IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-WY-0460-AJ (OES)

HOUSING FOR ALL,
RAMONA GAVIN,
DEBRA WOODS,
PATRICE SWAIN,
SHARON HERNDON,

Plaintiffs,

v.

MONROE GROUP LTD.,
ALICE ROBINSON,
THE AURORA MONTVIEW HEIGHTS LIMITED PARTNERSHIP,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, by and through their attorneys, Fox & Robertson, P.C., hereby move this Court for partial summary judgment as to liability against all Defendants.

Defendants have promulgated and continue to enforce a curfew at the Montview Heights Apartments which prohibits children under the age of 18 from being outside of their units after a given time, often as early as 8:00 p.m. Because Defendants could achieve their stated goals of safety and quality of life by targeting unsafe and disruptive behavior -- rather than barring from the common area everyone under the age of 18 for any purpose -- the curfew constitutes illegal discrimination on the basis of familial status in violation of the Fair Housing Act as amended ("FHA"). 42 U.S.C. § 3601 et seq. Plaintiffs are entitled to summary judgment as to liability.

STATEMENT OF UNDISPUTED FACTS

The Montview Heights Apartments ("Montview Heights") is an apartment complex in Aurora, Colorado. It is owned by Defendant Aurora Montview Heights Limited Partnership ("AMHLP") and managed by Defendant Monroe Group, Ltd. ("Monroe") through a resident manager, Defendant Alice Robinson, a Monroe employee.[1] All Defendants admit that AMHLP has promulgated and enforced curfews for minors at Montview Heights.[2] Although the time of the curfew has varied over the past few years, documents produced by Defendants demonstrate that the curfew has been as early as 8:00 p.m.[3]

Defendants publicized the curfew in a number of ways. It has been included in Montview's written rules,[4] and was the subject of an announcement, signed by Defendant Robinson, stating:

> EFFECTIVE FRIDAY, JANUARY 12, 2001, CURFEW WILL BE 8:00 PM FOR ANYONE UNDER 18 YEARS OF AGE. THERE WILL BE NO EXCEPTIONS. PARENTS PLEASE REMEMBER THE CURFEW CONTRACT YOU SIGNED A FEW MONTHS AGO IS STILL BINDING AND WILL BE ENFORCED.
>
> NOTE THIS CURFEW IS IN EFFECT 7 DAYS A WEEK UNTIL FURTHER NOTICE.

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[1] Complaint ¶¶ 9-11; Defendant The Aurora Montview Heights Limited Partnership's Amended Answer and July Demand ("AMHLP Answer") ¶ 5-6; Defendants Monroe Group Ltd. and Alice Robinson's Answer and Jury Demand ("Monroe/Robinson Answer") ¶ 5-6.

[2] Complaint ¶ 13; AMHLP Answer ¶ 8; Monroe/Robinson Answer ¶ 8.

[3] Gavin Decl. ¶ 12 & Ex. 3 (Tab 1 hereto).

[4] Gavin Decl. ¶ 11 & Ex. 2.

> I WILL BE WATCHING VERY CLOSELY, AND SEVERE CONSEQUENCES WILL OCCUR FOR ANYONE CAUGHT VIOLATING THIS CURFEW. ALSO REMEMBER IF YOUR CHILD IS CAUGHT 3 TIMES IT WILL RESULT IN YOUR EVICTION.[5]

Many residents, including the Individual Plaintiffs, were required to sign a "Formal Notice and Agreement," which stated

> CURFEW AT MONTVIEW HEIGHTS APTS IS 9:00 SUNDAY THRU THURSDAY AND 10:00 FRIDAY AND SATURADAY. [sic] I ACKNOWLEDGE THAT I UNDERSTAND AND WILL COMPLY WITH THESE RULES. . . . EFFECTIVE THE DATE OF ACKNOWLEDGMENT OF THESE RULES I UNDERSTAND THAT AFTER 3 CURFEW VIOLATIONS IT WILL RESULT IN AUTOMATIC EVICTION.[6]

According to Montview Heights policy, when Defendant Robinson or another agent of Defendants perceives or receives a report of an alleged violation of the curfew, he or she may issue a "ticket" to the resident perceived to be in violation. When one resident has received three "tickets," he or she may be evicted.[7] Defendants have issued tickets pursuant to the curfew policy.[8]

Plaintiffs Ramona Gavin, Sharon Herndon, Patrice Swain and Debra Woods ("Individual Plaintiffs") are all adults who either are or have in the recent past been domiciled at Montview

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[5] Gavin Decl. ¶ 12 & Ex. 3 (emphasis in original).

