STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TAL SIMHONI,

Petitioner,

vs. Case No. 18-4442

MIMO ON THE BEACH I CONDOMINIUM
ASSOCIATION, INC.,

Respondent.
_______________________________/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference at sites in Tallahassee and Miami, Florida, on November 5, 2018. A supplemental hearing was conducted by telephone on November 27, 2018, with participants at multiple locations.

APPEARANCES

For Petitioner: Tal Simhoni, pro se
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For Respondent: Melissa A. O'Connor, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent unlawfully discriminated against Petitioner on the basis of her religion or national origin in violation of the Florida Fair Housing Act.

PRELIMINARY STATEMENT

In a Housing Discrimination Complaint filed with the Florida Commission on Human Relations ("FCHR") on or around September 27, 2017, Petitioner Tal Simhoni alleged that Respondent Mimo on the Beach I Condominium Association, Inc., had engaged in unlawful housing discrimination based on religion or national origin by depriving her of access to common facilities or services.

FCHR investigated Ms. Simhoni's claims and, on August 7, 2018, issued a Notice of Determination of No Cause which dismissed the complaint she had filed on the grounds that reasonable cause did not exist to believe that a discriminatory housing practice had occurred. Thereafter, Ms. Simhoni filed a Petition for Relief, which FCHR transmitted to the Division of Administrative Hearings ("DOAH") on August 22, 2018.

The final hearing took place on November 5, 2018. A supplemental hearing session was held on November 27, 2018, for the limited purpose of letting Ms. Simhoni call as witnesses two City of Miami Beach employees. In a case spanning both days, Ms. Simhoni testified on her own behalf and presented three additional witnesses: Jimmy McMillan, Miguel Romero, and Marisel Santana. She also submitted a large notebook full of documents, which (with the exception of a New York Times article), was admitted as Petitioner's Composite Exhibit 1.

Respondent called one witness, Arlyn M. Mendoza, the current president of its Board of Directors. Respondent's Exhibits R1 through R4, R20 through R22, and R26 were admitted into evidence as well.

The final hearing transcripts were filed on December 27, 2018, and January 28, 2019. Each side submitted a proposed recommended order, and these have been considered.

Ms. Simhoni filed a number of post-hearing motions. Instead of ruling on each motion individually, the undersigned notes that all relevant evidence was carefully reviewed, as were all of the parties' respective arguments. Allegations, arguments, and evidence not specifically addressed herein were not overlooked but, rather, were rejected as irrelevant, unpersuasive, or contrary to the greater weight of the credible evidence. Any pending motion that requests relief inconsistent with the foregoing statement or with any portion of the balance of this Recommended Order is, to the extent of such inconsistency, hereby denied; to the extent not denied, the motions are granted.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2018 Florida Statutes.

FINDINGS OF FACT

1. Petitioner Tal Simhoni ("Simhoni"), a Jewish woman who identifies the State of Israel as her place of national origin,

at all times relevant to this action owned Unit No. 212 in Mimo on the Beach I Condominium (the "Condominium"), which is located in Miami Beach, Florida. She purchased this unit in 2009 and a second apartment (Unit No. 203) in 2010. Simhoni has resided at the Condominium on occasion but her primary residence, at least as of the final hearing, was in New York City.

2. The Condominium is a relatively small community consisting of two buildings comprising 28 units. Respondent Mimo on the Beach I Condominium Association, Inc. ("Association"), a Florida nonprofit corporation, is the entity responsible for operating and managing the Condominium and, specifically, the common elements of the Condominium property. Governing the Association is a Board of Directors (the "Board"), a representative body whose three members, called "directors," are elected by the unit owners.

3. Simhoni served on the Board for nearly seven years. From July 2010 until April 2011, she held the office of vice-president, and from April 2011 until June 1, 2017, Simhoni was the president of the Board.

4. Simhoni's term as president was cut short when, in May 2017, she and the other two directors then serving with her on the Board were recalled by a majority vote of the Condominium's owners. The Association, while still under the control of the putatively recalled directors, rejected the vote

and petitioned the Department of Business and Professional Regulation, Division of Condominiums, Timeshares, and Mobile Homes ("DBPR"), for arbitration of the dispute. By Summary Final Order dated June 1, 2017, DBPR upheld the recall vote and ordered that Simhoni, Marisel Santana, and Carmen Duarte be removed from office, effective immediately.

