

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICARDO VEGA,)
)
 Petitioner,)
)
 vs.) Case No. 08-6141
)
 CLUB DEVELOPMENT, INC., AND)
 FRANK BAREFIELD,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case in Orlando, Florida, on February 9, 2009, before Jeff B. Clark, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Barbara Billiot-Stage, Esquire
Law Offices of Barbara Billiot-Stage, PA
5401 South Kirkman Road, Suite 310
Orlando, Florida 32819

For Respondents: Richard S. Taylor, Esquire
531 Dog Track Road
Longwood, Florida 32750-6547

STATEMENT OF THE ISSUES

Whether the Florida Commission on Human Relations and the Division of Administrative Hearings have jurisdiction pursuant to Section 760.34, Florida Statutes, to consider Petitioner's Petition for Relief; and

Whether Petitioner timely filed his Petition for Relief with the Florida Commission on Human Relations.

PRELIMINARY STATEMENT

On December 9, 2008, the Division of Administrative Hearings ("DOAH") received a Petition for Relief from the Florida Commission on Human Relations ("FCHR"). The Petition alleges that Petitioner, Ricardo Vega, was the victim of a housing discriminatory practice as a result of Respondent, Frank Barefield's ("Barefield"), having violated the Florida Fair Housing Act, as amended. The Petition for Relief noted that four additional pages were initialed, dated, and attached. These four pages are two letters, one dated February 22, 2007, and the second dated August 24, 2007, both from attorneys representing Petitioner. It is noted that Barefield is an officer of Respondent, Club Development, Inc. ("Respondent"), the developer of the condominium that Petitioner wished to purchase. There is no allegation that Mr. Barefield has personal liability for the alleged acts of discrimination, only that he acted in his capacity as an officer of Respondent.

On October 31, 2008, FCHR issued a Notice of Determination, No Cause, having completed its investigation of a Housing Discrimination Complaint dated September 17, 2008, and signed by Petitioner on September 22, 2008. FCHR determined that "it does not have jurisdiction over it," referring to the complaint of

discrimination. FCHR's investigation determined that "the actual date of harm was December 28, 2006, when Respondent denied Petitioner's request for an extension of the closing date until February 28, 2007. In order for a complaint to be timely filed, it must be filed within one year of the date of harm. Therefore, based on the foregoing, FCHR "finds that this complaint was untimely filed and the Complaint is dismissed."

The investigative determination is supported by a legal concurrence filed by a FCHR staff attorney, which concludes "it is my legal concurrence that the commission should find that it is without jurisdiction to investigate this complaint."

Upon receipt of the Petition for Relief, on December 9, 2008, DOAH sent an Initial Order to both parties. Among other things, the Initial Order required the parties to provide mutually convenient dates for the final hearing.

On December 16, 2008, Respondent filed a Motion to Dismiss Petition for Relief alleging that the "alleged discriminatory housing practice had occurred over one year before the complaint was filed." On December 24, 2008, ruling on Respondent's Motion to Dismiss was reserved until evidence was received at the final hearing. Ruling on an Amendment to the Motion to Dismiss Petition for Relief was similarly reserved.

On December 24, 2008, a Notice of Hearing was entered scheduling the final hearing for February 16, 2008, in Orlando, Florida.

The final hearing took place as scheduled. It was agreed by the parties that the issues presented for determination are those set forth at the beginning of this Recommended Order. Respondent had raised the late filing of the Petition for Relief for the first time, as far as the undersigned was aware, at the hearing. No formal objection was raised by Petitioner to the late notice, nor did Petitioner seek a continuance.

The only witness to testify was Petitioner. Petitioner offered three exhibits that were received into evidence and marked Petitioner's Exhibits 1 through 3. Respondent offered two exhibits that were received into evidence and marked as Respondent's Exhibits 5 and 10.

A Transcript of the hearing was filed with DOAH on March 23, 2009. Both parties timely filed Proposed Recommended Orders.

All statutory references are to Florida Statutes (2008), unless otherwise noted.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following Findings of Facts are made:

1. Petitioner contracted to purchase a condominium, "unit 206 in Building 425 at Serravella at Spring Valley" from Respondent.

2. For reasons not relevant to the issues presented for determination, closing was deferred; and on December 22, 2006, Petitioner signed and submitted an "Addendum to Contract" to Respondent that sought "to revise contract closing date to 2/28/2007."

3. Sometime in late December 2006, a telephone conversation took place among Steve Myers, a realtor for Serravilla, Petitioner, and Barefield. Barefield was in Alabama, and Myers and Petitioner were in Florida on a speakerphone. Barefield advised Petitioner that the addendum would not be accepted by Respondent. Barefield and Petitioner did not speak to each other after this December telephone conversation. All communication was accomplished through third parties.