[6] See Gavin Decl. ¶ 13 & Ex. 4; Herndon Decl. ¶ 6 & Ex. 2 (Tab 2 hereto); Woods Decl. ¶ 5 & Ex. 4 (Tab 3 hereto).

[7] Complaint ¶ 14; AMHLP Answer ¶ 9; Monroe/Robinson Answer ¶ 9.

[8] AMHLP Answer ¶ 10; Monroe/Robinson Answer ¶ 10.

Heights with their minor children.[9] Defendants admit that the Individual Plaintiffs have received tickets for violating the curfew.[10] Finally, Defendants admit that

> [a]ll three Defendants are jointly and severally liable for the enactment, promulgation and enforcement of the curfew. In particular, Defendants Monroe Group and AMHLP have a non-delegable duty to comply with the Fair Housing Act and are therefore liable for the acts of Defendant Robinson and other individuals acting or purporting to act as their agents.[11]

The only justification offered by Defendants for the curfew is that it "is enforced for safety reasons and to protect the quality of life for all tenants."[12]

These facts are all based on admissions by Defendants in their answers and responses to interrogatories and on documents produced by Defendants. They are not in dispute.

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[9] Gavin Decl. ¶¶ 3-4; Herndon Decl. ¶¶ 2-3; Swain Decl. ¶¶ 2-3 (Tab 4 hereto); Woods Decl. ¶ 2-3.

[10] AMHLP Answer ¶ 14; Monroe/Robinson Answer ¶ 14; see also AMHLP Answer ¶¶ 15, 17, 18, 20-23; Monroe/Robinson Answer ¶¶ 15, 17, 18, 20-23 (admitting the issuance of specific tickets to specific plaintiffs); Gavin Decl. ¶ 6 & Ex. 1; Herndon Decl. ¶ 5 & Ex. 1; Swain Decl. ¶ 4 & Ex. 1; Woods Decl. ¶ 4 & Exs. 1-3.

[11] Complaint ¶ 18; AMHLP Answer ¶ 12; Monroe/Robinson Answer ¶ 12.

[12] Defendant Monroe Group Ltd.'s Response to Interrogatories and Requests for Production of Documents, Response to Interrogatory No. 14; Defendant Alice Robinson's Response to Interrogatories and Requests for Production of Documents, Response to Interrogatory No. 13; see also Defendant Aurora Montview Heights Limited Partnership's Response to Interrogatories and Requests for Production of Documents, Response to Interrogatory No. 13. (Robertson Decl. Exs. 1-3 (Tab 5 hereto).)

ARGUMENT

I. The Curfew at Montview Heights Discriminates Against Tenants on the Basis of Familial Status in Violation of Section 804(b) of the FHA.

Plaintiffs "make[] out a prima facie case of intentional discrimination under the [FHA] merely by showing that a protected group has been subjected to explicitly differential -- i.e. discriminatory -- treatment." Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995). Once Plaintiff makes out a prima facie case, Defendant "must establish that their rules constitute a compelling business necessity and that they have used the least restrictive means to achieve that end." Fair Housing Congress v. Weber, 993 F. Supp. 1286, 1292 (C.D. Cal. 1997); cf. Bangerter, 46 F.3d at 1503 (holding that safety-based restrictions on individuals with disabilities under the FHA cannot be based on blanket stereotypes but must be tailored to particularized concerns). In this case, the facts admitted by Defendants constitute a prima facie of discrimination on the basis of familial status, and, as a matter of law, the blanket curfew is not the least restrictive means of achieving Defendants' stated ends. Furthermore, Defendants have produced in discovery notices and tickets used to announce the curfew which constitute illegal publications indicating discrimination against families with children.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There are no material facts in dispute in this case and Plaintiffs are

entitled to judgment as a matter of law as to Defendants' liability under sections 804(b) and 804(c) of the FHA.

A. Plaintiffs Have Stated a Prima Facie Case of Familial Status Discrimination.

Section 804(b) of the FHA makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of . . . rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . familial status." 42 U.S.C. § 3604(b). The implementing regulations explain that this includes "[l]imiting the use of privileges, services or facilities associated with a dwelling because of . . . familial status." 24 C.F.R. § 100.65(b)(4). "Familial status" means an individual under the age 18 domiciled with a parent or other adult with legal custody. 42 U.S.C. § 3602(k).

The curfew at Montview Heights prevents families with children -- but not families without children -- from using the facilities and services of the apartment complex at certain hours. The curfew thus is a "facially discriminatory restriction on the use of apartment facilities by tenant children, which in turn discriminates against tenants with children on the basis of their familial status." Weber, 993 F. Supp. at 1290-1291. Because the Montview Heights curfew subjects a protected group to explicitly differential and thus discriminatory treatment, pursuant to Bangerter, 46 F.3d at 1501, Plaintiffs have made out a prima facie case under section 804(b).

