

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA COMMISSION ON HUMAN)
RELATIONS, ON BEHALF OF STEVEN)
AND JAMIE TERRY,)
)
Petitioner,)
)
vs.) Case No. 11-2270
)
HOYT AND NANCY DAVIS, FLORIDA)
COASTAL JACKSONVILLE REALTY,)
INC., AND JOHN MCMENAMY,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 29, 2011, in Jacksonville, Florida, before W. David Watkins, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: David A. Organes, Esquire
Florida Commission on Human Relations
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For Respondents Hoyt and Nancy Davis:

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For Respondents John McMenemy and Florida Coastal
Jacksonville Realty, Inc.:

N. Mark New, II, Esquire
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STATEMENT OF THE ISSUE

Whether Respondents engaged in a discriminatory housing practice in violation of the Florida Fair Housing Act, as amended, sections 760.20 through 760.37, Florida Statutes (2011)^{1/}.

PRELIMINARY STATEMENT

Petitioner, the Florida Commission on Human Relations ("Commission"), is a state agency charged with investigating complaints of housing discrimination filed pursuant to the Florida Fair Housing Act. §§ 760.22 - 760.37, Fla. Stat. On August 16, 2010, Steven and Jaime Terry filed a complaint with the Commission - dual-filed with the U.S. Department of Housing and Urban Development -- alleging Respondents, Hoyt and Nancy Davis, John McMenemy, and Florida Coastal Jacksonville Realty, Inc., discriminated against them on the basis of familial status in violation of section 760.23(1), Florida Statutes, and section 804(a) of the Federal Fair Housing Act of 1988. 42 U.S.C. § 3604(a).

An investigation of the complaint was made by the Commission. On September 17, 2010, the Commission issued its

determination that there was reasonable cause to believe a discriminatory housing practice had occurred in violation of section 760.23(1). The Commission's efforts to conciliate were unsuccessful, as stated in the Notice of Failure of Conciliation entered by the Commission on April 26, 2011. Mr. and Mrs. Terry elected to have the Commission act on their behalf pursuant to section 760.35(3)(a) Florida Administrative Code Rule 60Y-7.001(8)(b)7. On May 5, 2011, the Commission filed a petition for relief on behalf of Mr. and Mrs. Terry.

On May 5, 2011, the case was referred to the Division of Administrative Hearings ("DOAH") and assigned to Administrative Law Judge Lawrence P. Stevenson to conduct a formal hearing on the matter. However, on July 12, 2011, the case was transferred to the undersigned, and on September 19, 2011, an Order Granting Continuance and Re-scheduling Hearing was issued setting the final hearing for November 29 and 30, 2011, in Jacksonville, Florida.

The final hearing was conducted as noticed, at which time Petitioners called as witnesses Jamie Terry, John McMenemy and Nancy Davis, and offered in evidence nine exhibits. Respondents Hoyt and Nancy Davis recalled Nancy Davis as its sole witness, and offered four exhibits in evidence. Respondents John McMenemy and Florida Coastal Jacksonville Realty, Inc. called Hoyt Davis as their only witness, and offered one exhibit in evidence.

At the conclusion of the final hearing, the parties stipulated that proposed recommended orders would be filed within 14 days of the filing of the two-volume official transcript with the Division, which occurred on January 18, 2012. Thereafter the parties filed two separate requests for extensions of time to file proposed recommended orders, and those requests were granted. On March 5, 2012, Petitioners and Respondents Hoyt and Nancy Davis timely filed Proposed Recommended Orders, both of which have been carefully considered by the undersigned.

Based on the testimony and documentary evidence presented at hearing, the demeanor and credibility of the witnesses, and on the entire record of this proceeding, the following findings of fact are made:

FINDINGS OF FACT

Background

1. Respondents Hoyt and Nancy Davis (the Davises) own a residential property located at 1856 Cross Pointe Way, St. Augustine, Florida (the Property). The Property is utilized exclusively as a rental.

2. Respondent Florida Coastal Jacksonville Realty, Inc. ("Florida Coastal") and its principal John McMenemy ("McMenemy") acted as listing agents for the Property (collectively, the

"Broker Respondents"). Mr. McMenemy and his company have managed the rental of the Property for approximately six years.

3. In association with their listing of the Property, the Broker Respondents were responsible for advertising, showing, accepting applications for and assisting in the selection of tenants for the Property.

