STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RUBYE JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-5015
	)	
CANONGATE CONDOMINIUM APARTMENTS NO. ONE INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes,[1] before Administrative Law Judge Patricia Hart of the Division of Administrative Hearings on February 21, 2011. The hearing was held by video teleconference at sites in Miami and Tallahassee. Due to Judge Hart's unavailability, this case was assigned to Administrative Law Judge Cathy M. Sellers to prepare this Recommended Order using the existing record, pursuant to section 120.57(1)(a), Florida Statutes.

APPEARANCES

For Petitioner: Rubye Johnson, pro se
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For Respondent: Nicole Wall, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent committed an unlawful housing practice by discriminating against the Petitioner on the basis of race, in violation of the Florida Fair Housing Act, sections 760.20 through 760.37, Florida Statutes.

PRELIMINARY STATEMENT

On April 29, 2010, Petitioner, Rubye Johnson, an African-American woman ("Petitioner"), filed a Housing Discrimination Complaint ("Complaint") with the U.S. Department of Housing and Urban Development ("HUD"), alleging that Respondent, Canongate Condominium Apartments No. One, Inc. ("Respondent"), the condominium association responsible for the operation of the Canongate Condominium Apartments No. One, had unlawfully discriminated against her, in violation of the federal Fair Housing Act, by refusing to allow her to rent a condominium unit she owned, while allowing similarly situated white owners to rent their units. HUD forwarded the Complaint to the Florida

Commission on Human Relations ("FCHR") for investigation. The FCHR investigated the Complaint and issued a Notice of Determination of No Cause on June 11, 2010, determining that reasonable cause did not exist to believe that a discriminatory housing practice had occurred, and dismissing the Complaint.

On July 3, 2010, Petitioner filed a Petition for Relief ("Petition") with the FCHR. The FCHR forwarded the Petition to the Division of Administrative Hearings on July 12, 2010. The case was assigned to Judge Patricia M. Hart.

The case initially was set for final hearing on November 5, 2010. Pursuant to Respondent's Motion to Continue Final Hearing, the final hearing was continued until January 21, 2011, then rescheduled for February 21, 2011. A prehearing telephone conference between Judge Hart and the parties was held on February 11, 2011. On February 18, 2011, Petitioner filed a Motion to Request that Judge Hart Continue Case No. 10-5015. That same day, Respondent filed a response in opposition, and Judge Hart entered an Order denying the request for continuance.

Pursuant to notice, the final hearing was held on February 21, 2011. Petitioner testified on her own behalf and offered Petitioner's Exhibits 1 and 2 into evidence, which were admitted over objection. Respondent presented the testimony of Marsha Allen and Joyce Meade and offered Respondent's Exhibits 1, 2, 3, 4, 6, 12, 24, 25, and 31 into evidence, all of which

were admitted. Petitioner objected to the admission of Respondent's Exhibits 1 and 31. At the close of the hearing, Judge Hart left the evidentiary record open until March 3, 2011, to afford Petitioner the opportunity to file any subsequent amendments to Article VII, Paragraph H. of the Canongate Declaration of Condominium (Respondent's Exhibit 31) that she could locate and produce.

On March 3, 2011, Petitioner submitted correspondence to Judge Hart, again objecting to admission of the Canongate Declaration of Condominium[2] into evidence on the alleged basis that Article VII, Paragraph H. was outdated and had been deleted in the mid-1970s; however, Petitioner did not provide any evidence to substantiate this objection. Respondent submitted a response in opposition to Petitioner's submittal. Because Petitioner's submittal did not contain the evidence for which the evidentiary record had been held open, it was not admitted and the record was closed.

At the close of the final hearing, the parties were given ten days from the date of filing of the hearing transcript with the Division of Administrative Hearings in which to file their proposed recommended orders. The one-volume Transcript was filed on March 25, 2011. Respondent timely filed its Proposed Recommended Order on April 1, 2011. Petitioner's Proposed Recommended Order was untimely filed on April 11, 2011, but was

not stricken. Both parties' Proposed Recommended Orders were considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Dr. Rubye Johnson, is an African-American woman and, thus, is a member of a class protected under the Florida Fair Housing Act, sections 760.20 through 760.37, Florida Statutes.

2. Respondent, Canongate Condominium Apartments No. One, Inc., is the condominium association responsible for operation of the Canongate Condominium Apartments No. One ("Canongate").

3. Petitioner is a resident of Canongate and currently resides in Unit 201. She previously owned and lived in Canongate Unit 207, the unit at issue in this proceeding.[3] She no longer owns Unit 207.

4. Petitioner could not recall precisely when she became a resident of Canongate.[4] She testified that when she became a resident of Canongate she was a renter, and she rented Unit 207. The evidence indicates that she likely moved into Unit 207 sometime before February 4, 2000.

