

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DELORES ARCHINAL,)
)
 Petitioner,)
)
 vs.) Case No. 12-0553
)
 SIXTH MOORINGS CONDOMINIUM)
 ASSOCIATION, INC.)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes,^{1/} before Cathy M. Sellers, an Administrative Law Judge of the Division of Administrative Hearings, on May 11, 2012, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Delores Archinal, pro se
18555 Northeast 14th Street
Miami, Florida 33179

For Respondent: Kevin Peters, Esquire
Straley & Otto, P.A.
Suite C-207
2699 Stirling Road
Fort Lauderdale, Florida 33312

STATEMENT OF THE ISSUE

Whether Respondent unlawfully discriminated against Petitioner by failing to reasonably accommodate her handicap, in violation of Florida's Fair Housing Act.

PRELIMINARY STATEMENT

On October 19, 2011, Petitioner, owner of a residential unit in the Sixth Moorings Condominium, filed a Housing Discrimination Complaint ("Complaint") with the U.S. Department of Housing and Urban Development ("HUD"), claiming that Respondent, a condominium association, discriminated against her in violation of the federal Fair Housing Act of 1968 by failing to make reasonable accommodation of her handicap. HUD forwarded the Complaint to the Florida Commission on Human Relations ("FCHR"), which investigated the Complaint and issued a Notice of Determination of No Cause, determining that reasonable cause did not exist to believe that a discriminatory housing practice had occurred under Florida's Fair Housing Act and dismissing the Complaint.

On February 13, 2012, Petitioner filed a Petition for Relief ("Petition") with the FCHR. The FCHR forwarded the Petition to the Division of Administrative Hearings for the assignment of an administrative law judge and conduct of a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes.

The final hearing was held on May 11, 2012. Petitioner testified on her own behalf and Petitioner's Exhibit 1 was admitted into evidence without objection.^{2/} Respondent presented the testimony of John Koble and Respondent's Exhibits 2A, 2B, and 2C were admitted into evidence without objection.

Neither the FHCR nor the parties preserved the hearing testimony.^{3/} The parties were given until May 21, 2012, to file proposed recommended orders. Respondent filed its Proposed Recommended Order on May 18, 2012. Petitioner did not file a Proposed Recommended Order.

FINDINGS OF FACT

1. Petitioner is the owner of Unit No. 710 ("Unit") in the Sixth Moorings Condominium, located in Miami, Florida. Petitioner lived there for approximately 11 years. She is not currently living in the Unit.

2. Respondent is the condominium association responsible for the operation and management of the Sixth Moorings Condominium.

3. In early 2010, Petitioner suffered a stroke and underwent heart surgery. It is undisputed that as a result of her illness, Petitioner is "handicapped" for purposes of the Fair Housing Act.^{4/}

4. Petitioner spent several months in hospitals and nursing homes recovering from her stroke and surgeries. When

she was released from these facilities, she did not resume living in the Unit. She testified that this was because she could not go up a curb or steps, and because the condominium's elevator frequently was out of order.^{5/} She moved into a ground floor apartment a few blocks away from the Sixth Moorings Condominium.

5. Petitioner is not able to perform many basic tasks, such as grocery shopping, driving, cleaning her apartment, taking out the garbage, or retrieving her mail. Consequently, she decided to invite her nephew, Charles Alsberg, to move into the Unit, where he would be only a few minutes away from the apartment in which she was residing, and thus could serve as her caretaker.

6. Alsberg moved into the Unit in or around August 2010.

7. Petitioner did not reside in the Unit with Alsberg. She testified that even though he is a family member, she would not live in the Unit with him because she is "an elderly woman from a different generation and [she] would not live with a young man unless he was [her] biological son."

8. In late 2010, Respondent's President, John Koble, contacted Petitioner about Alsberg living in her Unit. Petitioner asked Koble to allow Alsberg to reside in the Unit so that he could serve as her caretaker, but Koble told her that because she was not residing there, Alsberg was considered an

unauthorized guest in violation of the condominium's restrictive covenants, and that he therefore must move out. Nonetheless, Alsberg continued to reside in the Unit for several more months, until he became ill and was hospitalized.

9. Following his release in August 2011, Alsberg returned to live in the Unit. At this point, Respondent—this time, through counsel—sent Petitioner a letter stating that she was violating the restrictive covenant prohibiting unauthorized guests, and demanding that Alsberg vacate the unit.

10. On September 13, 2011, Petitioner's attorney sent a response letter requesting that, due to restrictions on Alsberg's activity as a result of his illness, he be allowed to remain in the Unit for approximately 60 days.

11. By correspondence dated September 15, 2011, Respondent agreed to allow Alsberg to remain in the Unit through November 12, 2011. At hearing, Petitioner acknowledged that Respondent granted her request to allow Alsberg to stay there during his recuperation.