5. The run-up to the recall vote entailed a campaign of sorts to unseat Simhoni, which, as might be expected, caused friction between neighbors. Without getting into details that aren't important here, it is fair to say that, generally speaking, the bloc opposed to Simhoni believed that she had poorly managed the Condominium, especially in connection with the use of Association funds. Some of Simhoni's critics were not shy about voicing their opinions in this regard, which——understandably——led to hard feelings. Simhoni vehemently disputes the charges of her critics and, clearly, has not gotten over her recall election defeat, which she blames on false, unfair, and anti-Semitic accusations against her.

6. This is a case of alleged housing discrimination brought under Florida's Fair Housing Act (the "Act"). Specifically, Simhoni is traveling under section 760.23(2), Florida Statutes, which makes it "unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, <u>or in the provision of services or</u>

facilities in connection therewith, because of race, color, national origin, sex, handicap, familial status, or religion." (Emphasis added). The applicable law will be discussed in greater detail below. The purpose of this brief, prefatory mention of the Act is to provide context for the findings of fact that follow.

7. The principal goal of section 760.23(2) is to prohibit the denial of access to housing based on discriminatory animus. Simhoni, however, was not denied access to housing. She is, in fact, a homeowner. Contrary to what some might intuit, the Act is not an all-purpose anti-discrimination law or civility code; it does not purport to police personal disputes, quarrels, and feuds between neighbors, even ugly ones tinged with, e.g., racial or religious hostility. To the extent the Act authorizes charges based on alleged *post-acquisition* discrimination, such charges must involve the complete denial of services or facilities that are available in common to all owners as a term or condition of ownership——the right to use common areas, for example, pursuant to a declaration of condominium. Moreover, the denial of access to common services or facilities logically must result from the actions of a person or persons, or an entity, that exercises de facto or de jure control over access to the services or facilities in question.

8. This is important because, while Simhoni believes that she was subjected to anti-Semitic slurs during her tenure as Board president, the fact is that her unfriendly neighbors——none of whom then held an office on the Board——were in no position to (and in fact did not) deny Simhoni access to common services and facilities under the Association's control, even if their opposition to her presidency were motivated by discriminatory animus (which wasn't proved). As president of the Board, Simhoni wound up on the receiving end of some uncivil and insensitive comments, and a few of her neighbors seem strongly to dislike her. Simhoni was hurt by this. That impolite, even mean, comments are not actionable as unlawful housing discrimination under section 760.23(2) is no stamp of approval; it merely reflects the relatively limited scope of the Act.

9. Simhoni has organized her allegations of discrimination under six categories. Most of these allegations do not implicate or involve the denial of common services or facilities, and thus would not be sufficient to establish liability under the Act, even if true. For that reason, it is not necessary to make findings of fact to the granular level of detail at which the charges were made.

10. <u>The Mastercard Dispute.</u> As Board president, Simhoni obtained a credit card for the Association, which she used for paying common expenses and other Association obligations such as

repair costs. In applying for the card, Simhoni signed an agreement with the issuer to personally guarantee payment of the Association's account. It is unclear whether Simhoni's actions in procuring this credit card were undertaken in accordance with the Condominium's By-Laws, but there is no evidence suggesting that Simhoni was forced, encouraged, or even asked to co-sign the Association's credit agreement; she seems, rather, to have volunteered.

11. Simhoni claims that she used personal funds to pay down the credit card balance, essentially lending money to the Association. She alleges that the Association has failed to reimburse her for these expenditures, and she attributes this nonpayment to anti-Semitism.

12. There appears to be some dispute regarding how much money, if any, the Association actually owes Simhoni for common expenses. The merits of her claim for repayment are not relevant in this proceeding, however, because there is insufficient persuasive evidence in the record to support a finding that the Association has withheld payment based on Simhoni's religion or national origin.

13. Equally, if not more important, is the fact that Simhoni's alleged right to reimbursement is *not* a housing "service" or "facility" available in common to the Condominium's owners and residents. Nonpayment of the alleged debt might

constitute a breach of contract or support other causes of action at law or in equity, but these would belong to Simhoni as a *creditor* of the Association, not as an *owner* of the Condominium. In short, the Association's alleged nonpayment of the alleged debt might give Simhoni good legal grounds to sue the Association for, e.g., breach of contract or money had and received——but not for *housing discrimination*.

14. The Estoppel Certificate. On September 20, 2017, when she was under contract to sell Unit No. 212, Simhoni submitted a written request to the Association for an estoppel certificate, pursuant to section 718.116(8), Florida Statutes. By statute, the Association was obligated to issue the certificate within ten business days——by October 4, 2017, in this instance. Id. The failure to timely issue an estoppel letter results in forfeiture of the right to charge a fee for preparing and delivering the certificate. § 718.116(8)(d), Fla. Stat.

