STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DONALD AND MIRANDA SMITH,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 08-1955
	)	
MARIANNE C. MONTGOMERY, REALTOR/BROKER,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on July 16, 2008, in Brooksville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Donald and Miranda Smith, pro se
1047 Rudolph Court
Spring Hill, Florida 34609

For Respondent: David H. Sturgil,
as Qualified Representative,
c/o Exit Realty/Realty Shoppe
5300 Spring Hill Drive
Spring Hill, Florida 34606

STATEMENT OF THE ISSUE

Whether Respondent real estate broker is guilty of a discriminatory housing practice against Petitioners related to the sale and marketing of their home.

PRELIMINARY STATEMENT

Following a March 27, 2008, "Determination: No Cause" by the Florida Commission on Human Relations and Petitioners' subsequent timely-filed Petition for Relief, this cause was referred to the Division of Administrative Hearings on or about April 17, 2008.

The file of the Division reflects all pleadings and orders intervening before the final disputed-fact hearing.

At final hearing on July 16, 2008, David Sturgil was examined and accepted as Respondent's qualified representative, pursuant to Florida Administrative Code Rules 28-106.105 and 28-106.106.

Each Petitioner testified, and Petitioners' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, and 18, were admitted in evidence. Exhibits P-14, P-19, and P-20 were not admitted in evidence. Respondent Marianne (Marti) Montgomery testified. Respondent also presented the oral testimony of Ed Carr, Steve Van Slyke, Clara Ward, and Petitioner Miranda Smith. Respondent's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, and 15, were admitted in evidence. Respondent's Exhibit 12 was voided, and parts thereof were admitted under other exhibit numbers. Respondent's Exhibit 16 was not admitted.

No transcript was provided.

Each party timely filed a Proposed Recommended Order on August 4, 2008.

FINDINGS OF FACT

1. Petitioner homeowners allege that Respondent real estate broker discriminated against them by the length of the exclusive listing contract Petitioners signed with Respondent (eight months); by inferior service because Respondent showed Petitioners' home only once in the eight months the contract was in effect[1/]; by incorrectly stating the agreed asking price on flyers Respondent circulated; by providing an "open house" to all of Respondent's other clients, but not to Petitioners; and by asking Petitioners to remove some of their bi-racial family photographs.

2. Petitioner Donald Smith, Ph.D., is Caucasian. He is married to Miranda Smith, a dentist, who is African-American. They have at least one child, with whom they have been photographed. This case involves a house they owned on Cressida Circle in Spring Hill, Florida, where they displayed their bi-racial family photographs.

3. On or about January 28, 2007, Petitioners signed, as sellers, an exclusive real estate listing contract with Kathlen Hobbs, a real estate salesperson, who at that time was an independent contractor associated with Exit Realty Shoppe. Respondent Montgomery, real estate broker, is the qualifying

principal of Exit Realty Shoppe. Both Ms. Hobbs and Ms. Montgomery are Caucasian. The agreed asking price was $296,900.00. The term of the contract was for eight months: January 30, 2007, to October 1, 2007. Mr. Smith interviewed two other realtors, but he selected Ms. Hobbs and Respondent's proffered contract. It is a "fill-in the blanks contract," to which Mr. Smith had input.

4. Although she signed the contract, Mrs. Smith did not speak to either Ms. Hobbs or Ms. Montgomery concerning the sale of the house at any material time.

5. Mr. Smith testified that Ms. Hobbs initially told him that their home was "priced to sell" at $296,900.00, but he candidly admitted that Ms. Montgomery never made that representation and never "guaranteed" that the house would sell at that price.

6. Upon the evidence as a whole and because Mr. Smith testified at one point that the other two realtors he interviewed told him the house would sell at "$295,000.00 or $296,000.00," and also testified contrariwise that Ms. Hobbs and the other two realtors told him the house would sell at "between $292,000.00 and $298,000.00," it is found to be more probable that no one guaranteed a sale at Petitioners' asking price of $296,900.00.

