

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JUDE ALCEGUEIRE, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 03-2153  
 )  
 EMC MORTGAGE CORPORATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Miami, Florida, on November 6, 2003.

APPEARANCES

For Petitioner: Jude Alcegueire, pro se  
2913 Southwest 68th Avenue  
Miramar, Florida 33023

For Respondent: Richard B. Celler  
Heather L. Gatley  
Steel, Hector & Davis, LLP  
200 South Biscayne Boulevard, Suite 4000  
Miami, Florida 33131-2398

STATEMENT OF THE ISSUE

The issue is whether Respondent is guilty of discriminating against Petitioner on the basis of race, in violation of the Fair Housing Act, Sections 760.20-760.37, Florida Statutes.

PRELIMINARY STATEMENT

By Housing Discrimination Complaint dated August 22, 2002, Petitioner alleged that Respondent committed housing discrimination against him, based on his race, in violation of Sections 805 and 818 of Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988.

On May 7, 2003, the Florida Commission on Human Relations entered a Determination of No Reasonable Cause.

On June 5, 2003, Petitioner filed a Petition for Relief, alleging that Respondent is violating the Fair Housing Act, Sections 760.20-760.37, Florida Statutes.

At the hearing, Petitioner called two witnesses and offered into evidence three exhibits: Petitioner Exhibits 1-3. Respondent called one witness and offered into evidence six exhibits: Respondent Exhibits 10-13 and 17-18. All exhibits were admitted except Petitioner Exhibit 3, which was proffered.

The court reporter filed the transcript on December 1, 2003. Respondent filed its proposed recommended order on December 12, 2003. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner is an African-American and, as such, a member of a protected class. Petitioner owns residential real property at 2913 Southwest 68th Avenue in Miramar. The

residence is encumbered by a mortgage, which was originated by Superior Bank on November 2, 1998.

2. On May 1, 2002, Respondent acquired from Superior Bank the right to service Petitioner's mortgage, presumably as part of a much larger transaction. Respondent's servicing responsibilities include monitoring the mortgagor's payment of installments of the mortgage note, ad valorem taxes on the secured property, and insurance premiums on the improvements. The owner of Petitioner's mortgage is a party that is unrelated to Respondent, except for the contractual relationship that is involved in Respondent's servicing of the mortgage.

3. Prior to Respondent's acquisition of the right to service Petitioner's mortgage, Petitioner had complained of his treatment by Superior Bank or its agents. Specifically, Petitioner complained that, prior to purchasing the residence, he had contacted Superior Bank to obtain a mortgage loan. Petitioner claimed that a Superior Bank employee had informed him that Superior Bank did not make direct loans and instead referred him to a mortgage broker. Petitioner eventually obtained the mortgage through the broker, but he claimed that this unnecessary step cost him an additional \$5000.

4. Superior Bank and Petitioner later negotiated a settlement of Petitioner's claim. Pursuant to the settlement agreement, the vice-president and general counsel of Alliance

Funding Company, a division of Superior Bank, sent Petitioner a check for \$2370 and a general release. The general release, which Petitioner signed on April 9, 1999, states, in part: "I hereby voluntarily release the Company and its . . . successors and assigns . . . of and from any and all claims . . . that I . . . have or may have as of the date of execution of this Release, including . . . any alleged violation of: any federal, state or local civil or human rights law . . ."

5. Subsequently, Petitioner became dissatisfied with the condition of the property that he had bought. Petitioner expressed his dissatisfaction to Superior Bank. The parties settled this claim by Superior Bank advancing Petitioner \$2000, interest free, for repairs, and adding this amount to the principal of the mortgage indebtedness. The Agreement states that Petitioner "reaffirms the terms of the General Release [executed April 9, 1999] in full and . . . agrees that he will not seek further monies, compensation and/or accommodations from Superior in connection with the Property or the mortgage loan transaction."

