UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

J. R. HARDING,

Plaintiff,

-vs- **Case No. 6:11-cv-85-Orl-19DAB**

ORLANDO APARTMENTS, LLC &
BEHRINGER HARVARD DISTRICT REIT, LLC.,

Defendants.

ORDER

This case comes before the Court on the following:

1. The Motion for Summary Judgment and Memorandum in Support filed by Defendant Behringer Harvard District Reit, LLC (Doc. No. 64, filed Aug. 2, 2012);
2. The Response and Memorandum of Law in Opposition to Defendant Behringer Harvard District Reit, LLC's Motion for Summary Judgment filed by Plaintiff James R. Harding (Doc. No. 67, filed Aug. 31, 2012);
3. The Unauthorized Reply to Plaintiff James R. Harding's Response filed by Defendant Behringer Harvard District Reit, LLC (Doc. No. 74, filed Sept. 14, 2012); and
4. The Unopposed Motion for Bifurcated Trial filed by Defendant Behringer Harvard District Reit, LLC (Doc. No. 69, filed Sept. 7, 2012).

INTRODUCTION

Before the Court is the issue of whether a genuine question of fact exists for trial that Defendant Behringer Harvard District Reit, LLC ("BHDR") subjected Plaintiff James R. Harding ("Harding") to housing discrimination in violation of the Fair Housing Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619 (the "FHA"). As explained below, construing the record evidence in the light most favorable to Harding, the Court finds that no such question of fact is presented; thus, BHDR is entitled to summary judgment in its favor in accordance with Rule 56 of the Federal Rules of Civil Procedure.

PROCEDURAL BACKGROUND

On January 20, 2011, Harding initiated this housing discrimination action under the FHA by filing a Complaint against Perennial Properties, Inc. ("Perennial") as the "owner and developer" of the District Universal Boulevard Apartments & The District Shops, which is a multi-family apartment complex located in Orlando, Florida (the "District"). (*Id.*) Harding then filed a First Amended Complaint on February 14, 2011, against Defendants Orlando Apartments, LLC ("Orlando Apartments") and Behringer Harvard District Reit, LLC ("BHDR"). (Doc. No. 11 (the "Complaint").) The following day, Harding filed a Notice of Voluntary Dismissal as to Perennial. (Doc. No. 12, filed Feb. 15, 2011.)

Harding set forth two causes of action in his Complaint. (Doc. No. 11.) In his "First Cause of Action," Harding alleged that Orlando Apartments violated §§ 3604(f)(1)-(f)(2) and (f)(3)(C) of the FHA as the "Designer/Contractor" of the District. (*Id.* ¶¶ 22-26.) In his "Second Cause of Action," Harding alleged violations of § 3604(f)(1)-(f)(2) of the FHA by BHDR as "Owner" of the District. (*Id.* ¶¶ 27-31.) In support of his Second Cause of Action against BHDR, Harding alleged

that BHDR was liable for having knowingly continued to offer apartments for rent at the District even though it knew "or could have known" that the District lacks at least 22 accessible and adaptable features described in regulations promulgated by the United States Department of Housing and Urban Development ("HUD"), 24 C.F.R. § 100.205 (the "HUD Regulations"). (Doc. No. 11 ¶¶ 6-8, 25, 28.) Harding demanded compensatory and punitive damages, costs, attorney fees, and the following declaratory and injunctive relief against BHRD:

(1) a declaration that BHRD's alleged conduct "in continuing to rent covered units which do not comply with . . . 42 U.S.C. § 3604(f)(3)(C) is in violation of FHAA, 42 U.S.C. § 3604(f)(1) - (f)(2);" and

(2) an injunction that would:

(a) preclude BHRD from

(i) failing or refusing to bring the District's "covered dwelling units and the public use and common use areas . . . into immediate compliance with the requirements of 42 U.S.C. § 3604(f)(3)(C) and the applicable regulations . . . ," and

(ii) renting covered dwelling units in the District until all such units and the public common use areas of the District have been brought into "compliance with the requirements of 42 U.S.C. § 3604(f)(3)(C) and the applicable regulations," and

(b) require BHRD to

(i) survey each and every apartment community owned by BHRD and "assess the compliance of each with the accessibility requirements of the [FHA],"

(ii) report any "noncompliance" to the Court, and

(iii) "bring each and every such apartment community . . . into compliance with the requirements of 42 U.S.C. § 3604(f)(3)(C) and the applicable regulations.

(*Id.* at 10-12.)

