

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM KLEINSCHMIDT,)
)
 Petitioner,)
)
 vs.) Case No. 06-2251
)
 THREE HORIZONS NORTH)
 CONDOMINIUM, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on October 9, 2006, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: William Kleinschmidt, pro se
1470 Northeast 125th Terrace, Apt. 206
North Miami, Florida 33161

For Respondent: Krista A. Fowler, Esquire
Cole, Scott & Kissane, P.A.
1390 Brickell Avenue
Miami, Florida 33131

STATEMENT OF THE ISSUES

The issues in this case are, one, whether Respondent unlawfully discriminated against Petitioner on the basis of his national origin, religion, or handicap in violation of the Florida Fair Housing Act; and, two, whether Respondent subjected

Petitioner to acts of intimidation, coercion, or retaliation as a result of Petitioner's exercise, or attempted exercise, of a protected housing right.

PRELIMINARY STATEMENT

In a Housing Discrimination Complaint filed with the U.S. Department of Housing and Urban Development on December 6, 2005, and subsequently investigated by the Florida Commission on Human Relations ("FCHR"), Petitioner William Kleinschmidt alleged that Respondent Three Horizons North Condominium, Inc., had unlawfully used coercion, intimidation, or other means to interfere with his exercise of protected housing rights. The FCHR investigated Petitioner's claim and, on February 14, 2006, issued a notice setting forth its determination that reasonable cause did not exist to believe that a discriminatory housing practice had occurred. Thereafter, Petitioner filed a Petition for Relief, which the FCHR transmitted to the Division of Administrative Hearings on July 6, 2006.

At the final hearing on October 9, 2006, Petitioner called four witnesses: Lisa Ann Southerland, David H. Rogel, Jacquelin Cue, and Ruth H. Pearson. Petitioner moved three exhibits, identified as Petitioner's Exhibits 1 through 3, into evidence. Respondent did not present a case.

The "two-volume" final hearing transcript was filed on October 19, 2006.¹ Thereafter, Respondent timely filed a proposed recommended order, which has been considered. Petitioner filed a notice declaring his "inability" to submit a proposed recommended order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2005 Florida Statutes.

FINDINGS OF FACT

1. Petitioner William Kleinschmidt ("Kleinschmidt") owns a unit in the Three Horizons North Condominium. He purchased his condominium in 1999 and has resided there continuously since that time.

2. Respondent Three Horizons North Condominiums, Inc. ("Three Horizons"), manages the property of which Kleinschmidt's condominium is a part.

3. Kleinschmidt and Three Horizons have been involved in a long-standing feud stemming from Kleinschmidt's possession of cats in violation of the condominium's "no pets" policy. Three Horizons has tried since 1999 to compel Kleinschmidt's compliance with the "no pets" policy. The dispute over Kleinschmidt's cats came to a head last year, when a formal administrative hearing was held on Kleinschmidt's first housing discrimination complaint against Respondent. See Kleinschmidt v. Three Horizons Condominium, Inc., 2005 Fla. Div. Adm. Hear.

LEXIS 883, DOAH Case No. 04-3873 (May 25, 2005), adopted in toto, FCHR Order No. 05-097 (Fla.Com'n Hum.Rel. Aug. 23, 2005)(Kleinschmidt I). Among other allegations, Petitioner charged in Kleinschmidt I that Three Horizons had unlawfully refused to waive the "no pets" policy to permit his possession of "service animals" (i.e. cats) as an accommodation of his emotional handicap. Kleinschmidt lost that case.

4. Kleinschmidt presently alleges that Three Horizons has discriminated against him on the basis of handicap, national origin, and religion. The undersigned has had some difficulty making sense of Kleinschmidt's allegations. As far as the undersigned can tell, Kleinschmidt alleges that: (1) members of the condominium association's board of directors (and especially the board's treasurer, Ruth Pearson, whose German ancestry Kleinschmidt assumes makes her a Nazi sympathizer hostile to Jewish persons such as himself) have made disparaging comments about him; (2) when he applied to purchase his condominium back in 1999, Three Horizons charged him a \$100 screening fee, which should have been only \$75; (3) Three Horizon's agents illegally broke into his unit on September 21, 2000, and again on September 21, 2001, stealing personal property each time; (4) before he purchased his unit, Three Horizons agreed to waive the "no pets" policy, which agreement Respondent now refuses to honor; and (5) Three Horizons has engaged in ongoing (but

unspecified) acts of intimidation, coercion, and retaliation.

