

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PEDRO TAMAYO,

Petitioner,

vs.

Case No. 20-2841

AVTEC HOMES, INC. ET AL,

Respondents.

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case via Zoom videoconference on October 22, 2020, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner Pedro Tamayo, pro se
987 Raleigh Road Southeast
Palm Bay, Florida 32909

For Respondents Rebecca E. Rhoden, Esquire
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
215 North Eola Drive
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Respondents discriminated against Petitioner in the provision of housing, or services in connection therewith, in violation of the Florida Fair Housing Act (“the Act”).

PRELIMINARY STATEMENT

Petitioner, Pedro Tamayo, filed a Housing Discrimination Complaint (“Complaint”) against Respondents, Avtec Homes, Inc. (“Avtec”), and Mike Amicucci (“Amicucci”) (together, “Respondents”), with the Florida Commission on Human Relations (“Commission”) on October 24, 2019, alleging that Amicucci, an employee of Avtec, “began to treat him differently” after Petitioner disclosed to Amicucci that Petitioner “is a person with both non-visible and physical disabilities.” The alleged treatment included that (1) Amicucci was “verbally aggressive” to Petitioner when Petitioner met with him to discuss the type of fill being used in the construction of his new home; (2) Amicucci refused to accept Petitioner’s input on the construction process, which opportunity was offered to others; and (3) that Respondents incorrectly constructed his home and refuse to take responsibility therefor.

Following an investigation of the Complaint, the Commission issued a No Cause Determination, and Notice of Determination: No Cause (“Determination”), on March 12, 2020, finding no reasonable cause to believe that a discriminatory housing practice occurred.

On April 10, 2020, Petitioner filed a “Rebuttal to [Determination],” which was treated as a Petition for Administrative Hearing (“Petition”) and forwarded to the Division of Administrative Hearings (“Division”) for assignment of an Administrative Law Judge to conduct a disputed fact-finding hearing.

The undersigned granted Respondents’ Motion to Dismiss the Petition, with leave to amend, and Petitioner filed an Amended Petition on August 25, 2020. The final hearing was scheduled for October 22, 2020, and commenced as scheduled.

At the final hearing, Petitioner testified on his own behalf and introduced Petitioner's Exhibits 1 and 2, which were admitted in evidence.

Respondents offered the testimony of Amicucci and introduced Respondents' Exhibits 1, 3, 36, and 41, which were admitted in evidence.

The proceedings were recorded and a one-volume Transcript of the final hearing was filed with the Division on November 19, 2020. Respondents filed a Proposed Recommended Order on November 17, 2020, prior to the filing of the Transcript. On November 30, 2020, Petitioner requested a two-day extension of the filing deadline for his post-hearing filing, which was granted. Petitioner timely filed a Proposed Recommended Order on December 2, 2020.

Unless otherwise provided, all references herein to the Florida Statutes are to the 2018 version, which was in effect when the alleged acts of discrimination occurred.

FINDINGS OF FACT

1. Petitioner, Pedro Tamayo, suffers from anxiety, depression, memory loss, and complex regional pain syndrome ("RPD").
2. Respondent, Avtec, is a residential construction contractor, doing business in Palm Bay, Florida.
3. On November 10, 2018, Petitioner executed a Contract for Sale and Purchase ("Contract") with Avtec to construct a residential structure on property owned by Petitioner on Raleigh Road Southeast in Palm Bay, Florida. The specific floor plan chosen by Petitioner was the Citation 4 Plus.
4. Avtec executed the Contract on November 12, 2018.
5. The Contract covers clearing of property for construction, materials and color selections by the buyer, and the buyer's right to reverse the floor plan, among other terms.

6. When Petitioner entered into the Contract, he simultaneously chose many of the options available to customize the Citation 4 Plus, such as impact windows, an exterior pedestrian door in the garage, and a front septic system.

7. Among the options Petitioner chose was 36-inch (36”) doors for the master bedroom entrance, closet, and master bathroom entrance.

8. Petitioner has no obvious physical disability and does not require use of a wheelchair or walker.

Construction Setback

9. The Contract does not address the construction setbacks from the property lines. Setbacks are governed by local government codes and Avtec is required to follow those codes.

10. On November 30, 2018, Petitioner met with his sales agent, Sean McCarry, at the Avtec showroom, to discuss some of the options he had chosen for his new home. They specifically discussed plumbing issues for the master bathroom, 36” wide doors in the master bedroom, placement of the septic tank, the concrete culverts for the driveway, and a 45-foot (45’) setback of the home from the property line. While the standard setback for a home with a front septic tank is 38’ to 40’, Petitioner indicated he wanted to build an aluminum carport, which required additional setback footage.

11. Respondent Amicucci stepped into the meeting with Petitioner and Mr. McCarry to address Petitioner’s request for mitered ends on the culvert pipe. Mr. Amicucci was not present when Petitioner requested a 45’ setback.

12. Mr. McCarry verbally agreed to “take care of” the setback requested by Petitioner.

13. Petitioner’s selection of 36” doorways for the master bedroom, and a front septic system were reduced to writing and included in the Contract, signed by both parties, as an Option to Sales Agreement.

14. Petitioner executed five addenda to the Contract between November 30, 2018, and May 1, 2019, including optional upgrades and a modification to the design of the sidewalk.

15. On July 23, 2019, Petitioner and Avtec executed a change order to include the mitered ends of the culvert pipe.

16. No part of the Contract, any addenda thereto, or any change order, addresses Petitioner's request for a 45' setback.

17. Section 28 of the Contract provides that "NO OTHER AGREEMENTS exist between the BUYER and SELLER except as set forth in this Agreement. This Agreement shall not be modified except by an instrument in writing executed by both BUYER and SELLER."

18. Section 29 of the Contract contains the following statement in red underlined text:

No representative of Seller has authority to make any verbal statements that modify or change the terms or conditions of this contract. Buyer represents that buyer has read and understands this entire contract. Buyer also represents that buyer is not relying on any verbal statement, promise, or condition not specifically set forth in this contract. It is acknowledged that builder is relying on these representations and would not enter into this contract without this understanding.

19. Section 20 of the Contract specifically provides, "Once the rough plumbing is installed, absolutely NO CHANGES will be allowed."

20. Petitioner's new home was built 40' from the property line, rather than 45' as Petitioner requested.

21. Sometime after the rough plumbing was installed and the foundation was poured, Petitioner complained to Avtec that his home was not built with a 45' setback as promised by Mr. McCarry.

22. On August 22, 2019, Avtec, through its Director of Corporate Development, responded in writing to Petitioner's complaint. Avtec

apologized that the home was not built to the setback he had communicated to Mr. McCarry, and referred to the Contract terms that exclude any verbal agreements. Avtec offered to release Petitioner from his contract, refund his deposit of \$6,250, and give Petitioner \$30,000 for the property after selling it to another buyer.

23. On November 13, 2019, Petitioner signed a “Final Acceptance of Completion” of the construction of his home.

Fill Dirt

24. On March 8, 2019, Petitioner drove by the construction site and noted that the fill dirt being used was “contaminated” with tree branches and other material. He drove to the model home to discuss the issue with Mr. McCarry. Mr. McCarry contacted Mr. Amicucci, who agreed to meet Petitioner at the property to inspect the fill and address Petitioner’s concerns.

25. Petitioner and Mr. Amicucci testified to two very different versions of the events at the construction site that day.

26. Petitioner testified that, when Mr. Amicucci arrived, he got out of his vehicle, visibly upset, and raised his voice and cursed at Petitioner regarding his lack of knowledge of proper fill material. Petitioner testified, specifically that:

I feared that [Mr. Amicucci] would physically attack me by his aggressive demeanor and I immediately froze. I could not comprehend how a paying customer could be treated this way by raising concerns for the foundation of my home.

I am not a builder. [Mr. Amicucci] simply needed to explain the common practice of standard fill. Since March 8th, 2019, my quality of life has not been the same. I have severe anxiety due to the memories of that day and suffer constant nightmares.

I feel as [sic] my life can be in danger and, therefore, live in a state of high alert. My daily life has been disrupted. Simply having to drive by

Avtec showroom due to my normal routine routes triggers flashbacks of that day.

27. Mr. Amicucci testified that when he arrived at the property, Petitioner was upset and aggressive toward him, demanding that the fill be removed from his property.

28. Mr. Amicucci reassured Petitioner that the fill was all good soil and that it would be root-raked before it was spread for the foundation. Mr. Amicucci explained the root-raking process and the equipment used therefor.

29. Nevertheless, Petitioner insisted that Mr. Amicucci go with him to another construction site to show him the type of fill he wanted used on his property.

30. Mr. Amicucci accompanied Petitioner to the specific construction site, which was not an Avtec project, and Mr. Amicucci identified the fill being used there as a hard white shell material. Mr. Amicucci assured Petitioner that the brown sandy soil imported to his property would be better for the sod and plants Petitioner would be using to landscape the property.

31. Mr. Amicucci testified that, at the end of the meeting, Petitioner extended his hand and said, “[l]ook, that all sounds good. I just want to start back over. Are we good?” Mr. Amicucci shook Petitioner’s hand and assured him that they “were good.”

