STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCARLETT RABALAIS,

Petitioner,

vs. Case No. 20-1705

BOSSHARDT PROPERTY MANAGEMENT, LLC,

Respondent.
_____/

RECOMMENDED ORDER

On October 1, November 23 and 24, 2020, and February 16 and 17, 2021, Administrative Law Judge Yolonda Y. Green of the Division of Administrative Hearings ("DOAH"), conducted a hearing, pursuant to section 120.57(1), Florida Statutes (2020), by Zoom conference.

APPEARANCES

For Petitioner: Scarlett Rabalais, pro se
Post Office Box 5224
Salt Springs, Florida 32134

For Respondent: John McDonough, Esquire
Meier, Bonner, Muszynski, O'Dell & Harvey
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STATEMENT OF THE ISSUE

Whether Respondent, Bosshardt Property Management, LLC ("Bosshardt"), violated the Fair Housing Act as alleged in the Housing Charge of Discrimination.

PRELIMINARY STATEMENT

On December 20, 2019, Petitioner, Scarlett Rabalais ("Petitioner" or "Ms. Rabalais"), filed a Housing Discrimination Complaint ("Complaint") with the Florida Commission on Human Relations ("FCHR") alleging that Respondent engaged in unlawful housing discrimination based on disability and retaliation by depriving her of access to common services.

At the filing of this matter, Salt Springs Resort Association ("SSRA") was named as a Respondent in this matter. However, on February 5, 2021, Petitioner filed a Notice of Dismissal to dismiss SSRA as a party as those parties reached an agreement to resolve issues in dispute related to SSRA. Thus, the only remaining party is Bosshardt.

On March 24, 2020, FCHR issued a Determination of No Cause, by which FCHR determined that reasonable cause did not exist to establish that an unlawful housing practice occurred.

On April 1, 2020, Petitioner filed a Petition for hearing with FCHR, in response to FCHR's determination of "no cause." The Petition was transferred to DOAH for a final hearing and was assigned to the undersigned.

The final hearing was initially scheduled for June 26, 2020. Petitioner requested a continuance on June 1, 2020, which was granted. The undersigned rescheduled this matter for hearing on August 13, 2020. After another request for continuance, this matter was rescheduled for October 1, 2020.

On October 1, 2020, the hearing commenced as scheduled. However, the case was recessed as the hearing was not completed. The hearing was

ultimately completed on February 17, 2021. Petitioner offered the testimony of 12 witnesses: Ernest Foster, Gary Gensberg, Gary Griffith, Brenda Harvey, Peter Johansen, Jane Jorden, Robert McBride, Cynthia Nelson, Sharon Noble, Pam Wingfield, Garry Phillip Solomon, Ph.D., and Diane Suchy. Petitioner also offered Exhibits 3, 5, 6, 16, and 49,[1] which were admitted into evidence. Respondent did not offer any witnesses. Respondent's Exhibit 3 and 15 were admitted into evidence.

After the close of the record, Respondent made an ore tenus Motion to Exclude and Strike the Testimony of Gary Solomon, Ph.D. The undersigned heard argument from the parties and instructed them to file memoranda of law to support their respective arguments. After hearing argument and reviewing the memoranda of law, the undersigned denies Respondent's Motion.

The parties did not order a transcript, and thus, the proposed recommended orders in this matter were due on February 26, 2021. Petitioner timely filed her post-hearing submittal. Respondent filed its post-hearing submittal on March 1, 2021. Given there was no objection or prejudice shown, both parties' post-hearing submittals were considered in drafting this Recommended Order. Unless otherwise indicated, citations to the Florida Statutes refer to the 2018 version, which was the version in effect at the time of the alleged discrimination.

[1] Petitioner's Exhibits received into evidence included multiple pages within each numbered exhibit. To the extent any additional documents, audio, or visual files are contained on the thumb drive accompanying this Recommended Order, they were not received into evidence; and, therefore, were not considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

The following Findings of Fact are made based on the exhibits and testimony offered at the final hearing.

1. Ms. Rabalais is the owner of Lot 198 at Salt Springs Resort, a Florida recreational vehicle condominium established pursuant to chapter 718, Florida Statutes. As an owner of a lot in Salt Springs Resort, she is a member of SSRA, the homeowner's association.

2. Bosshardt is a Florida corporation providing community association management services and was the Community Association Manager ("CAM") for SSRA from September 2013 until August 31, 2019. Bosshardt acted as the agent, and at the direction of SSRA, managed the business related to the property, including enforcement of SSRA rules and decisions of the Board of Directors.

