UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CRISTIN FORREST, an Independent Fair Housing Tester,

Plaintiff,

v.

CASE NO: 8:12-cv-02573-VMC-MAP

BROADMOOR VILLA, INC., a Florida not-for-profit corporation; CHARLES RUTENBERG REALTY, INC., a Florida corporation; and JEFF LAUNIERE,

Defendants.
_____/

DEFENDANT BROADMOOR VILLA, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendant, Broadmoor Villa, Inc. ("Broadmoor"), through counsel, files this Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(B)(6) and 12(B)(1) and states as follows:

INTRODUCTION

Plaintiff, Cristin Forrest, an alleged independent fair housing tester filed a three count complaint against Broadmoor, Charles Rutenberg Realty, Inc. and Jeff Launiere attempting to allege that the Defendants violated the federal Fair Housing Act, specifically 42 U.S.C. § 3604(a) and (c). Specifically, Count I is the only count against Broadmoor and alleges in an unsupported and conclusory manner, that Broadmoor has promulgated, adopted and enforced a policy of deterring and/or prohibiting the rental or sale of units to families with children under the age of 16 and published advertising regarding the age restriction. However, if Plaintiff and Plaintiff's counsel would have taken the time required to complete the most basic pre-suit investigation and inquiry and at least reviewed and attached to the Complaint the subject December 6, 1994

Amendment ("Amendment") as referenced at paragraph 17 of the Complaint (D.E. #1), then Plaintiff and Plaintiff's counsel would have realized that the Amendment actually removed the alleged discriminatory language from the governing documents. A copy of the Amendment is attached hereto as Exhibit "A" which clearly demonstrates the subject language with a line crossing out all three lines of the subject age restriction. The subject language at issue states: "Not allow any children under the age of sixteen years of age to reside on the premise except as permitted under the regulations established from time to time." This language was contained in the original governing documents from 1968 as referenced by the Amendment, however, the Amendment removed the subject language.

Interestingly, the Complaint is devoid of any allegation related to Plaintiff actually contacting the co-defendants to rent or purchase a unit at Broadmoor. There are also no allegations that Broadmoor had any relationship with the co-defendants or the subject advertisements that Plaintiff has failed to attach to the Complaint. More importantly, there are no allegations that Plaintiff has a child that would reside with her that is under the age of 16. As such and quite expectedly, Plaintiff has not and cannot allege that Plaintiff has suffered an actual injury or identify any protected class member who was a direct victim of the Defendants alleged discriminatory conduct.

What's more, it is obvious why Plaintiff has failed to allege, beyond mere legal conclusions, how Broadmoor promulgated, adopted and enforced a policy of deterring and/or prohibiting the rental or sale of units to families with children under the age of 16, certainly this is because the subject policy hasn't existed since 1994! This alone prevents this Court from having any subject matter jurisdiction over this matter as the subject of this lawsuit is moot and has been for nearly twenty years.

Furthermore, if Plaintiff would have alleged the date(s) that Plaintiff allegedly visited websites or even attached the alleged internet advertisements by the co-defendants, then the Court and the Defendants might be able to determine if and when such a search occurred, the content of such advertisements and whether the applicable two year statute of limitations (42 U.S.C. §3613 (a)(1)(A)) may possibly apply. Lastly, Plaintiff has failed to allege any basis that the co-defendants are in any way agents of Broadmoor and as a result, Broadmoor cannot be held responsible for alleged advertising of an unrelated Realty or Realtors.

As such, due to this Court's lack of subject matter jurisdiction via the mootness of the subject discriminatory policy, Plaintiff's lack of standing and in the alternative Plaintiff's numerous pleading deficiencies, Plaintiff's Complaint must be dismissed with prejudice.

I. LEGAL STANDARD

a. Standard for Granting A Motion to Dismiss Pursuant to Rule 12(b)(1).

A court must dismiss an action the instant it becomes aware it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). A motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure may attack jurisdiction facially or factually. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir.1990). In considering a facial attack, the court assumes the allegations in the complaint are true and only determines whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction. *Id.* at 1529. Alternatively, when considering a factual attack, the court may consider matters outside the pleadings, such as affidavits and testimony, as the attack is challenging the existence of subject matter jurisdiction in fact, irrespective of the pleadings. *Id.* On a factual attack, the plaintiff's allegations are not entitled to a presumption of truthfulness, as afforded under Rule 12(b)(6) and 56, because a 12(b)(1) motion is challenging the court's jurisdiction— its very power to hear the

case. *Id.* For this reason, in considering a 12(b)(1) Motion to Dismiss, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.*