15. The Association missed the deadline, issuing the certificate one-week late, on October 11, 2017; it paid the prescribed statutory penalty for this tardiness, refunding the preparation fee to Simhoni as required. Simhoni attributes the delay to anti-Semitism.

16. It is debatable whether the issuance of an estoppel letter is the kind of housing "service" whose deprivation, if based on religion, national origin, or another protected

criterion, would support a claim for unlawful discrimination under the Act. The undersigned will assume for argument's sake that it is such a service. Simhoni's claim nonetheless fails because (i) the very statute that imposes the deadline recognizes that it will not always be met and provides a penalty for noncompliance, which the Association paid; (ii) a *brief delay* in the issuance of an estoppel letter is not tantamount to the *complete deprivation* thereof; and (iii) there is, at any rate, insufficient persuasive evidence that the minimal delay in issuing Simhoni a certificate was the result of discriminatory animus.

17. Pest Control. Pest control is not a service that the Association is required to provide but, rather, one that may be provided at the discretion of the Board. During Simhoni's tenure as Board president, apparently at her urging, the Association arranged for a pest control service to treat all of the units for roaches, as a common expense, and the apartments were sprayed on a regular basis. If the exterminator were unable to enter a unit because, e.g., the resident was not at home when he arrived, a locksmith would be summoned to open the door, and the owner would be billed individually for this extra service.

18. After Simhoni and her fellow directors were recalled, the new Board decided, as a cost-control measure, to discontinue

the pest control service, allowing the existing contract to expire without renewal. Owners were notified that, during the phaseout, the practice of calling a locksmith would cease. If no one were home when the pest control operator showed up, the unit would not be sprayed, unless the owner had left a key with the Association or made arrangements for someone else to open his door for the exterminator.

19. By this time, Simhoni's principal residence, as mentioned, was in New York. Although she knew that the locksmith option was no longer available, Simhoni failed to take steps to ensure that the pest control operator would have access to her apartment when she wasn't there. Consequently, Simhoni's unit was not sprayed on some (or perhaps any) occasions during the phaseout.

20. Simhoni blames anti-Semitism for the missed pest control visits, but the greater weight of the evidence fails to support this charge. Simhoni was treated the same as everyone else in connection with the pest control service. Moreover, Simhoni was not completely deprived of access to pest control, which would have been provided to her if she had simply made arrangements to permit access to her unit.

21. Short-term Rentals. Article XVII of the Condominium's Declaration of Condominium ("Declaration"), titled Occupancy and Use Restrictions, specifically regulates leases. Section 17.8

of the Declaration provides, among other things, that the Association must approve all leases of units in the Condominium, which leases may not be for a term of less than one year. In other words, the Declaration prohibits short-term, or vacation, rentals, which are typically for periods of days or weeks.

22. Short-term rentals can be lucrative for owners, especially in places such as Miami Beach that attract tourists who might be interested in alternatives to traditional hotel lodgings. On the flip side, however, short-term rental activity is not necessarily welcomed by neighboring residents, who tend to regard transients as being insufficiently invested in preserving the peace, quiet, and tidy appearance of the neighborhood. At the Condominium, the question of whether or not to permit short-term rentals has divided the owners into competing camps.

23. Simhoni is in favor of allowing short-term rentals. Accordingly, while she was Board president, the Association did not enforce the Declaration's prohibition of this activity. (It is possible, but not clear, that the Association was turning a blind eye to short-term rentals even before Simhoni became a director.) This laissez-faire approach did not sit well with everyone; indeed, dissatisfaction with short-term rentals provided at least some of the fuel for the ultimately successful recall effort that cost Simhoni her seat on the Board. After

Simhoni and the rest of her Board were removed, the new directors announced their intent to enforce the Declaration's ban on short-term rentals.

24. Simhoni alleges that the crackdown on short-term rentals was an act of religion-based housing discrimination. Her reasoning in this regard is difficult to follow, but the gist of it seems to be that the Association is selectively enforcing the ban so that only Simhoni and other Jewish owners are being forced to stop engaging in short-term rental activity; that the prohibition is having a disparate impact on Jewish owners; or that some owners are harassing Simhoni by making complaints about her to the City of Miami Beach in hopes that the City will impose fines against her for violating municipal restrictions on short-term rentals.

