

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
JAMES WHITE,
Complainant

v.

DOCKET NO. 12-BPR-00908

COSMOPOLITAN REAL ESTATE, INC.
Respondent

Appearances: Craig Schechter, Esq. for Complainant
Sheila E. Grant, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On April 17, 2012, Complainant, James White filed a complaint of discrimination with this Commission against Respondent Cosmopolitan Real Estate, Inc., its principal Kelly Catallo, listing agent, Mauro Melgaco and the owner of the subject property RA Johnson Realty, Inc. Complainant is the recipient of a Section 8 housing voucher that subsidizes his rental payments. His complaint alleged that he was quoted discriminatory terms and conditions with respect to the application process for a rental unit listed on Craigslist. He asserts that in response to his inquiry about the listed unit, Respondent's agent informed him that his deposit would be forfeited if the rental unit did not pass inspection by the Section 8 program. He alleges this was discrimination based on his receipt of public assistance. RA Johnson Realty and the two individuals, Melgaco and Catallo, were dismissed from this action prior to the hearing. Respondent, Cosmopolitan

Real Estate, Inc., denies liability for any statements made by the listing agent, asserting that he was an independent contractor and denies that it has a policy of refusing to return deposits if an apartment does not pass inspection. Respondent also asserts that the statements Melgaco made to the Complainant regarding his deposit were misconstrued by Complainant.

The Investigating Commissioner found probable cause to credit the allegations of the Complaint and efforts at conciliation were unsuccessful. The matter was certified for a hearing and the hearing took place before the undersigned hearing officer on February 3, 2015.

Complainant and two individuals employed as testers by the Greater Boston Fair Housing Center testified in support of the complaint. Respondent's owner, Kelly Catallo, and another of Respondent's employees testified on Respondent's behalf. Listing agent Mauro Melgaco no longer works for Respondent and did not appear at the Hearing. The parties submitted post-hearing briefs. Having considered the record in this matter and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. In October of 2011, Complainant was the holder of a Section 8 housing voucher administered by the Boston Housing Authority. He was issued his voucher in 2009. Complainant is unemployed and his sole source of income is Social Security Disability. In November or December of 2010, Complainant rented an apartment with his voucher in South Boston. His best memory is that the rent for this apartment was \$1200 per month.
2. Respondent, Cosmopolitan Real Estate, Inc. is a real estate brokerage firm with its principal place of business at 101 Mystic Avenue, Medford, MA. Respondent provides brokerage services for apartment rentals. Kelly Catallo is the Broker, President and Treasurer of Cosmopolitan Real Estate, Inc. and has been a licensed real estate broker for 23 years. At the time of the events

giving rise to this complaint, Mauro Melgaco was an independent contractor working as a real estate agent at Cosmopolitan Real Estate, Inc. He has not worked for Respondent since March of 2012, and has never answered any charges nor offered any testimony regarding this complaint.

3. Complainant testified that in October of 2011, he sought to relocate from his apartment in South Boston due to issues related to other tenants smoking in the building. On or about October 26, 2011, Complainant responded to an advertisement published on Craigslist for a one-bedroom apartment located in Arlington, MA. (Ex. 1) The apartment was listed at \$1175 per month with heat included and first month's rent and security deposit were required. The contact information included Melgaco's cell phone number and his personal and business email addresses.

Respondent Cosmopolitan Real Estate's name and address also appeared on the listing.

4. Complainant called the phone number in the ad and spoke to Mr. Melgaco and presumably informed him that he had a Section 8 housing voucher. Complainant testified that Melgaco advised him that a deposit of one month's rent was due with the rental application, and that the deposit would be forfeited if the apartment did not pass inspection. Complainant told Melgaco that he believed retaining his deposit was impermissible and stated he would have to speak to his leasing agent at the Housing Authority about this practice. Complainant testified that Melgaco did not invite him to view the apartment in question or to fill out an application. He also admits that he did not ask to see the apartment; nor did he request an application. Complainant was advised by his leasing officer that retaining a deposit if the apartment did not pass inspection was impermissible.

5. After speaking with his leasing officer, Complainant called Respondent's office to seek clarification about this policy. He spoke with Kelly Catallo and they had an abbreviated conversation due to a bad connection, but Catallo but called him back within a few minutes. In

Complainant's version of their conversation, he relayed to Catallo what Melgaco told him about forfeiting his deposit, and her response was that the owner wants to make sure the tenant can afford the apartment. This purported response was clearly not related to retention of Complainant's deposit, but was more likely related to questions about his income and a credit check.¹ Complainant testified that when he asked if this was the landlord's policy or her office policy, Catallo said she had work to do, had a family to feed, and hung up on him.

