

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BENEDICT THEISEN,

Petitioner,

vs.

Case No. 20-2538

PARK LANE CONDOMINIUM OWNERS
ASSOCIATION, INC. ET AL,

Respondents.

RECOMMENDED ORDER

Pursuant to notice, an evidentiary hearing was held in this case via Zoom Conference on August 25, 2020, before Lynne A. Quimby-Pennock, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Mark W. Lord, Esquire
46 North Washington Boulevard, Suite 16D
Sarasota, Florida 34236

For Respondents: Paul Edward Olah, Esquire.
Law Offices of Wells Olah, P.A
1800 Second Street, Suite 808
Sarasota, Florida 34236

STATEMENT OF THE ISSUES

Whether Respondents, Park Lane Condominium Owners Association, Jim Faix, and Polaris Property Management, Inc.,¹ discriminated against

¹ Respondents will collectively be referred to as Respondents, but Park Lane Condominium Owners Association will be referred to as the Association, and Polaris Property Management, Inc., will be referred to as Polaris. Jim Faix will be referred to as Mr. Faix.

Petitioner, Benedict Theisen (Mr. Theisen or Petitioner), on the basis of Mr. Theisen's disability in violation of the Florida Fair Housing Act (the Act), sections 760.20 through 760.37, Florida Statutes (2019),² and, if so, the relief to which Petitioner is entitled.

PRELIMINARY STATEMENT

The Florida Commission on Human Relations (FCHR or Commission) and the United States Department of Housing and Urban Development (HUD) administer the Act. In October 2019, Petitioner filed a housing discrimination complaint with HUD and FCHR. HUD and FCHR investigated the complaint; however it was FCHR that attempted conciliation between the parties. Following the unsuccessful attempt at conciliation, on May 20, 2020, FCHR entered a Notice of Determination of No Cause (Notice). The Notice was sent to Petitioner via certified mail, and provided, in part, the following:

Based on the evidence obtained during the investigation, the FCHR has determined that reasonable cause does not exist to believe that a discriminatory housing practice has occurred. Accordingly, the above-referenced complaint is hereby dismissed.

On June 1, 2020, Petitioner filed a Petition for Relief (Petition) with FCHR. In his Petition, Mr. Theisen alleged:

The Respondent alleges that I did not identify reasons why I would not sign. However I did identify several reasons in an email to their manager, 9/17/19 [sic]

They granted approval a year before they started nit-picking and hairsplitting with "covenants" and restrictions.

I had found a deal I could afford, they waited until then to go all passive-aggressive and kill my deal by scaring off the provider.

² All references to Florida Statutes are to the 2019 version, unless otherwise stated.

Raising objections at the end of a year is an
“unreasonable delay” [sic]
I can’t move because of the reverse mortgage [sic]

On June 3, 2020, FCHR referred the case to the Division requesting the assignment of an administrative law judge to conduct proceedings required by law and to submit a recommended order to the Commission. Later that same day an Initial Order was sent to the parties. On June 15, 2020, when no response to the Initial Order was received, the undersigned scheduled a video teleconference hearing for July 22, 2020.

On July 9, 2020, Petitioner filed over 40 unnumbered proposed exhibits on the Division docket. A Notice of Ex Parte Communication was issued as there was no indication that Respondents were sent a copy of the proposed exhibits.

On July 13, 2020, the Association’s counsel (Mr. Olah) filed an Amended Notice of Appearance, notifying all parties that he represented all three Respondents. That same day, a pre-hearing conference call was held, at which time Petitioner’s counsel (Mr. Lord) entered his appearance and orally requested a continuance. The hearing was rescheduled to August 25, 2020, via Zoom Conference.

The hearing took place on August 25, 2020. Joint Exhibits 1 through 8 were received into evidence. Petitioner presented two witnesses: himself and Brian Ball. Petitioner offered Petitioner’s Exhibits 1 through 8, which were received into evidence without objection. Respondents presented one witness: James Faix, the property manager for the Association who was an employee of Polaris. Respondents’ Exhibits 1 through 11, 13, 14, and 16 through 18³ were received in evidence.

³ Respondents’ Exhibits 1, 3, and 16, through 18 were admitted over objections.

At the end of the hearing, a discussion ensued regarding whether the transcript of the hearing would be ordered. The parties were advised that if a transcript was ordered, their respective proposed recommended orders (PROs) would be due ten days after the transcript was filed. The parties were also advised that if no transcript was ordered, each party's PRO was to be filed no later than September 4, 2020. However, Petitioner's counsel was granted until the close of business, 5:00 p.m., on Thursday, August 27, 2020, to confer with his client and provide a written status report on whether the transcript would be ordered.

