IN THE CIRCUIT COURT OF MARYLAND FOR MONTGOMERY COUNTY

TANIE A. GUIRAND et al.	*	
	*	
v.	*	
	*	Case No. 383580
	*	
BEL PRE RECREATIONAL ASSOCIATION, INC.	*	
	*	
	*	

DEFENDANT'S MOTION TO DISMISS COMPLAINT

Defendant Bel Pre Recreational Association, Inc. (BPRA), by and through its undersigned counsel and pursuant to Maryland Rule 2-322(b), hereby moves that the Complaint filed by Plaintiffs Tanie and Pierre Guirand (the Guirands) in the above-captioned case be dismissed for failure to state a claim upon which relief can be granted by this Court. In support hereof, Defendant states as follows:

1. The essence of the Complaint, filed on October 29, 2013, is that the Plaintiffs allege that a letter sent by Defendant, on or about September 26, 2013, to Plaintiffs requesting them to either remove a fence which they constructed on their property "or agree to have good faith discussions with the Board to see if we might reach a mutually agreeable compromise" is an action prohibited by the federal Fair Housing Act, 42 U.S.C. Section 3601 et. seq.

2. The Complaint alleges in Paragraph 15 that: "On or about September 26, 2013, Defendant delivered to Plaintiff a letter demanding the Plaintiff remove the

fence for the reason that the fence was in violation of the restrictive easement on the Property. (See attached letter as Defendant's Exhibit 1)."

3. The letter from BRPA attached as Exhibit 1 to the Complaint and incorporated therein by reference gives the Guirands the option to "remove the fence **or** agree to have good faith discussions with the Board to see if we might reach a mutually agreeable compromise to this issue". [Emphasis added] By its terms, that letter invited the Guirands to engage in discussions regarding whether a fence would be allowed by a "mutually agreeable compromise".

4. The Complaint does not allege any other enforcement action has been taken by Defendant BPRA with respect the fence constructed by the Guirands.

5. The Guirands concede that they own the property located at 3200 Bustleton Lane, Silver Spring, Maryland (Property) (Complaint Paragraph 6); that the Property is located on a corner lot (Complaint Paragraph 7); that the Property is subject to a Declaration of Covenants (Declaration) which contains "restrictive easements" (sic) (Complaint Paragraph 7); that BPRA is responsible for enforcing the provisions of the Declaration (Complaint Paragraph 7); and that the Guirands contracted to have a six foot fence built along the side and rear yard property lines of the Property (Complaint Paragraph 11).

6. By reference to the letter attached as Exhibit 1, the Guirands allege in Paragraph 15 that they have been informed that the fence restrictions (Fence Covenant) in the Declaration provide:

(i) No fabricated fences may be erected on any corner lot;

(ii) on any other lot, a fabricated fence may be erected but only in the rear yard and only on the condition that it shall not exceed forty-two (42) inches in height, except that the fences required around private rear year swimming pools shall conform to all requirements of local ordinances; and

(iii) in no case shall stockade fences be allowed.

7. The Complaint summarily alleges in Paragraph 18: "Defendant's threat to enforce a restrictive covenant is prohibited by the Fair Housing Act, 42 U.S.C. §3601 et seq. (the "Act")."

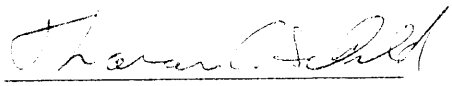
8. However, there is no allegation in the Complaint that Plaintiffs requested any accommodation in the enforcement of the Fence covenant in the Declaration which is reasonable and necessary to allow the residents of the Property an equal opportunity to use and enjoy the Property. In the absence of such an alleged request for accommodation, it follows that there has been no refusal by BPRA to allow such an

accommodation. There is no allegation in the Complaint that BPRA has refused to allow a reasonable and necessary accommodation or modification.

9. Absent an allegation that BPRA has refused to allow a request for a reasonable accommodation in the enforcement of the Fence Covenant which is necessary to allow the residents an equal opportunity to use and enjoy the Property coupled with the acknowledged offer of BPRA to engage in "good faith discussions with the Board to see if we might reach a mutually agreeable compromise to this issue", the Complaint fails to allege a violation of the Fair Housing Act and, therefore, fails to state a claim upon which the requested injunctive relief or a declaratory judgment can be granted by this Court.