Once subject matter jurisdiction has been questioned, a plaintiff is required to "clearly allege facts demonstrating that he is a proper party to invoke the jurisdictional resolution of the dispute and the exercise of the court's remedial powers." *Warth v.Seldin*, 422 U.S. 490, 518 (1975). "[T]he plaintiff has the burden of proving by a preponderance of the evidence that subject matter jurisdiction exists." *Brother v. Rossmore Tampa Ltd. Partnership*, 2004 WL 3609350, at *3 (M.D. Fla. Aug. 19, 2004). Courts may dismiss cases pursuant to Rule 12(b)(1) upon finding that the plaintiff's claims are "clearly immaterial, made solely for the purpose of obtaining jurisdiction, or are wholly unsubstantiated or frivolous." *Lawrence*, 919 F.2d at 1529 (11th Cir. 1990). Courts have an affirmative duty to examine their jurisdiction in each case, and if the Court concludes that jurisdiction is absent, the Court must not proceed on the merits of the case. *Lamb v. Charlotte County*, 429 F.Supp.2d 1302, 1306 (M.D. Fla. 2006).

Here, this Court does not have subject matter jurisdiction over this matter as the subject discriminatory policy was removed from the Broadmoor's governing documents in 1994 and Plaintiff lacks standing.

b. Standard for Granting A Motion to Dismiss Pursuant to Rule 12(b)(6).

This Court and specifically Your Honor has previously addressed the applicable legal standard to be applied to a motion to dismiss in *Cucinotta v. CVS Pharmacy, Inc.*, 2012 WL 5467524 (M.D.Fla 2012) which stated:

In reviewing a motion to dismiss, a trial court accepts as true all factual allegations in the complaint and construes the facts in the light most favorable to the plaintiff. *Jackson v. Bellsouth Telecomms.*, 372 F.3d 1250, 1262 (11th Cir.2004). However, courts are not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).

*2 In *Bell Atlantic Corp. v. Twombly,* the Supreme Court articulated the standard by which claims should be evaluated on a motion to dismiss:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, 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. Factual allegations must be enough to raise a right to relief above the speculative level. 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal citations omitted).

In accordance with *Twombly,* Federal Rule of Civil Procedure 8(a) calls "for sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 663, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly,* 550 U.S. at 570). A plausible claim for relief must include "factual content [that] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In decisions applying Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Eleventh Circuit has "adopted the 'incorporation by reference' doctrine, under which a document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment only if the attached document is: (1) central to the plaintiff's claim; and (2) undisputed." *Horsley v. Feldt,* 304 F.3d 1125, 1134 (11th Cir.2002) (internal citations omitted). *Horsley* explained that " '[u]ndisputed' in this context means that the authenticity of the document is not challenged." *Id.*

II. MEMORANDUM OF LAW

a. This Court Does Not Have Subject Matter Jurisdiction Over this Case as Subject Matter of The Lawsuit Was Rendered Moot in 1994.

It is an axiom of law that Courts are without authority to entertain a case if it is or has become moot. "Mootness is among the important limitations placed on the power of the federal judiciary, and serves long established notions about the role of unelected courts in our

democratic system." *National Advertising Co. v. City of Miami*, 402 F. 3d 1329, 1332 (11th Cir. 2005). Furthermore, "A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Footman v. Ollinger*, 139 Fed. Appx., 144, 146 (11th Cir. 2005). In such a situation, the Court has no authority to do anything other than dismiss the case. "Indeed, dismissal is required because mootness is jurisdictional. Any decision on the merits of a moot case would be an impermissible advisory opinion." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1335-36 (11th Cir. 2001).

In the present case, Plaintiff's entire case rests on an improper reading of the Amendment from 1994. Rather than Broadmoor promulgating, adopting and enforcing a restriction on residents with children under the age of 16 as incorrectly asserted by Plaintiff, the Amendment in 1994 actually removed any reference to a restriction on residents with children under the age of 16. Furthermore, there are no allegations that Broadmoor has ever taken any actions to enforce the language that was removed in 1994. Please see Exhibit "A" attached hereto that is directly referenced by Plaintiff at paragraph 17 of the Complaint (D.E. # 1).