7. Petitioners seek damages of $15,000.00, without stating any specific basis for that figure. They previously have sought $40,000.00, damages based upon the alleged lowered price of the house as sold by a subsequent realtor. However, the final date of sale and final sale price are not clear on this record.

8. Paragraph Nine of the parties' contract provided for its early termination prior to its eight-month expiration date, upon the following terms:

> 9. CONDITIONAL TERMINATION: At Seller's request, Broker may agree to conditionally terminate this Agreement. If Broker agrees to conditional termination, Seller must sign a withdrawal agreement, reimburse Broker for all direct expenses incurred in marketing the Property and pay a cancellation fee of $___ plus applicable sales tax. Broker may void the conditional termination and Seller will pay the fee stated in paragraph 6(a) less the cancellation fee if Seller transfers or contracts to transfer the Property or any interest in the Property during the same time period from the date of conditional termination to Termination Date and Protection Period, if applicable. (Blank space in original; emphasis supplied.)

9. Paragraph Six of that listing contract provides, in pertinent part:

> 6. COMPENSATION: Seller will compensate Broker as specified below for procuring a buyer who is ready, willing and able to purchase the Property or any interest in the Property on the terms of this Agreement or on any other terms acceptable to Seller. Seller will pay Broker as follows (plus applicable sales tax)

> (a) 6% of the total purchase price OR $__, no later than the date of closing specified in the sales contract. However, closing is not a prerequisite for Broker's fee being earned. (Blank space in original.)

10. Steve Van Slyke has been an active licensed real estate broker for over 20 years. For the last few years he has done more property appraisals than real estate sales. He has regularly taught and taken continuing education courses in the real estate profession since he was admitted to the profession in 1983. He has chaired the Professional Standards Committee of the Hernando County Association of Realtors (HCAR) since 1991. In that capacity, he has presided over hundreds of contract disputes between buyers and sellers, including the one that ultimately developed between the parties in this case. See infra.

11. According to Mr. Van Slyke, the contract in this case is one commonly used in Hernando County, in the sense of not being unusual, but there are no "average," "usual," or "industry standards" for the duration of an exclusive real estate listing contract. He further testified that to have such a generally agreed-upon provision within the real estate industry would run afoul of the United States Fair Trade Commission's jurisdiction of, and prosecution for, "price-fixing." For the same reasons, there is no established average, usual, or industry standard for

the conditional early release of a homeowner from a listing contract.

12. Because no dollar amount for a cancellation fee had been written into Paragraph Nine of the parties' contract herein, Mr. Van Slyke interpreted Paragraph Nine and Sub-paragraph Six (a) together, to permit Respondent broker the latitude to require payment by the sellers of six percent of Petitioners'/sellers' asking price as a condition of early termination of the contract upon their unilateral request.

13. Respondent submitted in evidence a similar contract dated March 5, 2007, between Respondent and a different homeowner for the duration of one year (12 months) from that date.[2/] Petitioners presented no other contracts between any seller and Respondent or, for that matter, between any seller and any other realtor which specified a duration of less than eight months.[3/]

14. It is accepted that a different realtor with whom Petitioners contracted in November 2007, after their eight-month contract with Respondent had expired, filled-in "$500.00" in the equivalent Paragraph Nine, but there was no competent, credible evidence that this replacement realtor, or any other realtor for that matter, had a similar arrangement with any other sellers.

15. Petitioners and Ms. Hobbs agreed that Ms. Hobbs would not submit Petitioners' sellers' contract on their existing home to Respondent until she got an acceptance on their offer as buyers for a new house on Rudolph Court. Accordingly, the listing contract for the Cressida Circle house in which Petitioners were living, and which contained their furniture and photographs, was not submitted to Respondent at least until January 31, 2007. Accordingly, Respondent could not begin attempts to sell Petitioners' existing home until the next day, February 1, 2007.

16. There are 185 realty firms in Hernando County. There are four printed real property advertising booklets which are circulated in Hernando and surrounding counties. Each booklet is published every 30 days. The lead time to get a photographic advertisement of a newly listed property into each publication is three weeks. Before a photo can be published, it has to be made.

