UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CRISTIN FORREST, an Independent
Fair Housing Tester,

Plaintiff, Case No. 8:12-CV-2573-T-33MAP

v.

CHARLES RUTENBERG REALTY, INC.,
a Florida Corporation; and JEFF LAUNIERE,

Defendants.
_______________________________________/

DEFENDANTS CHARLES RUTENBERG REALTY, INC. AND JEFF LAUNIERE'S MOTION TO DISMISS COMPLAINT AND MEORANDUM OF LAW IN SUPPORT

I. INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 12 (b)(1) and 12(b)(6), Defendants Charles Rutenberg Realty, Inc. ("Rutenberg Realty") and Jeff Launiere ("Launiere") (collectively "the Realtor Defendants") respectfully move to dismiss the Complaint and submit this Memorandum of Law in support of their Motion to Dismiss the Complaint filed by Plaintiff, Cristin Forrest ("Forrest" or "Plaintiff"). As the following shall demonstrate, Plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction because Plaintiff does not have standing to bring this action. Even if she could somehow establish standing, Plaintiff's Complaint should still be dismissed because she has failed to sufficiently plead a cause of action in accordance with the controlling pleading standards mandated by the United States Supreme Court in *Bell Atlantic Corporation v. Twombly*, 127 S.Ct. 1955 (2007). Accordingly, it is respectfully requested that Plaintiff's Complaint be dismissed in its entirety.

II. STATEMENT OF MATERIAL FACTS

Plaintiff filed the instant Complaint against Broadmoor Villa, Rutenberg Realty and Launiere on November 13, 2012. In the Complaint, Plaintiff alleges that she is an "independent fair housing tester" "who seeks to enforce fair housing laws so that people are protected from discriminatory housing practices." Complaint, ¶ 6. Plaintiff claims to have been posing as a "would-be purchaser" when she viewed alleged discriminatory advertisements "being perpetuated" by Defendants. Complaint ¶ 6. She first claims to have searched the internet and visited the website http://www.realtor.com, and encountered an advertisement for the sale of a condominium at Broadmoor Villa Condominiums, at 919 Osceola Road, Hallandale, Florida 33009. Complaint ¶ 10. She further alleges that the advertisement contained discriminatory language. Complaint ¶ 10. Plaintiff does not attach the alleged discriminatory advertisement to her Complaint. Plaintiff alleges that the advertisement stated that the listing was "brokered by Charles Rutenberg Realty, Inc." Complaint ¶ 11.

Plaintiff further alleges that she then performed an internet search on another website http:/www.tampahomespecialist.com, and viewed the same advertisement for the sale of a condominium at Broadmoor Villa Condominiums. Complaint ¶ 12. Again, Plaintiff fails to attach a copy of the alleged advertisement. Plaintiff alleges this advertisement listed the name of defendant Jeff Launiere as the listing agent for the property. Complaint ¶ 12. Despite failing to attach the alleged discriminatory advertisements, Plaintiff further alleges that the website http:/www.tampahomespecialist.com is owned and operated by Rutenberg Realty, and that the Realtor defendants developed the text of the alleged advertisement, which purportedly stated that children under the age of sixteen were not allowed at Broadmoor Villa Condominiums. Complaint ¶ 12. Without any specificity, Plaintiff alleges that she has diverted her "limited time and resources" on this case and "was emotionally distraught and extremely insulted" by the advertisements she viewed on the internet. Complaint ¶¶ 19, 20, 22. Plaintiff does not allege that she took any further investigatory action regarding the advertisements. Plaintiff also performed a Pinellas county records search and "determined that Broadmoor Villa Condominiums was not listed as a registered 55-and-over community." Complaint ¶ 15. Critically, Plaintiff does not allege that she spoke with anyone at either Broadmoor Villa or the Realtor Defendants regarding the advertisements. She does not allege she visited the property purportedly listed for sale or that she ever posed as a would-be purchaser of that property. She further does not allege that she is a member of the class she seeks to protect. Plaintiff does not allege that she, or anyone else for that matter, ever attempted to purchase the subject property at Broadmoor Villa and were the subject of any discriminatory conduct. Plaintiff does not allege that any member of a protected class under the FHA has encountered discriminatory conduct by Broadmoor Villas or the Realtor Defendants, nor does Plaintiff claim she is suing on behalf of any member of a protected class. The Complaint does not allege that anyone has counseled, spoken to, or otherwise expended any resources in communicating with any member of the protected class who claims to have encountered non-FHA compliant practices at either Broadmoor Villa or the Realtor Defendants. Plaintiff, as a purported "fair housing tester," does not allege that she falls within the protected class based on familial status.

