

September 20, 2016

Determination

Case Name: D'Aiuto, Thomas & Melinda v. MOON BAY CONDOMINIUM ASSOCIATION, INC. et. al.

Case Number: 04-16-4573-8

FCHR Number: 2016H0336

I. Jurisdiction

A complaint was filed with HUD on April 22, 2016 alleging that the complainant(s) was injured by a discriminatory act. It is alleged that the respondent(s) was responsible for: Discriminatory terms, conditions, privileges, or services and facilities; and Failure to permit reasonable modification. It is alleged that the respondent(s)'s acts were based on Handicap. The most recent act is alleged to have occurred on August 20, 2015, and is continuing. The property is located at: Moon Bay Condominiums, 104350 Overseas Highway, Boat Slip #34, Key Largo, FL 33037. The property in question is not exempt under the applicable statutes. If proven, the allegation(s) would constitute a violation of Sections 804b or f, and 804f3A of Title VIII of the Civil Rights Act of 1968 as amended by the Fair Housing Act of 1988.

The respondent(s) receive no federal funding.

II. Complainant Allegations

Complainant Thomas D'Aiuto alleged that he possesses a physical disability as defined by the Fair Housing Act (FHA). Therefore, Complainant belongs to a class of persons whom the Act protects from unlawful discrimination by virtue of disability. Complainant owns a condominium unit in "Moon Bay Condominiums," located at 104350 Overseas Hwy., unit B-102, Key Largo, FL 33037; which has a deeded boat slip #34. The unit and boat slip are subject to the rules and regulations of Respondent Moon Bay Condominium Association, Inc., and managed by Respondent Patriot Property Services, Inc.

Complainant alleged that his physical disability restricts his safe access and use of his boat in the boat slip. Complainant alleged that he made a reasonable modification request on May 2015, to Respondents, to be allowed to install a mechanical boat lift his deeded boat slip. Complainant explained that the mechanical boat lift would provide him equal opportunity to safely use and enjoy the amenities of the community, which include the boat slip. Complainant alleged that he provided Respondents with documentation that supported his need for the modification, including written physicians orders detailing his medical necessity. Complainant alleged that Respondents tentatively approved his modification request on August 20, 2015, but instituted several unreasonable requirements which prevented the installation of the boat lift. Complainant alleged that Respondents required an electric meter to be installed on the boat lift, and for the lift to be used in a manner which violated the manufacturer's specification, owner's manual, warranty and safe use. Complainant alleged that other slip owners are allowed unlimited use of electricity at their boat slips without metering and with no additional cost. Complainant explained that he regards Respondents' additional requirements as unreasonable, and believes that Respondents have constructively denied his modification request through the imposition of the additional requirements. As such, Complainant believes that Respondents have constructively denied his modification request, and subjected him to unreasonable terms in a discriminatory manner based on his disability.

III. Respondent Defenses

Respondents alleged that:

Complainant did not provide any information concerning his specific disability or how the requested accommodation will ameliorate the effects of his disability. Respondents admit having knowledge Complainant informed them the need to install a boat lift in his slip because he has trouble balancing due to his disability. Respondents alleged alternatives may exist depending on his specific condition. For example, without more information, the Commission cannot determine whether a ladder, swing chair or other device would be sufficient to

achieve the desired result of easier access to Complainant's recreations vessel. An alternative to a boat lift will not assist Complainant in embarking and disembarking his vessel anywhere but the Condominium. Complainant cannot demonstrate his request is reasonable and necessary. The Association has repeatedly granted the Complainant's requested accommodation with reasonable conditions in August 2015. Respondent alleged granting the accommodation would be a fundamental alteration of the Association's deed restrictions and covenants running with the land, certain conditions must be placed on the accommodation to make it reasonable.

Respondents alleged:

Respondents further alleged the accommodation would impose an undue financial and administrative burden on the Association. Without the reasonable conditions placed upon the accommodation, the Complainant would be receiving an increased benefit above other Condominium Unit and/or boat slip owners. Complainant has not provided any information about his disability that suggests the reasonable conditions would interfere with his equal use and enjoyment of his dwelling.