10. A Memorandum of Law in support of this Motion is submitted herewith.

Respectfully submitted,



Thomas C. Schild
Thomas Schild Law Group, LLC
401 North Washington Street, Suite 500
Rockville, Maryland 20850
(301)251-1414
law@schildlaw.com

Attorney for Defendant
Bel Pre Recreational Association, Inc.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT

Defendant Bel Pre Recreational Association, Inc., (BPRA) by and through the undersigned counsel, submits this Memorandum of Law in support of its Motion to Dismiss Complaint in the above-captioned case.

A. A Complaint should be dismissed if it does not state a claim for which relief can be granted.

Dismissal of a complaint is proper under Maryland Rule 2-322(b) when the alleged facts and reasonable inferences, if proven, would fail to afford relief to the plaintiff. See *Hogan v. The Maryland State Dental Association, Inc.*, 843 A. 2d 902, 155 Md. App. 556 (Md. App. 2004) where the allegations in the complaint were insufficient to state a claim for violation of the Maryland Consumer Protection Act.

B. Plaintiffs' Complaint does not state a claim for violation of the federal Fair Housing Act.

To state a claim for violation of the federal Fair Housing Act, 42 U.S.C. 3601 et seq. (Act), in the context of enforcement by a Maryland homeowners association of restrictive covenants regarding construction of fences, the Complaint must allege sufficient facts to show conduct by the homeowners association which constitutes:

> "**(A)** a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted; or
>
> **(B)** a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(A) and (B)

In sum, there must be a request and a refusal for a reasonable and necessary accommodation in the rules, services, or policies of the homeowners association or there must be a request and refusal for a reasonable and necessary modification of the premises. Absent a request and refusal of such request, there can be no violation of the Act.

See *Wallace H. Campbell & Co. v. Maryland Commission on Human Relations*, 33 A. 3d 1042, 202 Md. App. 659 (Md. App. 2011), where the Maryland Court of Special Appeals ruled that the analogous Maryland fair housing statute regarding accommodations to individuals with disabilities requires a request and a refusal of such request to establish prima facie case of failure to accommodate.

In *Campbell*, the Court of Special Appeals explained as follows:

> "Article 49B § 22(a)(9) is almost identical to the counterpart provision of the FHAA, 42 U.S.C. § 3604(f)(3)(B), and federal courts have consistently interpreted 42 U.S.C. § 3604(f)(3)(B) to require a prior request. The First Circuit summarized:
>
> 'To establish a prima facie case of failure to accommodate under the FHAA, a claimant must show that he is handicapped within the purview of 42 U.S.C. § 3602(h)[,] ... that the party charged knew or should reasonably have known of his handicap ...[,] [and] *that he requested a particular accommodation* that is both reasonable and necessary to allow him an equal opportunity to use and enjoy the housing in question. *Astralis Condo. Ass'n v. Sec'y, United States Dept. of Hous. & Urban Dev.*, 620 F.3d 62, 67 (1st Cir.2010) (citing *DuBois v. Ass'n of Apart. Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir.2006); *Bryant Woods Inn, Inc. v. Howard Cnty., Md.*, 124 F.3d 597, 603 (4th Cir.1997)) (emphasis added).'
>
> State appellate courts, interpreting their statutes that follow the FHAA, concur that the claimant must make a request. *See e.g.*, *Lucas v. Riverside Park Condos. Unit Owners Ass'n*, 776 N.W.2d 801, 808 (N.D.2009) (quoting the elements from *DuBois*); *Lebanon Cnty. Hous. Auth. v. Landeck*, 967 A.2d 1009, 1012 (Pa.Super.2009) (quoting *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109, 1129 (D.C.2005))."

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> "HUD and the Department of Justice ("DOJ") are both authorized to enforce the FHA. *See* 42 U.S.C. §§ 3612, 3614. HUD and DOJ issued a Joint Statement "regarding the rights and obligations of persons with disabilities and housing providers under the [Fair Housing] Act relating to reasonable accommodations." The Joint Statement asks and answers a series of questions to guide persons with disabilities. Question 14 poses: "Is a housing provider obligated to provide a reasonable accommodation to a resident or applicant if an accommodation has not been requested?" HUD and DOJ answer:
>
> *No. A housing provider is only obligated to provide a reasonable accommodation to a resident or applicant if a request for an accommodation has been made.* A provider has notice that a reasonable accommodation request has been made if a person, her family member, or someone acting on her behalf requests a change, exception, or adjustment to a rule, policy, practice, or service because of a disability, even if the words "reasonable accommodation" are not used as part of the request. HUD & DOJ Joint Statement on Reasonable Accommodations Under the Fair Housing Act, May 17, 2004, at 11 (emphasis added).
>
> The Commission cites no case law in support of its contention that mere knowledge of a handicap satisfies the requirements of the FHAA or the Maryland equivalent in Article 49B § 22(a)(9)." Id. 33 A.3d at 1053-54 202 Md. App. 668-669.