5. On February 4, 2000, the Association voted to amend Canongate's Declaration of Condominium, Article VII, Paragraph G, Section i. This amendment (the "2000 Amendment") prohibits the leasing or rental of units in Canongate. Existing leases and tenants as of the amendment's effective date were

grandfathered for the balance of the lease term; however, no lease extensions or renewals were allowed. Institutional mortgagees' existing rights under the Declaration of Condominium were expressly preserved.

6. At some point after Petitioner began renting Unit 207, the unit owner told her that due to the 2000 Amendment, she either would have to purchase the unit or move out in five years' time. The owner told her he thought the 2000 Amendment was approved because Respondent's Board of Directors ("Board") did not want any more black residents in the building.[5]

7. Petitioner purchased Unit 207 in or about 2004. When she purchased the unit, she was aware of the 2000 Amendment. She acknowledged that the 2000 Amendment prohibits the leasing or rental of units in Canongate without regard to race or gender.

8. Petitioner testified that when she came home one day, Laura Ochacher, who had owned Unit 210, approached her about renting one of her units. Ms. Ochacher told Petitioner that Unit 210 was the subject of foreclosure and that her family was being evicted. Petitioner saw the eviction notice.

9. Ms. Ochacher told Petitioner that Canongate property manager Marsha Allen had found a company to purchase Unit 210, and that the company had allowed them to remain in and rent Unit 210.

10. Through examining a document printed out from the Miami-Dade County Property Appraiser's Office website, Petitioner learned that Lansdowne Real Estate Holdings, LLC ("Lansdowne") owned Unit 210.

11. From this information, Petitioner surmised that Lansdowne had purchased Unit 210 and rented it to the Ochachers. She believed that Ms. Allen and the Board were complicit in what she viewed as a rental arrangement that violated the 2000 Amendment. Her belief was based on her knowledge of the screening and approval process entailed in purchasing a unit in Canongate.

12. Petitioner did not independently investigate the matters that Ms. Ochacher relayed to her. She did not ask Ms. Allen whether she had found a company to purchase Unit 210; whether Unit 210 was, in fact, being rented; or whether she or the Board knew of and allowed rental of the unit.

13. Petitioner understood Lansdowne to be a land company that bought and sold land on a large scale. She did not know whether Lansdowne is white, black, or of any other race.

14. Petitioner also heard rumors from other Canongate residents that other units were being rented. She identified these units as 618, 520, 602, 105, 309, 106, 115, 120, 315, 515, 313, 410, 430, 503, 514, "and perhaps more." She did not identify who told her about these units, nor did she

independently investigate whether the units were, in fact, being rented.

15. Following her discussion with Ms. Ochacher, Petitioner decided to ask the Board whether she could rent Unit 207.

16. She sent a communication to the Board, dated April 11, 2009, entitled "Issues and Concerns."[6] Item 12 of this communication states:

> 12. It is rumored that there are renters in the building and that the board of directors are [sic] sanctioning these arrangements. Is this true? If so, under what circumstance would the board of director's [sic] sanctions [sic] renters in the building? If not, do you have a clue how this perception has been generated?

17. Petitioner's testimony regarding whether she had actually requested permission from the Board to rent her unit was inconsistent. In her deposition, she testified that she viewed the statement in Item 12 as a request to rent Unit 207, but conceded that the request was "implied." At the final hearing, she acknowledged that her statement in Item 12 did not constitute a specific request, but stated that she previously had sent letters asking to rent the unit. She was unable to recall any specific letters she sent, when she sent them, or to whom the letters were sent. No such letters were proffered or admitted into evidence.

18. Petitioner claimed that she had orally asked Ms. Allen and various Board members, on numerous occasions, whether she could rent her unit. However, she could not recall who, other than Ms. Allen, she ostensibly had asked, nor did she recall the substance or details of such conversations.

19. Petitioner testified that, "by the way they acted," she knew she was not allowed to rent her unit. She stated that she also had been informed, orally and in writing, that she could not rent her unit. However, she could not recall who informed her, or any details of those discussions. She did not provide any evidence of written refusal to allow her to rent her unit.

20. Petitioner testified that she had discussed with Marsha Allen her concern that white unit owners were allowed to rent their units, while she was not. She acknowledged that no one had ever told her she was not allowed to rent her unit because she is black.

21. Canongate property manager Marsha Allen testified on behalf of Respondent. Ms. Allen's duties as property manager include overseeing the day-to-day operation of Canongate, reporting to the Board, and serving as Respondent's records custodian.

22. Ms. Allen testified that rental of units in Canongate is prohibited under the 2000 Amendment. She testified that

neither she nor the Board have allowed Canongate owners to rent their units, and that whenever owners have asked, they have been denied permission because of the rental prohibition. Ms. Allen testified that none of the units Petitioner identified was, in fact, being rented.