12. Notwithstanding this agreement, Alsberg did not vacate the Unit until sometime in early 2012, several months after the November 12, 2011 deadline. During this time, Respondent sent numerous pieces of correspondence that Petitioner characterized as "harassing" and "threatening," regarding enforcement of the

condominium's covenants and rules. Alsberg finally vacated the Unit after Respondent sent a "final notice" letter.

13. Currently, Alsberg is residing in an apartment approximately four blocks from Petitioner's apartment and is serving as her caretaker.

14. Koble testified that he was sympathetic to Petitioner's circumstances, but it was imperative that Respondent consistently enforce the restrictive covenants for the benefit of all unit owners. Koble noted that other unit owners also wanted to allow unauthorized guests to live in their units, and that if Respondent relaxed enforcement of the covenant for Petitioner, it would be forced to do so for others. The undersigned credits this testimony.

15. Koble also testified, credibly, that if Petitioner were residing in her unit, Respondent would have granted an accommodation of the covenant to allow Alsberg to live there for the purpose of serving as her caretaker.^{6/}

16. The evidence establishes that Petitioner did not request any accommodation from Respondent that was necessary for her equal opportunity to use and enjoy the Unit; rather, the purpose of Petitioner's request that Respondent not enforce the restrictive covenant against her was to enable her nephew to live in the Unit.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over parties and subject matter of this proceeding, pursuant to sections 120.569 and 120.57(1).

I. "Reasonable Accommodation" Claim Requirements

18. Section 760.23(8) provides:

It is unlawful to discriminate against any person in the terms, conditions, or privileges of the sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of:

- (a) That buyer or renter;
- (b) A person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or
- (c) Any person associated with the buyer or renter.

19. Section 760.23(9) provides in pertinent part: "[f]or purposes of subsections (7) and (8), discrimination includes:

. . . (b) A refusal to make reasonable accommodation in rules, policies, practices, or services when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."

20. The term "dwelling" is defined in pertinent part to mean "any building or structure, or portion thereof, which is occupied as, or designed or intended for occupancy as, a residence by one or more families. . . ." §760.22(4), Fla. Stat. Petitioner's Unit is a dwelling for purposes of the Fair Housing Act.

21. Here, Petitioner claims that Respondent has unlawfully discriminated against her by failing to reasonably accommodate her handicap because it will not permit her nephew to reside in the Unit for the purpose of serving as her caretaker while she resides in an offsite dwelling.

22. Florida's Fair Housing Act is modeled after the federal Fair Housing Act. Accordingly, federal housing anti-discrimination case law is instructive in interpreting Florida's law. Schwarz v. City of Treasure Island, 544 F.3d 1201 (11th Cir. 2008); Loren v. Sasser, 309 F.3d 1296 (11th Cir. 2002); Dorbach v. Holley, 854 So. 2d 211 (Fla. 2d DCA 2002).

23. To prevail, Petitioner must establish, by a preponderance of the evidence, each of the following elements comprising a "reasonable accommodation" claim: (1) that she is handicapped within the meaning of the statute, and Respondent knew or reasonably should have known of that handicap; (2) that she requested a particular accommodation that is necessary to afford her an equal opportunity to use and enjoy her dwelling; (3) that the requested accommodation is reasonable; and (4) that Respondent refused to make the requested accommodation. See Astralis Condo. Ass'n v. Garcia-Guillen, 620 F.3d 62, 67 (1st Cir. 2010); Colon-Jimenez v. GR Mgmt. Corp., 218 Fed. Appx. 2, 3 (1st Cir. 2007); United States v. California Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1380 (9th Cir. 1997); McKivitz v.

Township of Stowe, 769 F. Supp. 2d 803, 824 (W.D. Pa. 2010);
Stassis v. Ocean Summitt Ass'n, Inc., 2008 U.S. Dist. LEXIS
31856 (S.D. Fla. 2008).

II. Petitioner's Reasonable Accommodation Claim

24. The parties stipulated that Petitioner is handicapped within the meaning of the Fair Housing Act. Therefore, the first element of Petitioner's claim is met.

