

STATE OF VERMONT
RUTLAND COUNTY

PRESTON BILLINGS and)
MARYANNE BILLINGS,)
Plaintiffs,)
v.)
LORI GOODRICH and)
JAMES KINNE,)
Defendants.)

Rutland Superior Court
Docket No. 27-1-07 Rdev

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RUTLAND SUPERIOR COURT

MAY 30 2008

DECISION

Plaintiffs' Motion for Summary Judgment, filed January 4, 2008

Plaintiffs Preston and Maryanne Billings are the owners and operators of the Fort Warren Mobile Home Park in Castleton, Vermont. They seek the eviction of tenants Lori Goodrich and James Kinne for violation of the park's four-person occupancy limit. Ms. Goodrich and Mr. Kinne admit occupying their mobile home with three daughters, for a total of five persons, but have filed a counterclaim alleging that the occupancy restriction constitutes unlawful housing discrimination based on familial status. The present matter before the Court is the Billings' Motion for Summary Judgment, filed January 4, 2008, by Bonnie B. Shappy, Esq. Ms. Goodrich and Mr. Kinne's response was filed February 4, 2008, by Rachel A. Batterson, Esq.

The following facts are undisputed. The Billings are the owners and operators of the mobile home park, which they purchased in 1977. There are 32 mobile home lots in the older section of the park, and each of these lots shares a 1,000 gallon septic tank with the adjacent lot. These septic systems no longer comport with current standards, which require a 1,000 gallon septic tank for each mobile home lot, but are in compliance because they are grandfathered. A newer section of the park has septic tanks which comply with current standards.

The Billings maintain a four-person occupancy restriction for each mobile home lot. A version of this restriction (two adults, two children) was instituted by prior park owners. The Billings continued it during their ownership, but changed it in 1989 to a limit to a total of four persons without regard to age. The current occupancy restriction is included in all Fort Warren written lease agreements in the following form:

5. OCCUPANCY: Occupancy in the Home shall be limited to the persons listed on the signature hereto. Occupancy by more than four persons or by any person other than an occupant shall be deemed a substantial violation of this Lease.

In June 2005, the Billings entered into a written lease agreement with Ms. Goodrich and Mr. Kinne for the rental of Lot #29, which is in the older section of the park. During negotiations, the Billings became aware that Ms. Goodrich and Mr. Kinne intended to occupy their mobile home with their two daughters, for a total of four persons. The Billings discussed the occupancy restriction with Ms. Goodrich and Mr. Kinne, and informed them that they would have to find other housing if they had another child. Ms. Goodrich and Mr. Kinne agreed, and signed the lease agreement, which contained the above occupancy provision. On the signature page, Ms. Goodrich and Mr. Kinne listed themselves as the occupants along with their two daughters, who were aged twelve and fourteen at the time.

In April 2006, Ms. Goodrich gave birth to another daughter. This raised the total number of persons occupying the mobile home to five: Ms. Goodrich, Mr. Kinne, and their three daughters. The Billings began seeking eviction based upon the violation of the occupancy restriction. The Billings have not alleged any other lease violation.

After the Billings filed a complaint for eviction, Ms. Goodrich and Mr. Kinne filed a counterclaim alleging unlawful housing discrimination and consumer fraud.¹ Ms. Goodrich and Mr. Kinne assert that the occupancy restriction violates state and federal housing discrimination laws, which prohibit discrimination “because a person intends to occupy a dwelling with one or more minor children.” 9 V.S.A. § 4503(a)(1); see also 42 U.S.C. § 3604(a). They argue that the occupancy restriction, while facially neutral, was maintained by the Billings as a basis upon which to limit or exclude families with minor children from the mobile home park. Finally, they assert that the Billings committed consumer fraud by representing to Ms. Goodrich and Mr. Kinne that violation of the occupancy restriction was grounds for eviction, and by seeking eviction.

