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HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
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BOSTON RENT EQUITY BOARD

VS.

ROSALYN E. GUARINI TRUST, ET AL

*w**********

THE BOSTON FAIR HOUSING COMMISSION, ET AL

VS.

COPLEY ~~NAGEMENT & DEVELOPMENT CORP., ET AL

w********

FINDING AND ORDER

On or about April 11, 1985, the defendant Copley Management and Development Corporation; doing business: as the Copley Group (hereinafter the "Copley Group") notified tenants whose leases were due tc be renewed that they would be required to meet *income* guidelines in order to continue tenancy. Those *income* guidelines ($20,362 :or a single tenant or $23,287 for two tenants) match exactly tte *income* guidelines of the City of Boston Rent Equity Ordina~ce :or determining the amount of rent increases allowed in decor.~rC::Ed property. Under that *Ordinance* (C.B.C. Ordinances, Title :C, :hapter 34 (hereinafter "the Rent Equity Ordinance) ~ll elder:y, ~~~dicapped, or lo~ to moderate income tenants of decon~rC!:Ed housing may only receive a rent increase equal to

the percentage increase in the consumer price index for the twelve months immediately preceding the date of the notice of increase. "For the purpose of preventing rent gouging, all other tenants of decontrolled housing" may file a rent grievance if the landlord has increased the rent by a percentage greater than 12.5% in anyone year.

A low or moderate income tenant, as defined by the ordinance is one whose income is not more than 90% of the median income for the area as set forth in or determined based upon regulations promulgated from time to time by the U.S. Department of Housing and Urban Development, pursuant to Section 8 of the Housing Act of 1937, as amended by the Housing and Community Development Act of 1974. see Rent Equity Ordinance section 1(q). For the Fenway neighborhood of Boston where the property in question is located, the median family income for a family of 4 is $12,606 per year. The income figure stated by the defendants in their notice of April 11, 1985, would require all of their tenants to be above the lo~ to moderate income standard of $20,362 for a single person, S23,287 for a two person family. At least sixty-seven percent (67%) of the residents of the Fen~ay neighborhood would be excluded from rentals under the defendants' policy.

On April 25 and April 26, 1985, plaintiffs Garcia and Drachrr.an,both of whom were employed as testers by the Boston Fair Housing Commission, called real estate agents to whom they were referred to by the defendant Copley Group. Ms. Garcia represented herself as a single working mother with an income of Sll,OOO per year who was receiving Section 8 housing subsidy.

She was told by one broker that she would be required to show an income of $20,000 per year and by another broker, that the Copley Group did not accept Section 8. Neither broker offered Ms. Garcia the opportunity to obtain a co-signer on her lease. Ms. Garcia has standing to assert the claims of Section 8 tenants as a tester under Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

Ms. Drachman also called the real estate firms to whom she was referred by the Copely Group. She was informed that she and' her husband needed to show a combined income over $25,000 to rent a unit. She was discouraged from renting a two (2) bedroom apartment when she represented herself as married with two (2) children, by on~ croker and told by another broker than no two (2) bedroom units ~ere available. Ms. Drachman has standing to assert the claims of families with children: as a tester under Havens, Ibid.

Michael Rockwood has been a tenant of the defendants for three (3) years. He has always paid his rent on time. Mr. Rockwood is self-employed and suffers from dyslexia. Mr. Rockwood's handicap makes it impossible for him to be employed in a job position requiring reading and/or ~riting. Mr. Rockwood earns $13,000 per year and.therefore ~s below the ~inimum required to remain in his home under the defenda~~s new income" guidelines, despite his unchanged ability to pay ~is rent. Mr. Rockwood has complained to the Boston *Fair* Housinq Commission and the M.C.A.D., as have Ms. Garcia and Ms. Drachman. (For purposes of this case the Court makes no determination of relevancy as to

Michael Rockwood's dyslexia).