23. Ms. Allen stated that Petitioner never had asked her whether she could rent her unit. She was not aware of Petitioner ever having asked the Board or any Board member whether she could rent her unit. Ms. Allen did not interpret Item 12 of Petitioner's April 11, 2009, communication as constituting a request for permission to rent her unit.

24. Ms. Allen also stated that she never had discussed Canongate's rental policy with Petitioner, and she never had refused a request from Petitioner to rent her unit. She testified that she never had been directed by the Board or any Board member to refuse to allow Petitioner to rent her unit.

25. Ms. Allen testified that Petitioner never had complained to her that she was being discriminated against by not being allowed to rent her unit, while white owners were allowed to rent theirs.

26. Lansdowne sent a letter dated October 30, 2008, to Ms. Allen. The letter asked her to inform the Board that Lansdowne had acquired title to Unit 210 through foreclosure and that they were entering into an agreement with the borrower,

Laura Ochacher, to continue her occupancy for 12 months, during which she could redeem the property by paying the foreclosure judgment. The letter stated: "[t]his should not be considered a rental arrangement." The letter explained that Lansdowne had paid the past due assessments for the unit and would pay outstanding legal fees once the Board approved the occupancy agreement.

27. Upon receiving the letter, Ms. Allen reviewed the Canongate Declaration of Condominium, specifically, Article VII, Paragraph H., to ensure that the occupancy agreement for Unit 210 did not violate the 2000 Amendment's rental prohibition. Article VII, Paragraph H., provides that if the mortgagee of a condominium unit subject to an institutional mortgage given as security becomes the owner of the unit, the owner has the unqualified right to sell, lease, or otherwise dispose of the unit. Ms. Allen determined that, based on this provision, the occupancy agreement did not violate the 2000 Amendment.

28. Ms. Allen consulted with Respondent's legal counsel, who independently verified that the occupancy agreement did not violate the 2000 Amendment.

29. Respondent also presented the testimony of Joyce Meade, who has served as Respondent's president since 2008. Ms. Meade's duties as President include enforcing Respondent's

condominium documents, overseeing the Board, conducting meetings, and supervising Canongate's property manager.

30. Ms. Meade testified that Petitioner did not ask her for permission to rent her unit. She also testified that, to the best of her knowledge, Petitioner did not ask the Board for permission to rent her unit, and the Board did not specifically refuse. Ms. Meade testified that had Petitioner asked to rent her unit, she would not have been allowed because all rental requests are refused due to the 2000 Amendment.

31. Ms. Meade testified that Petitioner never complained to her that she was being discriminated against because she was not allowed to rent her unit, while white owners were allowed to rent theirs. She also was not aware of any such complaints by Petitioner to the Board.

Determinations of Ultimate Fact

32. Petitioner failed to present persuasive evidence that she requested Respondent's permission to rent Unit 207. Petitioner subjectively may have believed that she requested permission in Item 12 of her April 11, 2009, communication, but that item cannot reasonably be read to constitute such a request. Item 12 merely asks if there are renters in Canongate and the circumstances under which the Board would allow renters. No other items in the April 11, 2009, communication constitute a request to rent the unit. Petitioner did not present any

evidence that she submitted other written requests to rent her unit, and her testimony that she had orally requested to rent her unit was unpersuasive. Respondent's witnesses credibly testified that Petitioner had never requested, orally or in writing, to rent her unit.

33. Petitioner also failed to establish that her request to rent her unit was refused. Her testimony on this point was unclear, imprecise, and unpersuasive, and she provided no evidence of written refusal to allow her to rent her unit. By contrast, Respondent's witnesses testified unequivocally that they had not refused to allow Petitioner to rent her unit. They also credibly testified that Petitioner never had complained to them that she was refused permission to rent her unit because she is black, while white owners were allowed to rent theirs.

34. Petitioner did not establish that she was qualified and able to rent out her unit. The uncontroverted evidence established that the Canongate Declaration of Condominium prohibits leasing or rental of units. Accordingly, Petitioner could not have been allowed to rent her unit, even if had she asked.

35. Petitioner did not present any competent substantial evidence establishing that Respondent allows similarly situated white unit owners to rent their units, while refusing to allow Petitioner to rent hers. Petitioner's testimony that Lansdowne

was a purchaser and that the occupancy agreement for Unit 210 actually constituted a rental arrangement was merely her personal opinion, unsupported by any competent substantial evidence. Respondent showed that Lansdowne is an institutional mortgagee that took title through foreclosure and, therefore, was not similarly situated to Petitioner and the other owners who had purchased their units. Moreover, Petitioner presented no evidence that Lansdowne was white.