3. The CAM is the general point of contact for the association. The CAM would collect on bills and collect payments for assessment and manage the property.

4. Petitioner contends Respondent subjected her to retaliation beginning after the filing of Petitioner's HUD complaint. In support of her position, Petitioner points to alleged harassment by Ms. Noble, the failure to maintain her lawn and repaint her lot number, and removal of one of her posts from the townhall webpage.

5. Throughout the hearing, Ms. Rabalais raised allegations about incidents that occurred before December 20, 2018, which is 365 days prior to the filing of her Complaint of Discrimination dated December 20, 2019. However, some of the facts will be discussed herein to help supplement and explain the alleged continued discrimination and to provide a more detailed record of Ms. Rabalais's complaints.

Golf Cart Incident

6. Petitioner alleges that Bosshardt was responsible for housing discrimination and harassment arising out of an April 17, 2018, confrontation between Petitioner and Sharon Noble, a lot owner and former SSRA board member. Ms. Rabalais identified Ms. Noble as one of the worst of her neighbors who disliked her.

7. At some point before Ms. Rabalais filed the complaint of discrimination, Ms. Noble and Ms. Rabalais were good friends. While there is a dispute regarding the nature of the relationship, at some point the friendship deteriorated.

8. In 2016, a dispute arose between Ms. Rabalais and Ms. Noble over Ms. Rabalais's intent to file a lawsuit against SSRA and Ms. Noble's refusal to assist her. The dispute was referenced in emails between Ms. Rabalais and Ms. Noble and through Ms. Noble's testimony at hearing.

9. Ms. Noble acknowledged at the hearing that she and Ms. Rabalais were no longer friends.

10. On April 17, 2018, Sharon Noble was driving her golf cart on the road in front of Ms. Rabalais's lot. She stopped her cart to send a text message to someone. At around the same time, Ms. Rabalais attempted to enter her drive way. Ms. Rabalais was unable to enter the drive way as two carts could not drive on the road side by side. Ms. Rabalais began to blow her horn so Ms. Noble circled around behind Ms. Rabalais's golf cart to allow her to drive pass her. Ms. Noble then finished her text message and left the area. Ms. Noble credibly testified that she did not attempt to intimidate Ms. Rabalais.

11. Ms. Noble believed the incident was intentional and as a result, she wrote an incident report documenting the incident. Ms. Noble reported the incident to the SSRA.

12. Jane Jorden was in Ms. Rabalais's golf cart and witnessed the incident. She recalled that Ms. Noble was recording Ms. Rabalais's lot and

blocking the driveway with her golf cart. Ms. Rabalais became upset after Ms. Noble drove her cart behind her. Ms. Rabalais went to the guard gate to report the incident and call the police.

13. Tom, one of the employees working at the guard gate, completed a report regarding the incident. Tom did not testify at the hearing and, thus, his statement about the incident is not relied upon for a finding of fact. It is simply used to supplement the testimony offered at the hearing.

14. Tom did not observe the incident but rather reported that the police were called and took statements from Ms. Noble and Ms. Rabalais. SSRA sent Ms. Rabalais a letter advising her to contact the police if she is concerned about her safety.

15. While Ms. Rabalais believes that she was subjected to discrimination and retaliation by Respondent by way of the actions of Ms. Noble, the fact is that Ms. Noble, and more importantly Bosshardt, was in no position to deny Ms. Rabalais access to common services and facilities under SSRA's control. To the extent Ms. Rabalais believed her fellow neighbors disliked her or were not nice to her, that activity is not actionable as unlawful housing discrimination.

16. The greater weight of the evidence establishes that the incident with Ms. Noble was a personal dispute that was not due to housing discrimination facilitated at the direction of Bosshardt.

Lost Assessment Payment

17. Between July 1, 2018, and October 1, 2018, a quarterly assessment accrued. Ms. Rabalais's check with a send date of September 28, 2018, was mailed to Bosshardt using an address that was previously known to be Bosshardt's address. However, the assessment check payment was returned and the label affixed to the envelope indicated that the mail was returned to sender, was not deliverable as addressed, and was unable to be forwarded. In order to qualify as a candidate for a position on the SSRA Board of Directors,

all assessments must be paid before a designated date. As a result of the assessment check not being delivered before the deadline to declare candidacy, Ms. Rabalais did not meet the criteria to run for the Board.

