

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRISELLA WINDER, AS THE)
PERSONAL REPRESENTATIVE OF THE)
ESTATE OF MATTHEW LES FORIS,)
)
Petitioner,)
)
vs.) Case No. 04-1977
)
WHITEHALL ENTERPRISES, INC.,)
d/b/a VILLAS DES CHENES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

An administrative hearing was conducted before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on October 20, 2004, in Clearwater, Florida.

APPEARANCES

For Petitioner: Matthew P. Farmer, Esquire
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For Respondent: Cathy L. Lucrezi, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent, Whitehall Enterprises, Inc., d/b/a Villas Des Chenes, discriminated against Matthew Les Foris, deceased, on the basis of his race in violation of 42 U.S.C. Section 3604(a) and/or (b), and Sections 70-77 and 70-176, Pinellas County Code, by not renewing Les Foris' lease when it expired.

PRELIMINARY STATEMENT

On November 1, 2002, Matthew Les Foris filed a Complaint of Discrimination, HUD Form 903, with the Pinellas County Commission on Human Relations ("Commission"). The Commission investigated the matter, and on May 20, 2004, determined there was reasonable cause to support the allegations of discrimination. Petitioner requested a formal hearing, and the Commission referred the matter to the Division of Administrative Hearings (DOAH) to conduct an administrative hearing on June 1, 2004. Les Foris died on August 23, 2003. Crisella Winder was appointed as personal representative of the estate, and she was substituted as Petitioner by Order dated June 30, 2004, and discovery followed.

At the hearing, Petitioner testified in her own behalf; called two witnesses, James Yopp and Nicholas Rivera-Ruiz; and submitted three exhibits into evidence. Respondent called three

witnesses, Ralph Agliano, Nicholas Rivera-Ruiz, and Maxine Chartier; and submitted six exhibits into evidence.

A Transcript was requested and was filed on October 26, 2004. Following a Motion for Extension of Time to File Proposed Recommended Orders, the parties timely filed their post-hearing submittals on November 12 and 10, 2004, respectively.

FINDINGS OF FACT

1. Matthew Les Foris, the complainant in this case, was an African-American male and a member of a protected class. Following initiation of the proceedings before the Commission, he passed away on August 23, 2003. Les Foris' granddaughter, Crisella Winder, was appointed as personal representative of his estate, and she was substituted as Petitioner in this matter.

2. Respondent, Whitehall Enterprises, Inc. ("Whitehall or Respondent"), rents dwelling units to the public at various apartment communities in the Clearwater, Florida, area. Among others, Whitehall operates a 38-unit apartment community commonly known by the name Villas Des Chenes Apartments ("Villas Des Chenes"). These units are rented to adults over the age of 55 on a yearly lease basis.

3. Maxine Chartier is general manager and vice-president of Whitehall. She has held this position since 1998, and prior to this position, worked as an assistant to Whitehall's general manager.

4. James Yopp is the property manager at Villas Des Chenes, as well as at four of the other Whitehall properties in the Clearwater area. He has held this position for about six years, and prior to this position, worked as a maintenance man for the Whitehall properties. He has attended fair housing training.

5. Whitehall does not have a written policy regarding renewals or non-renewal of leases. It does not keep records of incidents at its properties. However, there were regular practices regarding renewals.

6. At Villas Des Chenes, there are fair housing posters in the office and the laundry room describing fair housing practices. They were present when Les Foris lived there and are presently still on display.

7. It was Yopp's practice to visit Villas Des Chenes on an almost daily basis. He would talk with Chartier nearly every day, reporting events and problems, as needed. The two would discuss what problems there were and, where possible, reach resolutions.

8. Chartier had a process she used in determining when to non-renew a tenancy. She would consider whether there had been problems in the previous year and consider what would work best for the property. Factors considered by Chartier included whether the tenant was unhappy and "bad-mouthing" the company,

mistreating staff, getting along with others, doing damage, paying rent late, or an accumulation of those factors. She would rely on what was reported to her by the property manager and her own observations, if any. The ultimate decision to non-renew a tenancy rested with her.

9. On November 13, 2000, Les Foris applied for an apartment at Villas Des Chenes. Yopp accepted the application, along with Les Foris' advance payment of \$200.00. The application was approved, and Les Foris and Respondent entered into a lease for a one-year term commencing December 1, 2000, and ending November 30, 2001. The leasing procedure for Les Foris was the same as that used for other tenants.

10. Approximately 30 days prior to the end of the initial lease's term, Yopp offered to renew the lease for another one-year term. Yopp and Les Foris signed a renewal on November 30, 2001. Under the terms of the renewal, the lease term was to end on November 30, 2002.