36. In sum, there is no competent substantial evidence in the record to support a finding of unlawful housing discrimination.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has personal and subject matter jurisdiction over this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

38. The Florida Fair Housing Act is codified at sections 760.20 through 760.37, Florida Statutes. Section 760.23(2) provides in pertinent part:

> Discrimination in the sale or rental of housing and other prohibited practices. --
> . . .
>
> (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 or services or facilities in connection therewith, because of race, color, national origin, sex, handicap, familial status, or religion.

39. The Florida Fair Housing Act is modeled after the federal Fair Housing Act. Accordingly, federal case law involving housing discrimination is instructive and persuasive in interpreting section 760.23, Florida Statutes. Dornbach v. Holley, 854 So. 2d 211, 213 (Fla. 2d DCA 2002).

40. In cases involving a housing discrimination claim, the Petitioner has the burden of establishing a prima facie case of discrimination by a preponderance of the evidence. Sec'y, Housing and Urban Dev. ex. rel. Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)(applying the burden-shifting analysis of McDonnell Douglas v. Green, 411 U.S. 792 (1973), in a housing discrimination case under the federal Fair Housing Act). The Petitioner's 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 (Fla. 1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)). However, if the Petitioner establishes a prima facie case, the burden shifts to the Respondent to articulate some legitimate, nondiscriminatory reason for its action. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981)(evidence of nondiscriminatory reason need only be sufficient to raise a genuine issue of fact regarding the alleged discrimination); Budnick v. Town of Carefree, 518 F.3d 1109, 1114 (9th Cir. 2008). If the Respondent satisfies this

burden, then the burden shifts back to the Petitioner to establish, by a preponderance of the evidence, that the reason articulated by the Respondent is merely a pretext to conceal unlawful discrimination. 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 (1994); Soules v. U.S. Dep't of Housing and Urb. Dev., 967 F.2d 817 (2d Cir. 1992).

41. To establish a prima facie case of housing discrimination based on race, the Petitioner must show: (1) she belongs to a class of persons protected under section 760.23(2); (2) she requested permission from Respondent to rent her unit; (3) she was qualified and able to rent her unit; (4) Respondent refused to approve her request to rent her unit; and (5) Respondent allowed similarly situated white owners to rent their units. See Budnick, 518 F.3d 1109, 1114 (9th Cir. 2008) (articulating the elements of a prima facie case of housing discrimination based on alleged disparate treatment of a protected class).

42. Here, Petitioner failed to establish a prima facie case of housing discrimination. It is undisputed that as an African American, she meets the first element; however, she did not establish any of the other elements by a preponderance of the evidence. Specifically, she did not prove that she asked Respondent's permission to rent her unit; that Respondent

refused to allow her to rent her unit; that she was qualified and able to rent her unit; and that Respondent allowed similarly situated white owners to rent their units, while not allowing Petitioner to rent her unit.

43. Moreover, even if Petitioner had established a prima facie case of discrimination, Respondent met its burden to offer a legitimate, nondiscriminatory explanation for treating institutional mortgagees that take title through foreclosure differently than other unit owners, such as Petitioner, who purchased their units.

44. In sum, Petitioner failed to prove by a preponderance of the evidence that Respondent unlawfully discriminated against her in the terms, conditions, or privileges of sale or rental of a dwelling because of her race, in violation of section 760.23(2), Florida Statutes.

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 finding Canongate Condominium Apartments No. One, Inc., not liable for housing discrimination and awarding no relief.

DONE AND ENTERED this 9th day of August, 2011, in Tallahassee, Leon County, Florida.

CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of August, 2011.

ENDNOTES

[1] Unless otherwise stated, all references are to Florida Statutes (2010).

[2] Petitioner's March 3, 2011, correspondence objected to what she called "Exhibit 3." However, the specific provision to which Petitioner objected is part of Respondent's Exhibit 31.

[3] Petitioner also purchased, and at various times owned, Canongate Units 516 and 201, neither of which is the subject of this proceeding. When Petitioner purchased Unit 516, she was required to undergo a standard purchaser qualifying process that entails filling out an application and being interviewed by Board members. Once her purchase was approved, she was issued a Certificate of Approval. She was not required to go through the qualifying process for her subsequent unit purchases.

[4] In her answers to Respondent's interrogatories (Respondent's Exhibit 12), Petitioner stated that she believed she had moved into Canongate in 1999. In her deposition (Respondent's Exhibit 1), she initially stated she had moved into Canongate in 2003 or

[5] Respondent, not its Board, approved the 2000 Amendment. Respondent's membership consists of Canongate's unit owners, at least several of which are African-American. There is no evidence that Respondent's approval of the rental prohibition in the 2000 Amendment was motivated by racial animus.

[6] Respondent's legal counsel sent a response, dated April 27, 2009, to Petitioner, stating that the Board did not sanction illegally rented units. The response described measures Respondent had undertaken in an effort to limit unit access to only owners, invited guests, and scheduled workmen. These measures included installing a glass wall and door and providing keys only to residents who proved unit ownership.

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.