendants waived their timeliness argument by failing to assert it as an affirmative defense in their answer to the second amended complaint. (The Pls.' Opp'n Mem. of Law at 15–17.) This argument is also clearly refuted by the Defendants' answer, which states as an affirmative defense: "[The] Plaintiffs' claims are barred by the applicable statute(s) of limitations." (Answer, Dkt. No. 57, at ¶ 7.)

Finally, the Plaintiffs assert that their source of discrimination claim relates back to the original complaint filed on July 14, 2010 because it arose out of the same conduct alleged in the original complaint. (The Pls.' Opp'n Mem. of Law at 17–18.) Here again, the Court disagrees.

Federal Rule of Civil Procedure 15(c)(B) permits parties to relate an amended complaint back to the date of the original filing when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading."

"In determining whether an amended pleading relates back, the central inquiry is 'whether adequate notice of the matters raised in the amended pleading has been given to the opposing party within the statute of limitations by the general fact situation alleged in the original pleading."' In re Noah Educ. Holdings, Ltd. Sec. Litig., No. 08 CIV. 9203 (RJS), 2010

WL 1372709, at *8 (S.D.N.Y. Mar. 31, 2010) (quoting Stevelman v. Alias Research Inc., 174 F.3d 79, 86–87 (2d Cir. 1999)); see also Slayton v. Am. Exp. Co., 460 F.3d 215, 228 (2d Cir. 2006) (same).

'"Where the amended complaint does not allege a new claim but renders prior allegations more definite and precise, relation back occurs."' Flum v. Dep't of Educ. of the City of New York, 83 F. Supp. 3d 494, 498 (S.D.N.Y. 2015) (quoting Slayton, 460 F.3d at 228). '"In contrast, even where an amended complaint tracks the legal theory of the first complaint, claims that are based on an 'entirely distinct set' of factual allegations will not relate back."' Id.

Here, the Plaintiffs' source of income discrimination claim is based on allegations in the second amended complaint that Levy would not rent to them because they did not have "working section 8 housing" or a guarantee from a government agency for their rental payments. (SAC at ¶¶ 130–31.) The original complaint contains no such allegation. Rather, the Plaintiffs' discrimination claims in the original complaint are premised on the allegation that Levy did not rent to the Plaintiffs solely because of the fact that Ennis Johnson had HIV. (See Original Compl. at ¶ 63.)

Therefore, the Court finds that the source of discrimination claim asserted by the Plaintiffs for the first time in their second amended complaint is based on an allegation and a legal theory distinct from the allegations which form the basis of their housing discrimination claims alleged in their original complaint. Accordingly, the Court concludes that the Plaintiffs' source of discrimination claim does not relate back to the original complaint for purposes of the three-year statute of limitations. See, e.g., ASARCO LLC v. Goodwin, 756 F.3d 191, 203 (2d Cir. 2014) ("While the Second Amended Complaint alleges that the enterprises involved in the Everett and MCMA operations were 'interrelated,' we cannot see how the original complaint

would have given 'adequate notice' that the MCMA claims, which were based on different conduct, in a different location, and attributable to different entities than the claims set forth in that pleading, would be at issue in the dispute."); Ridge Seneca Plaza, LLC v. BP Products N. Am. Inc., 545 F. App'x 44, 47 (2d Cir. 2013) (summary order) ("These later events were separate transactions, despite their connection to the first assessment . . . . The claims in the Amended Complaint did not arise out of the conduct alleged in the original complaint. We agree with the district court that the Amended Complaint was untimely."); Flum v. Dep't of Educ. of the City of New York, 83 F. Supp. 3d 494, 498 (S.D.N.Y. 2015) ("[F]or Plaintiff's Rehabilitation Act, NYSHRL, and NYCHRL claims regarding Waterside to survive a motion to dismiss, they must relate back to her original complaint. The Court finds that these claims do not relate back because they 'are based on an 'entirely distinct set' of factual allegations."') (quoting Slayton, 460 F.3d at 228).

In sum, the Court finds that the Plaintiffs' source of discrimination claim fails as a matter of law and is time-barred. Thus, the Court grants the Defendants' motion with respect to that claim. The Court will now turn to the Plaintiffs' remaining federal and state housing discrimination claims.

