STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RAYMOND GEISEL AND SUSANNE KYNAST,	)	
Petitioners,	)	
vs.	)	Case No. 11-0035
CITY OF MARATHON, CITY MARINA,	)	
Respondent.	)	

RECOMMENDED ORDER OF DISMISSAL

On February 28, 2011, Respondent filed a Renewed Motion to Dismiss Petition for Relief, or for an Order Relinquishing Jurisdiction. This case arises under the Florida Fair Housing Act, sections 760.20, et seq., Florida Statutes. In construing this act, Florida courts are guided by the decisions of federal courts construing the state law's federal counterpart, the federal Fair Housing Act, as amended, 42 U.S.C. sections 3601, et seq. Dornback v. Holley, 854 So. 2d 211, 213 (Fla. 2d DCA 2002).

This recommended order contains complicated, policy-laden legal conclusions within the substantive jurisdiction of the Florida Commission on Human Relations (Commission), not the Administrative Law Judge. § 120.57(1)(l), Fla. Stat. The alleged facts of the case, if tried, will take days of

testimony, which may prove contentious and painful for witnesses and parties. Rather than risk subjecting the parties to the time, expense, and turmoil of an evidentiary hearing on the merits of the housing discrimination claims, the Administrative Law Judge has elected to provide the Commission with a discussion of the applicable substantive law, a recommended disposition, and a timely opportunity to reject or modify the Administrative Law Judge's conclusions of law--in which case, of course, the Commission may remand the case to the Division of Administrative Hearings for an evidentiary hearing and recommended order.

There is no material dispute as to the jurisdictional facts. Petitioner Kynast executed a license agreement on January 20, 2008. By this agreement, she acquired several rights: to tie up her liveaboard boat to a city marina mooring ball; to use a dinghy to travel from her moored boat to the marina dock, where she could dock her dinghy; and to use the upland marina facilities, such as showers, bathrooms, laundry, parking, garbage receptacles, television and recreation room, storage, and septage pumpout.

In August 2008, Petitioner Geisel, who had been living with Petitioner Kynast on the boat, departed from the marina area, to which he did not return until December 2009.

At some point prior to Petitioner Geisel's return, Petitioner Kynast relocated her boat from the city marina mooring area to another part of the harbor. The state of Florida owns the submerged bottom of both areas. However, Respondent, which leases its mooring area from the state of Florida, has no interest in the area of the harbor to which Petitioner Kynast relocated her boat.

According to Respondent, this relocation occurred around January 20, 2009. According to Petitioners, this relocation may have happened closer to Petitioner Geisel's return in December 2009; however, the relocation predated his return. Significantly, Petitioner Kynast alleges that she was mostly left alone by the offending marina residents during Petitioner Geisel's absence, although she received some complaints about Petitioner Geisel's service animals. Thus, this dispute in the facts is without significance.

Respondent makes several arguments in its motion. First, it argues that the limitations period in this administrative proceeding is one year from the date of the filing of the housing complaint. This contention is correct. Petitioners filed their Housing Discrimination Complaint on September 28, 2010. Pursuant to section 760.34(2), Florida Statutes, the complaint must be filed within one year of when the alleged housing discrimination occurred. Section 760.35 provides a two-

year limitations periods for civil actions, but no limitations periods for administrative proceedings. The jurisdiction of the Division of Administrative Hearings is derived from the jurisdiction of the Florida Commission on Human Relations, so the limitations period for this proceeding starts September 28, 2009.

Jurisdiction in this case is based on section 760.23(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.

Respondent has reserved the argument that it never engaged in the sale or rental of a dwelling. This contention is incorrect. Until the relocation of Petitioner Kynast's boat, Respondent engaged in a relationship with Petitioners that would support a conclusion of jurisdiction under the Fair Housing Act, sections 760.20, et seq. As noted in the preceding Order, a marine vessel may be a dwelling unit. Project Life, Inc., v. Glendening, 139 F. Supp. 2d 703, 710-11 (D. Md. 2001), aff'd on other grounds, 46 Fed. Appx. 147 (4th Cir. 2002). The definition of "dwelling" ultimately boils down to determining what the aggrieved parties do at the putative dwelling, in terms of residential-type activities, and how long they live in the putative dwelling. The more residential-type things they do at

the putative dwelling and the longer they remain there, the more likely it is a dwelling under the federal Fair Housing Act. Schwartz v. City of Treasure Island, 544 F.3d 1201, 1215 (11th Cir. 2008).

It is not determinative that Respondent never rented Petitioners a liveaboard boat, only a mooring buoy. The situation is similar to when an aggrieved party rents a trailer lot, but relocates his trailer to the lot. This arrangement confers jurisdiction under the federal Fair Housing Act over the entity leasing the lot to the aggrieved party. See, e.g., Morgan v. Housing and Urban Development, 985 F.2d 1451, 1452 (9th Cir. 1993). The definition of "dwelling" at section 760.22(4) specifically includes "vacant land . . . offered for . . . lease for the . . . location on the land of any building or structure . . . ."

