STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. PJ05HB-64931

Nicholas Borg,	)	
	)	Administrative Action
Complainant,	)	
	)	**FINDING OF PROBABLE CAUSE**
v.	)	
	)	
The Shipyard,	)	
	)	
Respondent.	)	

On October 21, 2014, Hudson County resident Nicholas Borg (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that The Shipyard (Respondent) refused to provide him with a reasonable accommodation for his disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. DCR's investigation found as follows.

Respondent describes itself as a "residential complex with a street address of 2 Constitution Court," Hoboken, NJ. The complex has two residential buildings and an adjoining "private parking garage with 296 parking spots," which it rents to residents of both buildings. See Respondent's Answer to Verified Complaint, pp. 1&4, Dec. 12, 2014. One of the residential buildings contains condominiums. The other contains apartments.

In or around July 2006, Complainant purchased a condominium at The Shipyard and began leasing a parking space in complex's garage. He was initially assigned a first floor space (i.e., spot 39). In September 2008, Complainant asked for and was granted a new parking space on the first floor (i.e., spot 38), which was the closet spot to the elevator. Because spot 38 is at the end of the aisle, there is no parking spot on its passenger side (assuming that cars are parked head-first into the spots). In other words, the passenger door can be fully opened without risk of hitting another parked car.

On or about January 24, 2014, Respondent's Property Manager, Sasha de Gennaro, told Complainant that a resident with a disability requested spot 38 to accommodate her medical condition. de Gennaro stated that the resident required a spot that would enable her to fully open the passenger door to safely exit her vehicle. de Gennaro wrote:

> I'm writing today to let you know we have handicapped parking patron that would like the spot you currently park in, spot 38. She lives in your building and is having trouble walking distances. She would like spot 38 so that when she exits the car on the passenger side she has a short and direct walk to the South Constitution entrance there on the first floor. I'm able to offer you spot 73—just across from where you park now.
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> [See Letter from de Gennaro to Complainant, undated]

Complainant declined the offer to switch spots. He told Respondent that he needed the spot because he had a medical condition that restricted his ambulation. He wrote:

> I'd love to be accommodating to this person but, unfortunately, I can't because I suffer from diabetic peripheral neuropathy in my feet. Walking can be extremely painful for me so proximity to elevator is vital. My neuropathy was the reason for us taking the spot in the first place.
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> [See Email from Complainant to de Gennaro, Jan. 24, 2014, 11:07 AM]

Respondent asked Complainant to provide a "statement from a medical doctor certifying that you have this disability." See Message from de Gennaro to Complainant, undated.

On or about February 2, 2014, Respondent received a facsimile from Complainant's podiatrist stating as follows:

> [Complainant] is currently being treated for multiple lower extremity ailments. He suffers from diabetic neuropathy and experiences pain and numbness as a result. [He] has ambulatory restrictions that prevent excessive standing and walking. Please contact my office with regards to any questions or concerns.
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> [See Letter from Samantha Boyd, DPM, The Foot and Ankle Specialist of Hoboken, Jan. 31, 2014]

On February 27, 2014, Respondent told Complainant that it was reassigning him to parking spot 66, and stated that according to the lease agreement, it had the right to change any assigned space as long as it provided five days notice. Respondent wrote in part:

> The [other resident] has provided our office with proof of her disability and the supporting disability identification and placard from the NJ Division of Motor Vehicles. Please understand this move in no way suggests we are insensitive to your request to keep spot #38. However, we have agreed to provide the other patron with spot #38 since it has been determined she is truly disabled. Her disability requires that she be able to open the passenger door fully to maneuver her body out of the vehicle and it has severely and permanently limited her ability to walk. We are able to offer space #66. It, too, is on the first floor of the garage . .
>
> .
>
> [See Letter from de Gennaro to Complainant, Feb. 27, 2015]

Complainant replied in part as follows:

> When you originally informed me that another tenant wanted my spot, I told you of my own disability. You then asked me for a confirming letter from my physician, which I promptly provided. My doctor's note clearly described my condition and my need for elevator proximity. Additionally, I have applied for and await a state authorized disability card now that my peripheral neuropathy has significantly advanced. In spite of this, you've decided to move me to another spot. So, I am quite perplexed about your rationale for moving me to a spot farther from the elevator, given that I provided the documentation you requested. There must be

other spots in the garage being used by people without disabilities that would work as well as spot #38 for this resident. Given my own physical limitations, I am sympathetic to this fellow resident's needs. And, while I don't want to be unreasonable, I, too, am in need of a parking space close to the elevator that also affords me sufficient room to easily enter and exit my car. Why will spot #66 work for me and not for the other person? . . . I'm in Florida and am not able to view it in person.