11. Neither the lease nor the renewal provides for an automatic renewal of its terms.

12. Beginning sometime in May 2002, management noticed problems involving Les Foris' tenancy. In May 2002, Yopp received a call from a tenant who reported that Les Foris was upset with another resident. Yopp subsequently talked with Les Foris, and he complained about an upstairs neighbor on two

occasions. Yopp could see no evidence of the causes for the complaints by Les Foris.

13. A couple of days later, Les Foris complained again about the same neighbor. This time, Les Foris threatened to harm the neighbor. Yopp told Les Foris that such conduct by Les Foris would be inappropriate. Although Yopp had handled numerous tenant squabbles during his career as property manager, in none of them had a tenant threatened to harm someone. However, after this incident, Les Foris and the neighbor had no further problems. Subsequently, the neighbor moved out of the complex for unrelated reasons.

14. In addition, Les Foris repeatedly parked his car in spaces not reserved for him. On an almost daily basis when he was not working, Les Foris would park his car in spaces reserved for other tenants. The tenants would call Yopp, who would then ask Les Foris to move the car. Les Foris would then return his car to his proper parking space. The next day, the scenario would repeat itself. Les Foris would explain that he was moving his car so that it could be in the shade. Yopp told Les Foris that such conduct was inappropriate.

15. Yopp testified that he received complaints from two residents about Les Foris. The complaints were from Ruth Poetter and Carmella Eichen. Each of the women complained that Les Foris made them feel uncomfortable, without offering greater

explanation. It was a customary practice for many of the residents at Villas Des Chenes to sit outside their units at tables and chairs. Poetter followed this custom. About the time of her complaint to Yopp, Yopp observed that Poetter ceased sitting outside.

16. When Yopp visited the property, Les Foris would complain about Whitehall. Ralph Agliano, a former tenant of Villas Des Chenes, testified that Les Foris would routinely complain about things, and Agliano would attempt to explain them.

17. Yopp reported all problems, including those involving Les Foris, to Chartier.

18. On or about September 15, 2002, Yopp delivered a notice to all tenants, including Les Foris, regarding proposed rent increases that management intended to implement beginning in December 2002. The delivery of that notice was not triggered by the end date of any tenant's lease and was not an offer to renew.

19. As of September 15, 2002, when the notice about proposed rent increases was delivered to all tenants, no decision had yet been made to renew or not renew Les Foris' lease.

20. Yopp and Chartier subsequently discussed whether to renew Les Foris' lease. Chartier decided that, based on the

complaints relayed to her about Les Foris in the preceding months, Les Foris' lease would not be renewed when it expired at the end of November 2002. Chartier felt that it was not in the best interest of Whitehall to continue with a tenant who was unhappy with the company, made a threat to harm another tenant, and who made other residents uncomfortable. She did not want the residents of Villas Des Chenes to be afraid. It was an accumulation of things that formed her decision. This process by Chartier, as applied to Les Foris, was the same as that which she used for others.

21. Yopp prepared and issued a notice of non-renewal to the tenant. The notice did not set forth a reason for the non-renewal.

22. Yopp admitted that other tenants also parked in parking spaces other than those assigned to the tenant. In addition, it is anticipated that other tenants have disputes with their neighbors. In the six years Yopp had been property manager at the complex, no residents were non-renewed specifically for either reason.

23. When Les Foris received the notice, he became upset. He asked Yopp to explain the reason for the decision. Yopp declined to give an explanation.

24. In the year that Les Foris received his notice of non-renewal, Yopp delivered notices of non-renewal to three

other tenants. In none of them did Yopp give a reason for the non-renewal. The notice of non-renewal given to Les Foris did not differ in form or substance from that used for other tenants.

25. Les Foris spoke with Chartier by phone about the non-renewal. Les Foris asked Chartier the reason for the non-renewal. Chartier also declined to give one stating that she was not required to give a reason. At the hearing, Chartier explained that it was her practice not to explain the reasons for non-renewals. Because the lease did not require a reason, she did not offer one. Discussions about the reasons for non-renewal often lead to arguments and to Chartier, they serve no purpose.

26. During the phone conversation, Les Foris requested reconsideration and, if that failed, then additional time to find a new place to live. He explained to Chartier that he lacked funds and had no one to help him move. Chartier offered to allow some extra time to remain on the premises and to make an early refund of the security deposit.

27. Chartier returned the security deposit to Les Foris by way of a letter dated November 15, 2002.

28. Les Foris filed his complaint of housing discrimination on November 7, 2002. Chartier learned of it after sending him the November 15, 2002, letter.

29. Les Foris moved out of Villas Des Chenes in November 2002.

30. Winder had lost touch with her grandfather for sometime and had "found" him only about two years prior to his death. At the time she formed a bond with Les Foris, he was a tenant at Villas Des Chenes.

