

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GEORGINE ASSANTE,)
)
 Petitioner,)
)
 vs.) Case No. 08-2220
)
 WINDSOR PLACE AT BERKSHIRE)
 (LAKES),)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on July 24, 2008, in Naples, Florida.

APPEARANCES

For Petitioner: Georgine Assante, pro se
148 West 68th Street, Apartment 5B
New York, New York 10023

For Respondent: Susan M. McLaughlin, Esquire
Condo & HOA Law Group, LLC
2030 McGregor Boulevard
Fort Myers, Florida 33901

STATEMENT OF THE ISSUES

The issues are whether Respondent's enforcement of a condominium declaration requirement for window treatments is a discriminatory housing practice based on Petitioner's gender and alleged handicap, in violation of the Florida Fair Housing Act, Sections 760.20 through 760.37, Florida Statutes (2007),¹ and, if

not, whether Respondent should be awarded attorney's fees and costs pursuant to Subsection 120.595(1), Florida Statutes.

PRELIMINARY STATEMENT

On December 18, 2007, Petitioner filed a Housing Discrimination Complaint with the Florida Commission on Human Relations (Commission). The Commission issued a Notice of Determination of No Cause (No Cause Determination) on April 4, 2008. Petitioner requested an administrative hearing by filing a Petition for Relief (Petition) with the Commission on May 2, 2008. The Commission referred the Petition to DOAH to conduct an administrative hearing.

At the hearing, Petitioner testified and submitted no exhibits for admission into evidence. Petitioner actually submitted 15 exhibits, but the documents were original documents, and Petitioner did not deliver the originals to the ALJ. Pursuant to the agreement of the parties, the ALJ allowed Petitioner five calendar days from the date of the hearing to file copies of the original documents. Petitioner did not file copies of her exhibits. Respondent filed a written motion for attorney's fees and costs; presented the testimony of two witnesses, including counsel for Respondent who testified concerning her fees; and submitted six exhibits.

The identity of the witnesses and exhibits, and the rulings regarding each, are reported in the Transcript of the hearing

filed with DOAH on August 22, 2008. Petitioner and Respondent filed their respective proposed recommended orders on September 8 and August 26, 2008.

FINDINGS OF FACT

1. Petitioner owns a condominium in Windsor Place at Berkshire (Lakes)(Windsor Place). Windsor Place is a covered multifamily dwelling unit, and Petitioner's condominium is a dwelling, defined in Subsections 760.22(2) and (4), respectively.

2. Petitioner is a female, aged 65. Petitioner does not have a handicap defined in Subsection 760.22(7). Petitioner suffered physical injury from a bicycle accident in 1990 and has a surgically rebuilt tibial plateau, but a preponderance of the evidence does not support a finding that the injury substantially limits one or more major life activities.

3. Petitioner walks approximately 1.5 miles to the grocery store and carries her groceries back to her dwelling unit. Petitioner uses her key to access the Condominium pool and swims in the pool. Petitioner attended the hearing and represented herself with no apparent physical or mental difficulty.

4. A preponderance of the evidence does not support a finding that Petitioner established a prima facie case of discrimination on the basis of Petitioner's gender. Rather, a preponderance of the evidence shows that Respondent has

legitimate non-discriminatory reasons for requiring Petitioner to comply with the Declaration of Condominium and has not subjected Petitioner to disparate treatment.

5. Section 27.1 of the Declaration of Condominium prohibits window coverings in any dwelling unit except interior draperies, curtains, shades, or shutters that have a neutral-colored backing. Beginning sometime in 1997, Petitioner has displayed various items in her windows including rags, unidentifiable "shiny things," towels, bed sheets, a car floor mat, window stickers, items resembling garbage bags, and window wallpaper.

6. Petitioner claims her alleged handicap prevents Petitioner from standing on a ladder to hang appropriate window treatments. Respondent's representatives purchased standard window treatments and offered to install them in Petitioner's condominium at no cost to Petitioner. Petitioner refused and has continued to hang non-conforming window treatments in violation of the relevant condominium declaration.

7. Respondent seeks attorney's fees in this proceeding pursuant to Section 120.595. Pursuant to Subsection 120.595(1)(c), this Recommended Order finds that Petitioner has participated in this proceeding for an improper purpose.

8. Petitioner participated in this proceeding for a frivolous purpose within the meaning of Subsection

120.595(1)(e)1. The evidence submitted by Petitioner presented no justiciable issue of fact or law.