On March 11, 2011, BHDR filed a Motion to Dismiss the Second Cause of Action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and further challenged Harding's demands for certain injunctive relief. (Doc. No. 17 (the "Motion to Dismiss").) Harding filed a Response in Opposition to the Motion to Dismiss on April 7, 2011. (Doc. No. 25.) In their submissions to the Court, neither BHDR nor Harding cited any case law directly discussing the viability of claims under Sections 3604(f)(1) and (f)(2) against a building owner for failing to bring a completed and occupied building that the owner did not design or construct into compliance with HUD Regulations. (Doc. No. 26 at 7-12.) In the absence of pertinent case law, and given certain expansive language in the legislative history of the FHA, the Court declined to dismiss Harding's Second Cause of Action under Rule 12(b)(6) (the "Motion to Dismiss Order"). (*Id.* at 7-12 (holding that the Second Cause of Action was "well-pled" given the "legislative history" at H.R. Rep. 100-711, and the parties' failure to cite any case law "discussing the viability" of asserting such claims under Sections 3604(f)(1) and (f)(2)).) Although the Court denied BHDR's request to dismiss the Second Cause of Action, the Court agreed with BHDR that Harding's request for injunctive relief asserted against non-parties was improper; thus, the Court struck such requests. (*Id.* at 12.)

On April 29, 2011, BHDR filed its initial Answer to the Complaint. (Doc. No. 32.) Thereafter, BHDR sought and was granted leave to file a First Amended Answer and a Second Amended Answer. (Doc. Nos. 36-38; Doc. Nos. 58-60.) The following are among the "affirmative defenses" asserted in BHDR's Second Amended Answer: (1) Harding lacks standing to assert claims concerning some or all of the alleged design and construction defects identified in his Complaint; (2) BHDR is "not liable for any design or construction defects" because it did not own the District at the time of construction; (3) BHDR "is not a wrongful participant in any alleged

violation" of the FHA; (4) BHDR "is not liable for any unlawful decisions or acts of others, including but not limited to" Perennial, Orlando Apartments, and others involved in the design and construction of the District; (5) "the design and construction of the District complied with one or more of the 'safe harbors'" of the FHA; and (6) Harding failed to mitigate his alleged damages. (Doc. No. 60 at 4-5.)

On December 1, 2011, Harding filed a Motion to Compel Entry Upon Land for purposes of an inspection of the District by Harding's designated expert, Soy L. Williams ("Williams"). (Doc. No. 43 (the "Motion to Compel").) BHDR filed a timely Response in Opposition to the Motion to Compel. (Doc. No. 45, filed Dec. 15, 2011.) Upon referral, U.S. Magistrate Judge David A. Baker entered an Order granting the Motion to Compel in part and denying it in part (the "Discovery Order"). (Doc. No. 47, filed Dec. 30, 2012.) Specifically, the Discovery Order rejected Harding's demand for unfettered access to the District and limited Harding's inspection to those areas related to the specific architectural features referenced in the Complaint. (*Id.*) After entry of the Discovery Order, Williams conducted an inspection of the District on January 11, 2012. (Doc. No. 51-3 at 3.)

Based upon Williams' expert report dated February 15, 2012 (the "Williams Report"), Harding moved for partial summary judgment in its favor against Orlando Apartments (the "Partial Summary Judgment Motion").[1] (Doc. Nos. 50-51, filed Mar. 14, 2012.) Asserting that any ruling by the Court on Harding's Partial Summary Judgment Motion "would have no preclusive effect on

[1]After inspecting the District, Williams opined that 19 of the 22 features identified in the Complaint are "non-compliant" with HUD Regulations. (Doc. No. 51-3 at 10-13, ¶¶ 4.1.1 - 4.1.5, 4.1.7 - 4.1.13, 4.1.15 - 4.1.21); *see infra* SUMMARY OF FACTS VIEWED IN THE LIGHT MOST FAVORABLE TO HARDING. Disagreeing with Harding, Williams further opined that the three remaining features identified in the Complaint are"compliant" with HUD Regulations. (Doc. No. 51-3 at 10-13, ¶¶ 4.1.6, 4.1.14, 4.1.22 (opining that the tables in the Cyber Lounge, the entry door in the Business Center, and the pool deck accessibility route are all compliant with HUD Regulations).)

any of the issues pending between Harding and BHDR," Harding withdrew his Partial Summary Judgment Motion on May 10, 2012.[2] (Doc. No. 61 ¶¶ 3-4.)