Respondent further alleged:

Allowing Complainant to keep his boat in the up position would interfere with the view of the water of other and increase the benefit to Complainant, not equal to, but greater than other unit owners. Initially, the Association was working with Complainant to find a boat lift that would minimally interfere with the other owners use and enjoyment of the marina. However, at the Complainant's request, the Association agreed that Complainant could use the lift that he chose, provided that he kept the lift in the down position when it was not in use.

IV. Findings and Conclusions:

In order to conclude there is reasonable cause to believe that such discriminatory action occurred in violation of 804(f)(3)(A) of the Fair Housing Act, as amended, all the elements of the case must be met. First, the investigation of this case must show that Complainant possesses or demonstrates a physical or mental impairment that qualifies Complainant as a disabled (handicapped) person within the meaning of the Fair Housing Act, and therefore establishes that Complainant belongs to a class of persons whom the law protects from unlawful discrimination, and Respondent must have known or should have known that Complainant was a disabled person within the meaning of the Act. Second, Complainant must have specifically requested permission, either in writing or verbally, to make reasonable modifications to the premises and offered to pay for the modifications. Third, the requested modifications must have been necessary to afford Complainant full enjoyment of the premises, and Respondent must have known or should have known that the requested modifications were necessary to Complainant. Fourth, Respondent must have denied or unreasonably delayed permission to Complainant to make reasonable modifications.

Regarding the elements of this case, the investigation revealed the following:

1. Does Complainant possess or demonstrate any physical or mental impairment that qualifies Complainant as a disabled (handicapped) person within the meaning of the Fair Housing Act, and therefore establishes that Complainant belongs to a class of persons whom the law protects from unlawful discrimination, and did Respondent know or should Respondent have known that Complainant was a disabled person within the meaning of the Act?

Yes. The Florida and Federal Fair Housing Act define disability with respect to a person as a physical or mental impairment that substantially limits one or more major life activities, or being regarded as having such impairment.

According to the Medical Certification Form submitted by Susan May, M.D. on November 19, 2015, Complainant possesses or demonstrates a physical or mental impairment that qualifies Complainant as a disabled (handicapped) person within the meaning of the Fair Housing Act, and therefore establishes that Complainant belongs to a class of persons whom the Fair Housing Act protects from unlawful discrimination, based on handicap.

According to the Medical Certification Form submitted by Maen Hussein, M.D., on October 8, 2015, Complainant possesses or demonstrates a physical or mental impairment that qualifies Complainant as a disabled (handicapped) person within the meaning of the Fair Housing Act, and therefore establishes that Complainant belongs to a class of persons whom the Fair Housing Act protects from unlawful discrimination, based on handicap.

Yes. Respondents admitted to having knowledge that Complainant possessed a disability. Complainant submitted documentation to Respondents to show he had a disability. Respondents admitted to receiving medical documentation stating that Complainant was disabled. Complainant submitted letter from Chetan Malpe, MD dated June 17, 2015 as well as letter from Maen Hussein, MD establishing that Complainant had a disability and was therefore a member of a

protected class defined by the Fair Housing Act because of his disability.

2. Did Complainant specifically request permission, either in writing or verbally, to make a modification to the premises and offer to pay for the modification?

Yes. Complainant submitted a modification request on May 29, 2015. Respondents agree Complainant submitted a modification request to install a mechanical boat lift in June 2015 and resubmitted the request on January 26, 2016. Respondents' governing documents of the Association state that:

“Article VI, Section H of the Declaration requires,

1. No Unit Owner of a Boat Slip shall without first obtaining the prior written approval of the Association make any alteration or addition in or to any portion of his Unit of Boat slip or of the condominium Property, or remove any portion of his Unit or Boat Slip or of the Condominium Property, or remove any portion thereof, or make any addition thereto, or do any work which would jeopardize the safety or soundness of the Condominium or impair any easement.
2. No Unit Owner or Owner of a Boat Slip shall without first obtaining the prior written approval of the Association make any alteration, modification, decoration, repair, replacement, enclosure or change of the Common Elements, Limited Common Elements, dock area, balcony or terrace or to the Common Elements or common areas of the Condominium Property, or any exterior hallway lights, including but not limited to the erection of any awning, storm shutters, or other device, window covering, fixtures, paintings, or wall coverings, or other device, window covering, fixtures, paintings, or wall coverings, or any other changes or alterations which would in any way or manner whatsoever change the physical and visual appearance of the Unit or Boat Slip, including any balcony which is a part of the Unit.”