17. On or about February 1, 2007, Ms. Hobbs photographed Petitioners’ Cressida Circle house for purposes of advertising it via websites, flyers, real estate advertising booklets, and newspapers, and placed Respondent’s "for sale" sign and lock-box on Petitioners' lawn.

18. Respondent had admitted in evidence the first advertisements she paid for in three printed real estate

booklets ("Nature Coast", March 22-April 18, 2007; "Real Estate News", April 2007; and "Sunshine Living", April 2007). Each advertisement contained a photograph and information extolling the Cressida Circle house. Each advertisement correctly quoted Petitioners' asking price of $296,900.00.

19. Additionally, Respondent had admitted in evidence documentation showing that from March 22, 2007, until the end of her exclusive listing on September 30, 2007, she had advertised Petitioners' property repeatedly and/or consistently via newspaper, real estate advertising booklets, and/or Multiple Listing Services (MLS) websites and commercial websites.

20. Both parties agree that Ms. Hobbs' first printed flyer stated an incomplete, and thus incorrect, selling price of "$296,90.", and that this flyer was circulated and/or placed in the lock-box tube on the "for sale" sign about February 1, 2007. (See Finding of Fact 17.) Despite Petitioners' claim that this was "inferior marketing," it is probable that most serious home seekers would have figured out how to correctly read the price as "$296,900.00", or would have asked what price was intended when phoning for an appointment to view the house. While Ms. Hobbs' flyer was never corrected, Respondent Montgomery had other, correct flyers printed, and she placed and circulated those correct flyers for the remainder of the contract period.

21. It is customary for Exit Realty to conduct a "caravan" shortly after a contract is signed. A "caravan" involves Ms. Montgomery and all the salespeople she can round-up in her office. The entire team tours a seller's home, making notes, and then returns to Respondent's office, where a list of repairs and upgrades is compiled with each salesperson's in-put. Then the team brain-storms to develop selling techniques customized to each property listed.

22. On February 7, 2007, the day before Caravan Day, an independent contractor with Exit Realty showed Petitioners' home to a potential buyer. Through Ms. Hobbs, the salesperson relayed to Mr. Smith that the potential buyer had remarked that the house's exterior paint was unacceptable. Mr. Smith told Ms. Hobbs that he would paint the house at his own expense if the potential buyer would make an offer, but no offer was forthcoming.

23. Respondent's caravan viewed Petitioners' home on February 8, 2007. As a result, a list of selling suggestions was relayed by Ms. Hobbs to Mr. Smith.

24. A day or so after Caravan Day, Mr. Smith was told by Ms. Hobbs that to best present and sell Petitioners' home, Petitioners needed to deal with dirt and dust in an exhaust fan; replace a broken tile in a bathroom, and refinish their swimming pool. Mr. Smith also acknowledged that on the same date, or

minimally later, he was told by Ms. Hobbs to remove Petitioners' large family photographs over the sliding doors opening from the house's vaulted-ceiling living room onto its screened patio and pool area. According to Ms. Montgomery, she had advised Ms. Hobbs to relay this information and additional advice, including the information that Petitioners' house would sell better if Petitioners moved out or reduced the amount of furniture in the living room, so that potential buyers could visualize their own belongings in the room. It was not proven one way or the other whether Ms. Hobbs relayed the "move out" or "remove furniture" suggestions at that time.

25. When Mr. Smith pressed Ms. Hobbs as to why the family photographs had to be removed, she referred him to Ms. Montgomery, who "could better explain." Mr. Smith acknowledged that Ms. Hobbs never said anything about race or discrimination.