18. Ms. Rabalais alleges in her complaint that Bosshardt engaged in a discriminatory act by not accepting her payment so she could not run for the Board of Directors. There is no sufficient evidence to support this allegation. Although there was testimony from Ms. Nelson that there were suspicious circumstances surrounding delivery of the check, the evidence offered at hearing does not demonstrate that Bosshardt engaged in nefarious or discriminatory actions regarding the assessment payment. The greater weight of the evidence, however, established that the check was returned undelivered.

Failure to Maintain Property and Paint Lot Number

19. Ms. Rabalais alleged in her Complaint that Respondent failed to maintain her lawn and failed to repaint her lot number as it did for other lot owners. There was no clear indication that the conduct occurred on or after December 20, 2018.

20. Generally, all lot owners received basic services. An exception would be if the lot owner has a "no trespassing" sign on the property.

21. Diane Suchy worked as the designated CAM for SSRA. She testified that maintenance staff were employees of SSRA and worked at the direction of Bosshardt. They maintained common areas and the lawns of individual lot owners. The maintenance team also repaints the lot numbers as needed.

22. Gary Gensberg, the maintenance supervisor, testified that he maintained Ms. Rabalais's lawn and conducted weed maintenance as needed. He also recalled that Ms. Rabalais did not have a large area that required maintenance. Regarding the lot numbers, they would be repainted if it was not visible. Ms. Rabalais's lot number was visible at the time in question.

Mr. Gensberg credibly testified that he was never given instructions to not maintain Ms. Rabalais's lot.

23. Despite the maintenance team maintaining Ms. Rabalais property as needed, the evidence established that Ms. Rabalais posted no trespassing signs on her property for an unknown period of time. Furthermore, there was no evidence to support a finding that if Ms. Rabalais's lawn was not maintained or her lot number was not repainted, it was result of discrimination based on disability or retaliation.

Townhall Facebook Group Page

24. Gary Griffith, the Bosshardt president at the time of the allegations alleged in the Complaint, testified about the lot owners' Facebook group page. Mr. Griffith testified that Bosshardt did not manage the Facebook group page. Rather, Mr. Foster, Brenda Harvey, and other lot owners, were administrators on the account. Thus, Bosshardt made no determination regarding who could post or remove posts from the account.

25. The page had rules for posting including, the exclusion of posts that were argumentative, contained unfounded allegations, or attacked the Board of Directors. On February 4, 2019, Ms. Rabalais posted a message about her experience with litigation with SSRA and Bosshardt. At the end of that message she wrote, "SSRA/Bosshardt has caused a homeowner to kill himself and ruined many owners' lives …." The administrators determined the post was unsubstantiated and threatening and failed to comply with the guidelines established for the page. As a result, the post was removed. Based on the evidence offered at hearing, Bosshardt was not involved with removal of Ms. Rabalais's February 4, 2019, post. Therefore, there was no evidence to establish that Bosshardt discriminated against Ms. Rabalais when her post was removed from the Town Hall page.

Expert Testimony

26. Petitioner offered the testimony of Gary Solomon, Ph.D., as an expert regarding HOA syndrome. He works as a professor at the College of Southern Nevada. HOA syndrome is not a recognized clinical disorder, and there are no peer-reviewed articles offered to support Dr. Solomon's opinion. Despite his purported knowledge about HOA syndrome, he was unable to provide a basis for his conclusions. Dr. Solomon had not read the SSRA rules or policies and procedures; and he had no understanding of Florida condominium law. He was also unable to provide an opinion regarding whether Ms. Rabalais had suffered from HOA syndrome. Based on the evidence offered at hearing, Dr. Solomon was not accepted as an expert in this matter.

CONCLUSIONS OF LAW

27. DOAH has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

Petitioner's Disability Discrimination Claim

28. Section 760.34(2), Florida Statutes, provides, in pertinent part, that: "[a]ny person who files a complaint under subsection (1) (for a violation of housing discrimination) must do so within 1 year after the alleged discriminatory housing practice occurred." Petitioner timely filed her Complaint.

29. Petitioner brought the Complaint pursuant to section 804 (b) or (f) of Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988. Thus, the asserted claims fall under the Federal Fair Housing Act, 42 U.S.C. § 3604(b), and the Florida Fair Housing Act, section 760.23(2).

30. Section 760.23(2) provides that: "[i]t 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."

31. Florida's Fair Housing Act is patterned after the Federal Fair Housing Act. Federal court decisions interpreting the Federal Fair Housing Act provide guidance in determining whether a violation of Florida's Fair Housing Act has occurred. *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F. 3d 1277, 1285 (11th Cir. 2014). Section 760.23(2) is patterned after 42 U.S.C. § 3604(b) of the Federal Fair Housing Act; and, therefore, the same legal analysis applies to each section.