3. Was the requested modification necessary to afford the Complainant full enjoyment of the premises, and did Respondent know or should Respondent have known that the modification was necessary?

Yes. According to the Medical Certification Form submitted by Susana May, MD on November 19, 2015 and Medical Certification Form submitted by Maen Hussein, M.D. on October 8, 2015; the requested modification is necessary to afford Complainant an equal opportunity to use and enjoy the premises.

Yes. Respondents admitted to having knowledge that the modification was necessary. Furthermore, Respondents admitted that Complainant provided medical documentation showing the necessity for the requested modification. Respondents submitted a doctor's note from Dr. Chetan Maple MD dated June 17, 2015. Respondents further submitted a doctor's letter from Maen Hussein, MD.

4. Did Respondent deny or unreasonably delay permission to Complainant to make reasonable modifications?

Yes. Complainant submitted a modification request on May 2015, to install a mechanical boat lift to his deeded slip. In June 2015, Complainant provided medical documentation to Respondents showing the modification was due to a disability. Complainant further presented his request regarding the reasonable modification at a board meeting in June 2015. On August 20, 2015, Respondents approved Complainant's modification request with restrictions to the approval. Respondents' approval letter dated August 20, 2016 stated:

“...However, prior to approving such boat lift, the following applies:

1. You must pay for the cost of the installation and maintenance of the boat lift and obtain all Building Permits and governmental approvals for the installation;
2. You must agree to install a separate electrical meter and pay for the electrical costs for the operation of the boat lift;

3. The Association will specify the make, model and type of boat lift which may be installed (the Association will be engaging a marine specialist to provide consultation upon the appropriate boat lift type);
4. The boat lift must be left/stored in the down position and raised only to permit you to embark and disembark your vessel; or, until such time, if any, as boat lifts are approved for use in the marina by the Unit Owners pursuant to the requirements of the Declaration of Condominium;
5. You must provide evidence of insurance for the vessel and boat slip and list the Association as an additional insured in such insurance policy;
6. You will be required to execute a covenant running with your Unit specifying the terms and conditions of the boat lift installation and usage; said covenant will be in a format approved by the Association and be recorded in the Public Records of Monroe County, Florida;
7. If your Unit of slip is ever sold or you, Thomas J. D'Aiuto, no longer use or own your unit or slip, the boat lift must be removed at the Slip Owner's expense within thirty (30) days of the change in ownership/use; and
8. You agree that you will not market the slip for rent with the lift as an amenity.

The foregoing conditions must be satisfied before the installation of the lift is approved by the Board of Directors..."

The investigation found that Complainant agreed he will be responsible for the cost of the installation and maintenance of the boat lift; as well as responsible for obtaining any permits as required.

On restriction number 2, "You must agree to install a separate electrical meter and pay for the electrical costs for the operation of the boat lift;"

The investigation found that each boat slip owner pays \$150 per month for unlimited electrical use at the marina. Slip owners and renters have unlimited use of the electrical outlets without paying additional electrical costs. Owners at Moon Bay can decide to rent their units and the renters get to can have unlimited use of the marina outlets. On an interview conducted on August 8, 2016, with Laurie Wagner previous Board Director stated she does not believe it is fair to require Complainant to install a separate meter. She further stated the restrictions are obstacles to keep Complainant from having a boat lift. She further stated Respondents do not want a boat lift at the marina because they do not want other residents to request one. Additionally, Board Director Jose Chao, previous Treasure for the board stated he does not agree with Respondents to require Complainant to install a separate meter for the boat lift because the rules are that anyone can have unlimited use to the marina. He stated residents plug their boats to charge and have unlimited use of the meters without additional charge. Furthermore, resident owner, Chris Forry admitted to installing an extension cord directly to his slip #33 for his personal vessel. He further admitted to permanently mounting an extension cord with zip ties to the marina piling lines from the electrical box so that he could exclusively utilize unlimited power as needed. He admitted he was never told by Respondents this was not allowed nor asked by Respondents or management to reimburse for any electric costs associated with his permanent installation cord. He further admitted this is common practice by several owners. He further stated he personally observed slip owner #15, Ron Forman, who has the same installation as he for many years to power his vessels and onboard refrigerator. In addition, it was confirmed by correspondence dated September 30, 2015 and by interview conducted on August 22, 2016 with Mathew Konopacki with All Around Keys Electrical, Inc. the usage for the boat lift is very minimal. Mr. Konopacki estimated a usage of \$10-\$15 per month of electrical use. He further stated it is 2-3 minutes to bring lift up or down so the cost is very limited. He further stated having a boat lift uses less energy than someone charging a battery since battery would have to stay connected for a while for it to be charged.