On August 2, 2012, BHDR filed its Motion for Summary Judgment and Memorandum of Law (the "Motion"). (Doc. No. 64.) In support of its Motion, BHDR submitted the following evidence:

(1) the Declaration of Jessica Fisher ("Fisher"), who is the Community Director for the District (Doc. No. 64-2 (the "Fisher Declaration"));

(2) Correspondence dated February 4, 1999, addressed to Mr. R. Layne Morrill, then President of the National Association of Realtors ("NARS"), from the then Secretary of HUD, Andrew Cuomo (Doc. No. 64-3 (the "HUD Letter"));

(3) screen shots dated July 30, 2012 from HUD's official website, providing HUD's responses to eighty-six "Frequently Asked Questions" concerning the FHA (Doc. No. 64-4 (the "HUD FAQs"));

(4) the Affidavit of Matthew D. Hill ("Hill"), an attorney representing BHDR in this action, who provides authentication of the HUD documents (Doc. No. 64-5 (the "Hill Affidavit")); and

(5) a portion of the transcript of Harding's deposition taken on February 22, 2012 (Doc. No. 64-6 ("Harding Transcript")).

On August 6, 2012, the Court entered an Order in accordance with *Milburn v. U.S.*, 734 F.2d 762 (11th Cir. 1984), notifying the parties that the Court would take the Motion "under advisement" on September 17, 2012. (Doc. No. 65 (the "*Milburn* Order").) Thereafter, Harding filed his

[2]Almost a year before filing his Motion for Partial Summary Judgment against Orlando Apartments, Harding requested that a default be entered against Orlando Apartments because it had not responded to the Complaint and the time for doing so had passed. (Doc. No. 27, filed Apr. 15, 2011.) On April 15, 2011, the Clerk of the Court entered a default against Orlando Apartments in accordance with Rule 55(a) of the Federal Rules of Civil Procedure. (Doc. No. 28.) To date, Harding has not requested that the Court enter default judgment against Orlando Apartments in accordance with Rule 55(b) of the Federal Rules of Civil Procedure. In any event, entry of a final default judgment against Orlando Apartments would be premature pending resolution of Plaintiff's claims against BHDR.

Response and Memorandum of Law in Opposition to the Motion (the "Response"). (Doc. No 67, filed Aug. 31, 2012 (the "Response").) Apparently relying on the allegations of his Complaint, Harding submitted no evidentiary materials in support of his Response. (*Id.*)

On September 7, 2012, the parties filed their Joint Pretrial Statement, and BHDR filed an unopposed Motion to Bifurcate the Trial. (Doc. Nos. 68, 69.) On September 13, 2012, the parties attended a Final Pretrial Conference before Magistrate Judge David A. Baker. (Doc. No. 72.) The following day, BHDR filed a Reply to Harding's Response (the "Reply") (Doc. No. 74, filed Sept. 14, 2012.) Because BHDR did not seek authorization from the Court before filing its Reply, the Court will strike the document in accordance with Local Rule 3.01(c).[3] The Motion for Summary Judgment is ripe. (Doc. No. 65.) As explained below, based upon the documents properly submitted to the Court (Doc. Nos. 64, 64-1, 64-2, 64-3, 64-4, 64-5, 64-6, 67) and the applicable law, the Court will grant the Motion for Summary Judgment in favor of BHDR.

THE SUMMARY JUDGMENT STANDARD

Courts "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259 (11th Cir. 2004). An issue of fact is "material" under the applicable substantive law if it might affect the outcome of the case. *Hickson Corp.*, 357 F.3d at 1259. An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact

[3]Local Rule 3.01(c) prohibits any party from filing "any reply or further memorandum directed to [a] motion or response . . . unless the Court grants leave." To obtain such leave, the party must file a motion pursuant to Local Rule 3.01(d) in which the party specifies the length of the proposed reply. The party may not provide a copy of the proposed reply "as an attachment or otherwise." L.R. 3.01(d). Here, BHDR filed the Reply without seeking authorization from the Court. (Doc. No. 74.)

to find for the nonmoving party. *Id.* at 1260. The court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.*

The party moving for summary judgment has the burden of proving that: (1) there is no genuine issue as to any material fact, and (2) it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In determining whether the moving party has satisfied its burden, the court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the non-moving party. *Anderson*, 477 U.S. at 255. The court may not weigh conflicting evidence or weigh the credibility of the parties. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993). If a reasonable fact finder could draw more than one inference from the facts and that inference creates an issue of material fact, the court must not grant summary judgment. *Id.* On the other hand, summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. In addition, when a claimant fails to produce "anything more than a repetition of his conclusory allegations," summary judgment for the movant is "not only proper but required." *Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981).

