



STATE OF NEW JERSEY
 OFFICE OF THE ATTORNEY GENERAL
 DEPARTMENT OF LAW & PUBLIC SAFETY
 DIVISION ON CIVIL RIGHTS
 DCR DOCKET NO.: HC13BW-60740
 HUD NO.: 02-09-0653-8

LAURIE NEARY,)	
and)	
CHINH Q. LE, ESQ., DIRECTOR,)	
NEW JERSEY DIVISION ON CIVIL RIGHTS,)	
)	
Complainants,)	FINDING OF PROBABLE CAUSE
)	
v.)	
)	
DAVIS ENTERPRISES,)	
)	
Respondent.)	

Pursuant to a Verified Complaint filed on June 4, 2009, and Amendment to the Verified Complaint, the above-named respondent has been charged with unlawful discrimination within the meaning of the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, *et seq.*) and specifically within the meaning of N.J.S.A. 10:5-4, and 10:5-12(g) because of familial status.

Chinh Q. Le (Director) is the Director of the Division on Civil Rights and, in the public interest, has intervened as a Complainant in this matter pursuant to N.J.A.C. 13:4-2.2(e).

SUMMARY OF COMPLAINT

Complainant claimed Respondent subjected her to unlawful housing discrimination when it refused her rental of an available two-bedroom apartment because of her familial status (two children under age 18). To support her claim, Complainant alleged that on April 11, 2009, she and her husband, James Neary, stopped at Respondent’s apartment complex and inquired about a two-bedroom apartment. Complainant further alleged that Respondent’s agent advised her husband that their family was too large for a two-bedroom unit.

SUMMARY OF RESPONSE

Respondent denied discriminating against Complainant for any unlawful reason including familial status. Respondent further asserted no application was or ever has been submitted for an

apartment by Complainant; consequently, no personal information was ever supplied by Complainant upon which Respondent could base a denial.

BACKGROUND

Complainant is a member of the protected class in that she has two children under 18.

Respondent provides management services to Allison Apartments which is a 536-unit apartment complex located in Marlton, New Jersey. Marlton is an unincorporated area located within Evesham Township in Burlington County, New Jersey. Allison Apartments has studio, one-bedroom, and two-bedroom apartments.

Chinh Q. Le (Director) is the Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2 (e).

SUMMARY OF INVESTIGATION

This investigation established sufficient evidence to support a reasonable suspicion that Respondent engaged in unlawful housing discrimination in that it refused Complainant and her family an available two-bedroom apartment because of her familial status. During an interview with the Division's Investigator, Complainant's husband, James Neary, stated that on April 11, 2009, he and Complainant were in the car with their two sons, ages 18 months and 5 months. Mr. Neary indicated that they stopped at Allison Apartments, and he went into the rental office while Complainant waited in the car with their children. Mr. Neary said that when he went into the office, Respondent's agent Karen [Davidge] asked him who would be living in the apartment. Mr. Neary stated that after he told Ms. Davidge of his family composition, she told him they could not have a two-bedroom apartment because of their family size. During an interview with the Division's Investigator, Complainant said that when her husband returned to the car and told her what had happened, she went in the office and spoke to Ms. Davidge. Complainant stated that she was also advised that they could not have a two-bedroom apartment because of their family size. There was no dispute that both Complainant and her husband left the rental office without completing a rental application as they had already been advised that their family size was too large for a two-bedroom apartment.

During an interview with the Division's Investigator, Karen Davidge indicated that she had been employed by Respondent for six years as a rental manager assigned to the subject apartment complex. Davidge recalled the encounters with Complainant and her husband on April 11, 2009. Davidge said she told both Complainant and her husband that Respondent allowed a maximum number of three people in the two-bedroom apartments.

During the investigation Respondent asserted there are two types of two-bedroom apartments available at Allison Apartments: the large two-bedroom and junior two-bedroom. The large two-bedroom apartment is 900 sq. ft. with bedrooms of 154 sq. ft. and 132 sq. ft. The junior two-bedroom is 861 sq. ft. with bedrooms of 180 sq. ft and 143 sq. ft.

During the investigation, the Division's Investigator interviewed Burlington County's Chief Housing Inspector, Rick Rancani. Mr. Rancani stated that Evesham Township uses the state of New Jersey occupancy codes as promulgated by the Department of Community Affairs, Division of Codes and Standards. (N.J.A.C. 5:10-1.10, *et seq.*). Specifically, the Township of Evesham relies on N.J.A.C. 5:10-22.3 which states in pertinent part:

(a) In all dwelling units other rooming units, there shall be a minimum usable floor area for the initial occupant of 150 square feet and 100 square feet additional space for each additional occupant provided, however, that children under the age of two shall not be considered additional occupants.

(d) In every dwelling unit other than a rooming unit, every room occupied or intended to be occupied for sleeping purposes by one occupant shall have a minimum usable floor area of 70 square feet and every room occupied for sleeping purposes by more than one occupant shall have a usable floor area of at least 50 square feet for each such occupant, provided, however, that children under the age two shall not be considered to be additional occupants.

As stated above, Complainant's children were both under age two when the inquiry about the apartment was made and should not have been counted as additional occupants according to the occupancy code. However, even if both Complainant's children were counted as additional occupants, they could have shared a bedroom and been in compliance with the local ordinance.