On August 28, 2020, the undersigned issue an Order announcing that Petitioner's written status report had not been filed on August 27, 2020. The parties were directed, if they chose to, to file their respective PROs on or before the close of business on Friday, September 4, 2020. On September 4, 2020, Petitioner filed a "CONFIRMATION THAT HEARING TRANSCRIPT NOT REQUESTED."

The parties⁴ timely submitted their PROs,⁵ which have been duly considered in the preparation of this Recommended Order. To the extent the PROs contained new facts or information that was not subject to cross-examination during the hearing, those matters have been excluded from consideration.

⁴ Petitioner directly emailed his "ORDER ON PETITION FOR ADMINISTRATIVE RELIEF" (Petitioner's PRO) to the undersigned, which is inappropriate. The undersigned directed her Judicial Assistant to have the document placed on the docket.

⁵ Neither PRO provided that it had been served on opposing counsel. A Notice of Ex Parte Communication was issued for both submissions.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing the following Findings of Fact are made:

1. Petitioner is a 75 year-old male who resides in a second floor condominium unit located at 2155 Wood Street, Sarasota, Florida.

Mr. Theisen has lived in his condominium unit for over 29 years. Beginning at age 59, Mr. Theisen's health started declining, and he began taking his Social Security retirement at age 62.

2. Mr. Theisen experiences shortness of breath and considerable pain in his feet and legs when walking or climbing stairs. He uses a motorized scooter when possible. Mr. Theisen has an unrebutted diagnosis of diabetic peripheral neuropathy. Mr. Theisen has a physical handicap as defined by the Act, section 760.22(7)(a).

3. The Association is the managing body for the Park Lane Condominium (Condo), which is a 49 unit condominium located at 2155 Wood Street, Sarasota, Florida. The Condo was originally built as an apartment complex in the late 1950s, and converted to condominium ownership in 1979.

4. James Faix is the manager for the Association. He holds a bachelor's degree and has multiple certifications and licensures.

5. Polaris is a property management company that engaged Mr. Faix as the Association's manager.

6. Mr. Theisen, acting on his belief that his request for a chair lift⁶ had been approved by the Association,⁷ received an estimate/invoice from Florida Surgical Supply for the installation and removal of a chair lift at his Condo

⁶ The term chair lift and stair lift were used interchangeably throughout the hearing and the emails.

⁷ No evidence was introduced at hearing that the Association had "approved" the chair lift in 2018. There was testimony that in the fall of 2018, Mr. Theisen and Mr. Faix discussed what requirements the Association (or Board) "would approve" for a chair lift. Mr. Theisen testified that he did not speak directly with any Board member about the stair lift.

for \$1,500.00. The “Delivery Day/Date” on the estimate/invoice was handwritten: “9/13/19.”

7. Bryan Ball, the owner of Florida Surgical Supply, testified that he has been in business for 36 years, and has installed a number of chair lifts. He is not a licensed contractor, but has a Sarasota County business license, tax identification number, and liability insurance. Mr. Ball met Mr. Theisen through the church they attend, and Mr. Ball agreed to provide Mr. Theisen with a chair lift at cost.

8. On Friday, September 13, 2019, Mr. Theisen sent an email to Mr. Faix, which reiterated Mr. Theisen’s understanding of the Association’s requirements for his reasonable accommodation of a stair lift:

Hi Jim,

Recalling your explanation of the board’s requirements in regard to their reasonable accommodation of a stair lift to wit: I [Mr. Theisen] must pay for the stair lift myself and the stair lift must be removed upon my death or permanent departure from my unit.

Attached is the doctor’s prescription which is also being provided to the installer.

The installer company has agreed to remove the stair lift upon my death or permanent departure from my unit. ..

I do not have an exact figure for the electrical usage but it isn’t much. If it can be calculated that amount could be added to my monthly condo fee. I suppose the power supply will have that information printed on it.

Thanks for your tracking that all down for me. I guess it was a year ago. I hope I thanked you then as well.

Regards,
Pete

9. The “doctor’s prescription” from S. Lexow, M.D., provided, in pertinent part:

Theisen, Pete
Date: 9-12-19
R Stair lift.
Dx-
Diabetic peripheral neuropathy
(E13.42)
[Dr. Lexow’s signature]

10. Mr. Faix responded to Mr. Theisen via email later that same day. Mr. Faix’s response provided:

Pete,

I wish I would have had this in time for the board meeting last night.