Plaintiff is seeking declaratory relief, injunctive relief, compensatory and punitive damages, and an award of attorney's fees and an award of costs and litigation expenses. Complaint, ¶¶ 33, 43, 53. As it will be shown, Plaintiff's complaint should be dismissed for lack of subject matter jurisdiction because Forrest does not have standing to bring this action. Even if she could somehow establish standing, Plaintiff's Complaint should still be dismissed because she has failed to sufficiently plead a cause of action.

III. LEGAL DISCUSSION

A. Plaintiff's Complaint Should Be Dismissed For Lack of Subject Matter Jurisdiction Because She Does Not Have Standing to Bring This Action

1. Standard of Review for Dismissal Under Rule 12(b)(1)

It is well settled that federal courts are courts of limited jurisdiction, empowered to hear cases only as provided for under Article III of the Constitution and Congressional Enactments pursuant thereto. Under Article III of the United States Constitution, jurisdiction of the federal courts is limited to actual cases and controversies and the standing of a plaintiff to litigate the case or controversy is a jurisdictional prerequisite of this requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)("[T]he core component of standing is an essential and unchanging part of the case -or- controversy requirement of Article III").

The burden is on Plaintiff to allege and establish sufficient facts to invoke this Court's jurisdiction. *Brother v. Rossmore Tampa Ltd. Partnership*, 2004 WL 3609350, *3 (M.D. Fla. Aug. 19, 2004).

2. The Standard of Review for Dismissal Under 12(b)(6)

Federal Rule of Civil Procedure 8(a)(2) states that pleadings must contain a "short and plain statement of the claim showing the pleader is entitled to relief." While the pleading standard under Rule 8(a)(2) does not require "detailed factual allegations", Fed. R. Civ. P. 8 requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)(*citing Bell Atlantic Corporation. v. Twombly*, 127 S.Ct. 1955 (2007)).

In *Bell Atlantic Corporation v. Twombly*, *supra*, the Supreme Court clarified the 12(b)(6) standard. Specifically, the Court "retired" the language contained in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly* at 1968 (*quoting Conley*, 355 U.S. at 45-46). Instead, the factual allegations set forth in a complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 1965. As the Third Circuit has stated, "[t]he Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: 'stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element. This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.'" *Phillips*, 515 F.3d at 234 (*quoting Twombly,* 127 S. Ct. at 1965).

In affirming that *Twombly* standards apply to all motions to dismiss, the Supreme Court recently explained the principles. First, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 129 S. Ct. at 1948-49. Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* Therefore, "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." *Id.* at 1949.

2. Plaintiff's Complaint Does Not Establish Standing and Fails to State a Claim Upon Which Relief Can Be Granted

The Fair Housing Act prohibits discrimination in the sale, rental, or provision of housing on the basis of race, color, religion, sex, familial status, national origin, or handicap. 42 U.S.C. §3604. Under the FHA, the following persons are included within the protected class of "familial status:"

> One or more individuals (who have not attained the age of 18 years) being domiciled with-

> (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

42 USC § 3602(k) (1988). A citizen who is an "aggrieved person" under the act may bring a civil action for violation of the act pursuant to 42 U.S.C. §3613(a).