Any claim against Broadmoor under 42 U.S.C. § 3604(a) or (c) was rendered moot in 1994, with the approval and recording of the Amendment removing such discriminatory language. As such, this Court is obligated to dismiss this matter with prejudice as the claims sought by Plaintiff are moot.

b. Plaintiff Lacks Standing to Sue

This Court further lacks subject matter jurisdiction because Plaintiff lacks standing to sue. Plaintiff cannot be considered a member of a class protected by the FHA in this case, familial status, as Plaintiff has failed to allege that she has children under the age of sixteen (16) years old. As a result, as recognized by this Circuit, the only way Plaintiff could acquire

standing under the FHA, is to qualify as an aggrieved person. This Circuit has recognized that a person may sue under the Fair Housing Act ("FHA") if they are an "aggrieved person." An aggrieved person does not require membership in the protected class for standing. *See Wasserman v. Three Seasons Association No. 1, Inc.* 998 F. Supp. 1445 (S.D.Fla. 1998). Rather, "an aggrieved person is a non-class member who (1) suffers actual injury as an ancillary effect of present or imminent discrimination against a protected class member and (2) challenges the discriminatory policy on behalf of that class member." *Id. (emphasis added).* Plaintiff has not pled any facts to support that she is challenging a discriminatory policy on behalf of an individual or individuals that are part of the familial status protected class.

In *Wasserman,* the plaintiffs', a childless couple, did not have standing to sue under the FHA for the landlord's policy that the couple remain childless. The plaintiffs had wanted to rent an apartment but refused to sign an agreement that required that the plaintiffs remain childless or move out upon becoming pregnant. The plaintiffs sued alleging that the policy discriminated against individuals based upon familial status.

The court determined that the plaintiffs did not have standing because the plaintiffs "did not protest Defendant's policy on the ground they suffered an ancillary injury from Defendant's discrimination against protected class members. Indeed, [. . .] plaintiffs identify no protected class members on whose behalf they challenged Defendant's policies." The Court further explained:

> If the Court were to find that [p]laintiff had standing as 'aggrieved persons,' it would have to come to the overbroad conclusion that philosophical disagreement with a policy alone confers standing to challenge a policy, or the unlikely conclusion that the potential to become members of a protected class gives standing to challenge discriminations against class members. *Id.*

In the instant case, Plaintiff claims the hypothetical unequal treatment caused a unit at Broadmoor to be unavailable to Plaintiff solely on the basis of familial status, therefore affecting the availability of housing for Plaintiff and the loss of limited time and resources to pursue her fair housing goals. (D.E. #1 at ¶ 28). Yet the Complaint is devoid of any allegations that (1) Plaintiff has a child under the age of 16, (2) Plaintiff intends to have children, or (3) intended to rent or buy a unit at Broadmoor. Thus, Plaintiff has failed to allege that they have suffered any actual injury. Likewise, like the plaintiffs in *Wasserman*, Plaintiff has not and cannot allege any present or imminent discrimination against a protected class member.

Plaintiff's philosophical disagreement with an age restriction policy that hasn't existed since 1994, which has caused no actual injury to Plaintiff or present or imminent discrimination against a protected class member, does not confer standing to sue under the FHA. As such, Plaintiff's complaint must be dismissed with prejudice for lack of subject matter jurisdiction.

c. Plaintiff Fails to State A Claim for Injunctive Relief.

If this Court does not dismiss Plaintiff's Complaint on standing or mootness grounds, this Court should nevertheless dismiss Plaintiff's claims for injunctive relief, as Plaintiffs have failed to establish the first element of injunctive relief, *i.e.*, a "substantial threat of irreparable injury."[8] *See Statewide Detective Agency v. Miller,* 115 F.3d 904, 905 (11th Cir.1997). As discussed above, Broadmoor eliminated the discriminatory language in 1994, thus, Broadmoor has not caused and cannot cause a substantial threat of irreparable injury to Plaintiff.

d. Plaintiff Fails to State A Prima Facie Case of A Violation of Section 3604(a)

Section 3604(a) states that it shall be unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."

To establish a prima facie case of housing discrimination Plaintiff must show: **(1)** that she was a member of a protected class; **(2)** that she applied for and was qualified to rent or purchase property or housing at Broadmoor; **(3)** that she was rejected: and **(4)** that the housing or rental property remained available thereafter. *Gonzalez v. Sunrise Lakes Condominium Apartments Phase III, Inc.*, 2007 WL 2364050 *2, (S.D. Fla. 2007) citing to *United States Department of Housing and Urban Development v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990) other citations omitted.