During the investigation Respondent asserted, through a letter from its president, Miriam Nase, that it is within its rights to have higher occupancy standards for its properties, so long as they are non-discriminatory and uniformly applied. The letter stated in part:

I felt that Clause #28 of the Fair Housing Act gave us the right to restrict the number of individuals that can occupy a certain type of unit. Taking into consideration the age of the buildings, constructed in 1967, the age of the plumbing, and the fact that we pay for the water and sewer, we felt we were being reasonable with our restrictions.

Nase attached the back page of an unidentified pamphlet to the letter described above. It stated in pertinent part:

28. Can an apartment complex restrict the number of individuals that can occupy a certain type of unit?

As discussed above, if an apartment complex makes a distinction between individuals for a nondiscriminatory reason, the Act does not prohibit the distinction. If the apartment complex wishes to restrict a certain type of unit to a certain number of individuals (whether the individuals adults or children), there is no prohibition to such a policy. For example, if one-bedroom units were restricted to not more than two individuals, as long as the complex rented the unit to a parent and a child on the same basis as it would to two adults, this restriction would be allowed.

ANALYSIS

At the conclusion of the investigation, the Division is required to make a determination whether “probable cause” exists to credit a complainant’s allegation of discrimination. Probable cause has been described under the New Jersey Law Against Discrimination (LAD) as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev’d on other grounds, 120 N.J. 73 (1990), cert.den., 111 S.Ct. 799. A finding of probable cause is not an adjudication on the merits but, rather, an “initial culling-out process” whereby the Division makes a preliminary determination of whether further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978). See also Frank v. Ivy Club, supra, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

The LAD prohibits any person, including the owner or other person having the right of ownership or possession of any real property to refuse or discriminate against any person because of, among other things, familial status, in the terms, conditions or privileges of any sale, rental or lease, or in the furnishing of facilities or services connection therewith. N.J.S.A. 10:5-12(g). The prohibitions against familial status discrimination are intended to ensure that families with children are not denied the opportunity to obtain available housing.

To address public health concerns, governmental occupancy codes may limit the number of occupants “in reasonable relation” to habitable floor area per occupant and available sleeping and

bathroom facilities. See Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 253-54 (1971); see also State v. Baker, 81 N.J. 99, 110 (1979). Occupancy codes intended to cure antisocial behavior are, however, invalid. See Glassboro v. Vallorosi, 117 N.J. 421, 433 (1990). Governmental occupancy codes were taken into account by Congress when the Fair Housing Act was amended to include the prohibition against discrimination based on familial status. Congress exempted reasonable governmental restrictions regarding maximum number of occupants from the provisions of the Fair Housing Act. See 42 U.S.C.S. § 3607(b)(1).¹ Congress provided for this exception to allay concerns among some landlords that the familial status provisions would require a landlord to permit overcrowding in its units. Although private landlord occupancy policies are not prohibited, such policies are not provided the same deference as governmental codes. Pfaff v. U.S. Dept. Of Housing, 88 F. 3d 739, 746 (9th Cir. 1996). According to HUD policy, where a local occupancy code governs a dwelling, the code is presumptively considered a reasonable restriction.

The United States Supreme Court has described as “a prototypical maximum occupancy restriction” an occupancy limit that requires that a bedroom for two people be at least 70 square feet, with an increase by an additional 50 square feet for each person in excess of two. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 735-36 (1995). The New Jersey State Housing Code and occupancy standards governing multiple dwellings used by Evesham Township reflect a similar limitation. Under the State standard, a bedroom for one occupant must be at least 70 square feet. For each additional occupant, the bedroom space must be at least 50 square feet per occupant, except that a child under the age of two is not to be considered an additional occupant. See N.J.A.C. 5:28-1.11; N.J.A.C. 5:10-22.3. The two-bedroom apartment available at the time of Complainant’s application is, therefore, a larger dwelling for Complainant and her family than is required by the governing State occupancy restrictions, and this is true even if Complainant’s two children are counted as occupants.

Respondent argues that its more restrictive occupancy standard should be acceptable, citing to the age of plumbing in the building and water and sewer costs. However, it does not appear that Respondent’s articulated reason for its more restrictive occupancy requirements (to control use of water and sewer systems) would justify refusing to rent to Complainant, whose family included two children under the age of two. The State occupancy code recognizes that children under the age of two do not require the same amount of habitable area as adults or children under the age two. Since Respondent’s policy made Complainant ineligible for a unit that her family could easily occupy under the applicable governmental occupancy code, the policy appears to unreasonably limit or exclude housing opportunities for families with children.

¹Although the Division is not bound by federal precedent when interpreting the LAD, New Jersey courts have consistently “looked to federal laws as a key source of interpretive authority” in construing the LAD. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990).

Neary vs. Davis Enterprises
Docket No.: HC13BW-60740
Finding of Probable Cause
Page 6

FINDING OF PROBABLE CAUSE

It is, therefore, determined and found that Probable Cause exists to credit the allegations of the complaint.

Date

Chinh Q. Le, Esq., Director
New Jersey Division on Civil Rights