5. There is not a shred of competent, persuasive evidence in the record, direct or circumstantial, upon which a finding of any sort of unlawful housing discrimination could possibly be made. Ultimately, therefore, it is determined that Three Horizons did not commit any prohibited act.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, and 120.57(1), Florida Statutes.

7. Three Horizons has interposed two affirmative defenses, which, taken together, probably suffice to dispose of this case, in large measure at least. These defenses—the statute of limitations and res judicata—will be discussed first, followed by a discussion of the merits.

8. Section 760.34(2), Florida Statutes, provides that a written complaint alleging a violation of the Florida Fair Housing Act ("FFHA") must be filed with the FCHR "within 1 year after the alleged discriminatory housing practice occurred." This statute of limitations is similar to its counterpart in the Florida Civil Rights Act ("FCRA"), see Section 760.11(1), and hence should be given a similar interpretation. See Belletete v. Halford, 886 So. 2d 308, 310 (Fla. 4th DCA 2004).

9. Under Section 760.11(1), Florida Statutes, as under Section 760.34(2), any person aggrieved by an unlawful discriminatory practice may file a complaint with the FCHR within 365 days after the alleged violation. Failure to do so bars the claim under the FCRA. See Greene v. Seminole Elec. Co-op, Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997)(As a statute of limitations, Section 760.11(1) bars claims arising from acts that occurred more than one year before the charge was filed.); see also St. Petersburg Motor Club v. Cook, 567 So. 2d 488, 489 (Fla. 2d DCA 1990).² The undersigned concludes, therefore, that the failure to file a complaint within one year after the occurrence of an alleged discriminatory housing practice bars any state-law claim based on that practice.

10. Many (or all) of Kleinschmidt's allegations concern matters that occurred—if they occurred—more than one year prior to December 6, 2005, which date, it is undisputed, is the earliest filing date that could apply in this case. There is, moreover, no credible, persuasive evidence of any "continuing violation" that might arguably have fallen within the limitations period. See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363, 380, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982). Thus, it is concluded that, even if Kleinschmidt had offered proof of some or all of his allegations (which he did not), his

claims largely, if not entirely, would be time-barred and subject to dismissal with prejudice for that reason.

11. On the subject of issue preclusion, as the Florida Supreme Court has instructed, "[i]t is now well settled that res judicata may be applied in administrative proceedings." Thomson v. Department of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987). Res judicata includes the principle of estoppel by judgment, which holds that parties who previously have litigated a different cause of action are estopped (i.e. barred) from "litigating in [a later] suit issues—that is to say points and questions—common to both causes of action and which were actually adjudicated in the prior litigation." Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1142 n.4 (Fla. 2d DCA 2001).

12. The parties to the present action are the very same parties who faced each other in Kleinschmidt I, where the issues stemmed from Kleinschmidt's allegations that Three Horizons had retaliated against him (there, allegedly, for refusing to remove cats from his condominium in compliance with the association's "no pets" policy) and had engaged in discriminatory practices in connection with its attempts to enforce the "no pets" policy. In that previous case, after conducting a formal hearing on March 31, 2005, Administrative Law Judge Arrington issued a Recommended Order, dated May 25, 2005, in which he urged the

FCHR to dismiss Kleinschmidt's petition as unfounded in fact and law. On August 23, 2005, the FCHR adopted Judge Arrington's Recommended Order, issuing a Final Order dismissing Kleinschmidt's petition.

13. At least some of Kleinschmidt's allegations in this case are identical to charges he made in Kleinschmidt I. For example, it was determined in the earlier case that the "break in" which Kleinschmidt alleges occurred on September 21, 2001, did not constitute an unlawful act of housing discrimination. See Kleinschmidt I, 2005 Fla. Div. Adm. Hear. LEXIS 883, at *9-*10. It was found, as well, that no pre-purchase agreement to waive the "no pets" policy had been made. Id. at *14-*15 n.2. To the extent that Kleinschmidt's present allegations are attempts merely to revisit issues previously litigated and decided, the instant case is subject to dismissal with prejudice.