I’ll send it off to the board now and maybe I can get their consent. Will let you know as soon as I can.

Stay tuned. ...

Jim

11. On Tuesday, September 17, 2019, Mr. Faix emailed Mr. Theisen the following:

Pete,

The stair lift has been approved. OK to proceed.

They are putting together an agreement for you to sign regarding paying for the installation, continued maintenance, removal once you’re no longer using it, and restoring the lobby to its original condition after removal. These are the things we talked about, but well [sic] need to put in writing for the future. I’ll let you know when I get it and we can get together to sign it.

In the meantime, I would like to create a file on this. Can you have your installer send me some technical data sheets on the product, and some drawings on how this will be installed and maybe

some pictures if available I'm curious to know which side of the staircase it will be installed: along the wall or along the rail? It doesn't matter, but I'm just curious.

BTW, are you getting some sort of key switch installed? Is there a way to prevent others from using or abusing it? I would be concerned with the Association's liability if an unauthorized person used it and injured themselves. Please ask your installer about this. He's probably addressed this issue before.

I've never been involved with a stair lift installation and it's rather fascinating.

Best regards,
Jim Faix
Polaris Property Management, Inc.

12. Mr. Theisen responded to Mr. Faix via another email that reiterated his position that he would be okay with the agreement if it complied with the HUD guidelines. Mr. Theisen included in this email that: he had forwarded Mr. Faix's request to the installer; confirmed there was a key switch; explained that the seat could be installed on either side of the stair well, and the seat and arms folded up to take up very little room; and stated that the installer paints the ends of the rails with high visibility paint so people could see them. Lastly, Mr. Theisen suggested that once the chair lift was installed there might be other residents who would want to use the lift, and they should plan for that issue.

13. Later on September 17, 2019, a five-page "COVENANT RUNNING WITH THE LAND AND INDEMNIFICATION AGREEMENT" (Original Covenant) was emailed to Petitioner.

14. The Original Covenant contained a lot of “legalese” phrases⁸ and 14 specific clauses that both the Association and Petitioner had to agree upon. For example, one “legalese” phrase was a recitation for the consideration for the agreement clause, (“**NOW, THEREFORE, IN CONSIDERATION** of Ten Dollars (\$10.00), the permission and approval by the Board to allow the Owner to undertake and maintain the requested Improvement, and for other good and valuable consideration.”).

15. Even later on September 17, 2019, Mr. Theisen’s reaction was emailed to Mr. Faix:

That is ridiculous. The agreement is that the installer put it in and remove it when I die or move and I pay for it. No \$10, no insurance, no hairsplitting none of all the rest of it. I told you that attorney was sneaky.

16. Mr. Theisen provided another email to Mr. Faix which provided: “No \$10, no insurance, no hairsplitting,” but Mr. Theisen did not elaborate on what else was “ridiculous” about the Original Covenant. Petitioner sent Mr. Faix another email stating that he (Mr. Theisen) was turning the Original Covenant over to “HUD,” and if HUD told Petitioner to sign it, he would.

17. In addition to seeking HUD information and guidance, Mr. Theisen also arranged to consult with a legal aid attorney. Mr. Theisen could not get an appointment until sometime in October 2019.

18. Late on September 18, 2019, Mr. Theisen emailed Mr. Faix the following:

It is killed. Because the provider had a temporary over-stock of last year’s model (functionally and cosmetically the same as the latest model) that I

⁸ Upon review of the Covenant, the first “WHEREAS” clause provided that Mr. Theisen had requested permission to “install a motorized chair lift on the exterior of the building containing” his unit. Based on the oral descriptions and pictures entered in evidence, this was an obvious error in drafting, as the stairwell was within the lobby of the building.

would have been able to take advantage of. About half price. I could afford it at that price.

By the time the lawyers get done muddying the waters that will be over for a long time, perhaps forever. During season they will sell them out and have back-orders. Killed the deal.

If the government websites are to be believed, the lawyers are wrong. Not just wrong, but deliberately wrong – they have to know what the government policy is. I have had business with that firm before, on another controversy with the Wood Street board. I don't understand why the government doesn't crack down on them, and/or crack down on the board. Maybe they have "friends".[sic]

I don't blame you. I know the board always has a majority despot composition. And that law firm caters to despots.