6. Later claiming that Superior Bank was not performing on an oral promise that one of its employees had made to him, Petitioner contacted Superior Bank to start negotiations on a third settlement. However, at this time, Superior Bank was in

the process of transferring various assets, including the right to service Petitioner's mortgage loan, to Respondent.

7. On May 10, 2002, nine days after Respondent had begun servicing Petitioner's mortgage, Petitioner contacted Respondent and spoke with Christopher Carman, who is vice-president and associate general counsel of Respondent. In the conversation, Petitioner asserted that Superior Bank had promised to do certain things, and Respondent was bound to perform these promises. Petitioner became hostile when Mr. Carman did not agree that Respondent was obligated to perform Superior Bank's verbal promises.

8. Three to five telephone conversations ensued between Mr. Carman and Petitioner. After examining copies of the releases that Petitioner had signed, Mr. Carman added that Petitioner had released any and all claims that he might have had against Superior Bank. The two men then disagreed over the effect of the releases that Petitioner had signed.

9. Petitioner testified that Mr. Carman or another of Respondent's employees called him a "nigger," but this testimony is discredited based on Mr. Carman's denial, the inability of Petitioner to identify consistently the speaker, and Petitioner's irrational and disruptive behavior at the hearing. At no point during any of these conversations did Mr. Carman or any other employee of Respondent use the word, "nigger."

10. Petitioner's repeated attempts to disrupt the prehearing process and the final hearing appear to have been part of a scheme to avoid or at least delay the transition from easy allegation to hard evidence--during which time another settlement always remained a possibility. Petitioner's repeated assertion of claims covered by past releases and promise at the hearing to file multiple claims against Respondent for other unspecified instances of discrimination reveal Petitioner's obvious intent to convert the civil justice system into a personal automated teller machine, doling out relatively small, nuisance sums whenever Petitioner punches in the code indicative of some additional mistreatment.

11. In addition to failing to prove that any of Respondent's employees used a racial epithet, Petitioner produced absolutely no evidence of any adverse action that Respondent took against him, except for its justifiable refusal to pay for Superior Bank's alleged acts and omissions or failure to perform its alleged oral undertakings. Petitioner testified that Respondent's employees refused to take his telephone calls, but Petitioner never demonstrated any reason why Respondent's employees were legally obligated to take Petitioner's numerous calls, in which he repeatedly and heatedly expressed the same demands and complaints, call after call, day after day. Likewise, Petitioner produced absolutely no evidence that

Respondent has treated him differently from how, under similar circumstances, it has or would have treated persons who are not members of a protected class.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2003).

13. Section 760.25(2)(a), Florida Statutes, states:

It is unlawful for any person or entity whose business includes engaging in residential real estate transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, national origin, sex, handicap, familial status, or religion.

14. Section 760.25(2)(b), Florida Statutes, defines a "residential real estate transaction" as "any of the following:"

1. The making or purchasing of loans or providing other financial assistance:
  - a. For purchasing, constructing, improving, repairing, or maintaining a dwelling; or
  - b. Secured by residential real estate.
2. The selling, brokering, or appraising of residential real property.

15. The business of Respondent is servicing mortgages. Although Respondent may sometimes engage in this business by purchasing the mortgages themselves, in this case, Respondent

purchased only the right to service a mortgage. Petitioner's mortgage is owned by an unrelated party.

16. Petitioner bears the burden of proof. In Hickson v. Home Federal of Atlanta, 805 F. Supp. 1567, 1571-72 (N.D. Ga. 1992), the court stated:

To state a claim under section 3605 of the Fair Housing Act, [footnote omitted; this is the federal counterpart to Florida Statutes Section 760.25(2)(b)] Hickson must plead that: (1) he was a member of a protected class; (2) he attempted to engage in a "real estate-related transaction" with Homebanc, and met all relevant qualifications for doing so; (3) Homebanc refused to engage in the transaction despite Hickson's qualifications; and (4) Homebanc continued to engage in that type of transaction with other parties with qualifications similar to Hickson's. See Secretary, HUD ex rel. Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990).