25. The undersigned recognizes that a neutral policy such as the prohibition of short-term rentals conceivably could be enforced in a discriminatory manner, thus giving rise to a meritorious charge under the Act. Here, however, the evidence simply does not support Simhoni's contentions. There is insufficient evidence of disparate impact, disparate treatment, selective enforcement, harassment, or discriminatory animus in connection with the Association's restoration of the short-term rental ban. To the contrary, the greater weight of the evidence establishes that the Association is trying to stop short-term

rentals at the Condominium for a perfectly legitimate reason, namely that a majority of the owners want section 17.8 of the Declaration to be given full force and effect.

26. The Feud with Flores. Simhoni identifies Mr. and Ms. Flores as the worst of her antagonists among her neighbors. As advocates of the recall, these two were fierce critics of Simhoni. The Floreses reported Simhoni to the City of Miami Beach for engaging in short-term rentals without the required business tax receipt, in violation of the municipal code. At a code enforcement hearing, Mr. Flores gave Simhoni the finger.

27. None of this, however, amounts to housing discrimination because the Floreses' actions did not completely deprive Simhoni of common facilities or services, even if such actions were motivated by anti-Semitism, which the greater weight of the evidence fails to establish. Indeed, there is no persuasive evidence that the Floreses ever had such control over the Condominium's facilities or services that they could have denied Simhoni access to them.

28. Simhoni argues in her proposed recommended order, apparently for the first time, that the Floreses' conduct created a "hostile housing environment." Putting aside the legal problems with this belatedly raised theory, the Floreses' conduct was not sufficiently severe and pervasive, as a matter of fact, to support a "hostile environment" claim. Nor is there

sufficient persuasive evidence in the record to support a finding that the Floreses acted in concert with the Board to harass Simhoni, or that the Board acquiesced to the Floreses' conduct.

29. Roof Repairs. Simhoni alleges that the Association failed to repair the area of the roof over her unit, which she claims was damaged in Hurricane Irma, and that the Association has refused to make certain repairs inside her unit, which she asserts sustained interior water damage as a result of roof leaks. Simhoni asserts that, using Association funds, the Association not only repaired other portions of the roof, but also fixed interior damages similar to hers, for the benefit of non-Jewish owners.

30. The greater weight of the persuasive evidence shows, however, that the roof over Simhoni's unit is not damaged, and that the Association never instructed the roofing contractor *not* to make needed repairs. Simhoni, in short, was not denied the service of roof repairs.

31. As for the alleged damage to Simhoni's unit, section 7.1 of the Declaration provides that repairs to the interior of a unit are to be performed by the owner at the owner's sole cost and expense. The evidence fails to establish that the interior damage of which Simhoni complains falls outside of her duty to repair.

32. Because this is a housing discrimination case, and not a legal or administrative proceeding to enforce the terms of the Declaration, it is neither necessary, nor would it be appropriate, for the undersigned to adjudicate fully the question of whether the Association is obligated to repair Simhoni's unit as a common expense. Here, it is sufficient to find (and it is found) that section 7.1 of the Declaration affords the Association a legitimate, nonpretextual, nondiscriminatory reason to refuse, as it has, to perform the interior repairs that Simhoni has demanded.

CONCLUSIONS OF LAW

33. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

34. Under the Act, it is unlawful to discriminate in the sale or rental of housing. Specifically, section 760.23(2) prohibits the following acts and practices:

> 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.

35. Section 760.23(2) is patterned after section 804(b) of the federal Fair Housing Act. See 42 U.S.C. § 3604(b). Accordingly, the same legal analysis applies to each, see, e.g.,

Philippeaux v. Apartment Investment and Management Co., 598 Fed. Appx. 640, 643 (11th Cir. 2015), and the decisions of federal courts interpreting and applying the analogous federal laws provide persuasive guidance in determining whether a violation of the Act has occurred. See Dornbach v. Holley, 854 So. 2d 211, 213 (Fla. 2d DCA 2002).

36. The burden of proving that the Association engaged in unlawful housing discrimination belongs to Simhoni. See, e.g., Loren v. Sasser, 309 F.3d 1296, 1302 (11th Cir. 2002).

37. In cases involving a claim of housing discrimination, the complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. Generally speaking, a prima facie case comprises circumstantial evidence of discriminatory animus, such as proof that the charged party treated persons outside of the protected class, who were otherwise similarly situated, more favorably than the complainant was treated.[1/] 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 1996), aff'd, 679 So. 2d 1183 (Fla. 1996)(citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)).