31. Les Foris was happy there because he resided close to Winder and her children and was within walking distance of the grocery store where he worked part-time. Winder testified that when Les Foris was informed of the non-renewal, he became upset. He expressed to her his distress at being made to move. However, she helped him find a new apartment and helped him move.

32. Winder found movers and paid them on Les Foris' behalf. She also arranged for storing his property in a commercial facility. The move cost less than \$400.00. The rent was higher at the new complex, where Les Foris lived for just a few months before becoming ill.

33. Winder saw her grandfather regularly after he received the non-renewal notice. He frequently called her after having anxiety problems at his new apartment. Les Foris was disoriented about the location of items in his new apartment. He was definitely inconvenienced by the move. He was also humiliated and ashamed in front of his neighbors for being

forced to move out. His daily routine was disrupted, and he was unable to make friends at the new complex.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this proceeding pursuant to Section 70-77(e), Pinellas County Code. The parties were duly noticed for the administrative hearing.

35. 42 U.S.C. Section 3604(a) and (b), the federal law prohibiting discrimination in housing provides, in pertinent part:

[I]t shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

36. Section 70-176 of the Pinellas County Code provides:

(a) A person may not refuse to sell or to rent after the making of a bona fide offer, refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny a dwelling to any person because of race, color, handicap, religion, sex, familial status, or national origin.

(b) A person may not discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in providing services or facilities in connection with such sale or rental, because of race, color, handicap, religion, sex, familial status, or national origin.

37. If a discriminatory housing practice has occurred, a recommended and final order prohibiting the practice and recommending affirmative relief from the effects of the practice, including actual damages and reasonable attorney's fees and costs, may be entered. See Section 70-78(a), Pinellas County Code.

38. The burden of proof is on the complainant, in this case Petitioner, to establish the allegations supporting the claim of discrimination. See Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

39. Petitioner, the personal representative of the deceased complainant, an African-American male who rented an apartment from Whitehall, is a protected person under the Pinellas County Code. The burden of proof in a race discrimination housing case involves the "traditional" standard set forth in McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 , 101 S. Ct. 1089, 67 L. Ed. 2d

207 (1981). That is, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If she demonstrates a prima facie case, a presumption of discrimination arises, and the burden shifts to the housing provider to articulate a legitimate, non-discriminatory reason for its action.

40. In order to make a prima facie case of discrimination, Petitioner must show that: Petitioner is a member of a protected class; Petitioner was qualified to rent the apartment; Petitioner suffered a loss of housing opportunity under circumstances which lead to an inference that they based the action solely upon her grandfather's race; and the apartment remained available for rent thereafter. Martin v. Palm Beach Atlantic Associates, Inc., 696 So. 2d 919 (Fla. 4th DCA 1997). See also Maki v. Laakko, 88 F.3d 361 (6th Cir. 1996); Cavalieri-Conway v. L. Butterman and Associates, 992 F. Supp. 995 (N.D. Ill. 1998);.

41. Petitioner made a prima facie showing that Les Foris is a member of a protected class and that he suffered adverse action in that Les Foris' tenancy was not renewed.

42. The burden to go forward with the evidence shifts to Respondent who is required to articulate some legitimate, non-discriminatory reason as to its refusal to renew Petitioner's lease. Respondent must show that it refused to renew the lease

for legitimate, non-discriminatory reasons. See Burdine, 450 U.S. at 254-255.

43. Respondent has articulated a legitimate, non-discriminatory reason for not renewing Petitioner's lease. Les Foris had made spurious complaints about other residents; had commented that he would use an axe to resolve the differences; had made other tenants fearful such that they avoided sitting outside their units; and had repeatedly failed to follow rules about parking.

44. The burden of producing evidence is next placed on Petitioner to demonstrate that the proffered reason was pretextual. However, the ultimate burden of persuasion remains with Petitioner at all times. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507, 113 S. Ct. 2742, 2747 (1993).

45. Petitioner failed to show by a preponderance of the evidence that the legitimate reasons offered by Respondent were a pretext for discrimination.

46. A landlord does not have an obligation to continue a tenancy beyond the expiration date of the lease. A landlord may chose to not renew a lease provided the decision is not done for discriminatory or retaliatory reasons. Cf. § 83.64, Fla. Stat. (2003); see Fowel v. Continental Life Ins. Co., 55 A.2d 205 (D.C. Mun. App. 1947); Warthen v. Lamas, 43 A.2d 759 (D.C. Mun. App. 1945); see also Foster v. Tinnea, 705 So. 2d 782, 786

(Ct. App. La. 1st Cir. 1997) (in claim of housing discrimination based on handicap, it was not discrimination for landlords to non-renew tenant's lease.)

47. Petitioner attempted to enter evidence of a statement allegedly made by Yopp to Les Foris regarding the owner's attitude toward black men. The only evidence of the statement is Les Foris' written allegation contained in his complaint and Les Foris' comment to the Commission's investigator, Rivera-Ruiz. Given that Les Foris is now deceased, he was unavailable to testify at the hearing.