26. Mr. Smith testified to three versions of why he concluded that Ms. Montgomery was discriminating against Petitioners on the basis of race: first, because neither Ms. Hobbs nor Ms. Montgomery mentioned the bi-racial family photographs until after Ms. Montgomery had first seen them on Caravan Day, and Ms. Hobbs could not explain to his satisfaction the reason for removing the photographs; second, because Ms. Montgomery did not immediately return his phone calls; and

third, because when Ms. Montgomery did return his phone calls, she mentioned the photographs over the sliding doors repeatedly among several other upgrades she encouraged him to accomplish, all of which upgrades Ms. Hobbs apparently had not passed along to him.

27. Ms. Montgomery can suggest and encourage her independent contractors to pass on certain information to sellers and buyers and to pursue sales in certain ways, but she has no way to compel them.

28. Mr. Smith conceded that at no time did Ms. Montgomery ever mention race or make any overt discriminatory statement to him and that she responded to all his letters, even though she did not agree with him in those letters. See, infra.

29. Petitioners also agree that at no time did Ms. Montgomery or anyone associated with Exit Realty suggest that Petitioners remove tastefully framed bi-racial family photographs displayed on a bedroom dresser.

30. Ms. Montgomery credibly testified that successfully "staging" a home for sale usually requires removing as much furniture as possible and all of the personalization, such as awards and photographs hung on the walls of all rooms. Mrs. Smith acknowledged that she was familiar with this concept from print literature and television. Ms. Montgomery demonstrated, using a photograph she had taken of the house

without the wall photographs in place, that anything mounted above the living room's sliding glass doors had the potential to draw a shopper's eye away from the luxuriant sweep of the vaulted-ceiling and away from the scope and sweep of the view, through the sliding glass doors, of Petitioners' pool and patio.

31. Petitioners accomplished the three repair suggestions (exhaust fan; tile; and swimming pool) that Ms. Hobbs passed on to them, but they remained in the Cressida Circle house and did not remove their furniture or the photographs above the sliding glass doors.

32. In early March, Petitioners requested a reduction in the six percent commission specified in their Cressida Circle contract with Respondent. Respondent declined to consider reducing her commission until someone made an offer to buy.

33. Petitioners closed on their new home on Rudolph Court on March 30, 2007. The Rudolph Court sale and closing in which Petitioners were buyers, was also handled by Hobbs, Montgomery, and Exit Realty. Petitioners do not claim that any racial discrimination by anybody occurred in the process of buying their new home.

34. Closing on the Rudolph Court house left Petitioners with two houses to maintain and at least two (possibly four) mortgages to pay. Petitioners became concerned that no one had made an offer on their Cressida Circle house.

35. Mr. Smith made several telephone calls to Ms. Montgomery. She did not immediately return those calls. When she did return Mr. Smith's phone calls, Ms. Montgomery explained to him that the Cressida Circle house needed to be "staged" better, including removing furniture and the photographs over the patio doors.

36. Ms. Montgomery wrote Mr. Smith on April 5, 2007, to memorialize all of their April 4, 2007, conversation, giving him clear advice that a “lease/purchase procedure,” as opposed to a “lease/option to buy” arrangement which he had proposed, would be a better and safer solution for his needs. She also advised him that no home in his sub-development had been sold in the last seven months, and emphatically advised him to lower his asking price to $269,900.00, due to the competition of other similar homes for sale.

37. It is undisputed that the parties' contract was signed during a "housing market slump" and that the housing market continued to decline during the entire term of the parties' contract.

38. On April 9, 2007, Mr. Smith wrote Ms. Montgomery, making no reference to race or discrimination, but complaining about Exit Realty Shoppe showing his home only one time, requesting to void their contract, and closing with:

> If necessary we will follow thru [sic.] with a complaint to the Florida Real-estate [sic.] Commission in Tallahassee.