17. Petitioner has proved that he is a member of a protected class, but nothing else. He has not proved that he was engaged in a real estate transaction with Respondent. Having purchased only the right to service Petitioner's mortgage, Respondent had not engaged in a residential real estate transaction with Petitioner in which Respondent was making a loan, purchasing a loan, or providing any form of financial assistance, nor, of course, was Respondent selling, brokering, or appraising real property.



18. Nor has Petitioner proved that he met all qualifications for any real estate transaction into which he was seeking to enter, such as requiring Respondent to perform a released oral obligation of Superior Bank.

19. Even if Respondent's servicing of Petitioner's mortgage constituted a residential real estate transaction and Petitioner proved that he has met all applicable qualifications for the transaction that he sought to enter into with Respondent, Petitioner failed to prove that Respondent failed or refused to do anything. The record shows that Respondent failed to take the repeated calls of Petitioner, who was repeatedly making the same demands of Respondent's beleaguered employees, but the law does not require that these employees take these types of calls, which amount to nothing more than harassment.

20. Lastly, Petitioner produced not a trace of evidence that Respondent treated him any differently than it has or would have treated persons, under similar circumstances, who were not members of a protected class.

21. Section 57.105(1)-(5), Florida Statutes, provides:

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a

claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.

(2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the

motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

22. From the start, Petitioner's claim in this case was unsupported by one crucial fact--proof that, under similar circumstances, Respondent treated persons who were not members of a protected class any differently from how it treated Petitioner. Respondent's Housing Discrimination Complaint claims that he is "qualified, ready, willing, and able to continue to be a homeowner under the terms and conditions consistent with the EMC Mortgage Corporation" and that Respondent's employee called him a "nigger" while they were "speaking negotiations concerning the terms and conditions" of the mortgage. Petitioner's sole claim of discrimination is: "I believe this statement was discriminating and I believe that if I was white I would not have been treated this way." If

possible, the Petition for Relief supplies fewer details to actual discriminatory action following the alleged use of the racial epithet.

23. It is clear that Petitioner never had any proof of the third element of the Hickson test either. Petitioner never had any proof that Respondent was under any legal obligation to continue to take his harassing calls demanding irrationally that Respondent perform some promise supposedly undertaken by Superior Bank, but, even if so, clearly released by Petitioner at the time of his second settlement.

24. Unable to obtain Respondent's agreement to Petitioner's post-release claim to another adjustment almost three and one-half years after the closing of the mortgage with an unrelated party, Petitioner decided to transform his claim to one of racial discrimination, even though he was missing key elements to such a claim, including the racial epithet that Petitioner manufactured.

25. Petitioner's repeated, unprecedented attempts to disrupt the administrative process preclude any inference of good faith on his part. To the contrary, Petitioner was obviously using the administrative process merely for leverage to strike a deal, not to vindicate his good-faith claims of racial discrimination in housing.

RECOMMENDATION

It is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Petition for Relief.

ORDER

It is

ORDERED that, pursuant to Section 57.105(5), Florida Statutes, Petitioner shall pay Respondent its reasonable attorneys' fees and damages in the form of recoverable costs in connection with the defense of this case. The Division of Administrative Hearings retains jurisdiction over this portion of this case, pursuant to the terms described in this paragraph. If the parties are unable to agree upon the amount of fees and costs to be awarded pursuant to this paragraph, and document this agreement, within 60 days from the date of this Order, Respondent shall file a motion seeking a hearing on, and determination of, the amount of such fees and costs. If Respondent fails to do so within 180 days from the date of this Order, Respondent shall have waived its right to obtain such an award.

DONE AND ENTERED this 17th day of December, 2003, in  
Tallahassee, Leon County, Florida.



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ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 17th day of December, 2003.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS AS TO RECOMMENDED ORDER

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.

NOTICE OF RIGHT TO JUDICIAL REVIEW OF ORDER AWARDING ATTORNEYS'  
FEES AND COSTS

A party who is adversely affected by this final order is entitled to judicial review and may be entitled to such review at this time. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.