19. Mr. Theisen and Mr. Faix exchanged a number of emails between September 17 and October 1, 2019, regarding the Original Covenant and the legal aid appointment Mr. Theisen requested. Mr. Theisen emailed Mr. Faix that his legal aid appointment was scheduled for October. Mr. Theisen subsequently told the installer that the deal was killed. When Mr. Faix offered that the deal was not killed, just postponed, Mr. Theisen responded via email that by postponing the deal, it was killed.

20. After his October 9, 2019, appointment with a legal aid attorney, Mr. Theisen repeated to Mr. Faix that the Original Covenant was "over-lawyered," but did not provide specifics as to his objections.

21. Mr. Theisen then filed his complaint with HUD and FCHR.

22. In mid-October, Mr. Faix responded to an inquiry from HUD on behalf of the Condo, Polaris, and himself regarding the chair lift issue. Mr. Faix's HUD response and his credible testimony confirmed that at the time of the HUD response, Mr. Theisen's requested accommodation had been approved,

but that Mr. Theisen objected to the Original Covenant. The outstanding problem was that the Condo, Polaris, and Mr. Faix did not know which provisions of the Original Covenant Mr. Theisen found objectionable.

23. In late October, Mr. Faix, as the managing agent for the Condo and on behalf of Polaris, responded to a similar inquiry from FCHR. Mr. Faix again provided that Mr. Theisen's requested accommodation had been approved, but that Mr. Theisen objected to the Original Covenant. Mr. Faix offered that Respondents were willing to work with Mr. Theisen, but were not aware of the exact objections that he held. Further, Mr. Faix indicated Respondents would participate in a conciliation attempt.

24. At hearing (roughly 11 months after the Original Covenant was provided), Mr. Theisen verbalized his objections with the Original Covenant as the \$10.00 consideration and paragraphs 3 through 7.

25. At some point between October and January, FCHR provided Petitioner's objections to Respondents. As a result of being told what the objections were, the Original Covenant was reduced from a five-page document to a one-page document, known as the Covenant (Second Covenant). This Second Covenant was provided to Mr. Faix and Mr. Theisen on or about January 23, 2020.

26. Mr. Theisen shared his objections to the Second Covenant via an email to FCHR. Mr. Theisen provided that this Second Covenant was an improvement, but he could "not agree to numbers 2, 3, and 4." Those sections provided:

2. The Owner will hire an installer to install a motorized chair lift on the interior of the building containing Unit B-4 who is licensed and insured for furnishing such work and only such installer may furnish such work.

3. Prior to commencing such work, the Owner or installer shall obtain any required building permits from the City of Sarasota or Sarasota County, as applicable, to allow for such work to proceed. Upon

completion of such work, the work shall be inspected and approved by the appropriate government agency having jurisdiction of the work.

4. At least two (2) business days before commencing such work, the Owner or installer shall furnish the Association, through its management, evidence that the installer is licensed and insured for furnishing such work, a copy of any permit issued for the work, the make and model of all equipment to be installed, the mechanical mounting and electric hookup, power requirements, and the scheduled installation and repair dates and times.

27. Mr. Theisen objected to the requirement that the installer be licensed and insured, because the chair lift was going to be installed by a mechanic, who according to Mr. Theisen did not need to be certified. Mr. Theisen repeatedly testified that no building permits were necessary, and there was no need for the completed work to be inspected or approved by an appropriate government agency. Other than his self-serving testimony, Mr. Theisen did not provide competent evidence that permits, licenses, and inspections were not necessary.

28. Mr. Ball testified he provided the \$1,500.00 installation invoice offer to Petitioner in September 2019, but “pulled out” of the invoice offer in January 2020, when the project became too costly for him.

29. Mr. Theisen notified Mr. Faix at least two times after receiving approval that the chair lift installation was “killed.” However, both parties attempted to come to a positive resolution.

30. The term “condominium” is a form of real property ownership created pursuant to chapter 718, Florida Statutes. A condominium is comprised entirely of a collection of units and common areas along with the land upon which it sits. Units may be owned by one or more persons and those unit owners own a pro rata share of all the common elements. Each unit owner has exclusive ownership or rights to their unit’s interior space. Each unit

owner also owns an undivided interest with the other unit owners in the common elements, which interest cannot be separated from the unit. Those common elements are controlled by a condominium owners' association.