39. Not unreasonably, Ms. Montgomery regarded Petitioners' foregoing letter as a threat. She responded by registered mail on April 10, 2007, setting out in detail all she had done and describing the costs she had incurred as of that date to sell the Cressida Circle house. She enclosed three printed real estate publications advertising Petitioner's house (see Finding of Fact 18); proof that the home was being advertised with the correct price April 7-13, 2007, in the St. Petersburg Times; proof that she had registered the house with the correct price on the MLS; and proof that the house was being shown in color on Exit Realty's three websites and on Ms. Hobbs' personal website with the correct price. She also reminded Mr. Smith that she had, earlier in the week, suggested that Petitioners reduce their asking price by $30,000.00, to $269,900.00. She also advised him, and included information showing, that as of that writing, there were 11 comparable listings in his sub-development, nine of which were listed at less than Petitioners' asking price.

40. Evidence of all of Respondent's foregoing April 10, 2007, assertions was introduced in evidence by Respondent at the final hearing.[4/]

41. Respondent's April 10, 2007, letter also explained "staging," and offered to conditionally release Petitioners from their contract for six percent of their $296,900.00 asking price, as per the contract's Paragraph Six (a).

42. Ms. Montgomery's April 10, 2007, unopened letter and supporting documentation were returned to her by the U.S. Mail as "unclaimed." Because Petitioners were still residing at the Cressida Circle address and because the post office did not mark the envelope "refused," it is probable that Petitioners simply did not go to the post office to sign-for, and pick up, Ms. Montgomery's material. However, Petitioners must have received these items because Ms. Montgomery also had the same materials delivered by messenger to Mrs. Smith's office.

43. Also, on April 11, 2007, Mr. Smith wrote, acknowledging receipt of Respondent's April 10, 2007, letter, refusing to reduce the asking price, and advising Ms. Montgomery that:

> I feel that it will be my responsibility to express this dissatisfaction in anyway [sic] I can, to as many people as I can. . . . I will do what ever [sic.] I can do to be released from our agreement.

He further threatened to contact "different government agencies" to report what he described as very poor service, but he did not mention race or discrimination.

44. On or about April 19, 2007, Mr. Smith filed a complaint against Respondent dated April 16, 2007, with the local Better Business Bureau (BBB). His complaint alleged lack of service. Nowhere in his complaint is race or discrimination mentioned. The material in evidence shows that the BBB contacted Ms. Montgomery about the complaint, but marked it "information only," and did not pursue it at that time.[5/]

45. In early April 2007, Mr. Smith telephoned Ed Carr, Executive Director of the Hernando County Association of Realtors (HCAR). Mr. Smith said nothing to Mr. Carr about racial discrimination at that point, but said only that he wanted to get out of the listing contract with Respondent.

46. On or about April 23, 2007, Petitioners filed a formal complaint with HCAR. HCAR's Grievance Committee met May 7, 2007, and, apparently in the mode of a probable cause panel, referred the case for a full evidentiary hearing. On June 29, 2007, the case was first noticed for hearing by HCAR.

47. Petitioners' HCAR complaint is not in evidence, and the evidence herein falls short of enabling the undersigned to determine whether the complaint before HCAR involved racial discrimination. However, it is certain that Ms. Montgomery perceived it that way. The HCAR hearing was first scheduled to occur August 28, 2007, but it was re-scheduled. The actual date the hearing took place and the date HCAR issued its decision are

not clear in this record, but the hearing was on or after October 23, 2007. Mr. Van Slyke presided over the HCAR hearing. The HCAR decision resulted in a determination that Respondent had not violated professional real estate ethics.

48. Despite Petitioners' expressed dissatisfaction with HCAR's result and their claims that HCAR's panel was prejudiced in Respondent's favor and that Respondent manipulated timing of the hearing, the HCAR process, and its deciding body, there is no competent, credible, or compelling evidence herein demonstrating the validity of such accusations or demonstrating that HCAR's decision in Respondent's favor was based on racial discrimination or constituted a cover-up for racial discrimination. That said, HCAR's decision is not binding here.

49. Ms. Montgomery testified credibly that she had refused to acquiesce in any overt action, such as voluntarily letting Petitioners out of their contract without paying her commission, because to do so might make her appear to be prejudiced. Even more credible is her testimony that she did not want to let Petitioners out of their listing contract unless they paid her commission and costs, as provided in the contract, because she had already expended considerable time and money on Petitioners' behalf.