After discovery, the Billings filed the present Motion for Summary Judgment on the counterclaim. They argue that the mobile home park contains outdated septic systems that have been grandfathered under current standards, and that the occupancy restriction is intended to ensure that the septic systems do not fail. They also argue that Ms. Goodrich and Mr. Kinne rented a lot with an outdated septic system, and expressly agreed to the occupancy restriction as part of their written lease agreement. In addition, the Billings point out that Ms. Goodrich and Mr. Kinne lived in the park with two minor children, that other minor children have lived in the park in the past and continue to live in the park, and that Ms. Goodrich and Mr. Kinne both admit to having seen other minor children in the park. As such, the Billings argue that Ms. Goodrich and Mr. Kinne have not shown any material facts supporting their claim that the occupancy restriction is discriminatory. The consumer fraud claim in this case is dependent on the success of the housing discrimination claim.

¹ Prior to the initiation of the eviction complaint, Ms. Goodrich and Mr. Kinne filed a claim of housing discrimination with the Vermont Human Rights Commission. The Commission conducted a preliminary investigation and found no reasonable grounds to believe that the Billings discriminated against Ms. Goodrich and Mr. Kinne because of their minor children. This Court has not accorded any preclusive effect to this determination because decisions by the HRC do not foreclose a party’s right to pursue a private remedy. 9 V.S.A. § 4506.

Ms. Goodrich and Mr. Kinne assert that there are genuinely disputed questions of material fact as to whether the Billings committed housing discrimination by either disparate treatment or disparate impact. They point to the rental application, which requires prospective tenants to state not only the number of persons who intend to reside at the premises but also the number of minors, and to the written lease agreement, which requires tenants to list the ages of the persons residing at the property. They also assert that, prior to the amendment of housing discrimination laws in 1989, the Billings used lease agreements that restricted occupancy to two adults and two minor children, and that while this practice was discontinued in 1989 in favor of the four-person occupancy limitation, the Billings have maintained a status quo of familial-status discrimination.

Ms. Goodrich and Mr. Kinne also argue that the septic-related justifications are pretextual and not supported by the evidence. They contend that Mr. Billings is not an expert in septic systems, and that he has never conducted studies to determine whether the park's septic systems could accommodate more than four persons in a mobile home. In short, they argue that summary judgment should be denied because Mr. Billings has not demonstrated an empirical basis for his decision to limit the number of occupants to four.

State and Federal Housing Discrimination Statutes

The Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §§ 4500–4507, prohibits discrimination in renting “a dwelling or other real estate to any person because of the race, sex, sexual orientation, age, marital status, religious creed, color, national origin or handicap of a person, or because a person intends to occupy a dwelling with one or more minor children, or because a person is a recipient of public assistance.” *Id.* § 4503(a)(1). Discrimination based on familial status has been prohibited in dwellings since 1986, and has been prohibited in the rental of mobile home lots since 1989. *Human Rights Commission v. LaBrie, Inc.*, 164 Vt. 237, 242-243 (1995).

Ms. Goodrich and Mr. Kinne have also alleged that the Billings violated federal housing discrimination laws, which prohibit landlords from refusing to rent “to any person because of . . . familial status.” 42 U.S.C. § 3604(a). Housing discrimination based on familial status has been prohibited under federal law since 1988. *United States v. Lepore*, 816 F.Supp. 1011, 1016-17 (M.D.Pa. 1991). The Vermont statute is patterned after the federal statute, and the Vermont Supreme Court has relied upon federal cases when interpreting the state law. *LaBrie*, 164 Vt. at 243. The parties have not argued that there is any substantive difference between federal and state law as applied to the facts of this case, and have not argued any basis for concluding that federal law requires a different analysis or result than state law. Therefore, the federal and state claims will be analyzed together, rather than independently.

Direct Evidence of Disparate Treatment

Ms. Goodrich and Mr. Kinne argue first that the Billings engaged in disparate treatment discrimination by denying housing based solely upon familial status. This claim requires a showing that the landlord intentionally discriminated against tenants

because of their familial status, and may be proven by showing either direct or circumstantial evidence. *LaBrie*, 164 Vt. at 244; *Lepore*, 816 F.Supp. at 1017.