On restriction number 3, "the Association will specify the make, model and type of boat lift which may be installed (the Association will be engaging a marine specialist to provide consultation upon the appropriate boat lift type);"

The investigation found that Respondents hired a marine biologist to evaluate and give recommendations on different type boat lifts for the marina. It was found through the evaluation that the lift Complainant requested, a 4 post

beamless cradle boat lift was one of the approved boat lifts in marine biologist report.

On December 17, 2015, Jason Cummins, M.Sc., P.E. issued a recommendation letter to Moon Bay Condominium Association regarding different type of boat lifts for the Moon Bay marina. The Moon Bay Raina Boat Lift Evaluation letter stated:

“...The following boat lifts were evaluated: Proposed

- Hi-Tide T2 Topless X2

Alternatives

- Golden Boat Lifts GatorVator (2 and 4 motor)
- Hurricane Boat Lifts Category 2
- Sunstream Sunlift
- HydorHoist Boat Lifts HarborHoist”

“Hi-Tide T2 Topless X2

The T2 Topless X2, is a four-motor, four-post, beamless, cradle boat lift model from Hi-Tide Boat Lifts. The original configuration stipulates a 10” diameter piles with a center-to-center distance between piles of 12’3”, the piles could be positioned closer together. In addition to the support piles, the lift motor extends beyond the pile approximately 3.5’ and should be considered in the overall dimension. Standard specifications include all motors facing the same direction and orientation, however, one pair of motors could be oriented towards the vessel to maximize pile locations. As a result, the center-to-center distance of the lift piles would be reduced to approximately 10’11.5”. Approximately, 1’7” from the side of the slip would be lost to account for the pile and motor, resulting in an available width of 8’9.5”. including manufacturer the recommended 6” of separation from the lift motors through the use of guide posts on each side, the resulting maximum vessel beam would be 7’9.5”...It should be noted, a wider available beam could be achieved utilizing the Gear Drive Lift model, which is not beamless and includes top rails running from bow to stern pilings at the top. For a 12’3” slip width the potential vessel beam could increase to approximately 10’.”

On restriction number 4, “The boat lift must be left/stored in the down position and raised only to permit you to embark and disembark your vessel; or, until such time, if any, as boat lifts are approved for use in the marina by the Unit Owners pursuant to the requirements of the Declaration of Condominium;”

The investigation found that this restriction is unreasonable due to this request is against the 4 Post topless cradle lift’s user manual specifications. It was found through the investigation that leaving the boat lift submerged would be unsafe. On an interview with Carlos Quinones with Hi-tide Boat Lifts and marine products conducted on August 22, 2016, he stated that leaving the boat lift in the down position “would be unsafe use and detrimental to the lift...the main thing is that it is a water hazard to keep it in the down position”. He stated one of the main things they advise people not to do is “never keep the cradle in the down position” because it is detrimental to the lift but it is also a safety concern because it would impair safe and proper operation of the lift.

Respondent alleged their request to keep the lift in the down position is due to view obstruction. Respondents raised concerns about blocking residents’ views if the lift is kept in the up position. However, it was found through the investigation that Respondents do not have any height restrictions on boats.

Moon Bay Rules and Regulations state:

“Marina Rules #3. The maximum length overall of vessels moored in the marina shall not exceed thirty (30) feet. This measurement must include pulpit, bracket, engines, etc. No vessel shall be moored in the marina in such a manner as to cause a hazard to navigation of other vessels.”

The investigation found that there is currently a sail boat with a pole with a height higher than what a boat lift would be. Furthermore, Complainant alleged that at any point a resident or renter could bring a 30' log cabin cruiser, house boat, or Pontoon Boat, without breaking the rules of the marina based on the no height rules. He further alleged that the Pontoon Boat would be higher than his requested boat lift.