14. But even if some aspects (or all) of Kleinschmidt's case were able to survive Three Horizon's affirmative defenses, Kleinschmidt still would not be entitled to relief because his claims are without merit, for the alternative, and independently dispositive, reasons set forth below.

15. Under the FFHA, it is unlawful to discriminate in the sale or rental of housing. Although Kleinschmidt has not identified the particular provisions of the FFHA under which he

purports to travel, it is reasonably clear that he is attempting to assert discrimination claims pursuant to Section 760.23, Florida Statutes, and interference or coercion claims in accordance with Section 760.37, Florida Statutes.

16. Upon examination of the specific acts of unlawful discrimination and other prohibited practices enumerated in Section 760.23, it is concluded that the following (and only the following) provisions are or might be implicated by Kleinschmidt's allegations:

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

(2) It is unlawful 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, national origin, sex, handicap, familial status, or religion.

* * *

(8) It is unlawful 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 with such dwelling, because of a handicap of:

(a) That buyer or renter;

(b) A person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or

(c) Any person associated with the buyer or renter.

17. For purposes of subsection (8) above, the term "discrimination" includes:

(a) A refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises; or

(b) A refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

§ 760.23(9), Fla. Stat.

18. Any claims that Kleinschmidt might be asserting under Section 760.23(1) and Section 760.23(2), Florida Statutes, can be disposed of summarily because, for reasons that need not be explored in detail here, neither of these provisions creates a cause of action for a homeowner; rather, each protects (a) persons seeking to purchase or lease a dwelling and (b) tenants. See Lawrence v. Courtyards at Deerwood Ass'n, 318 F. Supp. 2d 1133, 1142-43 (S.D.Fla. 2004); Delawter-Gourlay v. Forest Lake Estates Civic Ass'n of Port Richey, Inc., 276 F. Supp. 2d 1222, 1229-34 (M.D.Fla. 2003), vacated because of settlement, 2003

U.S. Dist. LEXIS 26080 (M.D.Fla. Sept. 16, 2003).

Alternatively, in any event, Kleinschmidt did not prove any facts that could conceivably establish a basis for relief under either of these statutes, even if they applied to him as a homeowner, which they do not.

19. On the other hand, post-purchase claims of handicap-based housing discrimination are cognizable under Section 760.23(8), according to its plain terms. Thus, as a homeowner with a handicap³, Kleinschmidt could, in theory, state a legally sufficient claim alleging that, because of his handicap, Three Horizons discriminated against him either by denying him services or facilities in connection with his dwelling, refusing to make reasonable accommodations for his handicap, or both.

20. But, in actuality, this case, unlike Kleinschmidt I, does not involve any claims (that the undersigned can perceive) arising out of an alleged refusal to make reasonable accommodations for Kleinschmidt. Nor has Kleinschmidt accused Three Horizons of having denied him the use of any facilities associated with his dwelling. Therefore, if Kleinschmidt has a claim for housing discrimination based on handicap, it must involve some sort of denial of, or delay in providing, services.

21. In cases involving a claim of housing discrimination on the basis of handicap, the complainant has the initial burden of proving a prima facie case of discrimination by a

preponderance of the evidence. Generally speaking, a prima facie case comprises circumstantial evidence of discriminatory animus, such as proof that the charged party treated persons outside of the protected class, who were otherwise similarly situated, more favorably than the complainant was treated.⁴ Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

22. If, however, the complainant sufficiently establishes a prima facie case, the burden then shifts to the charged party to articulate some legitimate, nondiscriminatory reason for its action. If the charged party satisfies this burden, then the complainant must establish by a preponderance of the evidence that the reason asserted by the charged party is, in fact, merely a pretext for discrimination. See Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc., 3 F.3d 1472, 1476 n.6 (11th Cir. 1993), cert. denied, 513 U.S. 808, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994)("Fair housing discrimination cases are subject to the three-part test articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)."); Secretary, U.S. Dept. of Housing and Urban Development, on Behalf of Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)("We agree with the ALJ that the three-part burden of proof

test developed in *McDonnell Douglas* [for claims brought under Title VII of the Civil Rights Act] governs in this case [involving a claim of discrimination in violation of the federal Fair Housing Act].").