48. The statements of Les Foris, a deceased individual, are hearsay since they are out-of-court statements offered to prove the truth of the matter asserted. They are admissible only if they fall within an exception to the hearsay rules.

49. The statements of Les Foris cannot be admitted as "dying declarations" under Subsection 90.804(2)(b), Florida Statutes (2003). There is no suggestion they were made while the declarant believed that his death was imminent.

50. The written statement contained in the Commission's documents cannot be considered "business records," admissible under Subsection 90.803(6), Florida Statutes (2003), because they were not authenticated. Even if they had been authenticated, the documents contain hearsay statements which are not based on the personal knowledge of an agent of the

business. Reichenberg v. Davis, 846 So. 2d 1233, 1234 (Fla. 5th DCA 2003).

51. Where a witness is unavailable to testify, prior testimony can be admitted in some instances. Assuming arguendo that Les Foris' statements can be deemed to be "testimony," Petitioner has the burden of showing that the testimony has "indicia of reliability." State v. Kleinfield, 587 So. 2d 592, 593 (Fla. 4th DCA 1991). The requirements of the confrontation clause are met only when the prior recorded testimony bears indicia of reliability that would afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. Id. Here, there are no indicia that would lead to a sufficient level of reliability to overcome Respondent's entitlement to confront its accuser. The statements made by Les Foris were of two natures: (1) oral statements to an investigator which were not under oath; and (2) typed statements to which Les Foris affixed his signature below a sentence indicating he "declared under penalty of perjury" that the information was true and correct. These circumstances are not sufficient to permit an evaluation of the truthfulness of the statements. They cannot even be considered testimony since they were not offered in an official proceeding.

52. To the extent Petitioner sought to submit the written statements as evidence of indicia of reliability of Les Foris'

statement to the investigator, they are properly excluded. First, the documents containing the statement were not disclosed by Petitioner as exhibits prior to the hearing despite a prior Order of this Administrative Law Judge that required such disclosure. Second, if the written statements are offered merely to bolster the oral statement to the investigator, they are immaterial because the oral statement to the investigator was not made under oath and in no way can be considered "prior testimony."

53. As uncorroborated hearsay evidence that would not be admissible over a hearsay objection in a civil proceeding, Les Foris' statements about management's attitude toward black men are not competent or reliable substantial evidence upon which the Administrative Law Judge may base a finding of fact. Sims v. State, 754 So. 2d 657, 660 (Fla. 2000) (affidavit of deceased person is hearsay and not admissible); Bailey v. State, 419 So. 2d 721 (Fla. 1st DCA 1982) (deceased's statement offered to prove another person's motive was inadmissible hearsay); see also Department of Health v. Grabau, Case No. 97-3644 (DOAH April 17, 2003) (a "partial" deposition given in a civil case was not admissible evidence in a subsequent administrative proceeding because, inter alia, material was left "unexplored" by counsel); Department of Children and Family Services v. E.C.,

Case No. 99-5024 (DOAH July 12, 2000) (deceased's statement to department investigator not admissible.)

54. Petitioner's hearsay evidence does not fall into any of the hearsay exceptions found in Section 90.803, Florida Statutes (2003). Under Subsection 120.57(1)(c), Florida Statutes (2003), this hearsay evidence is not sufficient in itself to support findings of fact. Department of Environmental Protection v. Department of Management Services, Division of Administrative Hearings, 667 So. 2d 369, 370 (Fla. 1st DCA 1995); Department of Administration, Division of Retirement v. Porter, 591 So. 2d 1108 (Fla. 2nd DCA 1992); Harris v. Game and Fresh Water Fish Commission, 495 So. 2d 806, 809 (Fla. 1st DCA 1986). Without the hearsay evidence, Petitioner's evidence did not prove that Respondent's articulated reasons for non-renewal of Les Foris' lease was pretextual.

55. In this case, Petitioner failed to meet her burden of proof. There is no showing that Respondent's decision to not renew the lease was motivated by unlawful discrimination. Instead, Respondent's decision to non-renew Les Foris' lease was based on legitimate, non-discriminatory reasons.

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Administrative Law Judge will enter a final order dismissing Petitioner, Crisella Winder, as the Personal Representative of the Estate of Matthew Les Foris' Petition for Relief for failure to prove a case of housing discrimination against Respondent, Whitehall Enterprises, Inc., d/b/a Villas Des Chenes, after the period for submission of exceptions has expired.

DONE AND ENTERED this 17th day of December, 2004, in Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of December, 2004.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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 should be filed with the Clerk of the Division of Administrative Hearings in accordance with Section 70-77(g)(13), of the Pinellas County Code, and the undersigned Administrative Law Judge will issue the final order in this case.