

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DAMION CALES and FAIR HOUSING JUSTICE
CENTER, INC.,

Plaintiffs,

- against -

10 Civ. 3426 (DAB)
MEMORANDUM AND ORDER

NEW CASTLE HILL REALTY, ET AL,

Defendants.

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DEBORAH A. BATTS, United States District Judge.

This matter is before the Court on a Motion to Dismiss filed by Defendant Bayside NY homes LLC d/b/a Keller Williams Realty Landmark ("Bayside") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.¹ Bayside filed its Motion on June 22, 2010. By memo endorsed Order of October 8, 2010, this Court directed that Plaintiffs file their opposition no later than November 19, 2010 and that Bayside's reply be filed no later December 6, 2010. Plaintiffs timely filed a Memorandum in Opposition on November 19, 2010, and Bayside has filed no Reply. Accordingly, the Court deems the Motion fully submitted and ripe for decision.

¹Bayside asserts that its Motion is also made pursuant to Rule 21(b)(1), see Mem. in Supp. at 1, but fails to raise any arguments concerning this Court's subject-matter jurisdiction, see generally id.

For reasons detailed herein, Bayside's Motion is DENIED in its entirety.

I. BACKGROUND

The following facts alleged in the Complaint docketed at # 1 in this matter (the "Complaint" or "Compl.") are assumed to be true for purposes of this Motion to Dismiss. See McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007) (On a 12(b)(6) motion, the Court "accept[s] as true all factual statements alleged in the complaint and draw[s] all reasonable inferences in favor of the non-moving party.")

At all relevant times, Plaintiff Damion Cales ("Cales") was unable to work because of his disabilities. Compl. ¶ 13. He received Supplemental Security Income ("SSI"), a monthly federal income payment for low-income people who cannot work because of disability or age. Id. ¶ 35. Cales also received a New York City rental subsidy called a Fixed Income Advantage Voucher ("FIAV") which could be used to rent an apartment with a maximum monthly rental amount of \$889.00. Id. ¶¶ 2, 50. Plaintiffs allege, on information and belief, that almost everyone who receives a FIAV is a person with a disability and that landlords and real estate agents are aware that most prospective renters with a FIAV are

disabled or have a household member with a disability. Id. ¶¶ 3, 37, 40, 41.

Plaintiffs assert that Cales attempted to rent apartments throughout 2008 and 2009, but that real estate agents throughout New York City refused to show him apartments once they learned that he was unemployed, had SSI, and/or had a FIAV. Id. ¶ 5.

In July 2009, Cales contacted Plaintiff Fair Housing Justice Center ("FHJC") for assistance in finding an apartment. Id. ¶ 51. FHJC is a non-profit organization based in New York City which works to ensure that all people have equal access to housing opportunities in the New York City region. Id. ¶ 14. Among other advocacy activities, FHJC conducts testing to investigate allegations of housing discrimination. Id. ¶ 43. To that end, FHJC employs "testers" who pose as renters in order to obtain information about the conduct of landlords, real estate companies, agents, and others to determine whether illegal housing discrimination is taking place. Id. ¶ 45.

In 2008 and 2009, FHJC received multiple reports of disability and source of income discrimination against persons receiving SSI and/or an FIAV. Id. at 47. FHJC believed, based on those reports, that landlords and real estate companies were intentionally refusing to rent to persons with disabilities even where the renters' income, including rental vouchers, was

sufficient to pay the amount of rent required. Id. ¶¶ 59, 95. The Complaint alleges that such refusal to rent to persons who do not work, receive SSI, and/or participate in FIAV or other programs has a disparate impact on persons with disabilities. Id. ¶¶ 60, 96.

In July 2008, the FHJC conducted a study of apartments advertised to rent on www.craigslist.org and found numerous rental advertisements that included phrases indicating that the advertised apartments were not available to people with public sources of income such as SSI, the FIAV, or other programs. Id. ¶ 48. Among the allegedly discriminatory advertisements FHJC identified were at least eight which Plaintiffs allege were posted by real estate agents working for Defendant Bayside during July 2008, all of which stated that "no programs" would be accepted. Id. ¶¶ 34, 91. At least five of those advertisements were posted by Defendant Frank Maiorca, a licensed real estate agent who worked for Bayside. Id. ¶¶ 34, 91.