**C. As to the Plaintiffs' Federal and State Housing Discrimination Claims**

The second amended complaint asserts housing discrimination claims against the Defendants under FHA §§ 3604(f)(1), 3604(f)(2)(a), and 3617; and NYSHRL § 296(2-a).

Courts evaluate discrimination claims pursuant to the FHA and NYSHRL under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See also Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003) ("We evaluate claims of housing discrimination under the McDonnell Douglas burden-shifting

framework."); Passanante v. R.Y. Mgmt. Co., No. 99 CIV. 9760 (DLC), 2001 WL 123858, at *5 (S.D.N.Y. Feb. 13, 2001) ("The burden shifting approach established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972), applies to discrimination claims brought under the Fair Housing Act, . . . , the ADA, . . . , and the Rehabilitation Act[.]") (internal citations omitted).

Under this framework, "once a plaintiff has established a *prima facie* case of discrimination, the burden shifts to the defendant to assert a legitimate, nondiscriminatory rationale for the challenged decision." Mitchell, 350 F.3d at 47. "If the defendant makes such a showing, the burden shifts back to the plaintiff to demonstrate that discrimination was the real reason for the defendant's action." Id.

As the Court noted in its September 19, 2011 Order, to assert a *prima facie* claim of housing discrimination under the FHA and NYSHRL, a plaintiff must show that "he was qualified for an available benefit and was denied that benefit." (Sept. 11, 2011 Order, Dkt. No. 22, at 17); see also Mitchell, 350 F.3d at 47 ("Plaintiffs may establish a *prima facie* case of housing discrimination by showing (1) that they are members of a protected class; (2) that they sought and were qualified to rent or purchase the housing; (3) that they were rejected; and (4) that the housing opportunity remained available to other renters or purchasers.") (emphasis added); Wilson v. Wilder Balter Partners, Inc., No. 13-CV-2595 (KMK), 2015 WL 685194, at *9 (S.D.N.Y. Feb. 17, 2015) (same).

The Court further noted that '"[t]o satisfy the 'qualified' element for a *prima facie* [housing discrimination] claim, the renter must satisfy the applicable criteria that the owner established."' (Sept. 11, 2011 Order, Dkt. No. 22, at 17) (quoting Kennedy v. Related Mgmt., No. 08 CIV. 3969 (PAC), 2009 WL 2222530, at *4 (S.D.N.Y. July 23, 2009) aff'd, 403 F. App'x 566 (2d Cir. 2010)); see also Mancuso v. Douglas Elliman LLC, 808 F. Supp. 2d 606, 618

(S.D.N.Y. 2011) ("When analyzing this prong of a *prima facie* case, courts have used as a starting point the applicable criteria that the owner has established regarding who is 'qualified.'")

Here, as noted, on January 26, 2009, Levy sent the Plaintiffs an offer letter which stated that the "conditions" for a one-year lease of apartment C-3 at 51 Smith Street were (i) "two months security and the first month's rent must be paid at the lease signing"; and (ii) "the rent must be guaranteed by a governmental agency." (Kardisch Decl., Ex. H) (emphasis added).

In the September 19, 2011 Order, the Court, at the motion to dismiss stage, rejected the Plaintiffs' argument that the fact Ennis Johnson had a guarantee from the DSS for the first month's rent and security deposit was sufficient to satisfy both the first and second "conditions" of the lease. (Sept. 19, 2011 Order, Dkt. No. 22, at 23–24.) Rather, the Court held that "the only reasonable interpretation of the lease conditions provision is that the Plaintiffs were required to obtain a guarantee from a government agency for the remaining rent due for the one year." (Id.)

In their present motion for summary judgment, the Defendants again assert that the Plaintiffs have failed to proffer evidence sufficient to make a *prima facie* case that they satisfied the second condition of the lease — namely, that the "rent must be guaranteed by a governmental agency." (The Defs.' Mem. of Law at 16–18.) As such, they contend that the Plaintiffs were not qualified to lease apartment C-3 and therefore, their housing discrimination claims fail as a matter of law. (See id.)