32. Petitioner has the burden of proving by a preponderance of the evidence that Respondent violated section 760.23(2) by discriminating against her because of her disability. § 760.34(5), Fla. Stat. A "preponderance of the evidence" means the "greater weight" of the evidence, or evidence that "more likely than not" tends to prove the fact at issue. *Gross v. Lyons*, 763 So. 2d 276, 280. n.1 (Fla. 2000).

33. Petitioners alleging intentional discrimination under the Fair Housing Act must establish a prima facie case. Petitioners can do so either by direct or circumstantial evidence. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. *Denney v. City of Albany*, 247 F. 3d 1172, 1182 (11th Cir. 2001). "[O]nly the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination." *Wilson v. B/E Aerospace, Inc.*, 376 F. 3d 1079, 1086 (11th Cir. 2004); *see e.g., E.E.O.C. v. Alton Packaging Corp.*, 901 F. 2d 920, 923 (11th Cir. 1990)(holding that the general manager's statement that "if it was his company he wouldn't hire any black people," constitutes direct evidence). In this case, Petitioner presented no direct evidence of disability discrimination by Respondent.

34. When no direct evidence of disability discrimination exists, a Petitioner may attempt to establish a prima facie case circumstantially by demonstrating that they: (1) are an aggrieved party; (2) suffered an injury because of the alleged discrimination; and (3) were denied, based on her

disability, access to services or facilities protected by the Fair Housing Act that were available to other homeowners who did not have a disability. *Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n, Inc.*, 456 F. Supp. 2d 1223, 1232 (S.D. Fla. 2005); *Simhoni v. Mimo on the Beach I Condo. Ass'n, Inc.*, Case No. 18-4442 R.O. ¶ 39 (Fla. DOAH Feb. 26, 2019; FCHR May 16, 2019); and *Austin and Tomayko v. Saddlebag Lake Owners Ass'n, Inc.*, Case No. 16-1799 (Fla. DOAH Sept. 15, 2016; FCHR Dec. 8, 2016).

35. Not all conduct by a condominium association or board member is actionable under the Fair Housing Act. The Federal Fair Housing Act was passed to ensure fairness and equality in housing, not to become an all-purpose civility code regulating conduct between neighbors. *Lawrence v. Courtyard at Deerwood Ass'n, Inc.*, 318 F. Supp. 2d 1133, 1142 (S.D. Fla. 2004). Where the alleged discriminating conduct, as in the instant case, occurred after the complainants' purchase of their unit, which is commonly referred to as "post-acquisition," a narrow construction of the types of actionable conduct is required.

36. In *Georgia State Conference of the NAACP v. City of LaGrange, Georgia*, 940 F. 3d 627 (11th Cir. 2019), the court examined the plain language of 42 U.S.C. § 3604(b) in determining what post-acquisition conduct is actionable. The court explained that section 3604(b) "makes clear that the conduct at issue must relate to services provided in connection with the sale or rental of a dwelling…." Construing the plain meaning of the statute narrowly, the court stated that section 3604(b) only "reaches certain post-acquisition conduct, including post-acquisition conduct related to the provision of services, as long as those services are connected to the sale or rental of a dwelling." *Id.* at 632-34.

37. At issue in that case was municipality provided electricity, gas, water, and law enforcement services. The Eleventh Circuit Court of Appeal concluded that law enforcement services are not provided "in connection with

the sale or rental of a dwelling." However, basic utility services, such as electricity, gas, and water, "are inextricably intertwined with the dwelling itself" and "connected to the sale or rental of a dwelling because they are fundamental to the ability to inhabit a dwelling." *Id.* at 634.

38. In the instant case, Petitioner failed to establish the second and third prongs of a prima facie case. Petitioner failed to present sufficient evidence that she suffered an injury because of her disability. She also failed to establish that she was denied access to facilities or services protected by the Fair Housing Act that were available to other non-disabled lot owners.

39. Petitioner has resided at her lot continuously, without interruption. At no time has she been restricted from accessing any services of the resort. To the contrary, she was provided services as needed. To the extent she may not have received service, she had a "no trespassing" sign on her lot forbidding anyone to enter her property.

40. Petitioner failed to make a prima facie case because the evidence she offered at hearing did not prove that Bosshardt had deprived her of access to services available to the other lot owners. The burden, therefore, never shifted to Bosshardt to articulate a legitimate, nondiscriminatory reason for its conduct.