23. To make out a prima facie case for denial of services, Kleinschmidt needed to show that he: (1) belongs to a protected class; (2) is qualified to receive the services in question; (3) was denied or delayed services by Three Horizons; and (4) was treated less favorably by Three Horizons than were similarly situated persons outside of the protected class. See, e.g., Jackson v. Comberg, 2006 U.S. Dist. LEXIS 66405, *15 (M.D.Fla. Aug. 22, 2006).

24. Kleinschmidt failed to identify anyone outside of the protected class whom Three Horizons allegedly treated more favorably. For that reason alone, whatever claim Kleinschmidt might have been attempting to assert under Section 760.23(8) never had a chance. Id. Kleinschmidt's failure to make out a prima facie case of discrimination ended the inquiry. Because the burden never shifted to Three Horizons to articulate a legitimate, nondiscriminatory reason for its conduct, it was not necessary to make any findings of fact in this regard.

25. Turning to Kleinschmidt's claim under Section 760.37, Florida Statutes, which "regulates discriminatory conduct before, during, or after a sale or rental of a dwelling,"

liability would exist only if Kleinschmidt could demonstrate that, because of discriminatory animus,

[Three Horizons] coerced, intimidated, threatened, or interfered [with: (a) his] exercise of a right under [the FFHA]; (b) [his] enjoyment of a housing right after exercise of that right; or (c) [his] aid or encouragement to a protected person to exercise or enjoy a housing right[.]

Delawter-Gourlay v. Forest Lake Estates Civic Ass'n of Port

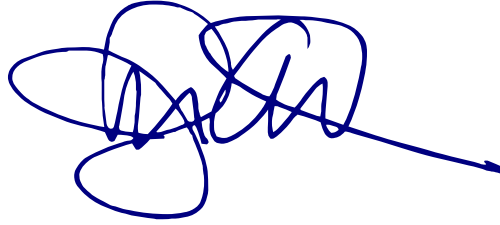
Richey, Inc., 276 F. Supp. 2d 1222, 1235 (M.D.Fla.

2003)(citation and footnote omitted), vacated because of settlement, 2003 U.S. Dist. LEXIS 26080 (M.D.Fla. Sept. 16, 2003). Kleinschmidt, however, proved none of the foregoing elements. Thus, Three Horizons is not liable under Section 760.37, Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the FCHR enter a final order finding Three Horizons not liable for housing discrimination and awarding Kleinschmidt no relief.

DONE AND ENTERED this 21st day of November, 2006, in
Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of November, 2006.

ENDNOTES

^{1/} Both "volumes" are contained in one transcript; the second "volume," which begins on page 150, comprises the afternoon session of the one-day final hearing.

^{2/} Although § 760.11(1) "states that a complaint 'may' be filed with the [FCHR], it is clear that such a complaint must be filed either with the [FCHR] or its federal counterpart by anyone who wishes to pursue either a lawsuit or an administrative proceeding under the act." Ross v. Jim Adams Ford, Inc., 871 So. 2d 312, 315 (Fla. 2d DCA 2004). In Belletete, the Ross court's interpretation of § 760.11(1) was found to be equally applicable to § 760.34, Fla. Stat. See 886 So. 2d at 310.

^{3/} The undersigned accepts the finding of fact, made in Kleinschmidt I, that Kleinschmidt is a person with a "handicap" as that term is defined in the FFHA. See 2005 Fla. Div. Adm. Hear. LEXIS 883, at *8, *13.

^{4/} Alternatively, the complainant's burden may be satisfied with direct evidence of discriminatory intent. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 621, 83 L.Ed.2d 523 (1985)("[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination" inasmuch as "[t]he shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'").

COPIES FURNISHED:

William Kleinschmidt
1470 Northeast 125th Terrace, Apt. 206
North Miami, Florida 33161

Krista A. Fowler, Esquire
Cole, Scott & Kissane, P.A.
1390 Brickell Avenue
Miami, Florida 33131

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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 agency that will issue the Final Order in this case.