

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

YOLANDA CLARK, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 08-2669  
 )  
 HOMEQ SERVICING CORP., )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on October 1, 2008, in Starke, Florida.

APPEARANCES

For Petitioner: Yolanda Clark, pro se  
Post Office Box 211  
Lawtey, Florida 32058

For Respondent: Celia C. Falzone, Esquire  
Akerman Senterfitt  
50 North Laura Street  
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner in violation of the Fair Housing Act<sup>1/</sup> in its servicing of her mortgage loan.

PRELIMINARY STATEMENT

On or about January 11, 2008,<sup>2/</sup> Petitioner filed a Housing Discrimination Complaint (Complaint) with the Florida Commission

on Human Relations (FCHR) alleging that Respondent discriminated against her in its servicing of her mortgage loan. On April 18, 2008, FCHR issued a "no cause" determination based upon its investigation of the Complaint. On May 21, 2008, Petitioner filed a Petition for Relief (Petition) with FCHR.

On June 3, 2008, FCHR referred the Petition to the Division of Administrative Hearings (DOAH). The referral was received by DOAH on June 5, 2008.

On June 9, 2008, the undersigned issued an Order to Show Cause because it appeared from a review of the case file that the Petition was not timely filed with FCHR. Petitioner filed a response to the Order to Show Cause on June 13, 2008.

On June 18, 2008, the undersigned issued a Recommended Order of Dismissal concluding that Petition was not timely filed and recommending that it be dismissed by FCHR. On July 29, 2008, FCHR issued an Order Remanding Petition for Relief from a Discriminatory Housing Practice (FCHR Order No. 08-050). The Remand Order rejected the conclusion that the Petition was untimely and "remanded" the case to DOAH for a hearing on the merits of the petition. On August 1, 2008, the undersigned entered an Order Reopening File.

The final hearing was scheduled for and held on October 1, 2008. At the hearing, Petitioner testified in her own behalf and Respondent presented the testimony of Jill Orrison.

Exhibits 1 through 4, 5A, 5B, and 6 through 13 were received into evidence, and official recognition was taken of the Summary Final Judgment in Foreclosure entered on December 3, 2007, in Case No. 04-2006-CA-511 (8th Jud. Cir.).

The Transcript of the final hearing was filed with DOAH on November 4, 2008. The parties were given 10 days from that date to file proposed recommended orders (PROs). Respondent filed a PRO on November 18, 2008. Petitioner did not file a PRO. Due consideration has been given to Respondent's PRO.

#### FINDINGS OF FACT

1. Petitioner is a black female and a Christian.
2. Respondent is a mortgage servicing company. It collects mortgage payments on behalf of the loan holder and distributes escrow funds for insurance and taxes.
3. Respondent does not offer financing or make loans, but it provides assistance to borrowers through loan modifications, repayment plans, and forbearance agreements for existing loans (i.e., loans made by other companies), subject to guidelines established by the loan holder.
4. In December 2005, Petitioner applied for and received a \$63,200 loan from New Century Mortgage Corporation (New Century) to purchase a home in Starke. The loan was secured by a mortgage on the home. The mortgage holder was New Century, not Respondent.

5. In January 2006, New Century assigned the loan and mortgage to Deutsche Bank National Trust Company (Deutsche Bank).

6. Petitioner was required to make monthly payments on the loan in the amount of \$609.05. The payments were due on the first of each month. A late fee was charged if the payment was not received by the fifteenth of each month.

7. Respondent began servicing Petitioner's loan for Deutsche Bank on May 1, 2006.

8. Petitioner did not make the payments due in May and June 2006, which caused her to be in default on her mortgage loan.

9. Respondent could have initiated foreclosure proceedings on behalf of Deutsche Bank at this point, but it did not do so. Instead, Respondent entered into a "repayment plan" with Petitioner in order to give her an opportunity to get her loan current.