50. Respondent continued to advertise the Cressida Circle house until the end of the eight-month contract (see Findings of

Fact 19 and 40), despite Petitioners' refusal to allow Respondent to reduce the asking price. Unfortunately, between June 14, and July 1, 2007, Respondent advertised an incorrect and lower asking price of $269,900.000, in "Nature Coast." Respondent did not know how the error occurred. The advertising for this two-week period was, as always, at Respondent's expense, and the asking price was corrected in the next issue.

51. While signed-up with Respondent, Mrs. Smith took material prepared by Respondent for marketing the Cressida Circle property, made minor adjustments to it, and placed it on her own and others' websites. The material she posted sometimes carried Ms. Hobbs' contact information. Other times, Mrs. Smith's internet advertisements showed a reduced price for contacting Petitioners. This placed Petitioners in direct competition with Respondent's advertisements in which Petitioners required that Respondent maintain the original $296,900.00, asking price. In so-doing, Petitioners may have offended a clause of the listing contract. In placing this information on MLS websites outside of Respondent's general geographic area, Petitioners may have exposed Respondent to liability in the professional real estate community. Respondent advised Petitioners of these problems, but there is no clear evidence that Respondent intervened to prevent Petitioners' behavior.

52. Petitioners moved into their new, Rudolph Court house in early June 2007. When they moved, their furniture and photographs went with them.

53. Photographic evidence shows that Petitioners allowed the Cressida Circle house to deteriorate after they moved to Rudolph Court, thereby rendering the sale property less desirable to potential buyers.

54. Petitioners each testified credibly that between January 31, 2007, and the time they moved out, probably about June 6, 2007, Respondent gave them no advance notices that a potential buyer was coming to view the Cressida Circle house, as had been agreed upon when the house was listed.

55. The sign-in sheet left in Petitioners' sale house demonstrated that Exit Realty showed the house once, on August 21, 2007. Petitioners acknowledged that the home was also shown another time on the day before Caravan Day. (See Finding of Fact 22.)

56. Respondent produced her lock-box's recorded printout showing that on February 1, 2007, Ms. Hobbs entered the house. (See Finding of Fact 17.) It shows also that Ms Hobbs entered again on June 7, 2007. On July 17, a ReMax salesman entered. On July 27, Respondent entered. On July 31, an ERA saleswoman entered. On August 10, and 11, Respondent entered. On August 21, another Exit Realty saleswoman entered. (See Finding of

Fact 55.) On September 20, Clara Ward, an independent contractor with Exit Realty entered. (See Finding of Fact 58.) On October 4, 2007, Ms. Hobbs entered.

57. Respondent acknowledged that on one or two of the foregoing occasions, she entered the sale house, not to show the property to prospective buyers, but to take photographs for the HCAR hearing (see Finding of Fact 47), but there is no credible evidence to support Petitioners' conjecture that the other visits by Ms. Montgomery and by all other real estate salespersons were not for the purposes of showing the house or for some other legitimate sales purpose.

58. Clara Ward testified that she showed the house to a legitimate potential buyer about a month before Respondent's listing ended, and again in approximately December 2007, after Petitioners had listed it with another realtor at the reduced price of $256,900.00.

59. Mr. Smith admitted that he never asked Ms. Hobbs for an "open house," until June 2007.

60. The contract does not require an "open house." Ms. Montgomery testified credibly and without refutation that she did not schedule an "open house" for Petitioners because, in the past, "open houses" have not resulted in sales for her. She rarely, if ever, utilizes them for any property.

61. Mr. Smith admitted that Petitioners had no evidence to support their allegation that every other home that Exit Realty signed in the same period was shown more than once. Petitioners also presented no evidence that every other home, besides the Cressida Circle home, which Exit Realty signed in the same period held even one open house.[6/]

62. In November 2007, Petitioners signed with another realtor who marketed the house at $269,900.00, which was $27,000.00 less than the only figure at which Petitioners would permit Respondent to market the house. If and when there was a sale is unclear.