Ms. Goodrich and Mr. Kinne allege that, prior to the 1989 amendments that prohibited familial-status discrimination in the rental of mobile home lots, the Billings restricted occupancy in the park to two adults and two minor children per mobile home lot. They argue that this is direct evidence of historical discrimination on the basis of familial status, and that the Billings have maintained the status quo of discrimination through their post-amendment, facially-neutral four-person occupancy limitation. They bolster this argument by pointing to the rental application and the written lease agreement, both of which require prospective tenants to identify whether they intend to reside in the park with minor children.

Two significant direct evidence cases are *LaBrie* and *Lepore*. In *LaBrie*, the owners and operators of a mobile home park adopted an adults-only occupancy policy in 1982 that prohibited tenants from residing in the park with children under the age of 18. 164 Vt. at 239. After the 1989 legislative amendments, the park owners changed the occupancy limitation to “two permanent occupants.” Despite the change, the evidence showed that, by the time of the 1995 appeal, no minor children had moved into the park since at least 1982. *Id.* at 239–40. On this record, the Vermont Supreme Court, noting that “evidence of a discriminatory practice prior to civil rights litigation, coupled with a post-legislation pattern of maintaining the status quo, may be sufficient to establish the intent to continue the discrimination through a neutral policy,” *id.* at 244, affirmed the trial court’s finding of direct evidence of housing discrimination.

There was similar direct evidence of discrimination in *Lepore*. As in *LaBrie*, the owners and operators of a mobile home park adopted an adults-only occupancy policy in the late 1970s. 816 F.Supp. at 1018. The landlord admitted that the adults-only policy was intended “to protect the sensibilities of the aging current residents of the park,” and expressed his belief that children would disrupt the peace of the adult residents. *Id.* After the legislative amendments, the owners adopted a two-person occupancy limitation. *Id.* The evidence showed that the status quo—exclusion of minor children—persisted after the amended policy was adopted, and the district court held that this evidence was sufficient to establish disparate treatment. *Id.* at 1020–21. The court explained that “[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases . . . where the evidence shows that discriminatory practice were commonly utilized, that they were abandoned when enjoined by the courts or made illegal by civil rights legislation, and that they were maintained by practices which though neutral on their face served to maintain the status quo.” *Id.* at 1017–18 (quoting *Rogers v. Lodge*, 458 U.S. 613, 625 (1982)).

There are significant differences between these two cases and the present case. The primary difference is that the Billings have never maintained an adults-only policy in the mobile home park. Instead, their pre-legislation policy restricted occupancy to two adults and two children, and the amended policy permits up to four occupants per mobile home, including children. There is no direct evidence that these policies excluded

children from the park. The Billings rented to Ms. Goodrich and Mr. Kinne, who had two minor children at the time the lease was signed.² Ms. Goodrich admits knowing that other minor children live in the park, and Mr. Kinne admits seeing other children in the park and assuming that they lived there. Neither dispute the Billings' representation that other minor children lived in the park both before and after 1989. Thus, unlike in *LaBrie and Lepore*, there is no direct evidence of historical discrimination in this case.

Similarly, the rental application and the signature page of the written lease agreement do not provide direct evidence of housing discrimination based on familial status. The rental application requires prospective tenants to list the names of all persons who will be residing in the mobile home, and to specify the number of children. The application also asks questions about financial information, including employment status. These questions do not provide direct evidence of housing discrimination. A landlord may be legitimately concerned with a prospective tenant's ability to make monthly rental payments, and finances are directly impacted by the number of dependents living in the home. Similarly, the written lease agreement requires prospective tenants to list the names and ages of all persons who will be residing in the home. Even taking the allegations in the light most favorable to Ms. Goodrich and Mr. Kinne, neither of these documents amount to direct evidence of disparate treatment.