4. At the time of the events in question, the Property was being offered for lease at a rate of \$1,450 per month. Generally, due to its location within a St. Johns County golf community and proximity to good schools, the Property rents easily and quickly.

The Rental Applications

5. On May 14, 2010, Petitioner Jaime Terry (Mrs. Terry) contacted McMenemy regarding the Property. McMenemy instructed Mrs. Terry on the rental application process. On the afternoon of Sunday, May 16, 2010, Petitioners submitted via e-mail their rental application, dated May 15, 2010.

6. On their application, the Petitioners disclosed that they had previously declared bankruptcy. The bankruptcy was entered in December 2007 and discharged in January 2009. Petitioners also disclosed that they were currently living with Mrs. Terry's parents. The application included a statement of the Terrys' monthly income, and also disclosed that they had three children residing with them -- aged eleven, five and two

at the time. A memo attached to the application elaborated on the bankruptcy and other details of their employment and financial situation. Mrs. Terry testified that during the application process the Respondents did not solicit additional information concerning her employment history.

7. On May 18, 2010, McMenemy ran a credit check on the Terrys using the "Online Rental Exchange." The credit report for Jaime Terry reflected a credit score of 664, while Steven Terry's assigned score was 649. However, both reports noted "conditional" approval because of the bankruptcy filing.

8. Although the exact date is unknown, at approximately the same time that the Terrys submitted their application, another couple, Rick and Jessica Egger (the Eggers) contacted McMenemy regarding their interest in possibly renting the Property.

9. On the evening of Thursday, May 20, 2010, the Eggers formally submitted an application to rent the Property. The Eggers' application disclosed that, unlike the Terrys', they did not have a bankruptcy in their history. In addition, the Eggers' combined monthly income was higher than the Terrys'^{2/} and the younger of their two children was nine years old. The credit report obtained for the Eggers reflected a credit score of 672 for Jessica Egger and 696 for Rick Egger, with an unconditional approval rating.

Respondents' Tenant Selection Process

10. McMenemy testified that in evaluating applications, potential tenants must meet certain minimum criteria. Factors he considers in assessing applicants include credit checks, criminal background checks, employment status, and rental history. However, he agreed that the evaluation process he uses is subjective.

11. McMenemy acknowledged that bankruptcy would not automatically disqualify a potential tenant, and in fact, confirmed that he has rented to tenants who have a bankruptcy in their history. With regard to credit scores, McMenemy testified that he considered a score below 500 to be unacceptable.

12. Mrs. Davis testified that McMenemy manages the entire process of renting the Property on behalf of herself and her husband. Once McMenemy determines the suitability of a prospective tenant, he discusses that tenant with the Davises. McMenemy does not discuss applicants with the Davises that he does not consider eligible. The Davises do not participate in the background screening process and they do not review applicants' credit ratings. However, Mrs. Davis was aware of McMenemy's process for selecting tenants, and she confirmed her understanding that applicants must meet certain minimum requirements. In selecting a tenant, McMenemy looks not only for a candidate that is financially qualified, but also one who

will rent the property for a significant period of time, will take good care of the property, and will make monthly rent payments in a timely manner, according to Mrs. Davis.

Denial of Petitioners' Lease Application

13. Mr. Davis testified that he and Mrs. Davis discussed the Petitioners' application with McMenemy. At hearing, Mr. Davis recounted that conversation as follows:

Cross-examination by Mr. Organes:

Q. Mr. Davis, you stated that you had discussed with Mr. McMenemy the application of Steven and Jaime Terry?

A. Yes.

Q. And that's a common practice with Mr. McMenemy as when he receives reasonably qualified applicants, he discusses them with you?

A. Yes.

Q. And that's what he did with the Terrys?

A. Yes.

Q. And you said you did not tell him not to rent to them because of their children?

A. That is true, we did not tell him.

Q. The issue of children wasn't discussed at all?

A. No.

Q. What reason did you give him to tell them why their application was being denied?

A. Because of their past rental history and their bankruptcy foreclosure.

Q. In general if you don't approve of an applicant, what reason would you give for denying that applicant?

A. I would give that reason, that we didn't feel that, you know, we probably would get a better applicant and the reason we turned them down is because we didn't feel that they were suitable for our rental.