CONCLUSIONS OF LAW

63. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.57(1), 120.569, 760.20, and 760.37, Florida Statutes.

64. Section 760.23, Florida Statutes, "Discrimination in the sale or rental of housing and other prohibited practices," provides:

> (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.

65. Section 760.24, Florida Statutes, "Discrimination in the provision of brokerage services," provides:

> It is unlawful to deny any person access to, or membership or participation in, any multiple-listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him or her in the terms or conditions of such access, membership, or participation, on account of race, color, national origin, sex, handicap, familial status, or religion.

66. Section 760.25, Florida Statutes, "Discrimination in the financing of housing or in residential real estate transactions," provides:

> (2)(a) 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.
>
> (b) As used in this subsection, the term "residential real estate transaction" means any of the following:
>
> 2. The selling, brokering, or appraising of residential real property.

67. Assuming that Section 760.29, Florida Statutes, governing "exclusions," does not bar this case entirely, the burden of proof herein is upon Petitioners. See § 760.34(5), Fla. Stat.

68. Petitioner has the burden of establishing facts to prove a prima facie case of discrimination. McCloud v. Jones,

DOAH Case No. 98-1925 (RO: 8/25/1998; FO: 5/17/99); U.S. Department of Housing and Urban Development v. Blackwell, 908 F. 2d 864 (11th Cir. 1990).

69. The three-part "burden of proof" pattern developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), applies herein. Under that test, Petitioners must first prove, by a preponderance of the evidence, that discrimination has occurred. If the Respondent then articulates some legitimate, non-discriminatory reason for its action, the burden shifts back to Petitioners to prove that the reason provided by Respondent is merely pre-textual and not bona fide. See Pollitt v. Bramel, 669 F. Supp. 172, 175 (S. D. Ohio 1987).

70. As a bi-racial family, Petitioners are members of a protected class, but Petitioners have not even presented a prima facie case of discrimination. Even had they done so, Respondent’s evidence overwhelmingly refutes it.

71. First, Petitioners are not qualified real estate brokers or agents and did not, as such, attempt to access membership or participation in any multiple listing service, real estate brokers' organization, other service organization or facility relating to the business of selling or renting dwellings. To the extent that Respondent complained about Petitioners' illicitly trying to use such entities/programs, (see Finding of Fact 51), there still is no evidence that

Respondent in any way denied Petitioners membership or participation in such entities/programs.

72. In regard to the allegations of discrimination by mis-feasance, mal-feasance, or non-feasance, in Respondent's marketing of Petitioners' house, there is not even a prima facie case. Neutral business decisions and honest mistakes are not the subject of Florida's Fair Housing Law.

73. Mr. Van Slyke's testimony is expert and compels the conclusion that there was nothing sinister in Respondent's signing Petitioners to an eight-month exclusive listing contract, instead of a six-month contract, or in Respondent's requesting her full commission for early termination of their contract at Petitioners' unilateral request. Petitioners had input to the contract's terms and voluntarily entered into it after consulting two other realtors.

74. Ms. Hobbs' early pricing mistake on the initial flyers was rationally explained and not demonstrated to be either Respondent's fault nor discriminatory. Respondent corrected the price on subsequent flyers. The pricing mistake in the June 14-July 1, 2007, "Nature Coast" advertisement was not demonstrated to be Respondent's doing, as opposed to a publisher's typographical error. It also was not shown to be either deliberate nor discriminatory.

75. The listing period herein occurred within a larger period of a rapidly declining housing market. Respondent urged Petitioners to cut their price so as to be competitive under worsening circumstances, and Petitioners declined to heed her advice. Against this undisputed evidence, lies Petitioners' mere conjecture that Respondent was not trying to sell Petitioners' home due to animus against their bi-racial family.

76. The contract did not require an open house. Respondent's decision to not hold an open house was a simple business judgment call. Petitioners presented no evidence that Respondent held open houses for all her Caucasian or single-race clients.