The Boston Fair Housing Commission was established by Ordinance in 1982 (C.B.C., Ordinances Title 10, Chapter 5 and empowered to receive and investigate complaints of discrimination in housing within the City of Boston. The Commission, acting through a Commissioner or the Executive Director may initiate its own complaints. (C.B.C., Ordinance Title 10 Chapter 5, Section 152, BFHC Regulations, Section 2.0l(a)). As part of its investigative process the Commission may run tests, either by telephone or in person, to determine the practices and policies of a landlord or realtor. Such a test was conducted on April 25 and 26, 1985, by Ms. Garcia and Ms. Drachman, who are e~ployees of the Corr~ission.

The plaintiffs have requested a Court order to prevent the defendants from implementing this policy until the Boston Fair Housing Commission and the Massachusetts Commission Against Discrimination can resolve the complaints now pending before them. The implementation of this policy by the defendants, it is argued will, result in the constructive eviction of tenants now occupying units owned or managed by the defendants and the continued denial of housing to recipients of Section 8 and otherwise qualified tenants in violation of the Boston Fair Housing Commissionand M.G.L.ch. l51B, Sec. 4(6), (10).

In the Boyd \. Lefrak Oraanization, 509 F2d. 1110 (2d. Cir.), cert. denied, ~23 r.s. 896 (1975), the Court considered the policy of a landlord which required that tenants show a weekly income equal to 90% of the monthly rent in order to rent a

unit. Plaintiffs in that case argued that such a policy had a disparate impact upon Black and Hispanic residents of New York City because it denied. Section 8 recipients the option of renting apartments from the defendant. Arguing that since a majority of welfare and Section 8 recipients were members of protected classes under Title VIII, 42 U.S.C. Section 36.01 et seq., such a policy was violative of Title VIII. The Court found, however, that plaintiffs were not protected on the basis of their source or amount of income by Title VIII, and held that the landlord's policy was justified because it was related on need to assure ability to pay rent. The case at bar presents a different situation, both in terms of fact and law. Unlike Title VIII, the Boston Fair Housing Ordinance and M.G.L.ch. 151B, Section 4(6), (10) do prc~ide protection from discrimination based upon source of income and receipt of pu~lic benefits.

The Boston Fair Housing Ordinance, C.B:C., Ordinance 10, Section 152(1) prohibits "the denial of equal access to . . . or discrimination against either an individual or a group . . . based on race, color, religious creed, marital status, handicap, military status, children, national origin, sex, age, ancestry, sexual preference or source of income."

BFHC Regulations, Section 1.Q2(p) states: "Source of Income" shall include income from all lawful sources, ir.cluding, without limitation, public benefits, public subsidies, insurance or investments of any sort, alimony or child support, businesses, and employment or professional services of any sort."

In fair housing law it is common for different statutory

schemes to protect different classes of people. Massachusetts anti-discrimination law, for instance, is clearly broader than federal fair housing law. Title VII of the Civil Rights Act of 1968, 42 U.S.C. 3601, et. (seq., prohibits only discrimination based on race, color, religion, sex or national origin, while state law has gradually been broadened to protect the blind and hearing impaired, veterans and members of the armed forces, and "recipient(s) of federal, local, or state public assistance," M.G.L. l5lB, Sec. 4(6), (10). The language of the Boston Ordinance and regulations is clearly purposely broader so ~~a~ it protects many more people than state and federal law, :or instance, all handicapped people as well as recipients of ~~~lic benefits.

Unlike the Boyd case, the defendants in this action have adopted a policy that is not related to the ,amount of the actual rent, but related instead to the ability of the defendant ~c command the maximum rent increase allowed under the City of Boston's Rent Equity Ordinance. In Boyd, the Court held that the landlord was justified in maintaining a requirement that t~e tenant be able to afford the rent by showing that the mont~ly rent would not exceed one quarter of the tenants monthly i~=ome.