31. Generally, the condominium owners' association is responsible for the condominium's assets as well as its operation in accordance with standards established by state and federal law, local ordinances, and the governing documents upon which the entity itself was created. This includes the repair and maintenance of the common areas, including the building(s) exterior. The condominium owners' association involves a commitment to all the owners to make decisions on behalf of all owners. One of a condominium owners' association's goals is to ensure that the facility's common elements are kept in a reasonable condition for everyone's use. It is common practice to use covenants running with the land to allow unit owners to make improvements to the common elements within reason.

32. Although the undersigned was not provided with a copy of the Condo's Declaration or by-laws, Mr. Faix provided the requisite insight with respect to the Association. In this instance, there are 49 units in the Condo. The Association is composed of five elected volunteer members. The Association received Mr. Theisen's request for a reasonable accommodation, the installation of a stair lift, and approved it. The Association, via Mr. Faix, notified Mr. Theisen of the approval, and that an agreement was being prepared for the future. The Covenant was not an unreasonable request, but one for the viability of the Condo. There was an unfortunate breakdown in communication and lengthy delay between Mr. Theisen and the Association over his objections to that agreement, caused in large part by Mr. Theisen's refusal to identify his specific objections. This does not negate the Association's approval of the requested accommodation.

CONCLUSIONS OF LAW

33. The Division has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 760.35(3)(b), Florida Statutes, and Florida Administrative Code Rule 60Y-4.016(1).

34. The Act, codified in sections 760.20 through 760.37, prohibits discriminatory housing practices. A “discriminatory housing practice” means an act that is unlawful pursuant to section 760.23(2), (8), and (9).

35. Section 760.23(2) provides:

(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.

36. Section 760.23(8) and (9) further provide:

(8) 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 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.

(9) For purposes of subsections (7) and (8), discrimination includes:

(a) A refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by

such person if such modifications may be necessary to afford such person full enjoyment of the premises; or

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

37. Section 760.34(5) provides:

(5) In any proceeding brought pursuant to this section or s. 760.35, the burden of proof is on the complainant.

38. The 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 the Act has occurred. *Dornbach v. Holley*, 854 So. 2d 211, 213 (Fla. 2d DCA 2002); *Solodar v. Old Port Cove Lake Point Tower Condo. Ass'n*, 2013 U.S. Dist. LEXIS 104996, at 25 n.7 (S.D. Fla. 2013).

39. A petitioner has the burden of proving by a preponderance of the evidence that a respondent violated the Act by failing to provide a reasonable accommodation for the petitioner's disability. *U.S. Dep't of Hous. & Urban Dev. v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990). Thus, Mr. Theisen has the burden of proving by a preponderance of the evidence that Respondents violated the Act by discriminating against him based on his disability.

40. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," *Black's Law Dictionary*, 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. *See Gross v. Lyons*, 763 So. 2d 276, 289 n.1 (Fla. 2000).

41. In evaluating fair housing, reasonable accommodation claims, courts apply the burden-shifting analysis developed in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-4, 93 S. Ct. 1817, 36 L. Ed. 2d 668

(1973). Under this approach, a petitioner must first establish a prima facie case of discrimination. If the petitioner is successful in doing so, then the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its action.

42. If the respondent satisfies its burden, the burden shifts back to the petitioner, who must then prove that the legitimate reasons asserted by the respondent are a mere pretext for discrimination. *Secretary, HUD on behalf of Herron v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990); *Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223, 1231 (S.D. Fla. 2005); *Vassar v. Gulfbelt Props., L.L.C.*, 2011 U.S. Dist. LEXIS 36241, at 8-11 (S.D. Ala. 2011).

43. To establish a prima facie case of failure to provide a reasonable accommodation under the Federal Fair Housing Act, a petitioner must demonstrate that: (1) he or she suffered from a handicap; (2) a reasonable accommodation was requested; (3) that such accommodation was necessary to afford him or her an opportunity to use and enjoy the dwelling and facilities; and (4) the respondent refused to make the requested accommodation. *Solodar*, 2013 U.S. Dist. LEXIS 104996, at 25 (S.D. Fla. 2013).

44. Although Mr. Theisen satisfied the first, second, and third prongs associated with establishing a prima facie case of failure to provide a reasonable accommodation, he failed to satisfy the fourth prong because Respondents approved his request, and did not, as claimed, impose unreasonable conditions to carry out the request.

45. Petitioner did not meet his burden of proof that Respondents discriminated against him based on his disability.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief filed by Petitioner Benedict Theisen.

DONE AND ENTERED this 25th day of September, 2020, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of September, 2020.

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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.