Although an "aggrieved person" is broadly defined to include parties with an interest in "balance and stability" in housing, a party must still show that he has standing under Article III of the Constitution in order to bring an action under the Fair Housing Act. *Nasser v. City of Homewood,* 671 F.2d 432, 437 (11th Cir. 1982). In order to establish standing, a party must establish injury in fact, a causal relationship between the injury and the challenged conduct, and the likelihood that the injury can be remedied by a favorable decision. *See Wasserman v. Three Seasons Association No. 1, Inc.,* 998 F. Supp. 1445, 1447 (S.D.Fla. 1998).

Thus, in order to establish standing under the Fair Housing Act, a plaintiff must allege that she: (1) personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, (2) her injury is causally connected to the defendant's conduct; and (3) the injury is likely to be redressed by the judicial relief sought. *See Havens Realty Corporation, et. al v. Coleman*, 455 U.S. 363, 364 (1982) ("the plaintiff must allege that as a result of defendant's actions he has suffered "a distinct and palpable injury.")(*citing Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). While an "aggrieved person" could include a "tester," meaning "individuals whom without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful...practices," they must allege "distinct and palpable injuries that are fairly traceable to the defendant's actions." *J.R. Harding v. Orlando Apartments*, LLC, et. al., 2011 WL 1457164 * 2 (M.D. Fla. 2011)(*citing Havens Realty Corp.*, 455 U.S. at 376. (internal citations omitted)). In this case, Plaintiff cannot establish the first element of the test for standing because she has not suffered a distinct and palpable injury.

In *Havens Realty v. Coleman*, the plaintiff posed as testers to determine whether an apartment complex owner was engaging in racial steering practices in violation of § 804 of the FHA. The plaintiffs were employed by a nonprofit equal opportunity corporation to serve as testers to determine whether the complex engaged in racial steering. One of the testers was white and one was black. In determining whether the individuals testers had standing to sue under the FHA, the Supreme Court examined whether the testers had suffered actual injury. The Court found that the black tested did have standing because the black tester was told that apartments were not available while the white tester was told that apartments were available. The white tester, however, was informed that apartments were available, thus alleging no injury to his statutory right to accurate information, and therefore he was found to have no standing to sue in his individual capacity as a tester and failed to plead a cause of action under the FHA. *Id.* at 1117.

In this case, Plaintiff, as an alleged "tester" has not alleged that she has suffered any injury to any statutory right because she has not pleaded that she is a member of the class she intends to protect. She claims that the Broadmoor Villa advertisement discriminates against persons based on familial status (prohibiting children under sixteen), but has failed to allege that she is a member of the protected class. The Complaint contains no allegations that Plaintiff is someone with children under the age of sixteen. Absent standing, Plaintiff's claim must fail. In *Wasserman v. Three Seasons Association No. 1, Inc.*, 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 that 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 went on to find that:

> the leading cases on standing as 'aggrieved persons' under the FHA make clear that the non-class member must have a sufficient stake in or nexus with the controversy and that a stake in the controversy is demonstrated when the non-class member suffers an ancillary injury as a result of the defendant's tangible discrimination against protected class members.

Id. The Court found that it could not conclude that standing was conferred simply because of a philosophical disagreement with the policy regarding children or the possibility that the Plaintiff's tenant had the potential to become members of a protected class by becoming pregnant in the future.

In this case, there is no discriminatory act from which any injury to Forrest could spring. Plaintiff does not claim that she is a member of a protected class, nor does she identify any protected class member involved in this matter. She does not sufficiently allege that she has a sufficient stake in or nexus with the controversy because other than conducting some limited internet research, she has suffered no ancillary injury as a result of the alleged discriminatory advertisement. Accordingly, she has no standing to sue pursuant to the Fair Housing Act. Because Plaintiff has failed to establish the necessary element of injury in order to satisfy the standing requirement, it is respectfully requested that the Complaint be dismissed.