In response to Cales' request for help in July 2009, the FHJC (a) searched for rental advertisements for New York City apartments which rented for less than \$900.00 per month; (b) helped Cales make calls to real estate companies about the apartments advertised for rent; and (c) conducted telephone tests to determine whether agents would consider renting apartments to

unemployed disabled individuals who had SSI and a FIAV. Id. ¶ 8. Specifically, between July 2009 and August 2009, FHJC staff looked for rental postings on www.craigslist.org for studio and one-bedroom apartments in New York City with rent below \$900.00. Id. ¶ 53. During August 2009, an FHJC employee helped Cales place calls to the persons offering those apartments. Id.

In addition to the calls placed by Cales, calls to real estate agents were placed by two male testers working for FHJC during July and August, 2009. Id. ¶ 55. Both testers were instructed to ask about the advertised unit(s) and to say they were seeking a studio or one bedroom apartment renting for less than \$900.00 per month. Id. Tester #1 told real estate agents that he was employed as a salesperson at a clothing store. Id. Tester #2 posed as a disabled person who did not work, received SSI, and planned to pay rent with a FIAV. Id.

According to the Complaint, FHJC intended to have Cales call and apply for any apartment that the testers learned was available to a disabled person with SSI and a FIAV. Id. ¶ 56. The purpose of the tests was thus twofold: (1) to help Cales find an apartment, and (2) to determine if the reason Cales was being denied an apartment was because of his disability and/or sources of income. Id. ¶ 56.

Between July 2009 and August 2009, neither Tester #2 nor Cales was able to make arrangements to see any advertised apartment or otherwise to negotiate with any real estate company they contacted for the rental of an apartment. Id. ¶ 58. Every rental agent they contacted refused to assist them once the agent learned that the caller had a disability, was not working because of a disability, had SSI, and/or had a FIAV. Id.

According to the Complaint, Bayside was one of the companies which refused to show apartments to or negotiate with the FHJC tester. See Compl. ¶¶ 91-94. On August 10, 2009, Defendant Frank Maiorca, Bayside's licensed agent, posted an advertisement on www.craigslist.org on behalf of Bayside. Id. ¶¶ 34, 92. The advertisement, which offered a one-bedroom rent stabilized Brooklyn apartment at a monthly rate of \$850.00, stated that prospective renters were required to show "minimum six months employment" in order to apply. Id. ¶¶ 34, 92. On August 11, 2009, Tester #1 called the number on the advertisement to ask about renting the apartment. Tester # 1 spoke with a man who identified himself as "Frank" and who Plaintiffs believe to have been Defendant Frank Maiorca. "Frank" told Tester #1 that the advertised apartment had an application pending, but that two comparable apartments were available: a studio apartment for \$750.00 and a one bedroom apartment for \$750.00. Id. ¶ 93.

On August 12, 2009, FHJC Tester #2 called the number listed in the same advertisement to ask about renting the apartment. Tester #2, too, spoke with a man who identified himself as "Frank," believed to have been Defendant Frank Maiorca. "Frank" told Tester #2 that the advertised apartment had an application pending, but that he had other apartments available for rent. When "Frank" asked Tester #2 what his price range was, Tester #2 explained that he had a FIAV for \$889.00. In response, "Frank" stated, "I'm not sure they work with programs." When Tester #2 asked "Frank" to contact the management company or landlord to find out whether persons enrolled in housing assistance programs could apply, "Frank" said, "Well, I'm pretty sure that they don't, I mean I asked them before and they didn't, so I don't think there'd be any reason why they would now." Thereafter, "Frank" declined to discuss available apartments within Tester #2's stated price range and refused to negotiate with him any further. Id. ¶ 94.

Plaintiffs assert that Cales would have attempted to rent an apartment from Bayside if Tester #2 had not been turned away by "Frank." Id. ¶¶ 56-57.

II. DISCUSSION

For a complaint to survive a motion brought under Rule 12(b)(6), the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility," the Supreme Court has explained,

when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 556-57). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (internal quotation marks omitted). "In keeping with these principles," the Supreme Court has stated,

a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume

their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 129 S.Ct. at 1950.