14. There is no evidence in this record as to precisely when the above conversation between the Respondents took place, although based upon Mr. Davis's statement that "we probably would get a better applicant" it is reasonable to infer that it was prior to the Eggers submitting their application on the evening of Thursday, May 20, 2010.^{3/}

15. Early on the morning of Friday, May 21, 2010, McMenamy sent an e-mail to Ms. Terry, which read:

Jaime

I left a message yesterday but did not hear from you. I spoke to the owner about the application and she was concerned about not really having any rental history and the number of small children. She is a perfectionist and just had the home professionally painted. The one family who lived there had small children and there were handprints all over the walls so that it needed to be repainted. So this was her main concern and therefore does not want to rent to you and the family.

If you have any questions please call.

Sincerely,

John

16. At hearing, Mrs. Davis maintained that the Petitioners' children were not the determining factor in the decision to deny their application. Rather, it was based on their finances and lack of rental history. Consistent with Mr. Davis's testimony, Mrs. Davis also testified that she and her husband did not instruct McMenemy to reject the Petitioners' application because of their children.

17. After being informed that their application was denied, Petitioners immediately began searching for alternate housing. Mrs. Terry testified that their primary concern was to locate a rental in a high quality school district. Within a couple of weeks of receiving the denial e-mail from McMenemy, the Terrys located a home at 983 Lilac Loop, St. Johns, Florida. Petitioners entered into a lease for this property on June 6, 2010; the rent was \$ 1,200 per month. Although the Lilac Loop home was acceptable, the Terrys considered it to be inferior to the Property, and Petitioners paid to have the home repainted and wired for cable access. The cable installation fee was \$150.00.

18. On September 22, 2010, Petitioners were notified that the Lilac Loop house was in foreclosure. Petitioners appealed

to a default-law organization in an attempt to enforce their one-year lease, but were ultimately unsuccessful. As a result of the foreclosure, Petitioners were forced to seek alternative housing within the same school district, and in November 2010, leased a property at 1528 Summerdown Way, Fruit Cove, Florida, 32259. The monthly rent at 1528 Summerdown Way was \$1,600 monthly. Petitioners also incurred additional expenses necessitated by hiring a moving service, in the amount of \$773.50. At of the hearing, Petitioners continued to reside in the Summerdown Way rental.

The Commission Investigation

19. On August 16, 2010, the Terrys filed a Housing Discrimination Complaint with HUD alleging they had been unlawfully discriminated against by Respondents based upon their familial status. Thereafter, the Commission opened an investigation of the allegation. As part of that investigation, Respondents were invited to submit written statements setting forth their version of the events at issue, and any defenses to the allegation they wished to raise.

20. On August 19, 2010, the Davises submitted a written statement to the FCHR. In the first paragraph of that submittal the Davises stated:

To Whom it May Concern:

We enlisted realtor John MaMenamy to find a new tenant for our rental house at 1856 Cross Pointe Way, St. Augustine, FL 32092. Mr. McMenemy was told that we preferred not to rent to someone with more than one, if any, very small children at this particular time. The reason being we just had to have the interior of the house professionally repainted and repairs made to several areas, the walls in particular. Additionally, in light of the fact there were several highly qualified persons interested in and looking at the house concurrently.

21. The submittal continued by identifying four former tenants of the Property, as well as the current tenants (the Eggers), all of whom had children living with them.

22. It is found that McMenemy's e-mail of May 21, 2010, and the Davises' letter of August 19, 2010, constitute direct evidence that Respondents' decision not to rent to Petitioners was based upon their familial status. The testimony of McMenemy and the Davises that familial status was not the reason for refusing to rent to Petitioners is rejected as not credible.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to sections 120.569 and 120.57, Florida Statutes (2011).

24. The Florida Fair Housing Act, codified in sections 760.20 through 760.37 provides, in pertinent part, that:

(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.

§ 760.23, Fla. Stat. (emphasis added)

25. Familial status is "established when an individual who has not attained the age of 18 years is domiciled with . . . a parent. . . ." § 760.22(5), Fla. Stat.

26. The federal Fair Housing Act is "a broad remedial statute," therefore, its provisions are to be generously construed and "its exemptions must be read narrowly." City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 804 (9th Cir.1994), aff'd, 514 U.S. 725, 115 S. Ct. 1776, 131 L. Ed. 2d 801 (1995). See Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc., 3 F.3d 1472, 1475 (11th Cir. 1993) ("Exemptions from the Fair Housing Act are to be construed narrowly, in recognition of the important goal of preventing housing discrimination."). In enacting the Florida Fair Housing Act, the legislature "essentially codified" the U.S. Fair Housing Amendments Act of 1988, 42 U.S.C. et seq. Dornbach v. Holley,

854 So. 2d 211, 213 (Fla. 2d DCA 2002). Because the provisions of the Florida Act are virtually identical to those provisions of the federal Act, federal case authority is persuasive in interpreting Florida's statute.