In response, the Plaintiffs assert that: (i) they have established a *prima facie* case that they were qualified to rent the apartment because there is evidence showing that the Defendants were willing to rent them the apartment despite the fact that Levy was aware that the Plaintiffs did not have a guarantee from the government for ongoing rental payments; (ii) the Defendants' proffered reason for denying them the apartment was pre-textual; and (iii) had they been given

the opportunity to obtain a government guarantee for their rental payments, they could have done so. (The Pls.' Opp'n Mem. of Law at 20–24.)

As noted, at the first step of the McDonnell Douglas framework, plaintiffs must make a *prima facie* showing that they were "qualified" for the apartment. See Mitchell, 350 F.3d at 47. The Second Circuit has described this burden as a limited one: "This burden is 'not onerous,' Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); indeed, it is 'minimal,' St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), or 'slight,' Wanamaker v. Columbian Rope Co., 108 F.3d 462, 465 (2d Cir. 1997)." United States v. City of New York, 717 F.3d 72, 84 (2d Cir. 2013).

Courts have found that plaintiffs failed to satisfy their initial *prima facie* burden where the defendant-landlords have clearly communicated the rental criteria relating to the purchase of the apartment to the plaintiffs, and the plaintiffs failed to satisfy that criteria. For example, in Passanante v. R.Y. Mgmt. Co., No. 99 CIV. 9760 (DLC), 2001 WL 123858, at *3 (S.D.N.Y. Feb. 13, 2001), the plaintiff, a homosexual with a psychiatric disability, brought housing discrimination claims under the FHA, ADA, Rehabilitation Act, and state law, against a management company, its subsidiaries, and several of its employees, for denying him housing on the basis of his sexuality and his disability. The undisputed evidence showed that the defendants had offered the plaintiff an apartment on two occasions, which he declined. Id. at 2. As to the third apartment, the evidence showed that the defendants informed the plaintiff that "his application would be cancelled if he did not submit evidence of his Section 8 subsidy by March 10, 2000. Having heard nothing from him by March 10, 2000, RY cancelled plaintiff's application for an apartment." Id.

The court in Passanante granted the defendants' motion for summary judgment, finding that the plaintiff had failed to make a *prima facie* case of housing discrimination because it was undisputed that he "was not qualified to rent an apartment from the . . . defendants because he did not have a Section 8 rent subsidy." Id. at *5.

Similarly, in Jiminez v. Southridge Co-op., Section I, Inc., 626 F. Supp. 732, 733 (E.D.N.Y. 1985), the court, after a bench trial, denied a plaintiff's request for an injunction based on a housing discrimination claim because it found that the plaintiff had failed to satisfy his initial *prima facie* burden as to whether he was qualified to rent the apartment in question. There, it was undisputed that the defendants had a policy requiring housing applicants to submit documentation showing that they were continuously employed for a year and met certain income requirements. See id. at 734. The plaintiff admitted that "he read, understood and agreed to be bound by defendant's terms," and it was also undisputed that the defendant told the plaintiff that they rejected his application because he had failed to meet these requirements. Id. at 733–34. Under these circumstances, the court found that the plaintiff could not establish that he was qualified for the apartment and denied the plaintiffs' request for an injunction. Id. at 735.

However, as the court noted in its September 19, 2011 Order, "the written rental conditions are not always binding where there is evidence or allegations that the requirements conveyed by the landlord diverged from the writing." (Sept. 19, 2011 Order, Dkt. No. 22, at 19–20.)

For example, in Mitchell v. Shane, 350 F.3d 39, 42 (2d Cir. 2003), the plaintiffs, an African-American couple, alleged that they were denied the right to purchase a property owned by the defendants, a white couple, due to their race. Id. at 41–42. The district court granted the defendants' motion for summary judgment, in part, because the district court found that the

plaintiffs did not meet the defendants' purported requirements that (i) the plaintiffs make a down payment no less than 80 percent of the purchase price of the home; and (ii) obtain a mortgage commitment letter before signing the sales contract. See id. at 47–48.