Circumstantial Evidence of Disparate Treatment

Ms. Goodrich and Mr. Kinne also argue that the evidence described above constitutes sufficient circumstantial evidence of disparate treatment discrimination to survive summary judgment. Discrimination claims based upon circumstantial evidence are evaluated under the burden-shifting framework developed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973) and accepted in Vermont by *State v. Whitingham School Board*, 138 Vt. 15, 18–20 (1979). Under the burden-shifting framework, Ms. Goodrich and Mr. Kinne must first demonstrate a prima facie case of housing discrimination based on familial status. Once the prima facie case is established, it becomes the Billings' burden to rebut that case by demonstrating a legitimate, nondiscriminatory reason for their actions, and Ms. Goodrich and Mr. Kinne would then have an opportunity to demonstrate that the justification is merely pretextual. *Whitingham*, 138 Vt. at 19. Though the burden of production shifts back and forth under this framework, the ultimate burden of persuasion remains with the party seeking to prove intentional discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000).

A prima facie case of housing discrimination is established by showing that (1) the tenants are a member of a protected class (2) who sought and were qualified to rent

² Ms. Goodrich and Mr. Kinne allege that the Billings only grudgingly agreed to lease Lot #29 to them, but this does not create a genuine issue of material fact, since the Billings did ultimately agree to the lease on the same terms as with other tenants. Similarly, though Ms. Goodrich and Mr. Kinne argue that the very fact that the Billings sought eviction based on the occupancy restriction is evidence of discrimination on the basis of familial status, the relevant question is whether Ms. Goodrich and Mr. Kinne have been treated differently because of their familial status. The historical evidence presented by Ms. Goodrich and Mr. Kinne does not create a genuine issue of material fact because it does not show that families with children have been treated differently than persons without children.

housing, (3) that the tenants were rejected from such housing, and (4) that the housing opportunity remained available to other renters. *Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003). It is undisputed that Ms. Goodrich and Mr. Kinne are members of a family with minor children, that they sought housing within the mobile home park, and that they were rejected from such housing after the birth of their third daughter. However, Ms. Goodrich and Mr. Kinne have not shown that the housing opportunity remained available to other renters with five-person households. In other words, the evidence presented by Ms. Goodrich and Mr. Kinne shows that the mobile home park owners make decisions about prospective tenants based on the number of tenants who intend to live within one mobile home, but the evidence does not show a prima facie case of housing discrimination based on familial status. The related question of whether the occupancy policy has a disproportionate impact upon families is discussed in the next section.

Even if Ms. Goodrich and Mr. Kinne had made out a prima facie case of disparate treatment housing discrimination, the Billings have demonstrated a legitimate, nondiscriminatory reason for their occupancy policy. The undisputed facts, as set forth by the Rule 56(c)(2) statements submitted by the parties, show that each mobile home lot in the older section of the park shares a 1,000 gallon septic tank with the adjacent lot. These septic tanks do not comply with current septic regulations, and have been grandfathered in. As explained by the Billings, the four-person occupancy limitation is designed to ensure that the current septic systems do not fail, and to ensure that adequate utilities are provided to all tenants. This is a reasonable legitimate and nondiscriminatory explanation for the policy.

Ms. Goodrich and Mr. Kinne argue that the Billings have not presented sufficient admissible evidence to support the septic-related justification. They assert that Mr. Billings is not an expert in septic systems, that he has never consulted an expert or engineer in septic systems regarding the park's septic capacity, that he merely adopted the prior owner's occupancy limitation without questioning whether it was necessary, and that Mr. Billings has never known whether the park's septic services could accommodate more than four people per lot. In other words, Ms. Goodrich and Mr. Kinne argue that Mr. Billings has not demonstrated any empirical basis for his decision to limit the number of occupants on a lot to four, rather than three, or five, or six, or more.