6. Catallo admitted that her conversation with Complainant became heated and that she ultimately terminated the phone call after about 45 minutes of arguing with him. Catallo testified that she had spoken to Melgaco about Complainant's issue and knew he had a section 8 subsidy. According to Catallo there was a misunderstanding and that Melgaco had informed Complainant that his deposit would be forfeited only if the Section 8 program approved the apartment and he then decided not to move in. She informed Complainant that if the apartment was not approved by the section 8 program, his deposit would be returned. Catallo testified that when she tried to explain this to Complainant he became angry. She also stated the Complainant refused to answer the standard questions about his income and information needed for a required credit check stating that his income was irrelevant because the Section 8 program was paying the rent. She told him that Respondent required a one month deposit, a copy of his driver's license and verification of his SSDI income. She also informed him that Respondent routinely secures a credit report and passes this information on to the landlord, who makes the final decision to accept or reject a tenant. Catallo also testified that Complainant called Respondent five or six times during the month of October, asked about at least one other apartment, left messages on the answering machine and spoke to at least three other agents in the office. He was referred to

¹ This comports with Catallo's version of the conversation wherein she repeatedly requested information for a credit and income check.

Melgaco because his initial contact was with Melgaco who was the listing agent for the apartment in question. According to Catallo, when Complainant called the office numerous times prior to October 26th, the agents he spoke with all experienced frustration dealing with him. I credit her testimony about her conversation with Complainant and that he had contacted the agency numerous times and was difficult. Complainant stated the he could not recall calling Respondent at other times in October but said he might have done so.

7. Robin Ray has been a real estate agent for 23 years and has worked for Respondent for the past five years. She testified that she assists with rentals at Respondent and has rented to many Section 8 tenants and other individuals in other government grant programs. During her tenure with Respondent she has attended two fair housing training classes. She testified that all the agents at Respondent asked every applicant the same standard questions. Ray stated that Complainant had called her the previous day to relay his conversation with Melgaco and she suggested he speak to Catallo. She was in the office on October 26, 2011 and overheard Catallo's conversation with Complainant. She testified that Catallo spent a long time on the phone with Complainant had to repeat the same questions over and over and was frustrated by the interaction. She finally told Complainant he was welcome to come in a fill out an application. According to Ray, Complainant also spoke on another occasion to an agent named Michelle who experienced frustration dealing with him. I credit Ray's testimony.

8. On October 27 and 28, 2011, the Boston Fair Housing Center of Greater Boston conducted two tests for housing discrimination related to this incident. According to a report signed on November 1, 2011, the first tester phoned Melgaco on October 27, 2011 to inquire about the apartment in question, was told the apartment was still available and that an application must be

filled out and that first month's rent and a security deposit were required at move-in. Melgaco offered to show the tester the unit and showed her an apartment on October 31, 2011. (Ex. 5)

9. On October 28, 2011, the second tester called the number in the same advertisement on Craigslist to inquire about the apartment and spoke to a male, who is not identified by name in her report dated December 1, 2011. He told her that first and last month's rent and a security deposit were required, asked about her income and informed her that Respondent would do a credit check and verify her employment. The tester represented that her income was only \$2,500 per month and a question arose about whether she could afford the apartment. She informed the agent that she had a section 8 housing voucher which covered a portion of the rent. The agent stated he wasn't sure about the voucher, but would pass her information on. She was not offered an application or an appointment to see the apartment. The tester called the number again on November 1, 2011 and spoke to the same man who told her the apartment was rented on October 29, 2011. (Ex. 2)

10. After his interaction with Respondent, Complainant found a basement apartment in Arlington. He claims there were problems with insects and second hand smoke from other tenants and that he had to move after six months because the smoke made him ill. He claims that he has been homeless since July of 2012 when he left that apartment in Arlington, and has lived in homeless shelters and with friends. At the time of the hearing, he was staying with a friend. Complainant states that he lost his Section 8 voucher because he did not have sufficient time to find suitable housing in areas where he wanted to live. He claims he was disappointed and frustrated after his interaction with Melgaco and stated that, in his experience, most landlords do not want to deal with the Section 8 program. I did not find Complainant's testimony about his emotional distress to be particularly credible or compelling. Complainant was not forthcoming

about his numerous interactions with Respondent and was evasive about his current living situation.

11. Catallo stated that her real estate office had facilitated rentals to a number of Section 8 voucher holders without issue. Respondent submitted evidence it has facilitated leases with at least 12 subsidy holders through various programs from February 2010 through April of 2013. (Ex. 3) She stated that her agency requires a deposit from all applicants and only once in six years was a deposit not returned to a prospective tenant. Respondent introduced the company policy which states that deposits will be refunded in the event the landlord does not accept the prospective tenant. (Ex. 4) Catallo reiterated that Respondent had a policy of requesting standard information from prospective applicants, that Complainant refused to provide this information, and that this was the reason they argued. Catallo testified the Respondent has had two other complaints filed against it alleging discrimination based on receipt of public assistance, and at least one originated with the Boston Fair Housing Center. There was no evidence regarding the substance or outcome of these charges.