As recently explained by the United States Court of Appeals for the Fourth Circuit in *Scoggins v. Lee's Crossing Homeowners Association*, 718 F. 3d 262 (4th Cir. 2013), where the Court determined that a homeowner's suit alleging failure to provide an accommodation for construction of a wheelchair ramp should be dismissed when there was no refusal to allow an accommodation for the ramp:

> "An issue becomes ripe for adjudication under the FHAA [Fair Housing Amendments Act] when a disabled resident first is denied a reasonable and necessary modification or accommodation", citing *Bryant Woods Inn, Inc. v. Howard County, Maryland*, 124 F. 3d 597 (4th Cir. 1997)."

In the instant case, there is no allegation of a request for a reasonable and necessary accommodation or modification, or a refusal by Defendant BPRA to allow any reasonable and necessary accommodation or modification. Rather, the Complaint in Exhibit 1 shows that BPRA invited Plaintiffs "to have good faith discussions with the Board to see if we might reach a mutually agreeable compromise".

C. A person requesting an accommodation must show it is reasonable and necessary to allow an equal opportunity to use and enjoy the dwelling.

Where an accommodation or modification is requested by or on behalf of a disabled person pursuant to the Act, the person requesting the accommodation or modification must show it is "reasonable" and "necessary" to allow the resident of the property an "equal opportunity" to use and enjoy the property. In *Bryant Woods Inn v. Howard County, Maryland,* 124 F. 3d 597 (4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit determined that a request for a zoning variance to allow a group home for 15 residents in an area zoned for group homes of up to 8 residents was not a reasonable and necessary accommodation under the Fair Housing Act. The Court explained:

> "The FHA thus requires an accommodation for persons with handicaps if the accommodation is (1) reasonable and (2) necessary (3) to afford handicapped persons equal opportunity to use and enjoy housing. See 42 U.S.C. § 3604(f)(3). Because the FHA's text evidences no intent to alter normal burdens, the plaintiff bears the burden of proving each of these three elements by a preponderance of the evidence." Id. at 603.

The Court in *Bryant Woods* further explained the "reasonableness" requirement as follows:

> "In determining whether the reasonableness requirement has been met, a court may consider as factors the extent to which the accommodation would undermine the legitimate purposes and effects of existing zoning regulations and the benefits that the accommodation would provide to the handicapped. It may also consider whether alternatives exist to accomplish the benefits more efficiently. And in measuring the effects of an accommodation, the court may look not only to its functional and administrative aspects, but also to its costs. "Reasonable accommodations" do not require accommodations which impose "undue financial and administrative burdens," Davis, 442 U.S. at 412, 99 S.Ct. at 2370 or "changes, adjustments, or modifications to existing programs that would be substantial, or that would constitute fundamental alterations in the nature of the program," Alexander v. Choate, 469 U.S. 287, 301 n. 20, 105 S.Ct. 712, 720 n. 20, 83 L.Ed.2d 661 (1985) (internal quotations omitted)." Id. at 604.

With regard to the "necessary" requirement, the Court of Appeals explained:

> "The "necessary" element--the FHA provision mandating reasonable accommodations which are necessary to afford an equal opportunity--requires the demonstration of a direct linkage between the proposed accommodation and the "equal opportunity" to be provided to the handicapped person. This requirement has attributes of a causation requirement. And if the proposed accommodation provides no direct amelioration of a disability's effect, it cannot be said to be "necessary." See Bronk, 54 F.3d at 429.
>
> And finally, the "equal opportunity" requirement mandates not only the level of benefit that must be sought by a reasonable accommodation but also provides a limitation on what is required. The FHA does not require accommodations that increase a benefit to a handicapped person above that provided to a nonhandicapped person with respect to matters unrelated to the handicap. As the Court in Davis noted, the requirement of even-handed treatment of handicapped persons does not include affirmative action by which

> handicapped persons would have a greater opportunity than nonhandicapped persons. Davis, 442 U.S. at 410-11, 99 S.Ct. at 2369 Congress only prescribed an equal opportunity. See 42 U.S.C. § 3604(f)(3)(B)." Id.