25. However, Petitioner fails to meet the second element of her "reasonable accommodation" claim—that is, that the requested accommodation is necessary to afford her an equal opportunity to use and enjoy her Unit. Fair Housing Act case law makes clear that to establish the "necessity" of a requested accommodation, the handicapped person must show that the accommodation sought affirmatively will enhance that person's quality of life by ameliorating the effects of the handicap. Bronk v. Ineichen, 54 F.3d 425 (7th Cir. 1995). To that end, the requested accommodation must be specifically linked to alleviating the effect of the particular handicap. See Colon-Jimenez, 218 Fed. Appx. at 3; Bronk, 54 F.3d at 429. Here, Petitioner's requested "accommodation" was to allow her nephew to live in her Unit while she was not living there. Petitioner has not shown that allowing her nephew to live in her Unit while she does not reside there will ameliorate the effect of her handicap^{7/} such that she is afforded an equal opportunity to use

and enjoy her Unit. The requested accommodation bears no relationship to Petitioner's opportunity or ability to use and enjoy her Unit because by her own election, she is not living there. The term "necessary," as used in the Fair Housing Act, is linked to the statute's goal of affording equal opportunity to the handicapped person, but the statute does not contemplate superior treatment of that person. Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Township of Scotch Palm, 284 F.3d 442, 460 (3d Cir. 2002); Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 152 (2d Cir. 1999); Smith & Lee Assoc., Inc. v. City of Taylor, 102 F.3d 781 (6th Cir. 1996). Here, the "accommodation" Petitioner seeks effectively would afford her treatment superior to that of other unit owners because excusing her noncompliance with the covenant would not ameliorate the effects of her handicap with respect to her opportunity to use and enjoy the Unit.

26. Petitioner also has failed to prove that the requested accommodation is reasonable. An accommodation is "reasonable" when it imposes no "fundamental alteration in the nature of the program" or "undue financial and administrative burdens." Howard v. City of Beavercreek, 276 F.3d 802, 806 (6th Cir. 2002). Here, Petitioner has requested an accommodation that is not aimed at affording her an equal opportunity to use and enjoy her Unit, but instead is aimed at providing her nephew rent-free

housing while he serves as her caretaker at her offsite apartment. In essence, Petitioner seeks relief from the restrictive covenant to accommodate her personal preference (i.e., her choice to live in an offsite apartment rather than in the Unit with her nephew) rather than her handicap. Under these circumstances, granting the accommodation would require a "fundamental alteration" in Respondent's administration and enforcement of the restrictive covenant against unauthorized guests.^{8/} Therefore, the requested accommodation is not reasonable.

27. Petitioner has shown that Respondent refused to grant her accommodation request to allow her nephew to reside in her Unit in her absence while serving as her caretaker.^{9/} Accordingly, she has established the fourth element of her "reasonable accommodation" claim.

28. In sum, Petitioner did not establish that the accommodation she requested is necessary and reasonable. Thus, she failed to prove that Respondent unlawfully discriminated against her by failing to reasonably accommodate her handicap in violation of Florida's Fair Housing Act.

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 no unlawful discrimination

by Respondent and dismissing the Petition for Relief.

DONE AND ENTERED this 29th day of May, 2012, in
Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2012.

ENDNOTES

^{1/} All references are to 2011 Florida Statutes.

^{2/} As her direct testimony at the final hearing, Petitioner read into the record a letter she prepared before the hearing giving her account of the events giving rise to the Complaint. That letter was admitted into evidence as a late-filed exhibit.

^{3/} Section 120.57(1)(g) states in pertinent part: "[t]he agency shall accurately and completely preserve all testimony in the proceeding...." Notwithstanding the Legislature's clear mandate that the agency is to preserve the testimony in section 120.57(1) hearings, the FCHR failed to do so in this proceeding.

^{4/} "'Handicap' means: ... a person has a physical or mental impairment which substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment. . . ."
§ 760.22(7)(a), Fla. Stat.

^{5/} Respondent's president, John Koble, acknowledged that the elevator had, at times, been nonfunctional. The hydraulic unit was replaced, which had rendered the elevator nonfunctional for a four- to five-day period. The elevator is now functional, and in the event of the occasional breakdown, it is repaired within a day. There is no evidence establishing that the elevator's state of disrepair was the sole, or even the primary, reason Petitioner chose not to reside in her Unit upon her release.

^{6/} Additionally, Koble testified that if Alsberg's name were added to the deed for the Unit, he would be an owner and thus allowed to live in the Unit. It appears that Respondent has tried to suggest means by which Alsberg may reside in the Unit without violating the restrictive covenants, but Petitioner has been unwilling to follow these suggestions.

^{7/} Section 760.20(9) refers to making reasonable accommodation in rules, policies, practices, or services to afford such person the equal opportunity to use and enjoy a dwelling. The term "such person" refers to the handicapped person.

^{8/} Koble testified that relieving Petitioner from complying with the covenant for reasons not constituting an accommodation of her handicap could completely undercut the enforceability and effectiveness of Respondent's covenant against unauthorized guests.

^{9/} Respondent takes the position that because it allowed Alsberg to live in the Unit during his recuperation, it granted Petitioner's accommodation. However, the evidence established that Petitioner's accommodation request was to allow Alsberg to live in her Unit to serve as her caretaker. That Respondent allowed Alsberg to live in the Unit during his recuperation (when he was not serving as Petitioner's caretaker) was commendably compassionate but did not constitute a grant of Petitioner's requested accommodation.

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.