[See Email from Complainant to de Gennaro, Mar. 4, 2014.]

On March 7, 2014, Respondent's counsel sent a letter to Complainant stating that Complainant's doctor did not support his requested accommodation. The letter said in part:

> [Respondent] has been contacted by another patron that is legally disabled and has provided [Respondent] with all of the supporting documentation regarding her disability. The parking spot that this patron has requested, due to the need for additional space on the passenger side of the vehicle, is the parking space currently assigned to you, spot number 38. When this issue was initially presented to you by my client, you indicated that you also suffered from a disability and therefore, you did not consent to transfer to another parking space a short distance away. You forwarded a letter dated January 31, 2014, from your doctor, Dr. Samantha Boyd, DPM, in support of your claim that you also suffered from a disability. This letter indicated that you are being treated for a limiting condition, but does not state that you are disabled . . . [U]pon receipt of the letter from your doctor, we investigated this issue further and spoke to your doctor's office. Upon speaking with her office, the contents of your doctor's letter was confirmed, that you are being treated for a limiting condition but that your condition is not disabling. Your doctor's office made it very clear that your condition is not disabling. We are very sympathetic to your condition and your wishes, but we are also sympathetic to the patron that has provided us proof of their disability and our intent is to accommodate both of you in the best manner we can . . . [Spot 66] is only a short distance from spot number 38 and your doctor's office has confirmed you are able to walk this additional short distance.

[See Letter from Matthew M. McDowell, Esq., to Complainant, Mar. 7, 2014.]

Complainant's attorney replied in part:

> My client informed me that he contacted Dr. Boyd directly who advised him that not only did she not speak with any attorney or member of a legal staff regarding his medical condition but that even if she had been contacted, she would never have violated his privacy rights by discussing his condition without his prior authorization. Dr. Boyd has also advised my client that there is no note in his case records of any such conversation with anyone from your office . . . Mr. Borg suffers from diabetic neuropathy . . . . [which] is a chronic and degenerative condition which causes him to suffer ambulatory restrictions. His condition is exacerbated by standing and walking.

[See Letter from Andrew Sangeorge, Esq., to M. McDowell, Esq., Jun. 9, 2014.]

Complainant twice asked Respondent for the identity of the person at the doctor's office with whom he spoke. On June 23, 2014, Sangeorge wrote to McDowell stating "the courtesy of a response would be appreciated." Complainant told DCR that neither he nor his attorney ever received any response to his questions, including his challenge to McDowell's assertion that he spoke with someone at Dr. Boyd's office.

During the course of the investigation, Respondent noted as follows:

> Upon receipt of the letter from Dr. Boyd, counsel for Respondent contacted Dr. Boyd per her invitation in her January 31, 2014 letter and left several messages to discuss Complainant's situation. Finally, on or about March 6, 2014, respondent's counsel was able to reach a nurse in Dr. Boyd's officce who was familiar with Respondent's [sic] condition. It was confirmed during this conversation that Complainant had been diagnosed with diabetic neuropathy; however, he was not "physically handicapped" or "physically disabled" and was still ambulatory. Additionally, it was confirmed that Complainant's condition did not prevent him from walking the additional 51.5 feet from parking space number 66 to the entrance of the Shipyard, nor would it exacerbate his condition. Furthermore, Dr. Boyd's office stated that if another resident with proof of disability needed parking space 38, the space should be reassigned to the handicapped resident.
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> [See Respondent's Answer to Verified Complaint, Dec. 12, 2014, p. 6.]

The podiatrist's office told DCR that it has no recollection or record of any such discussion. Dr. Thomas Azzolini told DCR that Dr. Boyd is no longer employed in the office. Azzolini said that his office has never employed a nurse and that it would be "highly unusual" for any of his staff to speak with a third-party and not make any notation in the file. Moreover, Azzolini stated that other than the practice's other physician, none of his staff would be qualified to offer a medical opinion about the Complainant's condition/degree of disability.

Complainant obtained a note from a neurologist stating that he needs a spot that allows him "to open the car door wide enough for him to easily put both feet firmly on the ground before standing." The neurologist wrote:

> Mr. Nicholas Borg is currently under my care. He has a severe case of chronic inflammatory demyelinating polyneuropathy, a progressive debilitating nerve disorder in his feet and lower legs. This condition causes Mr. Borg considerable pain, especially when walking or standing. Additionally, Mr. Borg has difficulty maintaining his balance, particularly when moving from sitting position to standing one. Upon exiting his vehicle, Mr. Borg must be able to open the car door wide enough for him to easily put both feet firmly on the ground before standing. Exiting his vehicle otherwise can cause him considerable pain and puts him at risk of falling. Please feel free to contact the office, 646-962-xxxx, should you require anything further.
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> [See Letter from Naomi Feuer, M.D., to "To Whom It May Concern," Oct. 15, 2015.]