4. Subsequent to Respondent's refusal to accept Petitioner's addendum, there is lengthy correspondence and litigation involving the parties.

5. For some time after Respondent rejected Petitioner's addendum, Petitioner desired to purchase the condominium and, apparently, indicated so in various offers communicated by his attorneys to Respondent.

6. If an unlawful discriminatory act occurred, the determination of which is not an issue presented for determination, the act occurred in December 2006.

7. Petitioner's Housing Discrimination Complaint dated September 17, 2008, and signed by Petitioner on September 22, 2008, was filed with United States Department of Housing and Urban Development more than one year after the alleged act of discrimination.

8. On November 6, 2008, Petitioner sent a four-page fax transmission to Lisa Sutherland, a FCHR employee, which included a Petition for Relief.

9. On November 13, 2008, Petitioner sent a second fax transmission of seven pages to Lisa Sutherland. Apparently, this second transmission included a Petition for Relief.

10. On December 4, 2008, Petitioner sent a third fax transmission addressed to "Mrs. Crawford/Lisa Sutherland." While the fax transmission cover sheet is dated "11-13-08," the report of transmission shows that this 11-page transmission was sent on "12/04 15:24."

11. The Petition for Relief forwarded by FCHR to DOAH was date-stamped "2008 DEC-4 PM 3:25."

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this

proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

13. Subsection 760.34(5), Florida Statutes, provides that "[i]n any proceeding brought pursuant to this section or s. 760.35, the burden of proof is on the complaining party."

14. The issues for determination are: (1) Respondent's motion to dismiss for lack of subject matter jurisdiction based on the alleged untimely filing of Petitioner's Housing Discrimination Complaint; and (2) Respondent's motion to dismiss based on Petitioner's alleged untimely filing of his Petition for Relief. Respondent has the burden of proving the allegations of these motions by a preponderance of the evidence.

15. The Florida Civil Rights Act of 1992, as amended (Chapter 760, Florida Statutes), was patterned after Title VII of the Civil Rights Act of 1964 and Federal case law interpreting Title VII and is applicable to cases arising under the Florida Act. Green v. Burger King Corp., 728 So. 2d 369 (Fla. 3d DCA 1999); Laborers' Int'l Union of N. Am., Local 478 v. Burroughs, 522 So. 2d 852 (Fla. 3d DCA 1987); School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

Motion to Dismiss for lack of Subject Matter Jurisdiction

16. In the Housing Discrimination Complaint dated September 17, 2008 (and signed by Petitioner on September 22, 2008), filed with the U.S. Department of Housing and Urban

Development, Petitioner alleges that "respondent refused to sell unit 206 to him." He further alleges that Respondent's refusal to sell was an act of discrimination and that the most recent date of the discrimination was August 25, 2008. The Petition for Relief, which occasions this action, is predicated on the appropriateness of Petitioner's Housing Discrimination Complaint.

17. The evidence revealed that Petitioner's tendered December 22, 2006, Addendum to Contract to extend the closing date was refused by Respondent during a telephone conversation in late December 2006. That is the date an unlawful discriminatory act would have occurred, if one did occur.

18. Continuing offers to purchase after Respondent's December 2006 refusal to agree to Petitioner's proposed addendum, do not create a series of unlawful discriminatory acts. The continuing series of denials of essentially the same request does not extend the requirement that the complaint be filed within one year of the discriminatory act. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002); Burnam v. Amoco Container Co., 755 F.2d 893 (11th Cir. 1985); Collins v. United Airlines, Inc., 514 F.2d 594, 596 (9th Cir. 1975).

19. Subsection 760.34(2), Florida Statutes, states, in pertinent part:

A complaint under subsection (1) must be filed within 1 year after the alleged discriminatory housing practice occurred. The complaint must be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. . . .

20. The controlling statute clearly requires that the complaint must be filed within one year of the alleged discriminatory act. Petitioner's Housing Discrimination Complaint should have been filed in late December 2007, not September 2008. As a result, the Petition for Relief is time-barred.

Motion to Dismiss--Late Filing of the Petition for Relief

21. Petitioner filed a Petition for Relief on November 6, November 13, and December 4, 2008. The Petition for Relief forwarded to DOAH was date-stamped December 4, 2008. The Notice of Determination is dated October 31, 2008, and required that a Petition for Relief from a discriminatory housing practice be filed within 30 days.

22. The Petitions for Relief filed on November 6 and 13, 2008, were filed within the required 30 days of service of the Notice of Determination.

23. Without further evidence of how FCHR treated the November 6 and 13, 2008, Petitions for Relief, Respondent has failed to carry the burden of proof.

RECOMMENDATION

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

RECOMMENDED that FCHR dismiss the Petition for Relief as being time-barred as a result of the late filing of Petitioner, Ricardo Vega's, Housing Discrimination Complaint.

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



JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of April, 2009.

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.