TATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FABIOLA HEIBLUM,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-5244
	)	
CARLTON BAY CONDOMINIUM ASSOCIATION, INC.	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference at sites in Tallahassee and Miami, Florida, on January 12, 2009.

APPEARANCES

For Petitioner: Fabiola Heiblum, pro se
2821 Northeast 163 Street, Apt. 5C
North Miami Beach, Florida 33160

For Respondent: Charles F. Otto, Esquire
Straley & Otto, P.A.
2699 Stirling Road, Suite C-207
Hollywood, Florida 33312

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent unlawfully discriminated against Petitioner on the basis of her national origin or ethnicity in violation of the Florida Fair Housing Act.

PRELIMINARY STATEMENT

In a Housing Discrimination Complaint filed with the U.S. Department of Housing and Urban Development in July 2008, and subsequently investigated by the Florida Commission on Human Relations, Petitioner Fabiola Heiblum, who is a Hispanic woman, charged that Respondent Carlton Bay Condominium Association had unlawfully discriminated against her by filing a Claim of Lien against her property as a means of collecting an unpaid debt. The Commission investigated Petitioner's claim and, on September 17, 2008, 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 Commission sent to the Division of Administrative Hearings on October 20, 2008.

At the final hearing on January 12, 2009, Ms. Heiblum testified on her own behalf and offered Petitioner's Exhibits 1 through 4, which were admitted in evidence. Respondent offered Respondent's Exhibit 1 during its cross-examination of Ms. Heiblum, and this document was received in evidence. Respondent did not otherwise present a case.

No final hearing transcript was filed. Each party filed a proposed recommended order before the established deadline, which was January 22, 2009.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 Florida Statutes.

FINDINGS OF FACT

1. Petitioner Fabiola Heiblum ("Heiblum") is a Hispanic woman who, at all times relevant to this action, has owned Unit No. 5C in the Carlton Bay Condominium, which is located in North Miami Beach, Florida. She purchased her unit in 2004 and has resided there continuously since some time in 2005.

2. Respondent Carlton Bay Condominium Association, Inc. ("Association") is the entity responsible for operating and managing the condominium property in which Heiblum's unit is located.

3. In March 2008, the Association's Board of Directors ("Board") approved a special assessment, to be levied against all unit owners, the proceeds of which would be used to pay insurance premiums. Each owner was required to pay his share of the special assessment in full on April 1, 2008, or, alternatively, in three equal monthly installments, due on the first of April, May, and June 2008, respectively. Heiblum's share of this special assessment was $912.81.

4. At or around the same time, the Board also enacted a procedure for collecting assessments, including the special insurance assessment. According to this procedure, owners would have a grace period of 15 days within which to make a required

payment. After that period, a delinquent owner would be notified, in writing, that the failure to pay his balance due within 15 days after the date of the notice would result in referral of the matter to an attorney for collection. The attorney, in that event, would file a Claim of Lien and send a demand letter threatening to initiate a foreclosure proceeding if the outstanding balance (together with costs and attorney's fees) was not paid within 30 days after receipt of the demand. This collection procedure applied to all unit owners.

5. Heiblum did not make any payment toward the special assessment on April 1, 2008. She made no payment on May 1, 2008, either. (Heiblum concedes her obligation to pay the special assessment and does not contend that the Association failed to give proper notice regarding her default.) The Association accordingly asked its attorney to file a Claim of Lien against Unit No. 5C and take the legal steps necessary to collect the unpaid debt. By letter dated May 8, 2008, the Association's attorney notified Heiblum that a Claim of Lien against her property had been recorded in the public records; further, demand was made that she pay $1402.81 (the original debt of $912.81 plus costs and attorney's fees) to avoid foreclosure.

6. On or around May 10, 2008, Heiblum gave the Association a check in the amount of $500, which the Association returned,

under cover of a letter dated May 16, 2008, because its attorney was now in charge of collecting the overdue debt. Heiblum eventually paid the special assessment in full, together with costs and attorney's fees, thereby obviating the need for a foreclosure suit.

7. Heiblum believes that the Association prosecuted its claims for unpaid special assessments more aggressively against Hispanics such as herself than persons of other national origins or ethnicities, for which owners the Association allegedly showed greater forbearance. Specifically, she believes that the Association did not retain its attorney to undertake collection efforts against non-Hispanic unit owners, sparing them the costs and fees that she was compelled to pay.