77. There is no evidence that Respondent practiced any disparate treatment of Petitioners, and certainly, no nexus to race was demonstrated on any issue.

78. Moreover, the absence of any racial animus was affirmatively demonstrated by Respondent's not asking Petitioners to remove the bi-racial family photographs from their bedroom. The undisputed evidence is that the only place Respondent asked Petitioners to modify with regard to their bi-racial photographs was over the sliding glass doors in their living room. This fact renders very credible Respondent's testimony that the only purpose of her request concerning the living room pictures was for the non-discriminatory purpose of

favorably displaying the indoor vaulted-ceiling and the patio-pool view. While decorating preferences are a matter of individual taste, Respondent's preferences are as valid as anyone else's and do not automatically establish bias, animus, or discrimination on the basis of race. More to the point, however, Respondent's "de-clutter" concept of staging unobstructed views and de-personalizing the walls of a sale home are acknowledged trends in the real estate sales profession.

79. No discriminatory intent or effect was established, but assuming arguendo that it was, it is contrary to common sense to believe that Respondent would ask Petitioners to reduce their price, thereby reducing her commission, in an effort to somehow hurt them because they would not remove bi-racial photographs from one room, while Respondent made no request that Petitioners remove bi-racial photographs from the other room. There also was affirmative evidence that there was no delay and Petitioner perceived no animus when Respondent, Ms. Hobbs, and Exit Realty sold Petitioners their new house on Rudolph Court.

80. Petitioners have not borne their burden of proof.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Complaint and the Petition for Relief.

DONE AND ENTERED this 19th day of September, 2008, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of September, 2008.

ENDNOTES

1/ Petitioner changed this claim in their Proposed Recommended Order, stating that Respondent only showed the house once in the first six months of the eight months' contract.

2/ Petitioners submit that this March 5, 2007, 12 months' contract cannot be considered or is non-probative because it came into existence after they complained about Respondent to the Better Business Bureau (BBB) and the Hernando County Association of Realtors (HCAR), but Petitioners produced no evidence of fabrication or collusion, and this contract is credible and probative. Moreover, the March 5, 2007, date on the contract actually pre-dates the parties' written correspondence, beginning April 5, 2007, Petitioners' April 16, 2007, BBB complaint; and Petitioners' April 23, 2007, complaint to HCAR. (See Findings of Fact 36, 44 and 46.)

3/ Mr. Smith testified that he was "told" by other realtors that the average listing contract was only six months long. This is uncorroborated hearsay which cannot be relied upon for Findings of Fact. See § 120.57(1)(c), Florida Statutes.

4/ Petitioners assert that these real estate publications were only published after they began to complain about poor service and asked to be released from their contract, but clearly Respondent had invested effort, expertise, and expense for these ads prior to their actual publication.

Petitioners further argue that none of Respondent's efforts should "count" because Mr. Smith had already complained to either BBB or HCAR before April 1, 2007. Petitioner's position on this is specious, due to the chronology substantiated by the evidence and found as fact. (See Finding of Fact 18 and n. 2.)

5/ Petitioners correctly point out that Ms. Montgomery's testimony that she had to negotiate with BBB to not oust Exit Realty Shoppe from that organization until BBB reviewed the result of Petitioners' subsequent HCAR complaint (see Finding of Fact 46) is inconsistent with the date on the BBB exhibit. However, her inconsistency or confusion on this point is reasonable and immaterial, given the multiple sequential complaints raised by Petitioners before the BBB, HCAR, HUD, Florida Commission on Human Relations, and Division of Administrative Hearings.

6/ Obviously, since Respondent claimed to not give open houses for any of her clients, she could not show that she had not given open houses. Throughout the hearing, Mr. Smith seemed to believe that it was up to Respondent to present evidence to disprove Petitioners' double negatives or unsubstantiated claims, saying his several allegations were based on "the fact that you [Respondent] have nothing to show me." This is not the burden of proof herein. See Conclusions of Law.

COPIES FURNISHED:

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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 agency that will issue the final order in this case.