When a plaintiff in a ~iscrimination claim presents a prima facie case it is incumbent upon the defendant to show a legitimate business justification, a non-discriminatory justification, for the policy or practice. Griggs v. Duke Fower Co., 401 U.S. 424, 432 (1971); Robinson *v*, 12 Lofts Realty, 610

F2d 1032 (2d Cir. 1979). The nature of the burden on justification in a discriminatory effect case under Title VIII is not yet well defined, but the Third Circuit has stated at the least "a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action co~ld be adopted that would enable that interest to be served wi~h less discriminatory impact." Resident Advisory Board v. Rizzo, 564 F2d 126, 149 (3d Cir. 1977), cert. denied, 435 U.S. SCS (1978), .

In Lynda Levy, et al v. Charles River Park, (S.C. 05598 Boston Divisio~, Housing Court Department) a small claims appeal, the plaintiffs were seeking the return of money deducted from their security deposit. In .arriving at a decision, this Court had to consider whether the landlord fairly sought to mitigate daffiages. Even though the landlord was able to rerent the apartment within two (2) weeks after the plaintiffs moved out, ~r. and Mrs. Levy contended, and Charles River Park did not dispute, that the plaintiffs had a sub-lessee available i~~ediately so that no damages would be suffered by the de:endant. In its July 2, 1984 finding and order, this Court s~ated at pgs. 3 and 4 "The only evidence that the landlord c::ers to demonstrate ~hat the rejection of the sub-lessee was n0~ arbitrary and capricious was for 'that' apartment Charles River Park had a standard minimum income that the tenant would have to earn of $30,000. o~ its face, this would appear

reasonable. But there is no evidence before the Court as to what the plaintiff's income was at the time of the letting, nor the income of the succeeding tenant. But in looking at the proposed sub-tenant offered by the plaintiff to the defendant, it would appear that person certainly could meet the rental payment; yet his application was rejected out of hand. The rejection would thus be arbi trary and capricious." If in that instance, the landlord's rejection was deemed arbitrary and capricious, simply because the proposed sub-tenant did not make the $30,000 minimal level, even though he had sufficient income to mair.~ain the rental payments, then certainly in this case, where the landlord does not even ascertain whe~her the individual has ~~e ability to pay the rent, and in addition, rejects Section 8 aFplicants outright, the policy is per se illegal.

A landlord has a right to reject a person on SEction 8, if even with the Section 8 cer~ificate, it would be u~~easonable to conclude that the tenant has the financial resources to pay the rent. But to reject a Sec~ion 8 application, out of hand may be understandable, from a bu::ness perspective, but is precisely the raison d'etre for the Massachusetts Legislature's declaration that such a rejection is illegal.

Defendants , policy in this instance can not meet the "justification" standard because it is an a~tempt to circumvent the public poli~y as articulated by the City of Boston to protect elderly, handicapped and low to moderate income tenants. While the City established two levels of allowable rent increases within that Ordinance, the intent of the City.was to protect tenants and not,

as the defendants have attempted here, to allow landlord to evict all low to moderate income tenants. The defendants' income requirements have been applied across the board, regardless of the size of the unit or the actual rental amount. It is not related to the legitimate purpose of insuring that a tenant can pay the rent, but only to the aim of the landlord to raise rents annually to the maximum allowable in the City.

Many landlords are dimly aware that you cannot discriminate against a person on welfare. A landlord is entitled to ask for one month's rent, a security deposit in the amount of one month's rent and a last month's rent; were a landlord to demand these monies just from individuals on welfare, this would be in violation of the state discrimination laws. But the protection of the state discrimination laws does not confine itself to welfare recipients. G.L.ch. 151B, Sec. 10 declares it to be an unlawful practice. "For any person furnishing credit, services or renting accommodations to discriminate against any individual who is a recipient of federal, state or local public assistance, including medical assistance, or who is a tenant receiving federal, state or local housing subsidies, including rental assistance or rent supplements, solely because the individual is such a recipient." Thus, when Ms; Garcia was informed that the Copley Group did not accept Section 8 certificates, the defendaryt crossed the line from permitted business practice into illegality.