3. Broadmoor Villa's By-Laws Render this Lawsuit Moot

The Realtor defendants join in the argument raised by co-defendant Broadmoor Villa that a review of Broadmoor Villa's by-laws render this lawsuit moot. The Realtor Defendants incorporate the arguments made in Broadmoor's Motion to Dismiss as follows:

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 of 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 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 sixteen as incorrectly asserted by Plaintiff, the Amendment in 1994 actually removed any reference to a restriction on residents with children under the age of sixteen. Furthermore, there are no allegations that Broadmoor has ever taken any actions to enforce the language that was removed in 1994. *See* **Exhibit A** attached hereto that is directly referenced by Plaintiff at paragraph 17 of the Complaint.

Any claim for discrimination based on familial status 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. Because Broadmoor does not restrict or otherwise limit occupancy based on familial status, Plaintiff has suffered no injury in this case and neither will any protected class under the FHA who seeks to rent or purchase in this community.

4. Plaintiff Has Alleged Damages That Are Not Available Under the Fair Housing Act

The FHA provides that, upon a finding of a discriminatory housing practice, a court may award actual and punitive damages, as well as injunctive relief. *See* 42 U.S.C. §3613(c). Furthermore, a court may award a prevailing party attorney's fees and costs. No other damages are permitted in this section of the Code permitting a private civil action for enforcement of the Fair Housing Act. Although Plaintiff seeks injunctive relief, Plaintiff has failed to establish the first element of injunctive relief, *i.e.*, a :substantial threat of irreparable injury. *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, there is no substantial threat of irreparable injury to Plaintiff.

Plaintiff also seeks personal injury damages for "the humiliation, embarrassment, and emotional distress" caused by the alleged discriminatory advertisement. Complaint ¶¶ 33E, 43D, 53D. However, she fails to alleged she is a member of the protected class. Such damages are not recoverable under the Fair Housing Act, and Plaintiff has failed to state any other claims for relief which would entitle her to the recovery of such damages.

IV. CONCLUSION

Based on the foregoing, the Realtor Defendants respectfully requests that this Honorable Court enter an Order dismissing Plaintiff's claims for lack of standing pursuant to Federal Rule of Civil Procedure 12 (b)(1) and for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12 (b)(6).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed foregoing document with the Clerk of the Court using ECF. I also certify that the foregoing document is being served on this 7th day of January, 2013 by ECF: **Joshua Aaron Glickman, Esq., and Shawn Alex Heller, Esq.,** Social Justice Law Collective, P.L., P.O. Box 70327, Washington, DC 20024.

/s/ Amy L. Christiansen
GEORGE M. VINCI, JR. ESQ.
Florida Bar No. 0817201
AMY L. CHRISTIANSEN, ESQ.
Florida Bar No. 0602841
SPECTOR, GADON, & ROSEN, LLP
360 Central Avenue, Suite 1550
St. Petersburg, Florida 33701
(727) 896-4600
Primary: gvinci@kawsgr.com and
achristiansen@lawsgr.com
Secondary: twames@lawsgr.com and
rmasco@lawsgr.com
Tertiary: Pleadings@lawsgr.com
Attorneys for Charles Rutenberg Realty, Inc. and Jeff Launiere

Case 8:12-cv-02573-VMC-MAP Document 6 Filed 01/02/13 Page 12 of 12 PageID 43

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

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

4C037683 PNL 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

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 O 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 Barbara L. Shove Barbara Shove

State of Florida
County of Pinellas

Sworn and subscribed before me on this date Dec 6 1994

IDENTIFICATION PROVIDED

(S)HE DID/DID NOT TAKE AN OATH.

[signature]
Notary Public

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

Platbook 2 Pg 82

Prepared by Toni Minton
RETURN TO: 506 N. Gulf Blvd. #504 Indian Rocks Bch Fla 34635

UNOFFICIAL COPY

EXHIBIT
A