27. Petitioners bear the initial burden of proof to establish a prima facie case of discrimination by a preponderance of the evidence. In evaluating housing discrimination claims, courts have applied the burden-shifting analysis developed in McDonnell Douglas Corp. v Green, 411 U.S. 792, 802-804 (1973), and later refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981). Following this approach, Petitioners must make a prima facie case for discrimination.

28. Petitioners may prove discrimination through any combination of direct and indirect evidence, including statistical evidence. However, if they establish a prima facie case of discrimination and Respondents produce any evidence of a legitimate business purpose, Petitioners must prove that the real reason for the complained-of action is discrimination. It is not enough to show that the legitimate business purpose is a pretext. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993). In other words, Petitioners at all times retain the burden of proving that either or both Respondents discriminated against Petitioners.

29. To state a claim of discrimination in the leasing of property pursuant to the FFHA, a petitioner must prove the following: a) The petitioners were members of a protected class; b) The respondents were aware of the petitioner's protected class; c) The petitioners were ready, willing and able to rent the property at issue; and d) The respondents refused to allow the petitioners to rent the property. Woolington v. 1st Orlando Real Estate Servs., 2011 U. S. Dist. LEXIS 100426; Dkt. # 6:11-cv-1107 (M.D. Fla. 2011).

30. Petitioners have proven by direct evidence housing discrimination by both Respondents based on familial status in this case.^{4/}

31. Section 760.35(3)(b) authorizes section 120.569 and 120.57(1) hearings on allegations of discriminatory housing practices. Section 760.35(3)(b) provides that, if the administrative law judge finds a discriminatory housing practice, he or she shall issue a recommended order "prohibiting the practice and recommending affirmative relief from the effects of the practice, including quantifiable damages and reasonable attorney's fees and costs." Section 760.35(3)(b) further provides that any circuit court with jurisdiction may enter judgment on the final order of the Florida Commission on Human Relations.

32. Section 760.35(3)(b), Florida Statutes, authorizes the Commission to award compensatory damages to the victim of a "discriminatory housing practice," but only if the damages are quantifiable and their amount has been established by competent substantial evidence. In this instance, the undersigned concludes that based upon this record there is no basis to award monetary damages to Petitioners. Rent paid by Petitioners for the Lilac Loop home was \$250.00 per month less than rent for the Property, and in one month alone this differential more than offset the \$150.00 cost of cable installation at the Lilac Loop home. Likewise, it would be inappropriate to assess as damages the moving costs and higher rent payments associated with Petitioners' relocation from the Lilac Loop home to the Summerdown property. That relocation was the result of the foreclosure on the Lilac Loop home, an intervening event that was remote in time from, and not proximately caused by, the wrongful act at issue. Moreover, the costs associated with that move were not "natural, direct, and necessary consequences" of Respondents' discriminatory housing practice. Rost v. Bowling, 861 So. 2d 1246 (Fla. 2d DCA 2003).

33. Petitioners did not present any evidence upon which an award of attorney's fees and costs may be based.

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 Respondents guilty of a discriminatory housing practice against the Terrys in violation of section 760.23(1) and (2), and prohibiting further unlawful housing practices by Respondents.

DONE AND ENTERED this 30th day of May, 2012, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of May, 2012.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2011 version.

^{2/} This finding is based upon Mr. McMenemy's testimony at hearing. The Eggers' Rental Application (McMenemy Ex. 1) does not reflect a monthly income for Rick Egger, but does reflect a net monthly income for Jessica Egger of \$2,600.00.

^{3/} This inference is corroborated by the statement in Mr. McMenemy's e-mail of May 21, 2010, to Mrs. Terry that "I left a message yesterday but did not hear from you" after which he recounts his conversation with Mrs. Davis and informs Mrs. Terry that their application had been denied.

^{4/} Should the Commission in its Final Order award damages in favor of Petitioners, all Respondents, including Florida Coastal Jacksonville Realty, Inc. and John McMenemy, would be jointly and severally liable, since were acting as agents for the Davises.

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.