10. The plan, dated July 24, 2006, required Petitioner to pay \$558.00 on July 31, 2006, and then to pay \$2,133.59 on August 31, 2006.

11. Petitioner paid \$558.00 on July 31, 2006, but she did not make the August payment required by the plan.

12. Respondent could have initiated foreclosure proceedings on behalf of Deutsche Bank at this point, but again

it did not do so. Instead, Respondent agreed to Petitioner's request to modify the repayment plan to give her another opportunity to get her loan current.

13. The modified plan, dated September 5, 2006, required Petitioner to make a payment of \$668.72 on September 6, 2006, and then to make bi-weekly payments of \$729.74, starting on September 20, 2006, and ending on November 29, 2006.

14. Petitioner did not make any of the payments required by the modified repayment plan.

15. Petitioner testified that she made a payment of \$350.00 on September 16, 2006, and another payment of \$350.00 on September 25, 2006. Petitioner presented MoneyGram receipts for those amounts to corroborate this testimony.

16. The two \$350.00 MoneyGram payments were not sufficient to meet Petitioner's obligations under the modified repayment plan.

17. Petitioner acknowledged in her testimony at the final hearing that the two \$350.00 payments would not get her loan current, but she testified that she was told by one of Respondent's customer service representatives that the payments would be enough to keep the home out of foreclosure. The notes in the Respondent's communication history log for September 25, 2006, corroborate this testimony.

18. Respondent did not receive either of the \$350.00 MoneyGram payments. One of the MoneyGram receipts show the payment going to "Home Servicing LLC" in Baton Rouge. The payee identified on the other receipt is illegible.

19. Respondent's office is in Sacramento, California. It does not have an office in Baton Rouge.

20. On September 27, 2006, Respondent referred Petitioner's loan to outside attorneys to initiate foreclosure proceedings on behalf of Deutsch Bank as a result of Petitioner's failure to comply with the modified repayment plan.

21. A foreclosure complaint was served on Petitioner in October 2006. The plaintiff in the foreclosure action was Deutsch Bank, not Respondent.

22. Respondent continued to work with Petitioner even though foreclosure proceedings had been initiated.

23. On October 30, 2006, Respondent sent Petitioner a Default Forebearance Agreement. Petitioner signed the agreement on November 13, 2006.

24. The agreement required Petitioner to make an initial payment of \$2,026 on November 15, 2006, and then to make monthly payments of \$891.04 on the fifteenth of each month through October 2008. The agreement stated that the foreclosure proceeding would be held in abeyance so long as Petitioner made the required payments, but also stated that Deutsch Bank could

proceed with the foreclosure if Petitioner failed to make any of the payments when due under the agreement.

25. Petitioner did not make the initial \$2,026 payment required by the Default Forebearance Agreement.

26. On November 20, 2006, Petitioner sent Respondent a payment of \$1,500 through Western Union.

27. In a letter dated November 29, 2006, Respondent advised Petitioner that it was returning the \$1,500 to her because "the account is in foreclosure and the check amount is not sufficient to reinstate the loan."

28. Petitioner called Respondent numerous times between November 30, 2006, and December 14, 2006, in an effort to work out another payment plan.

29. Petitioner testified that on November 30, 2006, she was told by a customer service representative named Drew that she would be sent another modified payment plan. This testimony is corroborated, at least in part, by the notes in Respondent's communication history log for November 30, 2006, which indicates that Petitioner and a customer service representative discussed a modified payment plan with a \$1,500 initial payment due on November 30, 2006, and monthly payments of \$1,058 from December 30, 2006 through May 30, 2008.

30. However, subsequent notes in the communication history log indicate that a modified plan was ultimately denied by

Respondent and/or Deutsch Bank because \$1,500 was not enough of a down payment and because it did not appear that Petitioner had the financial ability to make the \$1,058 monthly payments. The communication history log reflects that this information was communicated to Petitioner, and she acknowledged as much in her testimony at the final hearing.