Respondent told DCR that it left two telephone messages with Dr. Feuer, but those messages were never returned. Complainant told DCR that the garage has three floors and that each has the same parking configuration. Therefore, he argues, there are other aisle spots that are equally close to the elevator and where a car door can be fully opened.

Complainant told DCR that his new spot has insufficient space between parked vehicles for him to exit his vehicle safely. He stated that he has stumbled several times while exiting his vehicle because he was unable to put both feet on the ground before exiting.

Respondent notes that the alternative spot offered to Complainant, i.e., spot 66, was 104 feet from the elevator and spot 38 was 52.5 feet from the elevator, a difference of 51.5 feet, and that both are on the same level. See Answer to Verified Complainant, p. 4. Respondent argued that it "fully investigated this issue and acted in a manner [it] believed was the most fair and reasonable and in the best interest for all individuals that were involved." Id. at 4-5.

Property Manager de Gennaro told DCR that the conflict arose when another resident contacted her regarding a planned surgery that would adversely impact her mobility. She stated that the resident requested a parking space at the end of the row so that when her husband parked the car, her passenger door could be fully extended. She also requested that the assignment be on the first floor so that it would put her near the main entrance to the building. de Gennaro stated that after Respondent received Complainant's first note stating that he did not want to relinquish the spot because of a disability, Respondent's attorney contacted the doctor's office and reported that the nurse only indicated that Complainant had "limitations." de Gennaro stated, "If the other person is disabled while he has some minor limitations, it would not create a hardship to walk another 50-75 feet." Asked about the October 2014 letter from Complainant's neurologist stating he also needed additional space on the side of the car for a safe exit, de Gennaro replied, "What a coincidence . . . [He] needs to put both feet on the ground. Wonder where he got that from."

When asked about Complainant's claim that the garage has three identical levels so there are potentially additional spots that would be suitable for both tenants, de Gennaro replied that she was unaware if the configuration on each level is identical. She stated that there has been no further discussion about whether there could be an alternative accommodation for Complainant. She stated, "We have not explored anything as he only wants spot 38 and spot 38 has already been assigned." She added that "it's not up to us to determine who has the greater need."

Analysis

The LAD is "remedial legislation" designed to root out the "cancer of discrimination," Hernandez v. Region Nine Housing Corp., 146 N.J. 645, 651-52 (1996). In enacting the law, the New Jersey Legislature declared that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and functions of a free democratic State." N.J.S.A. 10:5-3; see also L.W. v. Toms River, 189 N.J. 381, 399 (2007) (noting "[f]reedom from discrimination is one of the fundamental principles of our society").

Because of the LAD's remedial purpose, courts have adhered to the Legislative mandate that the statute be "liberally construed," N.J.S.A. 10:5-3, by consistently interpreting the LAD "with that high degree of liberality which comports with the preeminent social significance of its purposes and objects." Andersen v. Exxon Co., 89 N.J. 483 (1982); Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446 (2005).

In New Jersey, it is "unlawful for a housing provider to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling." Oras v. Housing Authority of Bayonne, 373 N.J. Super. 302, 312 (App. Div. 2004) (quoting N.J.A.C. 13:13-3.4(f)(2)) (quotations omitted); see also N.J.S.A. 10:5-4.1; N.J.S.A. 10:5-12(g); see also Estate of Nicolas v. Ocean Plaza Condo. Ass'n, Inc., 388 N.J. Super. 571, 588 (App. Div. 2006) ("The requested accommodation must enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability.").[1]

However, the duty to provide a reasonable accommodation for a resident with a disability "does not necessarily entail the obligation to do everything possible to accommodate such a person." Estate of Nicolas, supra, 388 N.J. Super. at 588. Cost to the housing provider and benefit to the disabled tenant must be considered in determining what is reasonable. Oras, supra, 373 N.J. Super. at 315 ("The accommodation must facilitate the disabled tenant's ability to function, and it must survive a cost-benefit balancing that takes both parties' needs into account."). An accommodation is not "reasonable," and therefore not be required, if it would "impose undue financial and administrative burdens on the landlord or if the requested accommodation would fundamentally alter the nature of the landlord's operation." See Sycamore Ridge Apartments v. L.M.G., 2012 N.J. Super. Unpub. LEXIS 1313, *23 (App. Div. June 14, 2012).