B. Defendants' Justification Fails Because, as a Matter of Law, They Have Not Used the Least Restrictive Means to Achieve Their Stated Ends.

Because the Plaintiffs have established a prima facie case of familial status discrimination under section 804(b), the burden shifts to Defendants both to state a compelling business

necessity and to demonstrate that they have used the least restrictive means to achieve it. Weber, 993 F. Supp. at 1292; Llanos v. Estate of Coehlo, 24 F. Supp. 2d 1052, 1061 (E.D. Cal. 1998); cf. Bangerter, 46 F.3d at 1503 (holding that "[r]estrictions [on individuals with disabilities] predicated on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents.") Plaintiffs will assume for the purposes of this motion that Defendants' stated reasons -- safety and quality of life -- are compelling. Because Defendants' curfew bars all children from any activities anywhere outside their own units after a specified hour of the evening -- rather than targeting unsafe or disruptive behavior -- the curfew is not, as a matter of law, the least restrictive means of achieving those ends. Plaintiffs are entitled to summary judgment as to liability.

Several courts have granted summary judgment for plaintiffs holding that rules that restrict children's activities in apartment complexes are discriminatory based upon familial status and are, as matter of law, unjustified by reasons almost identical to those offered by Defendants here. See, e.g., Llanos, 24 F. Supp. 2d at 1060-61 (granting summary judgment to plaintiff holding that rules restricting children to two of the six swimming pools and restricting them from playing in designated "adult areas" violated the FHA); Weber, 993 F. Supp. at 1292 (granting summary judgment to plaintiff holding that rule prohibiting children from playing or running inside apartment building violated FHA); United States v. M. Westland Co., No. CV 93-4141 (AWT), Fair Housing-Fair Lending (P-H) ¶ 15,941 at 15,941.2 - .3 (C.D. Cal. August 3, 1994) (Robertson Decl. Ex. 4) (granting summary judgment in favor of plaintiffs holding rules that

barred children from recreational areas and required children to be accompanied by adult in pool violated FHA).

For example, the rule at issue in Weber prohibited children from "play[ing] or run[ning] around inside the building area at any time." Id., 993 F. Supp. at 1289. As noted above, the Weber court held that that rule constituted discrimination under the familial status provisions of the FHA. That holding shifted the burden to the defendant to justify the rule, which it did on grounds of safety and quiet. The court held that the rule was "not the least restrictive means for accomplishing" these ends. Id. at 1292. Indeed, the court held the rule superfluous in light of the general prohibition on "unnecessary noise, running, jumping, screaming, loud talking, or dangerous behavior." Id.

Similarly, in Llanos, the court held that a rule limiting use of certain swimming pools by children was illegal under section 804(b). The landlord attempted to justify the rules on safety grounds but the court rejected this justification. "As a general rule, safety judgments are for informed parents to make, not landlords." Llanos, 24 F. Supp. 2d at 1060-61; Weber, 993 F. Supp. at at 1293 (same); see also Westland at 15, 941.2 - .3 (holding that rules prohibiting unsupervised use of the jacuzzi and pool were unjustified by safety and health concerns); Department of Housing and Urban Dev. v. Paradise Gardens, HUDALJ 04-90-0321-1 & 04-90-0726-1, slip op at 13-15 (H.U.D. Oct. 15, 1992) (Robertson Decl. Ex. 5) (holding that community covenants restricting the use of the pool by children was discrimination not justified by safety or quality of life concerns); Department of Housing and Urban Dev. v. Edelstein, HUDALJ 05-90-0821-1, slip op at 5-6 (H.U.D. Dec. 9, 1991) (Robertson Decl. Ex. 6) (holding

that lease provision prohibiting children under 18 from using swimming pool was discrimination).[13]

Because it prohibits all children from any activities anywhere outside their own units after a specified hour of the evening, the Montview curfew is far more restrictive than the no-playing-indoors rule struck down in Weber. As was the case in Weber, the Montview Heights curfew cannot be justified as the least restrictive means of achieving the goals of safety and quality of life. Indeed, like the rule in Weber, the Montview Heights curfew is superfluous in light of Defendants' rule that "[n]othing should be done which will interfere with the rights, comfort, convenience or peaceful enjoyment of other residents."[14] That is, behavior that actually interferes with safety or quality of life can be prevented and/or punished under this rule, without punishing, for example, a 16-year-old returning from work, a child retrieving his family's laundry, or a family of adults and children holding a cook-out, if these activities occur after 8:00 in the evening. See Westland at 15,941.3 (holding that the prohibition on unaccompanied children in the swimming pool was overly restrictive because it would bar "even a 17-year-old certified lifeguard" from swimming unaccompanied).