On appeal in Mitchell, the Second Circuit affirmed the district court's grant of summary judgment in favor of the defendant-sellers because it found that it was undisputed that the sellers were not aware of the plaintiffs' racial background until after they had rejected the plaintiffs' offer. Id. at 49. However, the court in Mitchell disavowed the finding of the district court that the plaintiffs had failed to make a *prima facie* case that they were qualified to purchase the home. Id. at 48–49. As to the first purported requirement, the court reasoned that, "[e]ven assuming that the [sellers'] preference for greater equity in the property was an absolute prerequisite, it is anything but clear that the [plaintiffs] were unable to provide this level of financing." Id. As to the mortgage commitment letter, the Second Circuit in Mitchell found that the evidence showed that the plaintiffs had obtained a pre-approval letter but not a "mortgage commitment" letter. Id. at 48. However, the court found that "this hardly rendered the[] [plaintiffs] unqualified, since the sellers never suggested that prospective buyers needed to obtain a guarantee of financing before signing a contract to purchase the Property." Id. Moreover, the court noted that although the "[sellers] apparently expressed concern about this level of equity, there is no evidence that they objected to the provision of a preapproval letter rather than an actual commitment." Id. at 48.

Therefore, based on the record before it, the court in Mitchell found that the plaintiffs were qualified to purchase the property and therefore, summary judgment should not have been granted by the district court on that basis. Id.; see also Kennedy v. Related Mgmt., No. 08 CIV. 3969 (PAC), 2009 WL 2222530, at *5 n.6 (S.D.N.Y. July 23, 2009) aff'd, 403 F. App'x 566 (2d Cir. 2010) ("Under these facts and [the defendant's] continued work on the [the [plaintiffs'

rental] application, [the defendant] cannot claim that the Kennedys were not 'qualified' for purposes of establishing a *prima facie* case under the FHA simply because they were technically income ineligible when they applied."); Cleveland v. Bisuito, No. 03-CV-6334 CJS(F), 2004 WL 2966927, at *5 (W.D.N.Y. Dec. 21, 2004) (finding that the plaintiffs had established a *prima facie* case that they were qualified to rent an apartment because there was evidence in the record that the defendant's agent "offered to revise the lease to allow plaintiffs additional time during which to pay the security deposit").

Here, as noted, there is no dispute that on January 26, 2009, Levy faxed an amended offer letter to the Plaintiffs, which stated the "conditions" for the lease were (i) "two months security and the first month's rent must be paid at the lease signing" and (ii) "the rent must be guaranteed by a governmental agency." (Kardisch Decl., Ex. H) (emphasis added). It is also undisputed that the Plaintiffs did not have a guarantee by a governmental agency prior to February 5, 2009, when the Plaintiffs intended to meet with Campbell at DSS to sign the lease agreement. (See the Defs.' 56.1 Statement at ¶ 51; the Pls.' Counter-56.1 Statement at ¶ 51.)

However, the Plaintiffs have submitted evidence suggesting that the Defendants did not view the "condition" in the offer letter that they obtain a "guarantee by a governmental agency" as an absolute pre-requisite to the Plaintiffs signing the lease.

To the contrary, Sharon Johnson testified that on January 14, 2009, after viewing an apartment at 51 Smith Street, she told Levy that her husband's only income derived from SSD payments and that they were eligible for assistance from DSS only for the first month's rent and the security deposit. (Brewington Decl., Ex. D, at Tr. 45:9–17.) Thus, it was clear to Levy as early as January 14, 2009 that the Plaintiffs did not have a guarantee from DSS, or another governmental agency, for ongoing rental payments.

However, according the Plaintiffs' testimony, in subsequent conversations with Sharon Johnson from January 14, 2009 to February 4, 2009, Levy did not raise any objections to the Plaintiffs' application on the ground that the Plaintiffs did not have a guarantee from the government beyond the security deposit and the first month's rent. (See Brewington Decl., Ex. D, at Tr. 145:2-15; Ex. E, at Tr. 121:16–20.) To the contrary, Campbell, Levy's assistant, testified that Levy instructed her to meet the Plaintiff at DSS on February 5, 2009 in order to sign the lease and pick up the checks for the security deposit and the first two months of rent: "The purpose [of the February 5, 2009 meeting] was to have a lease signed for an apartment . . . . I remember carrying a folder [to the meeting] with me. I believe it was a rental agreement of some kind[.]" (Brewington Decl., Ex. C, at Tr. 24:11–14.)