Since Section 8 tenants have payment of their rent guaranteed either by the Boston Housing Authority or the

Commonwealth of Massachusetts, there is no legitimate claim the landlord can make as to why the policy of requiring the individual tenant to maintain an income of over $20,000 is necessary in order to insure the receipt of the monthly rent. To the contrary, the intention of the landlord is to prevent Section 8 and other tenants receiving public assistance from occupying any of the over 1,000 units either owned or controlled by the defendants. Further, as applied to all tenants, this policy discriminates against elderly living on a fixed income, handicapped and others whose level of income is not related to their ability to pay the rent.

The Court thus does not have to determine whether the defendants are attempting to insure ~~~none of their tenants are eligible to grieve rent increasss before the Boston Rent Equity Board. The defendants have been shown to have engaged in an activity which is a per se violation of the Commonwealth of Massachusetts discrimination laws. This per se violation corrupts the entire practice of the landlord. It is clear that the landlord has the right to reject Section 8 applicants, applicants on welfare, applicants who earn below their income guidelines - but only after honestly and fairly considering the individual's total resources and his/her credit history. This Court will not second guess a landlord who fairly rejects an applicant. Thus, this Court has upheld a landlord's rejection of tenants, in a three (3) family owner occupied house, whose lifestyle, not being protected by law, was completely at odds with the landlord's sense of morality. Where a rejection is

based upon subjective reasoning, this Court will not interfere with the rental market as long as no law is being violated. In this case the policy established is founded upon an objective standard which violates the law to which the landlord has presented no valid reason to justify *his* practice.

The defendants maintain a policy which has a potentially disparate impact on the elderly and handicapped, families with children and tenants receiving public benefits (many of whom are racial or ethnic minorities) and such a policy effectively denies housing based upon receipt of Section 8 housing assistance and f~rther, the defendants intentionally discriminate agai~st recipients of Section 8, in violation of the Boston Fair Housing Or=inance and M.G.L.ch. l5lB. ~hile the defendants have a policy of allowing tenants to obtain a co-signer, such a policy is not evenly applied in that Section 8 recipients are not offered that option. This income policy is clearly an attempt to evade the Ren~ Equity Ordinance by insuring that all their tenants are above moderate income. This is clearly against the public policy of this City ana thus cannot constitute a legitimate business justification in answer to a charge of discrimination.

Pursuant to M.G.L.ch. 151B, Sec. 9 this Court does have the power and obligation to issue temporary injunctive relief to prevent irreparable injury during the pendency of or prior to the filing of a complaint with the Massachusetts Commission against Discrimination.

When reviewing an application for a preliminary injunction, the Court looks to four (4) factors: (1) irreparable harm to the

applicant; (2) possible imparable harm to the defendant; (3) likelihood of success on the merits and (4) the public interest. Having found that the moving party *is* likely to suffer irreparable harm if the preliminary injunction is not issued, the Court must examine the harm that issuance may cause the defendant. Where the applicant has shown a likelihood of success on the merits of the case, and where the potential harm to the defendant *is* outweighed by the harm to the applicant, a preliminary injunction should issue, unless the public interest would be severely and adversely affected.

A preliminary injunction, it is argued, should issue in this case to prevent the defendants from cc~structively evicting current tenants because of their inab~:ity to meet the income guidelines or to obtain a co-signer. It is further argued, that loss of one's home, disruption of one's family, loss of time from work, apartment hunting, and fear of e\~iction are not harms which can be readily compensated for monetarily and that residents of the City who are currently seeking apartments and are denied or discouraged because of the income policy of the defendants have no adequate remedy at law.