41. Petitioner also claims that Respondent created a hostile housing environment based on her disability. There is some question of the viability of a claim for hostile housing environment. *See Lawrence v. Courtyards at Deerwood Ass'n, Inc.*, 318 F. Supp. 2d 1133, 1146; *Simhoni*, Case No. 18-4442 (Fla. DOAH Feb. 26, 2019; FCHR May 16, 2019); *Austin and Tomayko*, Case No. 16-1799 (Fla. DOAH Sept. 15, 2016; FCHR Dec. 8, 2016).

42. However, even if a claim of a hostile housing environment based on disability is cognizable, Petitioner has failed to establish such a claim. Courts that have recognized a claim of a hostile housing environment requires that a plaintiff establish that, because of their disability, she was subjected to unwelcome conduct that was so severe and pervasive as to alter the

conditions of her housing and interfere with her right to the use and enjoyment of her property. *Mohamed v. McLaurin*, 390 F. Supp. 3d 520, 548-51 (D. Vermont 2019)("courts that recognize a hostile housing environment claim under the FHA require a high degree of proof, effectively requiring a plaintiff to prove that the discriminatory harassment resulted in constructive eviction"); *Godwin v. City Redevelopment, LLC*, 2018 WL 3620482, at *3 (D. Nev. 2018)(unpleasant comments by neighbors including single off-hand comment about plaintiff's national origin was not severe or pervasive); *Krieman v. Crystal Lake Apartments Ltd. Partnership*, 2006 WL 1519320, at *12 (N.D. Ill. 2006)(recognizing a demanding standard for establishing hostile housing environment claim--conduct must be extreme and not merely rude or unpleasant offensive utterances); *Simhoni*, Case No. 18-4442, R.O. ¶ 43 (Fla. DOAH Feb. 26, 2019; FCHR May 16, 2019). "Whether a housing environment is illegally hostile or abusive can be determined only by looking at all the circumstances, and factors may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with the use and enjoyment of the premises." *Jackson v. Park Place Condo. Ass'n, Inc.*, 619 Fed. Appx. 699, 704 (10th Cir. 2015).

43. The conduct at issue in this case was sometimes unfriendly, but it never rose to a level of such extreme offensiveness as to be deemed severe and pervasive. Even if Petitioner could establish there was a hostile housing environment at SSRA, Petitioner has not established in any way that Respondent was the cause of a hostile environment or that she was denied access to service.

Retaliation

44. Section 760.37, the anti-retaliation provision, provides, in pertinent part: "[i]t is unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise of, or on account of her or his having exercised … any

right granted under [the Florida Fair Housing Act]." Section 760.37 is patterned after 42 U.S.C. § 3617 of the Federal Fair Housing Act; and, therefore, the same legal analysis applies to this section.

45. As with a claim of disparate treatment discrimination under section 760.23(2), Petitioner has the burden of establishing a claim of retaliation under section 760.37 by a preponderance of the evidence.

46. In the present case, Petitioners failed to present direct evidence of retaliation.

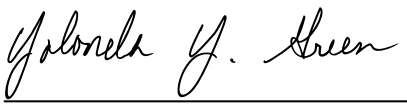
47. To establish a claim of retaliation under section 760.37 based on circumstantial evidence, Petitioner must show that: (1) Respondent coerced, intimidated, threatened, or interfered; (2) with Petitioner enjoyment of a housing right after the exercise of that right; (3) because of discriminatory animus. *Lawrence*, 318 F. Supp. 2d at 1143-44; *Anderson v. Shaddock Estates Homeowners Ass'n, Inc.*, 2008 WL 10590598, at *4 (S.D. Fla. 2008); *Cosme v. Lakeshore Club of Polk Cty. Homeowners Ass'n*, (Fla. DOAH July 7, 2011; FCHR Aug. 30, 2011).

48. Here, Petitioner relies on a series of events with neighbors and perceived misdeeds. The only incident that could be related to Respondent as the property manager, fails because Bosshardt did not employ the maintenance company and the company did not act at the direction of Respondent. Furthermore, based on the evidence established at hearing, by a preponderance of the evidence, Petitioner received services as needed. If she did not receive services, it was during a time that she had a no trespassing sign on her property. Nonetheless, none of the alleged conduct was based on discrimination or in retaliation for Petitioner filing her HUD Complaint. Based on the foregoing, Petitioner failed to establish a case of retaliation as it relates to Respondent.

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 dismissing the Petition for Relief.

DONE AND ENTERED this 5th day of April, 2021, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of April, 2021.

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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.