III. CONCLUSIONS OF LAW

General Laws c. 151B s. 4(10) makes it an unlawful practice for any person “furnishing rental accommodations to discriminate against anyone who is a recipient of federal, state or local housing subsidies...because such individual is a recipient or because of any requirement of such ...rental assistance or housing subsidy program.” To establish a prima facie case of housing discrimination under s. 4(10), Complainant must demonstrate that he : (1) was a member of a protected class; (2) sought to rent housing; (3) was objectively qualified to rent the housing; and (4) was deterred from renting and/or refused tenancy because of his protected class. *See*

Wheelock College v. MCAD, 371 Mass. 130, 136 (1976); *Ortega v. Papalia*, 35 MDLR 110 (2013)

Complainant has established that he held a Section 8 housing voucher and as such is a recipient of a government housing assistance program for low income individuals. He also demonstrated that he was objectively qualified to rent the apartment in question which was available at the time he made the inquiry. Complainant alleges that when he called Mauro Melgaco, the listing agent for the apartment, Melgaco discouraged him from applying by telling him he would lose his deposit if the apartment did not pass the Section 8 housing inspection. If this were true, Complainant would have sufficient evidence of a prima facie case that he was treated adversely because of a requirement of the Section 8 program. Since Melgaco did not testify in this proceeding, I am without benefit of his version of their conversation.

Once Complainant establishes a prima facie case, the burden of production shifts to Respondent to articulate a legitimate non-discriminatory reason for its actions. *Wheelock College, supra.* at 136. Respondent denies that Melgaco informed Complainant that he would forfeit his deposit if the apartment did not pass inspection. Respondent's owner Catallo testified this has never been a policy of Respondent. Based on Catallo's testimony, which I found credible, I am persuaded that there was likely a miscommunication between Melgaco and Complainant and that Complainant was told his deposit would be forfeited only if the apartment passed inspection and he thereafter refused to enter into a lease. I find that Complainant's confusion in this regard is understandable. Respondent has offered other non-discriminatory reasons why Complainant was not shown a unit. Catallo stated that he refused to provide her with information she requires of every applicant and was argumentative, not only with her but

with other agents of Respondent. Respondent has met its burden to articulate a legitimate non-discriminatory reason for its treatment of Complainant.

Once the Respondent articulates a legitimate non-discriminatory reason for its action, Complainant must prove that Respondent's reasons are a pretext for discrimination, *i.e.* that Respondent, or the agent acting on Respondent's behalf, acted with discriminatory intent or state of mind. *Lipchitz v. Raytheon*, 434 Mass. 493, 504 (2001).

Catallo admitted that Melgaco was one of Respondent's agents at the time relevant to this complaint. The testimony of the testers demonstrates that Melgaco discouraged another prospective tenant with a Section 8 certificate from applying for the apartment stating that he wasn't sure about the Section 8 certificate, implying that it might not be accepted. He did not offer her an application or to show her the apartment. When that tester followed up he informed her the apartment was already rented. He gave the non-Section 8 tester an application, offered to show her the apartment and subsequently showed an apartment, presumably the listed apartment that both testers had inquired about, a day after telling the Section 8 tester it was rented. Melgaco was clearly not disposed to facilitating the rental process for this apartment with tenants holding Section 8 subsidies. While I believe that Complainant may have been confused about what Melgaco told him regarding his deposit, it is apparent that Melgaco was not going to offer to show this apartment to a prospective tenant with a subsidy. He made comments that would likely discourage individuals with subsidies, including Complainant, from applying for the apartment, as demonstrated by the test results. I find that this evidence is sufficient to demonstrate that Melgaco acted with discriminatory intent or state of mind.²

² I do not believe that Catallo's actions or statements to Complainant in their subsequent phone conversation were discriminatory or that she refused to provide service to him because of his Section 8 certificate. Catallo was dismissed from this case as an individual Respondent prior to the hearing.