31. Petitioner did not present any credible evidence concerning her financial situation on and after November 30, 2006, to demonstrate that she was indeed able to make monthly payments of \$1,058.

32. Petitioner continued to call Respondent periodically in 2007 and 2008 to complain about how her loan was handled.

33. Petitioner testified that during one of her conversations with a customer service representative named Laura, she mentioned putting her trust in God. According to Petitioner, the customer service representative told her not to mention God and also told her that Petitioner should get God to help her make her mortgage payments. Petitioner testified that she was offended by these comments because she is a devout Christian.

34. Petitioner testified that this conversation occurred after Respondent had returned her \$1,500 payment. She did not identify the precise date on which the conversation occurred, but testified that it was likely in December 2006.



35. A Summary Final Judgment was entered in favor of Deutsch Bank in the foreclosure proceeding on December 3, 2007, but according to Petitioner, the foreclosure sale has not yet been held.

36. Jill Orrison, a consumer advocacy analyst for Respondent, credibly testified that Petitioner was treated no differently than any other person in her situation with respect to Respondent's servicing of her mortgage loan.

37. There is no credible evidence that Respondent discriminated against Petitioner in any way based upon her race or her religious affiliation.

38. The evidence fails to support Petitioner's claim that Respondent mishandled her loan or that it failed to do what it agreed to do. Rather, the more persuasive evidence establishes that Respondent worked with Petitioner for many months to help her avoid foreclosure and that it was Petitioner who failed to do what she agreed to do by not complying with any of the repayment plans that she was given by Respondent.

#### CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.35(3), Florida Statutes (2008).<sup>3/</sup>

40. FCHR is the state agency responsible for administering and enforcing the Fair Housing Act. See § 760.30(1), Fla. Stat.

41. Respondent argues in its PRO that the Complaint is "time barred" because it was filed with FCHR more than one year after the alleged discriminatory housing practices. See Respondent's PRO, at ¶¶ 48-50 (citing 42 U.S.C. Section 3610(a)(1)(A)(i)).

42. Consistent with the statute of limitations in the federal Fair Housing Act cited by Respondent, Florida Administrative Code Rule 60Y-7.001(2) provides that "[a] complaint may be filed at any time within one year of the occurrence of the alleged discriminatory housing practice."

43. The only conceivable discriminatory housing practices are Respondent's failure to offer Petitioner a fourth repayment plan in November 2006 and the statements about God allegedly made to Petitioner by one of Respondent's customer service representatives in December 2006. These events occurred more than a year before the Complaint was filed with FCHR in January 2008, and as a result, Respondent is correct that the Complaint was time-barred.

44. Nevertheless, the merits of the Complaint are addressed below in the event that FCHR or an appellate court disagrees that the Complaint was time-barred.

45. Section 760.25, Florida Statutes, which is part of the Fair Housing Act, provides:

(1) It is unlawful for any bank, building and loan association, insurance company, or other corporation, association, firm, or enterprise the business of which consists in whole or in part of the making of commercial real estate loans to deny a loan or other financial assistance to a person applying for the loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him or her in the fixing of the amount, interest rate, duration, or other term or condition of such loan or other financial assistance, because of the race, color, national origin, sex, handicap, familial status, or religion of such person or of any person associated with him or her in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or because of the race, color, national origin, sex, handicap, familial status, or religion of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given.

(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:

1. The making or purchasing of loans or providing other financial assistance:

a. For purchasing, constructing, improving, repairing, or maintaining a dwelling; or

b. Secured by residential real estate.

2. The selling, brokering, or appraising of residential real property.

46. Petitioner has the burden to prove that Respondent violated this statute and thereby committed a discriminatory housing practice. See § 760.34(5), Fla. Stat.