9. Petitioner was her only witness. Her testimony was vague and ambiguous, lacked precision, and was not specific as to material facts. Cross-examination of Respondent's witnesses may be fairly summarized as consisting of comments on the answers to questions and argument with the witnesses. Petitioner repeatedly disregarded instructions from the ALJ not to argue with witnesses and not to comment on the testimony of a witness. The ALJ allowed Petitioner five days after the date of the hearing to provide copies of her exhibits, and Petitioner did not submit any exhibits for admission into evidence.

10. Respondent is the prevailing party in this proceeding, and Petitioner is the non-prevailing party. Petitioner has participated in two or more similar proceedings involving Respondent, the same dwelling unit, and the same factual issue of whether the window treatments utilized by Petitioner violate the relevant condominium declaration. In the previous proceedings, Petitioner did not establish either the factual or legal merits of her position. The factual and legal position of Petitioner in this proceeding is substantially the same as her position in the previous proceedings.

11. Respondent fined Petitioner for early violations of the relevant condominium declaration, and Petitioner paid the

fine. However, Respondent had to fine Petitioner for subsequent violations, and Petitioner refused to pay those fines.

12. Respondent obtained counsel and filed a Petition for Condominium Arbitration with the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes. The Department issued a Summary Final Order dated September 17, 2002.

13. Petitioner refused to comply with the Summary Final Order. Rather, Petitioner filed a Fair Housing Complaint with the Commission. That complaint contained substantially similar allegations as those at issue in this proceeding. The Commission issued a detailed Determination of No Reasonable Cause in February 2004.

14. Petitioner filed a complaint against Respondent with the Department of Agriculture. The Department dismissed the complaint.

15. During the holiday season in December 2006, representatives for Respondent informed Petitioner that Respondent intended to seek legal recourse in court if Petitioner continued to violate the relevant condominium declaration. Petitioner continued to hang nonconforming items in her windows including shiny objects, garbage bags, and decals.

16. In March 2007, Respondent filed suit in County Court for Collier County, Florida, to enforce the Summary Final Order issued in 2002. Respondent was unable to serve Petitioner until sometime in November 2007. Petitioner filed the complaint at issue in this proceeding on December 12, 2007.

17. Respondent seeks attorney's fees totaling \$7,424.00 and costs totaling \$680.88. The hours, hourly rate of \$285, and the items of costs are detailed in the attorney's affidavit and attached exhibits. The amount of fees and costs are reasonable and appropriate, and Respondent is awarded fees and costs in the amounts requested pursuant to Subsection 120.595(1)(d).

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the subject matter of and the parties to this proceeding. §§ 760.20 through 760.37 and §§ 120.569, 120.57(1), and 120.595, Fla. Stat. (2008). DOAH provided the parties with adequate notice of the formal hearing.

19. Petitioner has the burden of proof in this proceeding. Petitioner must submit evidence sufficient to establish a prima facie case of discrimination. See Massaro v. Mainlands Section 1 and 2 Civic Association, Inc., 3 F.3d 1472, 1476 n.6 (11th Cir. 1993)(fair housing discrimination is 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 of the United States Department of Housing and Urban

Development on Behalf of Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)(three-part burden of proof test in McDonnell governs claims brought under Title VII of the Civil Rights Act). For reasons stated in the Findings of Fact, Petitioner did not present a prima facie case of discrimination or disparate treatment.

20. A determination of whether a party participates in a proceeding for an improper purpose is a finding of fact. See Burke v. Harbor Estates Associates, Inc., 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991)(applying former Subsection 120.59(6), the predecessor to current Subsection 120.595(1)(e)1.); accord State of Florida v. Hart, 677 So. 2d 385, 386 (Fla. 4th DCA 1996); Dolphins Plus v. Residents of Key Largo Ocean Shores, Clarence C. Hobdy and State of Florida, Department of Environmental Regulation, 598 So. 2d 324 (Fla. 3d DCA 1992). The fact-finder may rely on permissible inferences based on the facts and circumstances in the proceeding. Burke, 591 So. 2d at 1037. The absence of direct evidence of intent does not convert the issue to a question of law. Id.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order dismissing the Petition for Relief and requiring Petitioner to pay attorney's fees and costs in the amounts awarded herein.

DONE AND ENTERED this 15th day of September, 2008, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of September, 2008.

ENDNOTE

^{1/} References to subsections, sections, and chapters are to Florida Statutes (2007) unless otherwise stated.

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.