The Defendants dispute much of the testimony offered by the Plaintiffs. In an affidavit in support of the instant motion, Levy states that he did in fact tell the Plaintiffs on several occasions that he would not rent to them unless they "received a guarantee from a governmental agency for the duration of the lease term." (Levy Aff. at ¶ 13.) He further contends that he believed DSS, not Campbell, was preparing the lease for his apartment and that he sent Campbell to DSS on February 5, 2009 to sign the lease based on his belief that he "was going to obtain a lease [from DSS] with rental payments guaranteed by governmental entity." (Id. at ¶ 21.)

However, the fact that there is disputed testimony as to the Plaintiffs' qualifications to rent the Defendants' apartment is of no moment in determining whether the Plaintiffs made a *prima facie* case **of** housing discrimination. That is because at the first stage of the McDonnell Douglas framework the "the *prima facie* requirements are relaxed . . . . in the initial phase of the case, the plaintiff can establish *a prima facie* case without evidence sufficient to show discriminatory motivation." Littlejohn v. City of New York, 795 F.3d 297, 307 (2d Cir. 2015).

Thus, the Plaintiffs need only show at this first stage "enough evidence for the trier of fact," City of New York, 717 F.3d at 83, to infer that the Plaintiffs are "1) members of a protected class; (2) that they sought and were qualified to rent or purchase the housing; (3) that they were rejected; and (4) that the housing opportunity remained available to other renters or purchasers." Mitchell, 350 F.3d at 47.

Here, there is no dispute that the Plaintiffs have satisfied the first, third, and fourth elements. Further, the Court finds that the Plaintiffs have submitted enough evidence, based on the testimony of the Plaintiffs and Campbell discussed earlier, for a factfinder to infer that Levy viewed the Plaintiffs as qualified despite the fact that they did not have an ongoing rental guarantee. Thus, the Court finds that the Plaintiffs have made a *prima facie* case of housing discrimination. See Mitchell, 350 F.3d at 48 ("The district court also found the Mitchells unqualified because they did not obtain a mortgage commitment letter until March 1, 2002 . . . . But this hardly rendered them unqualified, since the sellers never suggested that prospective buyers needed to obtain a guarantee of financing before signing a contract to purchase the Property . . . . Though the Shanes apparently expressed concern about this level of equity, there is no evidence that they objected to the provision of a preapproval letter rather than an actual commitment . . . . The plaintiffs, therefore, were qualified to purchase the Property.")

As noted, "once a plaintiff has established a *prima facie* case of discrimination, the burden shifts to the defendant to assert a legitimate, nondiscriminatory rationale for the challenged decision." Id. at 47. Although the Defendants do not state it explicitly in their memoranda, Levy's affidavit suggests that he declined to rent the apartment for reasons that were non-discriminatory: "I repeatedly advised Mrs. Johnson that the only reason that I was ceasing the interaction with them at the time was because they had lied about the rent being

guaranteed by a governmental agency." (Levy Aff. at ¶ 22.) Moreover, according to Levy, he only learned that Ennis Johnson was HIV-positive after he had told Campbell to cease interaction with him. (Id. at ¶ 21.)

At a June 15, 2010 deposition, Levy also testified that he did not know at the time he decided not to move forward with the Plaintiffs that Ennis Johnson was HIV-Positive. (Brewington Decl., Ex. B, at Tr. 48:22–25.) However, he testified that his reason for rejecting their application was not based on their income, but rather, because the Plaintiffs had a cat: "I also recall that [Campbell] told me that she had a cat . . . And I told her that as much as I love cats, unless and until she had possession of the apartment, I can't permit the animal." (Id. at Tr. 47:7–14.)