But Respondent is correct in asserting that this rental relationship ended prior to the start of the limitations period. And Respondent is correct in asserting that the relationship between the parties, after Petitioner Kynast relocated the boat off the city marina mooring area, was insufficient to establish the requisite rental relationship within the meaning of the first clause of section 760.23(2): "sale or rental of a dwelling." The dwelling was a combination of the liveaboard boat and the mooring, and Petitioner Kynast's relocation of the

boat off the city marina mooring area ended the landlord-tenant relationship between Petitioners and Respondent, as the dinghy and the upland marina accessory facilities do not qualify as a dwelling.

At this point, it is necessary to determine whether the clause, "or in the provision of services or facilities in connection therewith," modifies "sale or rental of a dwelling," or merely "dwelling." The more restrictive interpretation of the statute would apply this clause to "sale or rental of a dwelling." This would tend to restrict claims of housing discrimination to the transaction in which the aggrieved party acquired the ownership or leasehold interest in the dwelling. The more expansive interpretation of the statute would apply this clause to "dwelling," so claims of housing discrimination could attach to post-acquisition acts or omissions, even by parties that did not participate in the transaction by which the aggrieved party acquired the ownership or leasehold interest in the dwelling. Inferentially, Respondent argues for the more restrictive interpretation of section 760.23(2).

As far as the Administrative Law Judge can determine, the Commission has provided no guidance on this issue in its final orders. Twice, the Florida Commission on Human Relations has issued final orders stating, in dictum, that section 760.23(2) applies to sales. In Heiblum v. Carlton Bay Ass'n, Inc., DOAH

Case No. 08-5244, FCHR Case No. 28-92666H, Final Order No. 09-042 (May 12, 2009), the Commission declined to adopt an Administrative Law Judge's conclusions of law that section 760.23(2) does not extend to a homeowner, as distinguished from persons seeking to purchase or lease a dwelling and from tenants.

In reaching the result that it did in Heiblum, the Commission relied on its earlier final order in Kleinschmidt v. Three Horizons North Condominium, Inc., FCHR Case No. 25-91782H, Final Order No. 07-013 (Feb. 15, 2007), which stated, also in dictum, that section 760.23(2) is available for a condominium owner who alleges a "hostile housing environment . . . sufficiently severe or pervasive to alter the conditions of the housing arrangement."

Respondent omits any discussion of post-acquisition discrimination, but, it may be safely assumed, it would not invite the Commission to construe section 760.23(2) in such a fashion. Case law from the United States district courts in Florida does not close the door claims for relief for post-acquisition discrimination based on 42 U.S.C. section 3604(b), which corresponds to section 760.23(2), Florida Statutes.

The most favorable case for Respondent is Lawrence v. Courtyards at Deerwood Association, Inc., 318 F. Supp. 2d 1133 (S.D. Fla. 2004). In this case, a black couple purchased a home

in a residential development consisting of townhomes, single-family homes, and condominiums. As required, the plaintiffs joined the homeowners' association for the development. The purchase and sale was unremarkable. Shortly after moving in, the couple began to have problems with a neighbor. The problems involved complaints direct toward the neighbor of roaming cats, verbal assaults (including racial epithets), cut cable lines, threatening notes, and the appearance of dead rats on front steps and back patios. Reciprocal complaints from the neighbor included claims that the plaintiffs parked in handicapped spaces, trespassed on her property, took pictures of her house, and threatened her. The plaintiffs informed the homeowners' association and demanded that it stop the racial harassment. The homeowners' association conducted a reasonable investigation and concluded that the dispute was entirely personal. Finally, the neighbor threatened to kill one of the plaintiffs, who immediately moved out.

As to the section 3604 claims before it, the Lawrence court first distinguished Evans v. Tubbe, 657 F.2d 661 (5th Cir. 1981), in which the defendant erected a locked gate across a road that passed through his land, providing a key to all the white persons who owned real property that required use of the road for access, but not to the black persons needing to get by the gate to access their real property. The Lawrence court

restricted Evans to cases of "direct discrimination" plus threats, intimidation, and harassment. Presumably, this analysis applied to the section 3604(a) claim before the court, as the Evans court restricted its holding to section 3604(a) and declined to reach the "less arguable claims under . . . § 3604(b)." 657 F.2d at 663.

The Lawrence court held that the homeowners' association was not required, under section 3604(b), to protect the plaintiffs' quiet enjoyment of their common area. In so doing, the Lawrence court reasoned that the phrase, "the provision of services or facilities in connection therewith," modifies the "sale or rental of a dwelling," not merely the "dwelling."