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[13] Although Paradise Gardens and Edelstein are administrative decisions, "HUD is the federal agency charged by Congress with interpreting and enforcing the Act, and it has special expertise in housing discrimination. . . . Therefore, these decisions are entitled to great weight." Llanos, 24 F. Supp. 2d at 1060 n.8 (quoting Fair Housing Council v. Ayres, 855 F. Supp. 315, 318 (C.D. Cal. 1994) and citing Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972)).

[14] Gavin Decl. Ex. 2 at 003445.

Finally, to the extent it is the safety of the children themselves that Defendants seek to protect, the swimming pool cases are dispositive. If an apartment complex cannot restrict children from using a swimming pool -- a direct source of drowning risk -- it cannot restrict children from being anywhere outside their units, the source of only far more generalized and speculative risk. As the courts in Weber and Llanos held, these determinations are for parents, not landlords, to make.

Because the facially discriminatory curfew constitutes a prima facie case of familial status discrimination, and because Defendants cannot, as a matter of law, show that they have used the least restrictive means to achieve their stated ends, Plaintiffs are entitled to summary judgment as to liability under section 804(b) of the FHA.

II. Notices and Statements Concerning the Curfew Discriminate Against Families with Children in Violation of Section 804(c) of the FHA.

The curfew notices published by Defendants violate the FHA by indicating a preference, limitation and discrimination against families with children. Section 804(c) of the FHA makes it unlawful:

> To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on. . . familial status. . . or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. § 3604(c). This section applies "to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling." 24 C.F.R. § 100.75(b). Defendants have published a number of notices and statements announcing and enforcing the curfew, including rules and

regulations, periodic announcements and curfew tickets. These notices and statements violate section 804(c) of the FHA.

The standard for determining whether a given statement violates section 804(c) is whether the statement suggests a preference to the ordinary reader. Ragin v. New York Times Co., 923 F.2d 995, 999-1000 (2d Cir.), cert. denied, 502 U.S. 821 (1991); see also Jancik v. Dep't of Housing and Urban Dev., 44 F.3d 553, 556 (7th Cir. 1995) (same); Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 646 (6th Cir. 1991) (same); Spann v. Colonial Village, Inc., 899 F.2d 24, 29-30 (D.C. Cir. 1990) (holding that the standard is whether to a "reasonable reader the natural interpretation" indicates a preference or an intention to make a preference); United States v. Hunter, 459 F.2d 205, 215 (4th Cir.), cert. denied, 409 U.S. 934 (1972) (holding that the standard is the ordinary reader). The author does not have to intend for the statement to be discriminatory; rather "the touchstone is . . . the message." Ragin, 923 F. 2d at 1000. A number of cases have held the publication of rules restricting the use by children of an apartment's facilities to violate section 804(c). See, e.g., Weber, 993 F.Supp. at 1290-92 (granting summary judgment for plaintiffs holding that the promulgation and enforcement of a rule prohibiting children from running or playing inside an apartment building was a violation of section 804(c)); Westland at 15,941 - .4 (granting summary judgment in favor of plaintiffs holding rules that barred children from recreational areas and required children to be accompanied by adult in pool violated section 804(c)); Paradise Gardens, slip op. at 16 (holding that published rules limiting access of children to swimming pools violated section 804(c)).

In Weber, for example, the court held that the rule restricting children's play activities was "clearly a 'limitation' on the use by children tenants of the apartment facilities, and an ordinary reader . . . could not reasonably interpret it otherwise." 993 F. Supp. at 1292. Likewise at Montview, residents were given a number of written notices that children were not to be outside their apartments in the evenings, including one notice they were required to sign that asserted "3 curfew violations it will result in automatic eviction," and another that threatened "I WILL BE WATCHING VERY CLOSELY, AND SEVERE CONSEQUENCES WILL OCCUR FOR ANYONE CAUGHT VIOLATING THIS CURFEW. "[15] Each Plaintiff received notices of curfew violations pursuant to this policy.[16] An ordinary reader would reasonably find that these notices limited the use of the facilities at Montview Heights by children- -- and therefore by families with children -- in violation of section 804(c).

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[15] Gavin Decl. Ex. 3.

[16] Gavin Decl. ¶ 6 & Ex. 1; Herndon Decl. ¶ 5 & Ex. 1; Swain Decl. ¶ 4 & Ex. 1; Woods Decl. ¶ 4 & Exs. 1-3.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully request that this Court enter summary judgment against Defendants as to liability for violation sections 804(b) and 804(c) of the Fair Housing Act, 42 U.S.C. §§ 3604(b) & (c).

Respectfully submitted,

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