The Supreme Court has held that in pleading a case for discrimination, a plaintiff need not prove discriminatory intent. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). Rather, at this early stage, Plaintiff need only make "a short and plain statement of the claim . . . [that] give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Swierkiewicz, 534 U.S. at 512 (quotation marks and citations omitted); see also Boykin v. KeyCorp, 521 F.3d 202, 213 (2d Cir. 2008) (applying pleading standards from Swierkiewicz, an employment discrimination case, to claims brought under the Fair Housing Act). The Swierkiewicz pleading standard for discrimination claims applies together with and not counter to the heightened "plausibility" standard for pleading set by Twombly and Iqbal. See Twombly, 550 U.S. at 547 ("This analysis does not run counter to Swierkiewicz. . . . [T]he Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."); see also Iqbal, 129 S.Ct. at 1953 ("Our decision in Twombly expounded the pleading standard for all civil actions, and it applies to antitrust and discrimination suits alike")

(internal quotation marks and citations omitted). While the Supreme Court did not explicitly address Swierkiewicz in Iqbal, courts in this District have repeatedly found that Twombly, Iqbal, and Swierkiewicz apply together in determining whether a plaintiff has pled a plausible case for discrimination. See Barbosa v. Continuum Health Partners, Inc., No. 09 Civ. 6572, 2010 WL 768888, at *3 (S.D.N.Y. Mar. 8, 2010) ("Reconciling Swierkiewicz, Twombly, and Iqbal, a complaint need not establish a prima facie case of employment discrimination to survive a motion to dismiss; however 'the claim must be facially plausible and must give fair notice to the defendants of the basis for the claim.'") (quoting Fowler v. Scores Holding Co., No. 08 Civ. 7796, 2009 WL 5178475, at *2 (S.D.N.Y. Dec. 28, 2009)); Nyame v. Bronx Lebanon Hosp. Ctr., No. 08 Civ. 9656 (DAB), 2010 WL 1379794, at *5 (S.D.N.Y. March 31, 2010). Therefore, a "complaint that contains specific factual allegations as to events leading up to an adverse action, accompanied by conclusory allegations of discriminatory intent, suffices to state a discrimination claim." Morales v. Long Island R.R. Co., No. 09 Civ. 8714 (HB), 2010 WL 1948606, at *2-3 (S.D.N.Y. May 14, 2010) (citing Boykin, 521 F.3d at 214-15).

Courts in this Circuit analyze claims of discrimination and disparate impact under the FHA according to the three-stage,

burden-shifting framework set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 798 (1973). See Boykin, 521 F.3d at 213. "[A]nalysis of housing discrimination claims under [the New York human rights laws] is the same as [analysis of] housing discrimination claims under the FHA." Kennedy v. Related Management, 08 Civ. 3969 (PAC), 2009 WL 2222530 at *25 (S.D.N.Y. Juny 23, 2009) (citing Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003)). Accordingly, all of Plaintiff's discrimination claims herein are subject to the McDonnell Douglas analysis, regardless of whether they are brought under the Federal, State, or City statutes.

Under McDonnell Douglas, a plaintiff bears the initial burden of establishing a prima facie case of discrimination through direct or circumstantial evidence. Windham v. Time Warner, Inc., 275 F.3d 179, 187 (2d Cir. 2001). Plaintiffs may establish a prima facie case of housing discrimination by showing (1) that they are members of a protected class; (2) that they sought and were qualified to rent or purchase the housing; (3) that they were rejected; and (4) that the housing opportunity remained available to other renters or purchasers. Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003). To establish a prima facie case of housing discrimination based on disparate impact, a plaintiff must allege that a facially neutral practice or policy

has had a significantly adverse of disproportionate impact on a protected class of persons. Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 934 (2d. Cir. 1988). The plaintiff does not need to show discriminatory intent. Id. at 935. Once the plaintiff establishes a prima facie case of discrimination, the defendant must show that it had a "bona fide and legitimate justification for its action with no less discriminatory alternatives available." Id. at 936. If the defendant does so, the presumption of discriminatory intent drops out, shifting the burden back to Plaintiff to prove intent. See Woodman v. WWOR-TV, Inc., 411 F.3d 69, 76 (2d Cir. 2005).