Although the Levy's affidavit and his testimony are somewhat inconsistent, both sources present evidence of a non-discriminatory rationale for the decision by the Defendants not to rent the apartment to the Plaintiffs — namely, because the Plaintiffs' failed to obtain a governmental guarantee, and because of their desire to bring a cat with them to the apartment. The Court finds that this evidence is sufficient to shift the burden of persuasion back to the Plaintiffs to demonstrate an issue of fact as to whether the Levy's proffered reasons for rejecting the Plaintiffs' rent application were pre-textual and, instead, the result of discrimination based on the fact that the Plaintiff was HIV-positive. See Littlejohn, 795 F.3d at 307-08 ("However, once the employer presents evidence of its justification for the adverse action, joining issue on plaintiff's claim of discriminatory motivation, the presumption 'drops out of the picture' and the McDonnell Douglas framework 'is no longer relevant.' St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). At this point, in the second phase of the case, the plaintiff must demonstrate that the proffered reason was not the true reason (or in any event

not the sole reason) for the employment decision, which merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against her.") (citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

The Court finds that the Plaintiffs have submitted enough evidence to create a genuine issue of material fact as to whether Levy's decision was based on discrimination against Ennis Johnson. Specifically, Campbell testified that she told Levy that Ennis Johnson was "being treated for AIDs" prior to Levy instructing her to call off signing a lease with the Plaintiffs. (Brewington Decl., Ex. C, at Tr. 42:8–13.) While Campbell did not state that Levy ultimately told her to call off the deal because Ennis Johnson had AIDs, Sharon Johnson testified that when she subsequently spoke to Levy, he made clear to her that the fact her husband was HIV-positive was the reason that he was not going to rent an apartment to the Plaintiffs. (See Brewington Decl., Ex. D, at Tr. 64:4–8; Ex. E, at Tr. 39:14–16.)

As discussed earlier, Levy offers a totally different version of what he told Campbell and Sharon Johnson on February 5, 2009 as to why he decided not to rent to the Plaintiffs. However, the question of whose testimony is more credible is a classic question for the jury, not for this Court to decide at the summary judgment stage. See Altomare v. Wells Fargo Sec., LLC, No. 09 CIV. 9702 (PGG), 2012 WL 489200, at *9 (S.D.N.Y. Feb. 15, 2012) ("However, 'it is not the role of the Court to make these credibility determinations on summary judgment; rather, it must assume that plaintiff's testimony will be credited and draw all reasonable inferences in plaintiff's favor."') (quoting Catalano v. Lynbrook Glass & Architectural Metals Corp., No. 06–CV–2907(JFB)(AKT), 2008 WL 64693, at *9, n.5 (E.D.N.Y. Jan. 4, 2008)).

Therefore, based on the conflicting testimony offered by both parties, the Court finds that a rationale factfinder could infer that Levy's decision not to rent to the Plaintiffs was based on discrimination, as the Plaintiffs contend, or the Plaintiffs' failure to procure a government guarantee for their ongoing rental obligations, as the Defendants contend. Accordingly, the Court denies the Defendants' motion for summary judgment with respect to the Plaintiffs' housing discrimination claims under the FHA and NYSHRL.

**D. As to the Plaintiffs' ADA and Anti-SLAPP Claims**

The second amended complaint also asserts claims under (i) Title III of the ADA, 42 U.S.C. § 12182(a); and (ii) the New York Anti-SLAPP statute, N.Y. Civ. Rights Law § 70-a. (SAC at ¶¶ 60–70; 106–110.) As set forth below, both claims suffer from deficiencies as a matter of law.

**1. Title III of the ADA**

42 U.S.C. § 12182(a) provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C.A. § 12182 (West)(a) (emphasis added).

"In order to state a claim for violation of Title III, which authorizes private actions only for injunctive relief, not monetary damages, see, e.g., Powell v. National Board of Medical Examiners, 364 F.3d 79, 86 (2d Cir.2004), a plaintiff must 'establish that (1) he or she is disabled within the meaning of the ADA; (2) that the defendants own, lease, or operate a place of public accommodation; and (3) that the defendants discriminated against the plaintiff within the meaning of the ADA[.]"' Krist v. Kolombos Rest. Inc., 688 F.3d 89, 94-95 (2d Cir. 2012) (quoting Roberts v. Royal Atlantic Corp., 542 F.3d 363, 368 (2d Cir. 2008).