Guided by those principles, courts have held, for example, that it would violate the LAD for a "condominium association [to fail] to provide a reasonable parking space accommodation in the parking lot common element sufficient to afford [a resident with a disability] an equal opportunity to the use and enjoyment of her condominium unit" if there was no showing that the accommodation would impose an undue burden on the association. Estate of Nicholas, supra, 388 N.J. Super. at 591.[2]

At the conclusion of an investigation, the Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), certif. den., 111 S.Ct. 799. Thus, the "quantum of evidence

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[1] The verified complaint alleged that the conduct violated N.J.S.A. 10:5-12(f), which addresses public accommodation issues. Based on information that came to light during the course of the investigation, the verified complaint is hereby amended to allege that the conduct may also violate N.J.S.A. 10:5-12(g), which addresses housing discrimination.

[2] Similarly, a place of public accommodation must make "reasonable accommodations to the limitations of a patron or prospective patron who is a person with a disability, including making such reasonable modifications in policies, practices, or procedures, as may be required to afford goods, services, facilities, privileges, advantages, or accommodations to a person with a disability," unless it can demonstrate that making the accommodation would impose an "undue burden on its operation." N.J.A.C. 13:13-4.11(a); see also N.J.S.A. 10:5-4 ("All persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation" without discrimination on the basis of disability); N.J.S.A. 10:5-12(f).

required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

Here, there is no dispute that Complainant requested an accommodation and that Respondent denied his request. Respondent acknowledges receiving a doctor's note stating that Complainant "suffers from diabetic neuropathy and experiences pain and numbness as a result" and has "ambulatory restrictions that prevent excessive standing and walking." See Letter from Boyd, supra. Respondent does not contend that granting Complainant's request would have imposed an undue financial burden or fundamentally altered its operations. Respondent appears to suggest that the requested accommodation would impose an undue administrative burden because another resident with a disability requested the same parking spot as a disability accommodation. Respondent has not demonstrated that this constituted an undue burden, in part because it did not attempt to address the possibility that an alternative accommodation for either Complainant or the other resident, either temporary or ongoing, might ameliorate the effects of Complainant's medical condition. Instead, Respondent appears to have concluded that Complainant overstated the extent of his physical limitations. That conclusion appears to be based on Respondent's contention that a nurse from the office of Complainant's podiatrist stated that Complainant was not disabled, and that his condition would not prevent him from walking an additional 51.5 feet on each walk between his car and the elevator.

Complainant maintains that the podiatrist assured him that no such discussion occurred. During the course of the investigation, the podiatrist's office told DCR that it had no knowledge or record of any such discussion, and that it did not employ a nurse during the relevant time.

Respondent also dismisses Complainant's assertion that he needs additional room on the side of his car to accommodate his medical condition. Respondent acknowledges receiving a neurologist's note stating that Complainant has a "progressive debilitating nerve disorder in his feet and lower legs" that causes "considerable pain, especially when walking or standing," and which causes him to have "difficulty maintaining his balance, particularly when moving from sitting position to standing one." See Letter from Feuer, supra. The note states that Complainant needs to be able to "open the car door wide enough for him to easily put both feet firmly on the ground before standing," and that "[e]xiting his vehicle otherwise can cause him considerable pain and puts him at risk of falling." Ibid. Respondent justifies its disregard for the medical documentation by stating that it left two telephone messages with the neurologist that were never returned. Respondent does not state what it wanted to discuss with the neurologist. DCR finds that the language of Feuer's letter is sufficiently clear and unequivocal to support Complainant's accommodation request. And although Respondent appears to disagree with the doctor's expert medical opinion, it has produced nothing to suggest that the medical opinion was flawed. Nor did Respondent give Complainant any information about what clarification or additional information it was seeking from his medical providers, so that Complainant could elicit cooperation from his doctors to provide any additional information that might be needed.

A housing provider or place of public accommodation cannot unilaterally override the only available competent medical evidence and reject an accommodation request based on a layperson's unsupported conjecture that the person and his treating physicians are misstating his medical condition. When it does so, it falls short of its legal obligation to make a good faith effort to provide reasonable accommodations to patrons and/or residents with disabilities. Accordingly, the Director is satisfied that there is "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief" that probable cause exists

to support the allegations of housing and/or public accommodation discrimination based on disability. N.J.A.C. 13:4-10.2.

DATE: 1-20-16

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS