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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOYCE NDIMBIE,)
)
 Petitioners,)
)
 vs.) Case No. 03-1626
)
 BROWARD COUNTY COMMUNITY)
 DEVELOPMENT CORPORATION, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on June 1 and 2, 2005, and January 27, 2009, in Fort Lauderdale, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joyce Ndimbie, pro se
Post Office Box 100813
Fort Lauderdale, Florida 33310

For Respondent: David M. Hawthorne, Esquire
Akerman Senterfitt
Las Olas Centre, Suite 1600
350 East Las Olas Boulevard
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed a discriminatory housing practice against Petitioner in violation of the Fair Housing Act.

PRELIMINARY STATEMENT

Joyce Ndimbie filed a fair housing discrimination complaint against the Broward County Community Development Corporation, Inc., hereinafter BCCD,¹ with the U.S. Department of Housing and Urban Development, hereinafter HUD, and the Florida Commission on Human Relations, hereinafter FCHR. The complaint was investigated by the FCHR. On February 27, 2003, the FCHR issued and on March 24, 2003, filed a Determination of No Reasonable Cause (No Cause), determining that no reasonable cause existed to believe that a discriminatory housing practice had occurred.

Ms. Ndimbie timely filed a Petition for Relief from a housing discriminatory practice with FCHR against BCCD. On May 5, 2003, FCHR referred this matter to the Division of Administrative Hearings.

An Initial Order was sent to the parties. Ms. Ndimbie's address of record was a Post Office Box address, and the Initial Order sent to her was returned by the U.S. Postal Service as undeliverable: "Return to Sender"; "Box Closed"; "Unable to Forward." An Amended Initial Order was sent to the parties. The final hearing was subsequently scheduled, but was continued and re-scheduled. Discovery disputes arose, and the hearing was continued. Several factors precluded the re-scheduling of the final hearing, including Ms. Ndimbie being incarcerated, and her telephone being disconnected, resulting in communication with

her only by mail. The hearing was subsequently re-scheduled; but, due to BCCD's request for a location with security and out of an abundance of caution, the hearing was re-scheduled in a location with security.

The final hearing was held, but was not completed. Shortly thereafter, Ms. Ndimbie was declared incompetent by courts of Florida's Seventeenth Judicial Circuit in several criminal proceedings. This matter was held in abeyance until such time as the court determined that Ms. Ndimbie was competent. Almost two years later, Ms. Ndimbie was declared competent by the court. The final hearing was subsequently completed.

At hearing, Ms. Ndimbie testified in her own behalf, presented the testimony of one witness, and entered 18 exhibits (Petitioner's Exhibits numbered 1 through 10, and 12 through 19) into evidence. BCCD presented the testimony of three witnesses and entered six exhibits (Respondent's Exhibits numbered 1-5, and 8) into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the transcript. The Transcript, consisting of four volumes, was filed on February 5, 2009.² Ms. Ndimbie was certified indigent by the Clerk of the Division of Administrative Hearings and was provided a copy of the Transcript, the last two volumes were provided on

February 19, 2009. Extensions of time were granted for the filing of post-hearing submissions. Ms. Ndimbie filed a partial post-hearing submission and, subsequently, filed the remainder of her post-hearing submission, which was accepted. The parties' post-hearing submissions were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. No dispute exists that Ms. Ndimbie is handicapped for purposes of the Fair Housing Act. She has more than one mental illness diagnosis, including Schizoid Personality Disorder, Schizotypal Personality Disorder, Obsessive-Compulsive Personality Disorder, with two of her symptoms being that she "relates poorly with others" and that she "lacks insight into the feelings of others and when she feels accosted, she becomes angry and reacts, often inappropriately."

2. BCCD was a Florida not-for-profit organization. Its mission was to provide affordable housing for individuals with mental illnesses.

3. BCCD acts as a landlord for its tenants, who have difficulty finding affordable housing due to having a mental illness. A prerequisite to being a tenant at BCCD was to have a mental illness, and, therefore, all of BCCD's tenants had a mental illness.

4. On an annual basis, BCCD contracted with and received funds from the Florida Department of Children and Families, hereinafter DCF. The funding from DCF supplements rent received from the tenants.

5. On June 29, 2001, the Executive Director of BCCD, Nancy Merolla, entered into an annual contract with DCF for the period of July 1, 2001, through June 30, 2002, hereinafter Annual Contract. Exhibit A of the Annual Contract provided in pertinent part:

The [BCCD] will provide housing stipends to ensure safe, accessible and affordable housing opportunities to low income individuals of Broward County, who are disabled with a mental illness and/or co-occurring disorders. . . .

6. Each tenant, who resided in housing provided by BCCD, was required to receive case management. However, BCCD did not provide case management services for its tenants. The tenants received case management services from sources outside of BCCD.

7. DCF assigned case managers and, therefore, assigned case managers for Ms. Ndimbie. Case management services were provided to Ms. Ndimbie by Henderson Mental Health Clinic

8. Even though Ms. Ndimbie maintains that BCCD was required to provide case management services, the evidence demonstrates that BCCD was not required to provide such services.

9. DCF was having difficulty finding housing for Ms. Ndimbie due to her mental challenges and requested the assistance of BCCD. On October 30, 2001, Ms. Ndimbie and Ms. Merolla, on behalf of BCCD, executed a month-to-month lease agreement, hereinafter Lease, for an apartment unit at 334 Northwest 43rd Street, Oakland Park, Florida. The Lease provided, among other things, that the total rent payable was \$570 per month; that Ms. Ndimbie's portion of the rent was \$115 per month; and that the portion paid by the Public Housing Agency, under the Shelter Plus Care Program of HUD was \$455. The Lease, which identified Ms. Ndimbie as the Tenant and BCCD as the Landlord, was effective November 28, 2001.

10. An addendum to the Lease was a Tenant Agreement. Ms. Ndimbie was under the Shelter Plus Program, which provided for a single occupant to be entitled to a one-bedroom unit. However, BCCD only had a two-bedroom unit available. The Tenant Agreement provided, among other things, that Ms. Ndimbie was "being temporarily allowed to stay in [a two-bedroom unit] until a one bedroom unit [became] available with [BCCD]."

11. On or about November 28, 2001, Ms. Ndimbie moved into the two-bedroom unit.

12. At some point in time after Ms. Ndimbie moved into the two-bedroom unit, BCCD and the other tenants, who were Ms. Ndimbie's neighbors, began to have problems with her

behavior. The other tenants filed complaints with BCCD regarding her behavior. In March 2002, after input from Ms. Ndimbie, her case manager, and DCF, BCCD conducted a meeting with Ms. Ndimbie and the complaining tenants in an effort to reconcile the differences. An agreement was reached regarding resolution of the differences.

13. However, the problems, regarding Ms. Ndimbie's behavior, continued. The tenants were filing petitions for injunctions for protection against her, and she was filing the same petitions against the tenants.

14. In particular, the continuous problems resulted in one neighbor, Luis Colon, obtaining an injunction for protection against Ms. Ndimbie on May 2, 2002.³ A circuit court ordered, among other things, that she was not to have any contact with Mr. Colon and not to go within 15 feet of Mr. Colon's unit (apartment).

14. Ms. Ndimbie contends that BCCD represented Mr. Colon at the injunction hearing as his case manager. However, the evidence demonstrates that BCCD was not his case manager at the injunction hearing, but only responded to the presiding judge's inquiries.

15. Subsequently, on May 23, 2002, the injunction for protection was amended. The circuit court ordered, among other things, that the Ms. Ndimbie was not to go within 500 feet of

Mr. Colon's unit. The amended injunction for protection was effective on midnight, May 31, 2002. Ms. Ndimbie's unit was less than 500 feet from Mr. Colon's unit, and, therefore, the effect of the amended injunction for protection was to prevent Ms. Ndimbie from residing in her unit after midnight, May 31, 2002.

16. BCCD offered Ms. Ndimbie an alternative unit at another location. Ms. Ndimbie viewed the apartment building where the alternative unit would be located and found that it was being renovated. She did not believe that it would be timely completed.

17. Further, Ms. Ndimbie inquired of law enforcement regarding criminal activity within the surrounding geographical area of the alternative unit. It was reasonable for her to gather such information. She was informed by law enforcement that there was drug activity in the surrounding area.

18. Based upon the construction activity at the alternative unit, coupled with her belief that the alternative unit would not be timely completed, and upon the history of drug activity in the surrounding area, Ms. Ndimbie decided that she would not accept the alternative unit.

19. Even though the alternative unit was being renovated, the evidence demonstrates that it was to be completed before the effective date of the amended injunction for protection, i.e.,

midnight, May 31, 2002. Consequently, Ms. Ndimbie's belief that the alternative unit was not going to be timely completed was not reasonable.

20. Additionally, even though the surrounding area of the alternative unit had a history of drug activity, no evidence was presented that the alternative unit had been determined to be not suitable for leasing under the Annual Contract between DCF and BCCD. As a result, the alternative unit remained an available unit under the Annual Contract.

21. Ms. Ndimbie refused to accept and move into the alternative unit.

22. No other housing was found for Ms. Ndimbie by midnight, May 31, 2002. Her belongings were placed in a storage unit.

23. Another tenant with mental illness moved into the alternative unit.

24. Subsequently, Ms. Ndimbie moved into a hotel. With DCF's approval, BCCD provided her with \$1,000 to assist her with the cost of the hotel room.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

26. The standard of proof is preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2009).

27. These proceedings are de novo. § 120.57(1)(k), Fla. Stat. (2009).

28. The Fair Housing Act is found at Sections 760.20-760.37, Florida Statutes (2009).⁴

29. A discriminatory housing practice is defined as "an act that is unlawful under the terms of ss. 760.20-760.37." § 760.22(3), Fla. Stats.

30. Section 760.23, Florida Statutes, provides in pertinent part:

(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.

* * *

(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.

31. Handicap is defined to include a person who "has a physical or mental impairment which substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment." § 760.22(7)(a), Fla. Stat.

32. The parties agree that Ms. Ndimbie is handicapped as defined by Section 760.22(7)(a), Florida Statutes, and is, therefore, a member of the protected class.

33. When the Florida Legislature enacted the Fair Housing Act, it essentially codified the United States Fair Housing Amendments Act of 1988 (FHAA). Dornbach v. Holley, 854 So. 2d 211, 213 (Fla. 2nd DCA 2002). The application of the FHAA by the federal courts has been found to be instructive and persuasive by the courts of Florida in considering the application of the Fair Housing Act. Id.

34. "Discrimination claims under the FHA [FHAA and the Fair Housing Act] are subject to the Title VII McDonnell Douglas

Corp. v. Green, burden-shifting analysis.” Savanna Club Worship Service, Inc. v. Savanna Club Homeowners’ Association, 456

F.Supp.2d 1223, 1231 (S.D. Fla. 2005) (citations omitted).

“Under this test, a plaintiff first bears the burden of establishing that the defendant has engaged in discrimination. Once that is done, the burden then shifts to the defendant to establish a legitimate non-discriminatory business reason for taking the action. If the defendant comes forth with such reason, then the burden returns to the plaintiff to establish that the defendant’s reason is merely a pretext.” Id. at 1231-1232.

35. The federal courts have determined that discrimination may exist under the FHAA in either one of three ways: the FHAA (1) "prohibits intentional discriminatory conduct towards a handicapped person"; (2) "prohibits incidental discrimination, that is, an act that results in making the property unavailable to a handicapped person"; or (3) "prohibits an act that fails to make a reasonable accommodation that would allow a handicapped person the enjoyment of the chosen residence." Dornbach, at 213 (citations omitted). Given the similarity of the language and the purpose of the FHAA and the Fair Housing Act, the three approaches to fair housing discrimination are applicable to the Fair Housing Act. Id.

36. "The courts have uniformly held that a plaintiff establishes a prima facie case under . . . [the Fair Housing Act] by proving: (1) That he or she is a member of a racial minority; (2) That he or she applied for and was qualified to rent . . . certain . . . housing; (3) That he or she was rejected; and (4) That the housing . . . remained available thereafter." Selden Apartments v. U.S. Department of Housing and Urban Development, 785 F.2d 152, 159 (6th Cir. 1986). See Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003); Secretary, U.S. Department of Housing and Urban Development, on behalf of Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990).

37. Regarding the first criterion for a prima facie case, Ms. Ndimbie meets the criterion in that she has a mental disability.

38. As to the second criterion for a prima facie case, Ms. Ndimbie meets the criterion in that, initially, she applied for a unit (apartment) and entered into a rental agreement for the unit; and that, subsequently, she was qualified and eligible for an alternative unit.