8. There is, however, no competent, persuasive evidence in the record, direct or circumstantial, upon which a finding of any sort of unlawful housing discrimination could be made. Ultimately, therefore, it is determined that the Association did not commit any prohibited discriminatory act vis-à-vis Heiblum.

CONCLUSIONS OF LAW

9. 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.

10. Under the Florida Fair Housing Act ("FFHA"), it is unlawful to discriminate in the sale or rental of housing.

Specifically, Section 760.23, Florida Statutes, prohibits the following acts and practices (among others):

> (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.

11. As a matter of law, Heiblum's claims under Section 760.23(1) and Section 760.23(2), Florida Statutes, must fail because neither of these provisions creates a cause of action for a *homeowner*[1]*;* 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); see also Richards v. Bono, 2005 U.S. Dist. LEXIS 43585, *11-*12 (M.D.Fla. April 25, 2005).

12. None of the allegedly discriminatory conduct of which Heiblum complains adversely affected the *availability* of

housing, which is the value that Sections 760.23(1) and 760.23(2), Florida Statutes, are intended to safeguard. See, e.g., Richards, 2005 U.S. Dist. LEXIS 43585 at *9. Moreover, in essence Heiblum's dispute with the Association is a dispute with her *neighbors*——the other unit owners who, like herself, are the Association's members. It is not the purpose of the FFHA to serve as an all purpose civility code between neighbors. See Lawrence, 318 F. Supp. 2d at 1143.

13. The Florida Commission on Human Relations ("FCHR"), has taken a contrary view, declaring that "Section 762.23(2), Florida Statutes, would clearly apply to homeowners . . . in a condominium setting." See Kleinschmidt v. Three Horizons North Condominium, Inc., FCHR Case No. 25-91782H, Final Order No. 07-013 (Feb. 15, 2007), at 2. FCHR based this conclusion on Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993). In Honce, the court examined the circumstances under which sexual harassment might be actionable as a form of housing discrimination. The plaintiff in the case, however, was a *tenant*, not a homeowner like Heiblum. The court therefore had no reason to consider (and did not address) whether, or under what circumstances, the Federal Fair Housing Act reaches post-*sale* discrimination. On the contrary, the court articulated the governing principle involved in the case as follows: "The [Federal] Fair Housing Act prohibits gender-based discrimination in the *rental* of a

dwelling, or in the provision of services in connection with a *rental*." Id. at 1088 (emphasis added). Honce is inapposite.

14. It is the undersigned's duty to apply the law independently and recommend an outcome that comports with his judgment, even if the agency is known to have a different view of the matter. Consequently, the undersigned urges FCHR to reconsider its position regarding the reach of Section 760.23(2), Florida Statutes, which according to its plain language does not permit a homeowner to bring a post-sale housing discrimination claim against her neighbors.

15. On the assumption that FCHR likely will consider the merits of Heiblum's claim, the undersigned has made the necessary findings of fact, which were stated above, and has reached the necessary legal conclusions, as set forth below.

16. In cases involving a claim of housing discrimination, 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.[2] 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)).

17. 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].").

18. To make out a prima facie case of discrimination, Heiblum needed to show that she: (1) belongs to a protected class; (2) is qualified to receive the services or use the

facilities in question; (3) was denied the services or facilities by the Association; and (4) was treated less favorably by the Association 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).

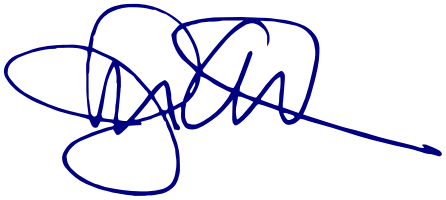
19. It is undisputed that Heiblum is a Hispanic woman and thus in a protected class. There is likewise no dispute that, as a unit owner, Heiblum is eligible to be provided the same services and facilities that all the other owners at Carlton Bay Condominium enjoy. Heiblum, however, did not prove the remaining facts required to establish a prima facie case of discrimination on the basis of national origin or ethnicity.

20. Heiblum's failure to establish a prima facie case of discrimination ended the inquiry. Because the burden never shifted to the Association to articulate a legitimate, nondiscriminatory reason for its conduct, it was not necessary to make any findings of fact in this regard.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Commission on Human Relations enter a final order finding the Association not liable for housing discrimination and awarding Heiblum no relief.

DONE AND ENTERED this 27th day of February, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 27th day of February, 2009.

ENDNOTES

[1]/ Handicap-based discrimination is cognizable under § 760.23(8), Fla. Stat., but no such claim has been made here.

[2]/ 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:

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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.