On restriction number 5, “You must provide evidence of insurance for the vessel and boat slip and list the Association as an additional insured in such insurance policy;”

HUD's Joint Statement states:

“22. May a housing provider or homeowner's association condition approval of the requested modification on the requester obtaining special liability insurance?”

No. Imposition of such a requirement would constitute a violation of the Fair Housing Act.”

Complainant alleged he has had a hard time getting the boat lift insured. He stated the insurance companies will not even give him a denial letter. Complainant submitted a letter from Progressive Insurance dated November 12, 2015, showing he added Moon Bay to his boat insurance policy. Complainant further provided a copy of his homeowner's insurance to reflect Respondents' name on the policy. What's more, Complainant has a deeded slip; therefore, Complainant's slip would be covered under Complainant's home owner's insurance. In addition, Complainant supplied an additional policy from USAA Casualty Insurance showing an umbrella liability policy of \$1,000,000.

On restriction number 7, “If your Unit of slip is ever sold or you, Thomas J. DAiuto, no longer use or own your unit or slip, the boat lift must be removed a the Slip Owner's expense within thirty (30) days of the change in ownership/use;”

The investigation found per number 22 of HUD's Joint Statement on Reasonable Modifications state that Reasonable Modifications made to the exterior of the dwelling are not required to be restored; therefore, making this restriction unreasonable.

On a site visit to the community in question, Respondents admitted they did not offer Complainant any other lift since Complainant was requesting a specific lift and they just went with his request. However, Respondents hired an engineer to evaluate Complainant's requested lift as well as other possible lifts that would work for the marina. Through the investigation it was found that Complainant's requested boat lift, a 4 Post topless cradle lift, was one of the approved boat lifts evaluated and recommended per Coastal & Marine Engineering's report dated December 17, 2015. Respondents further alleged that the requested boat lift would not fit in Complainant's slip and would infringe in someone else's slip. However, Complainant obtained permits required for the installation of the lift. Complainant obtained approval from the DEPARTMENT OF THE ARMY on July 30, 2015. Complainant further obtained a permit from the Florida Department of Environmental Protection dated June 29, 2015. Complainant was able to attain appropriate permits to install the lift within his deeded slip without infringing on other residents slips. Furthermore, on an interview with Jason Cummins from Cummins|Cederberg Coastal & Marine Engineering, he confirmed that the Hi-Tide boat lift that Complainant requested was one of the approved lifts in his report. In addition he confirmed that the report showed that the HydroHoist Boat lift was not a stable lift since there was still movement of the boat caused by waves. He further confirmed that the Sunstream Sunlift is mounted on the seabed and due to the marina area being seagrass habitat; it was unlikely for Complainant to get approval permits. He stated the Moon Bay Marina was protected because of its habitat. Therefore, any lifts mounted on the seagrass would be difficult to obtain permits.

On an interview with Ingrid Gilbert with the US Army corps of Engineers regulatory office conducted on August 22, 2016, she stated they issue the permits based on navigation and the need for the lift. They make sure it does not affect navigation. She stated she has been working with the agency for over 12 years and has never heard of an association requesting a person have the lift submerged when not in use. She stated it is undesirable for safety purposes to request

to have the lift submerged.

In conclusion, it was verified that Complainant is a member of a protected class because of disability. It was further verified that Complainant made a reasonable modification request to Respondents and supplied medical documentation to support his request. On August 20, 2015, Respondents approved Complainant's request but with restrictions that were unreasonable. As stated above, the lift Complainant requested was one of the approved lifts per engineering report. Complainant attained the two permits giving him permission to install the requested lift.

Therefore, based on the foregoing, the Commission finds that there is reasonable cause to believe that a discriminatory housing practice occurred in violation of 804(f)(3)(A) of the Fair Housing Act, as amended.

V. Additional Information

Notwithstanding this determination, the Fair Housing Act provides that the complainant may file a civil action in an appropriate court. According to Florida Statute, such a civil action shall be commenced no later than two years after an alleged discriminatory housing practice has occurred.

Under the Florida Public Records Act, this dismissal is a public document.

A copy of the final investigative report can be obtained from:

FLORIDA COMMISSION ON HUMAN RELATIONS
4075 ESPLANADE WAY, ROOM 110
TALLAHASSEE, FLORIDA 32399