In balancing the injury to current tenants, prospective tenants and residents of the City'of Boston, with any potential harm that may come to the defendant, it must be noted that the defendant will not be prevented from collecting the current rents from tenants as they come due, there *is* no harm to the defendants which outweighs the potential harm to the tenants and .the residents of the City of Boston. In addition, since the

defendants are currently violating the Boston Fair Housing Ordinance by failing to rent to recipients of Section 8, they suffer no harm in being restrained from further violation of the law.

The other standard most commonly considered *in* deciding whether to grant a preliminary injunction is the likelihood of success on the merits.

The Massachusetts Commission Against Discrimination is the administrative agency empowered by the General Court to investigate and adjudicate complaints of unlawful discrimination within the Commonwealth. M.G.L.ch. 151B, Section 3. The Supreme Judicial Court has recognized the importance of deferring to the Commission's expertise. Rock v. MCAD, 384 Mass. 198, 204, 424 N.E. 2d 244 (1981); East Chop Tennis Club v. ~, 364 Mass. 444, 305 N.E. 2d 507 (1973). The Boston Fair Housing Commission, receiving its mandate from the City of Boston, serves the same function with similar expertise. The focus of an action before these Commissions, which may be simultaneous, are much broader than an individual action. Both are required to investigate, and if a finding of probable cause *is* made, to seek voluntary *compliance.* If conciliation is unsuccessful and the complaint proceeds to an adjudicatory heari~g, the MCAD is authorized to issue broad remedies regarding future compliance with discrimination laws of the City and the Commonwealth. These remedies protect our society at large and are not limited to redress of a particular Complainants's grievance. To this end the Commission has a significant interest in adjudicating the

discrimination claim in this case. The Court finds that the Boston Fair Housing Commission has a significant interest in this instance; and the Boston Fair Housing Commission can initiate a complaint on behalf of testers.

In Havens Realty Corp. v. Coleman, Ibid. three (3) individuals and an organization, Housing Opportunities Made Equal (HOME), sued the realty company for declaratory, injunctive, and monetary relief from steering white applicants to housing for whites and black applicants to integrated housing. The district court denied standing to the black tester, a white tester and to HOME. The Supreme Court, however, ruled that the black tester had suffered a specific injury because she alleged injury to her statutorily created right to truthful housing information. Because the white tester was not denied housing, since it was the black tester who was told no housing was aV9ilable, the Court held that he lacked standing. Apart from their status as "testers" the testers argued that the steering practices deprived them of the benefits of liVing in an integrated community that is, of the right to the important social, professional, business and economic, political and aesthetic benefits of (in that case) interracial associations that arise from living in integrated communities, free from discriminatory housing practices. The Court refused dismissal on the pleadings, but remanded to afford the testers the opportunity to make their allegation more definite.

The use of evidence gathered by testers has been allowed in numerous jurisdictions including Massachusetts, Katz v.

Mass. Commission Against Discrimination, 365 Mass. 357 (1974). See also Richardson v. Howard, 712 F. 2d 319 (7th Cir. 1983); Metro Fair Housing Services v. Morrowood Garden Apartments, Ltd., 576 F. Supp. 1090 (N.D.Ga., 1983) (tester has standing to sue under Title VIII, not section 1982); Hobson v. George Humphreys, Inc., 563 F. Supp. 344 (W.O. Tenn. 1982). As the Tenth Circuit observed in a 1973 decision, "It would be difficult indeed to prove discrimination in housing without this means of gathering evidence." Hamilton v. Miller, 477 F. 2d 908, 910 n.l (10th Cir. 1973). Although there are no cases on point in the Commonwealth of Massachusetts affording standing to testers in their own right, the Court perceives no legitimate reason not to accord standing to those testers, who are officially sanctioned by a governmental body.

Finally, there is no requirement that a "tester" be a bona fide homeseeker in order to be accorded standing. Havens, Ibid. "That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home does not negate the simple fact of injury without the meaning of Section 804 (d) (Title VIII)." Havens, Ibid at 374.