See also *Scoggins*, supra. where the U.S. Court of Appeals for the Fourth Circuit determined that a request for a disabled resident to operate an All Terrain Vehicle on the roads in a community governed by a homeowners association was not a "reasonable" request for an accommodation; *Gavin v. Spring Ridge Conservancy, Inc.*, 934 F. Supp 685 (D. Md 1985), where the U.S. District Court for the District of Maryland determined that refusal by a homeowners association to allow an oversized shed constructed by a disabled resident did not violate the Fair Housing Act because the oversized shed was not shown to be "necessary" for the resident to have an equal opportunity to use and enjoy his dwelling. The Court in *Gavin* noted: "What is really going on in this case is a post-factum attempt by Mr. Gavin to use his handicapped status as a justification for keeping an improper structure on his property". Cf. *Cameron Grove Condominium II v. State of Maryland Commission on Human Relations*, 63 A. 3d 1064, 431 Md. 61 (Md. 2013).

In the instant case, the Plaintiffs have deviated from the Fence Covenant in the Declaration with regard to the location, height, and material of the fence constructed by Plaintiffs.

1. The Fence Covenant prohibits any fence on corner lots. The Plaintiffs' fence is constructed on a corner lot. (Complaint Paragraph 7)

2. The Fence Covenant prohibits any fence not constructed in the rear of the house. The Plaintiffs fence is constructed on the rear and side boundary lines. (Complaint Paragraph 11)

3. The Fence Covenant prohibits fences greater than 42 inches in height. The Plaintiffs' fence is 72 inches (6 feet) in height. (Complaint Paragraph 11)

4. The Fence Covenant prohibits stockade fences. The Plaintiffs' fence is a stockade fence. (Complaint Exhibit 1)

The Complaint does not allege that such deviation from the Fence Covenant is reasonable or necessary for the residents to have an equal opportunity to use and enjoy the property as required for an accommodation.

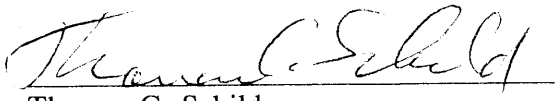
Plaintiff alleges only that a fence is required by an unspecified provision of the Code of Maryland Regulations (COMAR) where a group home is occupied by individuals with Alzheimer's disease. **Assuming for purposes of Defendant's Motion to Dismiss that there is such a COMAR requirement for a fence, there is no allegation that the fence as constructed is "necessary" with respect to its location, height and materials.**

In the absence of facts to establish a prima facie showing that the fence is reasonable and necessary to allow the resident an equal opportunity to use and enjoy the dwelling, the Complaint fails to state a claim upon which the requested relief can be granted by this Court.

D. Conclusion

For the reasons stated in its Motion to Dismiss and this Memorandum of Law, Defendant respectfully requests that the Court DISMISS the Complaint filed by Plaintiffs in this case.

Respectfully submitted,

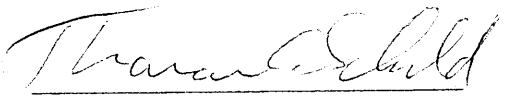


Thomas C. Schild
Thomas Schild Law Group, LLC
401 North Washington Street, Suite 500
Rockville, Maryland 20850
(301)251-1414
law@schildlaw.com

Attorney for Defendant
Bel Pre Recreational Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum of Law in Support of Defendant's Motion to Dismiss Complaint was mailed, postage prepaid, this 10th day of February, 2014 to: Michael Woll, Esq., 4405 East West Highway, Suite 201, Bethesda, Maryland 20814.



Thomas C. Schild

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REQUEST FOR HEARING

Defendant hereby requests a hearing on its Motion to Dismiss.

Thomas C. Schild

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I HEREBY CERTIFY that a copy of the foregoing Defendant's Motion to Dismiss Complaint was mailed, postage prepaid, this 10th day of February, 2014 to:

Michael Woll, Esq.
4405 East West Highway, Suite 201
Bethesda, Maryland 20814

Attorney for Plaintiffs

Thomas C. Schild

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