Two federal district courts in Florida have distinguished Lawrence on the basis that it applies to a sale, not a rental transaction. Obviously, rental transactions are markedly different from sales transactions in the duration of the relationship between the potentially aggrieved party and the potential defendant. This distinction is discussed in Richards v. Bono, 2005 U.S. Dist. LEXIS 43585 (M.D. Fla. 2005), as the court ruled that the federal Fair Housing Act extends to post-acquisition discrimination against a tenant, where "acquisition" is the discrete act of the acquisition of the leasehold. See also Jackson v. Comberg, 2006 U.S. Dist. LEXIS 66405 (M.D. Fla. 2006).

But the Florida federal district court case that deals most comprehensively with post-acquisition discrimination is Savanna Club Worship Service, Inc., v. Savanna Club Homeowners' Ass'n, Inc., 456 F. Supp. 2d 1223 (S.D. Fla. 2005). The Commission should follow this case, to the extent of any conflict with Lawrence, due to the superior reasoning in Savanna; the Savanna court's readiness to apply 42 U.S.C. section 3604(b) to a sales transaction, which comports with the dictum in the Commission's two final orders, discussed above; and the result that permits the application of the Fair Housing Act to prohibit important, institutional sources of post-acquisition housing discrimination, as mentioned below.

In Savanna, some homeowners within a homeowners' community had organized a religious group that was denied the use of the community's club house and other common area. The court noted that other courts, including Lawrence, generally declined to recognize post-acquisition discrimination, unless it "deprives a person of their [sic] housing." 456 F. Supp. 2d at 1228.

However, the Savanna court refused to create a "bright-line rule" that the federal Fair Housing Act fails to reach any post-acquisition discrimination. The court recognized that the federal Fair Housing Act might apply more readily to the provision of services in planned communities where the services are integrated with the home ownership. Citing a regulation of

the U.S. Department of Housing and Urban Development, the court noted that the federal agency interpreted the phrase, "the provision of services or facilities in connection therewith," as modifying "dwelling," not "sale or rental." This lent further support to the court's conclusion that discriminatory conduct that deprives homeowner association members of the use of common area is actionable under the federal Fair Housing Act. Failing to find a complete denial of access to services connected to the dwelling, though, the court granted summary judgment for the defendant.

If the Commission and courts recognize post-acquisition housing discrimination under the Fair Housing Act, they will draw distinctions to avoid an unmanageable proliferation of litigation that wanders far afield from the obvious purpose of the legislation, which is to prohibit housing discrimination. Courts have more readily recognized post-acquisition discrimination to the extent that it is both direct and it deprives the aggrieved person of substantial enjoyment of her dwelling--as in cases of post-acquisition housing discrimination by homeowner insurers, see, e.g., Ojo v. Farmers Group, 600 F.3d 1205, 1208 (9th Cir. 2010); home improvement or refinancing lenders, see, e.g., Beard v. Worldwide Mortgage Corp., 354 F. Supp. 2d 789, 809 (W.D. Tenn. 2005); local governments, see,

e.g., Larkin v. Michigan Dep't of Social Servs., 89 F.3d 285, 288-89 (6th Cir. 1996); Ass'n for Retarded Citizens v. City of Fultondale, 672 So. 2d 785 (Ala. 1995).

By requiring both direct discrimination and substantial deprivation of enjoyment of one's dwelling for a claim of post-acquisition discrimination under section 760.23(2), the Commission will prevent extension of the Fair Housing Act into what are essentially squabbles among neighbors, be they members of condominiums associations, homeowner associations, or marinas. As in Lawrence, these squabbles may regrettably contain epithets of a category covered by the Fair Housing Act, but a claim for relief should require careful analysis of a combination of the directness of the involvement of the defendant and the extent to which the aggrieved party has suffered the deprivation of enjoyment of her dwelling as a result of the discrimination.

On the basis of the allegations, this case presents a good instance of substantial deprivation of enjoyment of one's dwelling, as Petitioners were impeded in their ability to perform such basic tasks as laundry, garbage disposal, and grocery shopping. But, on the basis of the allegations, this case presents a poor instance of direct discrimination. Petitioners have not alleged direct discrimination by Respondent. The direct acts of discrimination are alleged to

have been committed by other residents of the marina. Petitioners' claim against Respondent is essentially that, after they complained of direct discrimination from other marina residents, Respondent did nothing.

This case is a very poor vehicle for the recognition of post-acquisition housing discrimination in Florida for another reason. Uncertainty attaches to what event marks the point of acquisition. Perhaps it is the liveaboard, which may have been acquired many years earlier. Perhaps it is the liveaboard and the city mooring, but no case law addresses post-acquisition discrimination following disposition of the "dwelling"--for what should be obvious reasons. Likely, it is the liveaboard and the subsequent mooring, but as the relationship of Respondent to Petitioners' dwelling attenuates, the directness of the requisite discrimination to trigger liability under the Fair Housing Act probably should intensify, if a claim for relief is to be recognized.

Based on the foregoing, it is

RECOMMENDED that the Commission enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 11th day of March, 2011, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
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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 must be filed with the agency that will issue the final order in this case.