47. To establish a prima facie case of housing discrimination, Petitioner must prove that (1) she was a member of a protected class; (2) she attempted to engage in a real estate transaction with Respondent and met all relevant qualifications for doing so; (3) Respondent failed to engage in the transaction despite Petitioner's qualifications; and (4) Respondent continued to engage in that type of transaction with similarly-qualified persons outside of Petitioner's protected class. See Alcegueire v EMC Mortgage Corp., Case No. 03-2153, 2003 Fla. Div. Adm. Hear. LEXIS 1086, at ¶ 16 (DOAH Dec. 17, 2003) (quoting Hickson v. Home Federal of Atlanta, 805 F. Supp. 1567, 1571-72 (N.D. Ga. 1992)), adopted, Order No. 04-001 (FCHR Feb. 26, 2004). Accord Secretary, Housing and Urban Development ex. Rel. Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990) (applying the burden-shifting analysis from McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), in a housing discrimination case under the federal Fair Housing Act).

48. Petitioner failed to establish a prima facie case.

49. First, the servicing of a mortgage loan is not the type of transaction covered by Section 760.25, Florida Statutes. See Alcegueire, supra, at ¶ 17.

50. Second, even if it was determined that Respondent was subject to the provisions of Section 760.25, Florida Statutes, in connection with its servicing of Petitioner's mortgage loan, the evidence fails to establish that Petitioner was financially qualified for a fourth modified repayment plan that she was not offered in November 2006. The evidence also fails to establish that Respondent offered such plans to similarly-(un)qualified persons outside of Petitioner's protected class. Moreover, the comments about God that offended Petitioner occurred after she had been denied the fourth modified repayment plan and are insufficient in and of themselves to establish a discrimination claim.

51. Third, even if it were somehow determined that Petitioner established a prima facie case, the more persuasive evidence establishes that Respondent had legitimate, non-discriminatory reasons for not offering Petitioner a fourth repayment plan due to her failure to comply with the previously agreed upon plans and her lack of financial wherewithal to make the payments necessary to get her loan current. Petitioner

failed to prove that these reasons were merely a "pretext" for unlawful discrimination.

52. Finally, or alternatively, the Petition should be dismissed as untimely for the reasons set forth in the Recommended Order of Dismissal entered on June 18, 2008. FCHR's interpretation of the word "service" in Florida Administrative Code Rule 60Y-8.001(1)<sup>4/</sup> to mean "received" (see Remand Order, at 2) is illogical, contrary to the word's ordinary meaning in the legal context (see Fla. R. Civ. P. 1.080(b) ("Service by mail shall be complete upon mailing.")), and contrary to the Notice of Determination sent to Petitioner in this case. Moreover, such an interpretation is unnecessary to harmonize the rule with Section 760.35(3)(a)2., Florida Statutes, because as pointed out in Endnote 2 of the Recommended Order of Dismissal, that statute is not implicated where, as here, FCHR has issued a "no cause" determination.

#### RECOMMENDATION

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

RECOMMENDED that FCHR issue a final order dismissing the Petition for Relief with prejudice.

DONE AND ENTERED this 25th day of November, 2008, in  
Tallahassee, Leon County, Florida.



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T. KENT WETHERELL, II  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of November, 2008.

ENDNOTES

<sup>1/</sup> Sections 760.20 through 760.37, Florida Statutes. Unless otherwise indicated, all references to the Fair Housing Act are these statutes, not the federal law of the same name.

<sup>2/</sup> This is the date stamped by FCHR on the Housing Discrimination Complaint contained in the case file. However, the complaint also includes a typewritten date of December 12, 2007, and a handwritten date next to Petitioner's signature of January 25, 2008; and the Determination contained in the case file states that the complaint was filed with the U.S. Department of Housing and Urban Development on January 15, 2008.

<sup>3/</sup> All statutory references are to the 2008 version of the Florida Statutes.

<sup>4/</sup> Similar language to this rule is also contained in Florida Administrative Code Rule 60Y-7.004(9).

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.