Because of a settlement in Havens, the Court did not decide whether HOME had standing to assert its own members' interests, .. but held that HOME had standing in its own right, because it was frustrated by the steering practices in its efforts to assist equal access to housing through counselling and other referral services. "If, as broadly alleged, petitioners' steering

practices have perceptibly impaired HOME's ability to provide counselling and referral services for low and moderate income homeseekers, there can be no question that the organization has suffered injury-in-fact." Ibid at 379.

It is the policy of the City of Boston to eliminate prejudice, intolerance, bigotry, and discrimination *in* housing. The Boston Fair Housing Commission has been mandated to carry out that policy. City of Boston Code, Ordinances, Title 10, Sections 150, et seq. (1982). Among the many powers and duties indicated in Section 152 of the Ordinance, the *Commission is* mandated to perform such other duties as may be prescribed under law. Section 152 (7). This mandate compels the Commission to protect the resioents of the City of Boston using all available avenues of redress to prevent discrimination in housing. Where, as in the present case, the public interest warraryts immediate action, the Cornrr.issiomay seek the preservation of the status quo in the appropriate forum. Commonwealth v. Mass. CRINE, 392, Mass. 79, 89 (1984).

In United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir. 1972), the Court held that the United States as a plaintiff had standing whenever it has an interest that would suffice for standing of any other party. In that case the government sought to enjoin the publication of a book by a former Central Intelligence Agency employee. The Court held, "standing arises from the government's interest in protecting the national security." ibid at 1313. The Court quoted from In re Debs, 158 U.S. 564 (1985), that "every government ••. has a right to

apply to its own courts for any proper assistance .•• and it is no sufficient answer to its appeal . . . that it has no pecuniary interest in the matter." Ibid, at 584. In as much as the City of Boston can apply to the Court for assistance, so too, the Boston Fair Housing Commission as an agency of the City of Boston, specifically designated to protect equal opportunity in housing for all of Boston's residents. A landlord in the private sector *is* entitled to choose whom he will accept as tenants as long as he does not discriminate on one of the statutorily condemned basis; he may seek assurances that prospective tenants will be able to meet their rental responsibilities. While it may be argued, that the mere showing of a racially discriminatory effect does not, however necessarily constitute a violation of G.L.ch. l5lB, the invidious nature of that practice puts into question any justification which may be forthcoming by the landlord. Furthermore, the Court will note that the defendant has an alternative course of action, i.e. to reject applicants on the basis of individual rent. Where a particular tenant has been an occupant in good standing with the landlord, and has established a credit history, it is particularly repugnant and disturbing, for the landlord to now require a co-signor - the Court perceives no justification for this practice, which is to deny a certain segment of people adequate housing.

Upon the complaint herein and upon the affidavits filed the Court:

1. Orders the defendants preliminarily enjoined from implementing the income guideline requirement

in renewing all leases of current tenants of the defendants, or occupying units managed by the defendant Copley Management and Development Corporation:

2. Orders the defendants enjoined from imposing income guidelines, not related to actual amount of rent, on all current and future applicants for housing in any of the units owned or managed by the defendants:

3. Enjoins the defendants from evicting any tenants for failing to obtain a co-signor or for failing to meet income guidelines:

4. Orders the defendants to notify each and every tenant who previously received a copy of the noticet of the income guidelines and every real estate broker who lists any property owned by the defendan~s forthwith of the order of this Court enjoining the defendants from requiring the tenant~ meet the income guidelines:

5. Defers this matter to the Boston Fair Housing Commission and the Massachusetts Commission Against Discrisination pending exhaustion of administrative remedies and procedures.

Since the application of the Boston Rent Equity Board is interwined with tbe Boston Fair Housing Commission the Court will defer taking any action on its request until the case proceeds through the administrative process created both by statute and City of Boston Ordinance.

T:. GEORGE DAHER
CHIEF ~USTICE

Date: May 14,1985

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