Plaintiff has not and cannot plead facts to support any element of a prima facie violation of Section 3604(a). Plaintiff is not a member of a protected class in this case (familial status). Plaintiff does not allege she applied for or was even qualified to rent or purchase property or housing at Broadmoor. Plaintiff has not alleged she was rejected from the sale of the condominium at Broadmoor. Lastly, there is no allegation regarding what unit was for sale, if it is still for sale or if it was ever for sale. Plaintiff hasn't even begun, as she can't, to allege any facts, let alone sufficient facts, to establish and eventually prove a violation of Section 3604(a) against Broadmoor. As such, Plaintiff's Complaint must be dismissed with prejudice.

e. Plaintiff Fails to State A Prima Facie Case of A Violation of Section 3604(c)

Section 3604(c) states that is shall be 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 race,

color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."

This Court has found that to establish a prima facie case of housing discrimination under Section 3604(c), Plaintiff must show: (1) Broadmoor made a statement or advertisement; (2) the statement or advertisement was made with respect to the sale or rental of a unit at Broadmoor; and (3) the statement or advertisement indicated preference, limitation or discrimination on the basis of familial status. *Haynes v. Wilder Corporation of Delaware*, 721 F.Supp.2d 1218, 1227 (M.D. Fla June 22, 2010).

Once again, Plaintiff has not and cannot plead facts sufficient to establish a prima face case of discrimination under Section 3604(c). Plaintiff has failed, as she cannot, plead any facts that Broadmoor made a statement or was any part of any alleged advertisement for the sale of a condominium at Broadmoor. Furthermore, there are no allegations that Broadmoor owned the subject condominium or that there was any affiliation between Broadmoor and the co-defendants. Broadmoor can certainly not be held liable for alleged advertisements related to a condominium owned by a private party at Broadmoor.

In addition, the Code of Federal Regulations, Title 24: Housing and Urban Development makes it clear that written or oral notices or statements must be made by a person engaged in the sale or rental of a dwelling. *Housing Opportunities Project for Excellence, Inc. v. Wedgewood Condominium Ass'n, Inc.*, 2012 WL 4193969 *9 (S.D. Fla. 2012). ("The governing regulations interpret this provision to cover 'all written or *oral* notices or statements by a person engaged in the sale or rental of a dwelling.' "*Id.* (citing *24 C.F.R. § 100.75(b)*). There are no allegations, as there cannot be, that Broadmoor was engaged in the sale or rental of a dwelling at Broadmoor.

As such, for the above mentioned myriad of reasons, Plaintiff's Complaint must be dismissed with prejudice.

WHEREFORE, Defendant, Broadmoor Villa, Inc., respectfully request this Honorable Court enter an Order dismissing the Complaint with prejudice, granting Defendant's attorney's fee and costs, along with any other relief that this Honorable Court deems just and proper in light of the foregoing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by Email this _2_ day of January, 2012 to: **Shawn A. Heller, Esq.** shawn@sjlawcollective.com

Respectfully submitted,

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INST # 94-343235
DEC 19, 1994 3:43PM

PINELLAS COUNTY FLA.
OFF.REC.BK 8869 PG 293

4C037883 PAL 12-19-1994 15:26:34
01 AGR-BROADMOOR VILLAS CONDO ASSOC
RECORDING 1 $6.00

TOTAL: $6.00
CASH AMT. TENDERED: $6.00
CHANGE: $.00

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Amendment to the By-Laws
of
Broadmoor Villas Condominium Association, Inc.
A Florida Non-Profit Organization

The following Amendment to the By-Laws of Broadmoor Villas Conodminium Assoc., Inc. was approved at the annual homeowners meeting held on November 30,1994, by the required vote of all members of the corporation association as required in the By-Laws.

Article 20 Section G as recorded in the official records of Pinellas County O.R. book 2820 page 140 reads as follows:

"~~Not allow any children under the age of sixteen years of age to reside on the premise except as permitted under the regulations established from time to time~~"

We the undersigned, as duly elected officers of Broadmoor Villas Condominium Assoc. Inc., do hereby certify that the above amendment was approved as stated.

December 6,1994

President [signature] Steve Sanderson
Vice-Pres [signature] Barbara Shove

State of Florida
County of Pinellas

Sworn and subscribed before me on this date Dec 13 1994
IDENTIFICATION PROVIDED Signed
(S)HE DID/DID NOT TAKE AN OATH
Notary Public

LIANA L. VANDEGRIFT
MY COMMISSION EXPIRES JUNE 1, 1998
#CC 373223
Bonded thru Troy Fain Insurance
NOTARY PUBLIC, STATE OF FLORIDA

RETURN TO: Prepared by Toni Minton 586 N. Gulf Blvd. #5A Indian Rocks Bch Fla. 34635

EXHIBIT
A