These objections to the business wisdom of the park's occupancy policy do not demonstrate that the septic-related justification is not legitimate, or that the proffered explanation is pretextual or otherwise unworthy of credence. It is reasonable for a landlord to be concerned about the continued viability of an outdated septic system, legal because grandfathered, even if he or she has not employed engineers to determine the precise capacity of the system, and even without monitoring the actual septic usage by a particular tenant, and to seek to minimize risk of failure of the system and potential harm to park tenants as a result. The evidence produced by the Billings is sufficient to conclude that the occupancy limitation was based on a legitimate and nondiscriminatory reason. Even taking all the allegations in the light most favorable to Ms. Goodrich and Mr. Kinne, they have not demonstrated that the septic-related justifications are pretextual or otherwise unworthy of credence. Therefore, the tenants have not demonstrated that

there is a genuinely disputed question of material fact as to whether the Billings committed disparate treatment discrimination, and the Billings are entitled to summary judgment in this respect.

Disparate Impact

Ms. Goodrich and Mr. Kinne also argue that the occupancy restriction constitutes disparate impact discrimination against families with minor children. Disparate impact discrimination may be shown by demonstrating that a facially-neutral policy has a disproportionate effect upon a statutorily protected minority. *LaBrie*, 164 Vt. at 243.

An important disparate impact case in the field of housing discrimination is *Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development*, 56 F.3d 1243 (10th Cir. 1995). In that case, mobile home park residents challenged a three-person occupancy limitation by showing statistical evidence that the occupancy restriction had a disproportionate impact upon families. The Secretary of HUD presented national statistics showing that at least 50.5% of families with minor children have four or more individuals, that at least 71.2% of all households with four or more persons contain at least one minor child, and that at most 11.7% of households without minor children have four or more persons. *Id.* at 1251, 1253. The 10th Circuit held that this statistical evidence was not sufficient to support a prima facie case of disparate impact discrimination, because (1) national statistics provide weak evidence of the impact of an occupancy limitation on the local housing market in light of local family demographics; (2) the mobile home park owner presented a legitimate explanation for the occupancy limitation, which was based on septic limitations; and (3) the nature of the relief sought would have required the landlord to construct new septic systems to provide housing to families, as opposed to merely enjoining the landlord from engaging in discriminatory practices. *Id.* at 1253.

Ms. Goodrich and Mr. Kinne have not presented any evidence supporting their claim of disparate impact discrimination. No evidence has been presented regarding the impact of occupancy limitation on either national or local housing markets, or regarding the size and composition of local families. In response to a properly-supported motion for summary judgment, the non-moving party may not rest upon mere allegations of disparate impact without setting forth specific facts showing that there is a genuine issue for trial. V.R.C.P. 56(e). Ms. Goodrich and Mr. Kinne have not demonstrated that there are any genuinely disputed issues of material fact regarding whether the Billings committed disparate impact discrimination.

Consumer Fraud

Ms. Goodrich and Mr. Kinne allege that the Billings violated the Vermont Consumer Fraud Act, 9 V.S.A. §§ 2451–2466, by terminating the lease based on the occupancy restriction. The CFA prohibits deceptive acts in commerce, and “[a] landlord can commit a deceptive act prohibited by § 2453 of Title 9 when a landlord rents property to a tenant that is in violation of the law.” *L’Esperance v. Benware*, 2003 VT 43, ¶ 14, 175 Vt. 292 (citing *Bisson v. Ward*, 160 Vt. 343, 351 (1993)). Ms. Goodrich and Mr.

Kinne argue that they have demonstrated genuine issues of material fact with respect to whether the Billings engaged in historical and ongoing discrimination through illegal occupancy restrictions and other policies that have limited the number of minors who reside within the mobile home park.

As discussed more fully above, the occupancy restriction does not represent illegal housing discrimination. Accordingly, Ms. Goodrich and Mr. Kinne have not demonstrated that the Billings committed housing discrimination by terminating their tenancy for a substantial violation of the occupancy provision. In response to the Motion for Summary Judgment, Ms. Goodrich and Mr. Kinne have not produced evidence of other deceptive acts or practices that would prevent summary judgment on the consumer fraud claim.

ORDER

For the foregoing reasons, Plaintiff's Motion for Summary Judgment, filed January 4, 2008, is *granted* as to the counterclaims.

Dated at Rutland, Vermont this 30th day of May, 2008.

Mary Miles Teachout
Hon. Mary Miles Teachout
Superior Court Judge