38. If, however, the complainant sufficiently establishes a prima facie case, the burden then shifts to the charged party to articulate some legitimate, nondiscriminatory reason for its

action. If the charged party satisfies this burden, then the complainant must establish by a preponderance of the evidence that the reason asserted by the charged party is, in fact, merely a pretext for discrimination. See 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, 115 S. Ct. 56, 130 L. Ed. 2d 15 (1994)("Fair housing discrimination cases are subject to the three-part test articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)."); Sec'y, U.S. Dep't of HUD, on behalf of Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)("We agree with the ALJ that the three-part burden of proof test developed in *McDonnell Douglas* [for claims brought under Title VII of the Civil Rights Act] governs in this case [involving a claim of discrimination in violation of the federal Fair Housing Act].").

39. To establish a prima facie case of housing discrimination in a post-acquisition deprivation-of-services case such as this one, a claimant must prove that she: (i) is an aggrieved party; (ii) has suffered an injury because of the alleged discrimination; and (iii) was denied, based on religion or national origin, the provision of services protected by the Act, which were available to other homeowners. Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223, 1232 (S.D. Fla. 2005). Concerning the third element, the

Act "only applies to those deprivations in the provision of services which cause a complete denial of access to such services." Id.

40. Simhoni failed to make a prima facie case because the evidence she adduced did not prove that the Association had completely deprived her of access to services available to the other unit owners. The burden, therefore, never shifted to the Association to articulate a legitimate, nondiscriminatory reason for its conduct. Nevertheless, the Association did put forward such explanations where, as with the disputes regarding pest control and the roof, the allegations raised at least the possibility that access to protected services might have been denied. As discussed above, the undersigned found the Association's explanations to be credible and nonpretextual.

41. As mentioned, Simhoni argues in her proposed recommended order that the Association is guilty of having created a hostile housing environment. This theory was not presented to FCHR in Simhoni's original Housing Discrimination Complaint dated September 27, 2017. Not surprisingly, therefore, FCHR did not address the question of whether Florida law recognizes a claim for hostile housing environment, much less whether reasonable cause existed to believe that such a practice had occurred in Simhoni's case.

42. Simhoni's principal claims of post-acquisition deprivation of services are on fairly solid legal ground as cases such as Savanna Club, 456 F. Supp. 2d at 1223, have receded from a bright-line rule holding that the federal Fair Housing Act does not reach discrimination against homeowners. Whether federal law supports a cause of action for a hostile housing environment is more controversial. See Lawrence v. Courtyards at Deerwood Ass'n, 318 F. Supp. 2d 1133, 1146 (S.D. Fla. 2004). A claimant seeking to assert such a novel cause of action under Florida law should be required to present his or her case to FCHR for investigation and determination before seeking further judicial or administrative remedies.

43. Even if the cause of action is available under the Act, however, and even assuming Simhoni's allegations of a hostile housing environment are properly before the undersigned, the charge at issue would fail as a matter of fact. This is because, to be actionable, a claim for hostile housing environment must be based on offensive behavior that is so severe and pervasive as to alter the conditions of the housing arrangement and interfere with the claimant's use and enjoyment of the premises. Greater New Orleans Fair Hous. Action Ctr. v. Kelly, 2019 U.S. Dist. LEXIS 15492, at *25-*26 (E.D. La. Jan. 31, 2019). In other words, the offensive conduct must be analogous to the kind of behavior that would support a hostile

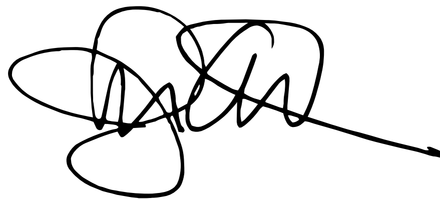
work environment claim of sexual harassment under Title VII. Id.

44. The conduct at issue in this case was sometimes impolite and unfriendly, but it never rose to a level of such extreme offensiveness as to be deemed severe and pervasive. The Act was not written for quotidian disputes between neighboring homeowners where access to housing (or common amenities) has not been denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Commission on Human Relations enter a final order finding the Association not liable for housing discrimination and awarding Simhoni no relief.

DONE AND ENTERED this 26th day of February, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of February, 2019.

ENDNOTE

[1/] Alternatively, the complainant's burden may be satisfied with direct evidence of discriminatory intent. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S. Ct. 613, 621, 83 L. Ed. 2d 523 (1985)("[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination" inasmuch as "[t]he shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'").

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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.