32. Mr. Amicucci’s testimony regarding the events that occurred on March 8, 2019, is accepted as more credible and reliable than Petitioner’s.

Knowledge of Petitioner’s Disability

33. Mr. Amicucci testified that he was not aware that Petitioner had any kind of disability until the Complaint was filed against him and Avtec.

34. Petitioner testified that his disability was revealed to Mr. Amicucci on November 30, 2018, during a meeting at the Avtec showroom to discuss the various options selected by Petitioner when he signed the contract. Petitioner testified that Mr. Amicucci asked him what he did for a living and Petitioner

told him that he was retired and disabled from the City of Hialeah. He testified that Mr. Amicucci was further on notice because Petitioner always wears a glove to improve circulation in his right hand and that he can hardly sign his name, which would have been apparent to Mr. Amicucci at the November 30, 2018 meeting. Finally, Petitioner alleges Mr. Amicucci should have been aware of his disability because he requested 36” ADA-compliant door widths for the master bedroom.

35. Mr. Amicucci did not recall Petitioner telling him he was disabled or seeing Petitioner wearing a glove. He did recall seeing Petitioner wearing a sling of some sort and inquiring whether he had been injured. He recalled Petitioner telling him it was related to an old injury.

36. Mr. Amicucci was not present for any discussion about the 36” doorways. Assuming, arguendo, that he was present for that discussion, a request for 36” doorways alone is not proof of a disability. Many buyers upgrade to larger doorways to accommodate larger furniture or in anticipation of needing a walker or wheelchair access in the future.

37. Furthermore, requesting ADA-compliant doorways is irrelevant to Petitioner’s claim that he has emotional disabilities and chronic pain.

38. The evidence does not support a finding that Mr. Amicucci knew of Petitioner’s disabilities of anxiety, depression, memory loss, and RPD.

39. No other witness was offered on behalf of Avtec. There is no evidence to support a finding that Avtec had knowledge of Petitioner’s disability through any other employee.

CONCLUSIONS OF LAW

40. The Division has jurisdiction over the parties and the subject matter of this case. §§ 120.569 and 120.57(1), Fla. Stat. (2020).

41. The Act makes it “unlawful to discriminate against any person in the terms, conditions or privileges of sale ... of a dwelling, or in the provision of

services or facilities in connection therewith, because of ... disability[.]”
§ 760.23(2), Fla. Stat.

42. “Disability” is defined as a “physical or mental impairment which substantially limits one or more major life activities[.]”

43. Petitioner is a person who is disabled as defined in the Act.

44. The Act is patterned after Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988. As such, discriminatory acts prohibited under the federal Fair Housing Act also are prohibited under the Act, and federal case law interpreting the federal Fair Housing Act is applicable to proceedings brought under the Act. *See Brand v. Fla. Power Corp.*, 633 So. 2d 504, 509 (Fla. 1st DCA 1994) (noting that “the Florida statute will take on the same constructions as placed on its federal prototype.”).

45. In cases involving claims of housing discrimination, the complainant has the burden to prove a prima facie case of discrimination by a preponderance of the evidence. § 760.34(5), Fla. Stat.; *Fla. Dep’t of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981). 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, 289 n.1 (Fla. 2000).

46. When, as here, there is no direct evidence of discrimination by Respondent related to, or affecting the terms of, the construction of his home, fair housing cases are subject to the three-part test set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

47. Under the three-part test, Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802.

48. Petitioner alleges he was treated differently than other Avtec customers based on his disability. In order to establish a prima facie case of

disparate treatment in the provision of services connected with construction of his home, Petitioner must show that he: (a) is a member of a protected class; (b) requested services to be performed on terms comparable to others contracting with Avtec for new construction; and (c) that, based on his disability, was denied provision of those services which were available to other customers.

49. The final element implies that Respondents were aware of Petitioner's protected class status.

50. Petitioner did establish the first element of a prima facie case: he is a member of a protected class. Likewise, he established the second element: he requested services in connection with the construction of his home—a 45' setback and a particular type of fill dirt.

51. However, Petitioner did not establish that the actions (or inactions) of Respondents were influenced by Petitioner's disability. The evidence was insufficient to establish that Respondents were even aware of his disability.

52. Further, Petitioner introduced no comparators. Thus, there was no credible evidence that customers with no disabilities were treated more favorably than Petitioner.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing Petition for Relief from a Discriminatory Housing Practice No. 202022149.

DONE AND ENTERED this 22nd day of December, 2020, in Tallahassee,
Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
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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.