Respondent presented evidence that it has rented apartments to Section 8 tenants and holders of other types of subsidies. Respondent asserts that the real estate company is not liable for Melgaco's behavior because he was acting as an independent contractor and not an employee of Respondent real estate agency.³ Catallo testified that the advertisement in question was Melgaco's listing and that he had control over it. However, Cosmopolitan Real Estate's name and address also appeared on the listing. Melgaco worked as an agent for Respondent. Since Melgaco was an agent of Respondent, his discriminatory actions bind Respondent, and the company may be held liable for his violation of M.G.L. c. 151B, § 4(10) under an agency theory. Principals may be held liable for the discriminatory acts of their agents that are committed within the agent's scope of authority. *Rome v. Transit Express*, 19 MDLR 159, 160 (1997), citing *O'Leary v. Fish*, 245 Mass. 123, 124 (1923). An agency relationship is established where the principal indicates to the agent that he or she consents to having the latter act on his or her behalf, and the agent similarly consents to act for the principal. *Luna v. Lynch*, 7 MDLR 1699, 1720 (1985). I conclude that Melgaco was acting within the scope of his authority as an agent for Cosmopolitan Real Estate when he discouraged prospective tenants who held Section 8 vouchers from applying for the apartment in question.

Moreover, the duty to comply with fair housing laws and to ensure equal access to housing may not be delegated by a property owner. *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974); *U.S. v. Real Estate Development Corp.*, 347 F.Supp. 776 (N.D. Miss. 1972); *U.S. v. L. & H. Land Corp.*, 407 F.Supp. 576 (S.D. Fla. 1975); *Baker v. Collazo*, 4 MDLR 1421 (1982). It stands to reason that the same principle would apply to a real estate agency and its agents. This is because the right of equal access to housing is an important one. A real estate agency's duty to

³ See *Monell v. Boston Pads, LLC, et al.*, 471 Mass. 566 (2015)

prospective tenants extends beyond the duty of its principals to obey the fair housing laws with respect to their own personal actions. The agency has a non-delegable duty to ensure that its agents consider any interested party for tenancy without regard to his or her membership in a protected class. *Baker v. Collazo, supra.* at 1434. While I do not believe that Catallo was aware of, or condoned Melgaco's actions, the company nonetheless remains responsible for his discriminatory conduct in violation of c. 151B s. 4(10).

IV. REMEDY

Upon a finding of unlawful discrimination, the Commission is authorized to award remedies to effectuate the purposes of G.L. c. 151B and damages for the emotional distress suffered as a direct result of discrimination. *See Stonehill College v. MCAD*, 441 Mass. 549 (2004); *Buckley Nursing Home v. MCAD*, 20 Mass. App. Ct. 172, 182-183 (1988). Complainant did not testify as to any out of pocket losses he incurred because of Melgaco's actions. He claims that he was disappointed and frustrated by his interaction with Melgaco. This was the only evidence of emotional distress he offered. His claim that he subsequently lost his Section 8 certificate and became homeless cannot be attributed to Respondent. He secured an apartment with his subsidy after his dealings with Respondent and chose to leave that apartment some six months into his tenancy. He claimed that thereafter he could not find a suitable apartment in areas he wanted to live within the time allotted by the Section 8 program and that this was the reason he lost his certificate.

An award of emotional distress damages must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See

Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). There was no evidence that Complainant suffered distress that was severe, long-lasting, or pervasive, and scant evidence that he suffered much distress at all, resulting from his interaction with Respondent. Moreover, Melgaco's actions were not the proximate cause of the loss of Complainant's subsidy. I credited Respondent's testimony that Complainant was difficult, uncooperative and frustrating to deal with, which likely contributed to the difficulties he encountered in the rental market. He was not an entirely forthcoming witness and I found his testimony evasive and unpersuasive in a number of respects. My assessment is that Complainant suffered very minor distress resulting from his interaction with Melgaco and that despite Catallo's best efforts to explain any confusion surrounding Respondent's deposit policy, he remained unconvinced and argumentative. I find that he is entitled to a de minimus award of damages in the amount of \$200. The evidence demonstrates that Respondent has facilitated rentals to numerous subsidy holders and offered credible evidence that, despite Melgaco's actions, its agents are properly trained in the fair housing laws and that it has adopted practices and policies that conform to the fair housing laws.

V. ORDER

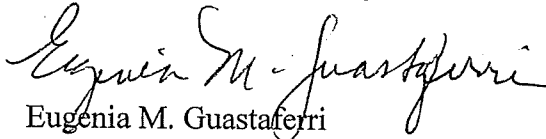
In light of the foregoing Findings of Fact and Conclusions of Law it is hereby Ordered that:

- 1) Respondent pay to Complainant James White the amount of \$200 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or this award is reduced to a court judgment and post-judgment interest begins to accrue.

- 2) Respondent continue to monitor the actions of its agents to ensure that they cease and desist from any actions that deny or discourage Section 8 or other subsidy holders from applying for and being considered for rental housing.

This decision constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a notice of appeal to the Full Commission within 10 days of receipt of this Order and a Petition for Review to the Full Commission within 30 days of receipt of this Order.

So Ordered this 10th day of July, 2015.


Eugenia M. Guastaferrri
Hearing Officer