There are a number of elemental issues as to the Plaintiffs' Title III ADA claim.

First, it is well-established that "[a] private individual may only obtain injunctive relief for violations of a right granted under Title III; he cannot recover damages." Powell v. Nat'l Bd. of Med. Examiners, 364 F.3d 79, 86 (2d Cir. 2004). Here, the Plaintiffs do not seek injunctive relief, but rather, monetary damages in "excess of $3,000,000." As the Plaintiffs may not obtain such relief, their claim fails as a matter of law. See, e.g., Ajuluchuku-Levy v. Schleifer, No. 08 CV 1752 SJF/AKT, 2009 WL 4890768, at *3 (E.D.N.Y. Dec. 15, 2009) ("As the damages sought by Plaintiff are not remedies available pursuant to Title III of the ADA, Plaintiff has failed to state a claim upon which relief may be granted, . . . , and accordingly, this branch of Defendant's motion to dismiss is granted."); Fiorica v. Univ. of Rochester, Sch. of Nursing, No. 07-CV-6232T, 2008 WL 907371, at *2 (W.D.N.Y. Mar. 31, 2008) ("In the instant case, plaintiff's Complaint seeks monetary damages for the alleged discrimination against her by the defendant. Because she may not obtain such relief as a matter of law, she has failed to state a claim upon which relief may be granted.").

Second, as noted, in order to properly allege a claim under Title III of the ADA, plaintiffs must allege that the "defendants own, lease, or operate a place of public accommodation." Kolombos Rest. Inc., 688 F.3d at 94-95. In the present case, there is no dispute Smith Street is a private management company owned by Levy, a private individual. Nevertheless, the second amended complaint asserts that the second element — requiring that the defendants "own, lease, or operate a place of public accommodation" — is satisfied because the "Defendant Levy and 51 Smith Street LLC, receive funding from DSS and other governmental agencies, in exchange for providing housing to those qualified under various State and Federal housing programs." (SAC at ¶ 64.)

However, courts in this Circuit have repeatedly dismissed Title III claims against private residential facilities, even if those facilities are used for public subsidized housing. See, e.g., Ayyad-Ramallo v. Marine Terrace Associates LLC, No. 13-CV-7038 (PKC), 2014 WL 2993448, at *1 (E.D.N.Y. July 2, 2014) ("[A]lthough Title III of the ADA applies to private entities that operate 'places of public accommodation,' residential facilities, even those that accept public subsidies, do not constitute public accommodations under Title III."); Rappo v. 94-11 59th Ave. Corp., No. 11-CV-4371 (SLT), 2011 WL 5873025, at *2 (E.D.N.Y. Nov. 21, 2011) ("[Title III of the ADA] does not apply to private residential complexes, even if the premises are used for publicly subsidized housing."); Reid v. Zackenbaum, No. 05-CV-1569 (FB), 2005 WL 1993394, at *4 (E.D.N.Y. Aug. 17, 2005) ("A residential facility, such as an apartment, is not a public accommodation under the ADA.").

Thus, based on the undisputed facts of this case — namely, that the Plaintiffs seeks monetary damages and that the Defendants Smith Street and Levy own a private residential facility — the Court finds that the Plaintiffs' housing discrimination claim under Title III of the ADA fails as a matter of law.

**2. The New York Anti-SLAPP Statute**

The second amended complaint alleges a claim under the label, "New York Civil Rights Law § 70," based on the allegation that the "Defendants Levy and 51 Smith Street LLC, interfered with [the] Plaintiff Ennis Johnson's right to enjoyment of the premises by refusing to lease 51 Smith Street unit C-3[.]" (SAC at ¶ 109.)

New York's Anti-SLAPP statute provides:

> A defendant in an action involving public petition and participation . . . may maintain a[ ] . . . counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:

> (a) costs and attorney's fees may be recovered upon a demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law . .

N.Y. Civ. Rights Law § 70-a (McKinney).

An action involving "public petition and participation" is expressly defined narrowly as:

> [a]n 'action involving public petition and participation' is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.