39. However, regarding the third criterion for a prima facie case, Ms. Ndimbie fails to meet the criterion. BCCD did not reject her from renting the alternative unit. When continuing to be a resident at the first unit proved to be impossible, due to the court's amended injunction for

protection, BCCD made available an alternative unit for her. Ms. Ndimbie refused to accept and chose not to rent the alternative unit. The evidence demonstrates that her refusal and choice were unreasonable under the circumstances presented.

40. When Ms. Ndimbie did not move into the alternative unit, it was rented to another person who was also suffering from a mental disability and who also met the requirements under the Annual Contract with DCF. Further, with the approval of DCF, BCCD provided Ms. Ndimbie with financial assistance toward the cost of a hotel room.

41. Consequently, Ms. Ndimbie failed to establish a prima facie case that BCCD discriminated against her.

42. Even assuming that Ms. Ndimbie had established a prima facie case of discrimination, BCCD established a non-discriminatory reason for its action. Although the evidence demonstrates that BCCD had communication challenges with Ms. Ndimbie, the court's issuance of the amended injunction for protection made it impossible for her to continue to reside in her original unit. BCCD had no choice but to remove her from the original unit. However, BCCD offered Ms. Ndimbie an alternative unit, which was unreasonably refused by her. Ms. Ndimbie's belongings were removed from the unit and stored. And, with the approval of DCF, BCCD provided her with financial assistance toward the cost of a hotel room.

43. BCCD having established a non-discriminatory reason for its action, the burden shifts to Ms. Ndimbie to establish that BCCD's reason for its action is merely a pretext for discrimination. The evidence fails to establish that BCCD's reason for its action is merely a pretext for discrimination.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that Broward County Community Development Corporation, Inc. did not commit a discriminating housing practice against Joyce Ndimbie in violation of the Fair Housing Act.

DONE AND ENTERED this 29th day of January, 2010, in Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of January, 2010.

ENDNOTES

^{1/} Broward County Community Development Corporation, Inc., is now known as Broward Housing Solutions.

^{2/} February 5, 2009, was the date the last volume was filed.

^{3/} Mr. Colon testified at hearing. He is now deceased. One factor of interest asserted by Ms. Ndimbie was that, in Mr. Colon's petition, he alleged that she "spit on" him. At the hearing in the instant case, Mr. Colon testified that Ms. Ndimbie did not spit "on" him, but spit "at" him. Even though Mr. Colon's testimony was found credible, this aspect of his testimony was not crucial to the outcome of the instant case.

^{4/} The statutory sections are applicable from 1997 through 2009.

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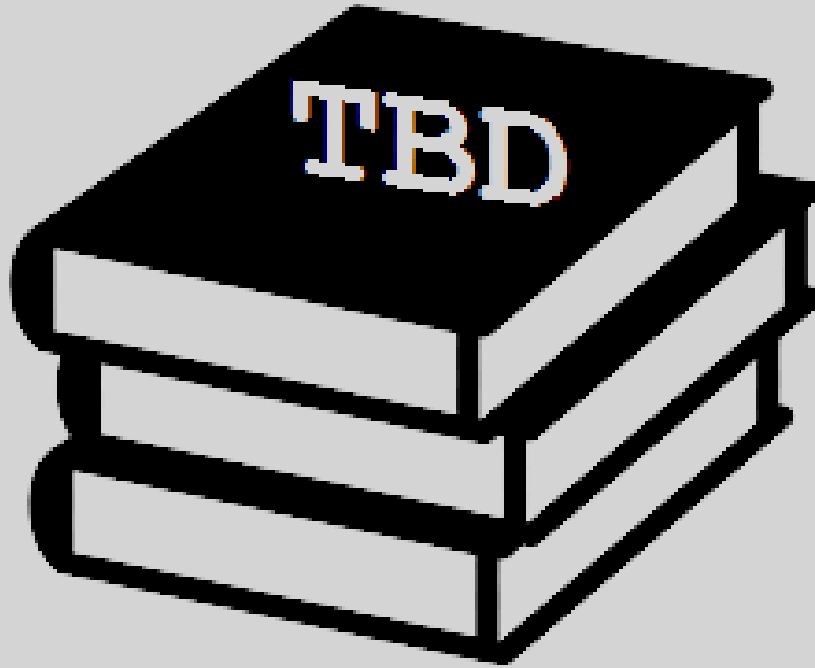
NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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.

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