Under the standing provisions of the FHA, any "aggrieved person" may bring a civil action for a discriminatory housing practice. 42 U.S.C. § 3613(a)(1)(A). The FHA defines "aggrieved person" as any person, including a corporation, who "(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i). Fair housing organizations, as well as actual home seekers, can be "aggrieved persons" under the FHA. Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982); see also Cabrera v.

Jakabovitz, 24 F.3d 372 (2d Cir. 1994); Ragin v. Harry Macklowe Real Estate Co., 801 F. Supp. 1213, 1232-1233 (S.D.N.Y. 1992), aff'd in pertinent part, 6 F.3d 898, 904-905 (2d Cir. 1993).

Here, Plaintiffs' Complaint does not rely upon conclusory assertions of law, but makes specific factual allegations that support a case for impermissible housing discrimination.

Plaintiffs allege that almost all FIAV holders are disabled; that real estate professionals are aware of the likelihood that FIAV holders are disabled; that a caller identifying himself as an FIAV holder contacted Bayside to seek access to rental apartments for which he was otherwise qualified; that Bayside summarily refused to work with that caller on the grounds that he had a FIAV; and that apartments for which the caller would have been qualified were available for rent. Compl. ¶¶ 40-41, 91-94.

Plaintiffs also allege that three of Bayside's practices have a disparate impact on persons with disabilities: (1) requiring that applicants have a "minimum six months employment"; (2) refusing to accept any "programs"; and (3) refusing to accept FIAV. Compl. ¶¶ 91-94, 96, 60, 47, 49.

The Court is satisfied that Plaintiffs have pled a plausible prima facie case for housing discrimination, sufficiently detailed to give fair notice of the basis of Plaintiff's claims. Under McDonnell Douglas, the burden therefore shifts to Bayside,

which must show bona fide and justifiable non-discriminatory reasons for its actions.

Bayside asserts that it declines to participate in government programs, including FIAV, for non-discriminatory reasons such as a desire to avoid the administrative burdens imposed by those programs. However, it has been illegal since March 26, 2008 for landlords and real estate agents in New York City to discriminate in the rental or terms and conditions of housing on the basis of "lawful source of income," including "income derived from . . . any form of federal, state or local public assistance or housing voucher." N.Y.C. Admin. Code §§ 8-107(5) and 8-102(25) ("Local Law 10"). New York courts interpreting Local Law 10 have consistently held that landlords and agents cannot avoid liability for refusing to participate in government housing programs by claiming that the terms of or burdens imposed by a voucher program are undesirable. See, e.g., Jones v. Park Front Apartments, LLC, 901 N.Y.S.2d 46 (N.Y. Ct. App. 2010); Tapia v. Successful Mgmt. Corp., 897 N.Y.S.2d 672 (Table), No. 400563/08, 2009 WL 2163595 (N.Y. Sup. Ct. Jul. 20, 2009); Rakhman v. Alco Realty I, L.P., 900 N.Y.S.2d 603 (N.Y. Sup. Ct. 2010); Timkovsky v. 56 Bennett, LLC, 881 N.Y.S.2d 823 (N.Y. Sup. Ct. 2009).

If, as alleged, Bayside refuses to rent to individuals who propose to pay with vouchers, Local Law 10 prevents it from

avoiding liability by asserting a desire to avoid administrative requirements, as it attempts to do here. Bayside's assertion of a non-discriminatory motive is therefore without merit and cannot overcome the presumption of discrimination created by Plaintiffs' prima facie showing of housing discrimination. Accordingly, Bayside's Motion to Dismiss Plaintiffs' discrimination claims is DENIED.

Because the Court finds that Plaintiffs have adequately pled their Federal claims, the Court does not reach Bayside's arguments concerning supplemental jurisdiction, which are moot. To the extent Bayside's Motion seeks a stay of discovery pending this Court's decision on the merits of the Motion, it is DENIED as moot.

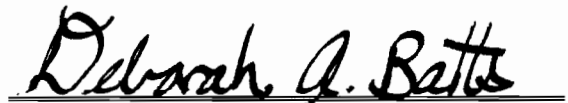
III. Conclusion

For the reasons stated, Bayside's Motion to Dismiss, Docket # 20 in this matter, is DENIED in its entirety.

SO ORDERED.

Dated: New York, New York

January 31, 2011



Deborah A. Batts
United States District Judge