N.Y. Civ. Rights Law § 76–a(1)(a).

> A "public applicant or permittee" is defined as:
> any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission

N.Y. Civ. Rights Law § 76-a (McKinney).

Thus, in order for an Anti-SLAPP claim to exist under New York law:

> 1) there must be a public application or petition, 2) the public applicant or permittee of that application must file a lawsuit against a person [that] is 'materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission,' and 3) the lawsuit must be, at a minimum, substantially without merit[.]

Gilman v. Spitzer, 902 F. Supp. 2d 389, 398 (S.D.N.Y. 2012) (quoting Chandok v. Klessig, 648 F.Supp.2d 449, 460 (N.D.N.Y. 2009)).

In other words, New York's Anti-SLAPP law "is available only in relatively rare circumstances" where the plaintiff has been sued by a party seeking to challenge the plaintiff's ruling on his application for "a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body." See N.Y. Civ. Rights Law

§ 76-a (McKinney); see also Spitzer, 902 F. Supp. 2d at 398 ('"A narrow construction of the Anti-SLAPP law requires that a SLAPP-suit defendant must directly challenge an application or permission in order to establish a cause of action.'") (quoting Guerrero v. Carva, 10 A.D.3d 105, 779 N.Y.S.2d 12, 21 (1st Dep't 2004)).

That is not the case here. In this case, the Plaintiffs are seeking monetary damages arising from the decision by the Defendants, who are private parties, not to rent an apartment to the Plaintiffs based on what they contend to be discrimination on the basis of Ennis Johnson's disability. In other words, the Plaintiffs' Anti-SLAPP claim appears to be totally duplicative of their housing discrimination claims. It is clear from the plain language of the Anti-SLAPP statute that the New York state legislature did not intend for the statute to create a cause of action for garden variety housing discrimination claims, such as those that the Plaintiffs attempt to assert here. Those claims are properly asserted as housing discrimination claims under the FHA and NYSHRL. Thus, the Plaintiffs' Anti-SLAPP claim also fails a matter of law.

**3. Fed. R. Civ. P. 56(f)**

Despite what the Court finds to be somewhat obvious deficiencies in the Plaintiffs' claims under Title III of the ADA and the New York Anti-SLAPP statute, the Defendants have not raised those deficiencies in their present motion.

However, Fed. R. Civ. P. 56(f) authorizes a district court to "grant the motion [for summary judgment] on grounds not raised by a party" after the court gives "notice and a reasonable time to respond" to the party opposing summary judgment. Cf. Willey v. Kirkpatrick, No. 13-699, --- F.3d ---- 2015 WL 5059377, at *8 (2d Cir. Aug. 28, 2015) ("Because the district court did not provide Willey with notice that it would consider grounds not raised in the

defendants' brief in support of their motion, we must vacate the judgment to the extent that it exceeded the grounds raised in that motion.").

Therefore, in compliance with the procedures of Rule 56(f), the Court permits the Plaintiffs to file a letter no longer than five pages within seven days of the date of this Order showing cause as to why the Court should not dismiss their claims under Title III of the ADA and the New York Anti-SLAPP statute. Failure to do so will result in the dismissal of those claims on the grounds set forth above.

## III. CONCLUSION

For the foregoing reasons, the Court (i) grants the Defendants' motion with respect to the Plaintiffs' seventh cause of action under the NCAC and dismisses that claim; and (ii) denies the Defendants' motion with respect to the Plaintiffs' housing discrimination claims under the FHA and NYSHRL, which are labelled as the second, third, fourth, and sixth causes of actions in the second amended complaint.

The Court further permits the Plaintiffs to file a letter within seven days of the date of this Order no longer than five pages showing cause as to why this Court should not dismiss the Plaintiffs' claims under Title III of the ADA (the first cause of action) and the New York Anti-SLAPP statute (the fifth cause of action). Failure to do so will result in the dismissal of those claims on the grounds set forth in this Order.

**SO ORDERED.**
Dated: Central Islip, New York
October 23, 2015

*/s/ Arthur D. Spatt*
ARTHUR D. SPATT
United States District Judge