SUMMARY OF FACTS VIEWED IN THE LIGHT MOST FAVORABLE TO HARDING

Harding is "disabled" under the FHA, and his claims against BHDR are premised on a single visit to the District on November 24, 2010, which Harding made for the specific purpose of testing the District for compliance with the FHA. (Doc. No. 11 ¶¶ 1, 4; Doc. No. 64-6 at 16.) There is no dispute that the District was required to be designed and constructed in compliance with HUD

Regulations. (Doc. Nos. 11, 51-3, 64.) Harding and his designated expert witness agree that the District fails to comply with HUD Regulations in the following respects:

1. Accessible parking is not provided at the Walgreen's or the Leasing Office (Doc. No. 51-3 at 10 ¶¶ 4.1.1, 4.1.2);

2. Guest parking at the District has a surface slope in excess of two percent (*id.* at 10 ¶ 4.1.3);

3. A restroom in the leasing office and another restroom at the pool have a "forward approach within the restroom" that is less than 18 inches (*id.* at 10 ¶ 4.1.4; *id.* at 13 ¶ 4.1.20);

4. A bar in the Cyber Lounge provides insufficient knee space (*id.* at 10 ¶ 4.1.5);

5. A portion of the mailboxes are located "at heights exceeding 54 inches" from the finished floor (*id.* at 11 ¶ 4.1.7);

6. The entry door and patio door in both a model unit (the "Model) and a "handicapped" dwelling unit (the "Unit"), and the patio door in the Business Center all have slopes in excess of those permitted under the HUD Regulations (*id.* at 11-12 ¶¶ 4.1.8, 4.1.10, 4.1.13, 4.1.17, 4.1.18);

7. Accessible routes in the Model and the Unit are too narrow (*id.* at 11-12 ¶¶ 4.1.9, 4.1.19);

8. In the bathroom of the Model, the water closet feature is too close to the side wall and insufficient clear floor space exists at the tub (*id.* at 11 ¶¶ 4.1.11, 4.1.12);

9. A bathroom in the Business Center, provides a water closet feature that is too close to the side wall and a fixture has insufficient knee space (*id.* at 12 ¶ 4.1.15);

10 Fire extinguishers are positioned improperly throughout the District (*id.* at 12 ¶ 4.1.16); and

11. The control for the rinse shower at the pool does not operate and is located too high from the finished deck (*id.* at 13 ¶ 4.1.21).

(Doc. No. 51-3; Doc. No. 11 ¶ 25.)

BHDR disputes Harding and Williams' opinions concerning the above features, and it contends that the District complies with the accessibility and adaptability requirements of the FHA and HUD Regulations. (Doc. No. 60; Doc. No. 68 at 14-22.) Although a dispute exists concerning whether the District is in compliance with HUD Regulations,[4] there is no dispute that BHDR had no involvement in the design or construction of the District. (Doc. No. 64 ¶¶ 5-7; Doc. No. 64-2 ¶¶ 3-4; Doc. No. 64-6 at 2.) In fact, BHDR did not acquire ownership of the District until December of 2010.[5] Further, BHDR has not made any structural changes to the District since it acquired the District in December of 2010. (Doc. No. 64 ¶ 8; Doc. No. 64-2 ¶¶ 4.)

ANALYSIS

BHDR argues that the Court should enter summary judgment in its favor because Harding can offer no evidence that BHDR was involved in the design or construction of the District or that it otherwise discriminated against Harding under sections 42 U.S.C. § 3604(f)(1) or (f)(2). (Doc. No. 17 at 7-17.) According to BHDR, its argument is supported by a fair reading of the FHA, the absence of case law supporting Harding's claim, HUD's informal guidance to the public in the HUD Letter and HUD FAQs, and HUD's enforcement practices. (*Id.* at 8-11 (citing *Meyer v. Holley*, 537 U.S. 280, 287-88 (2003) and *Doyle v. Southern Guaranty Corp.*, 795 F.2d 907, 912 (11th Cir. 1986)).

Relying solely on the existence of the non-compliant features identified at the District, coupled with the allegations of his Complaint concerning BHDR's alleged "knowledge" of such

[4]For purposes of BHDR's Motion only, the Court will assume that the features identified by Harding and Williams fail to comply with HUD Regulations. *Celotex*, 477 U.S. at 323.

[5]Orlando Apartments developed the District and owned it until it was purchased by BHDR. (Doc. Nos. 11, 64.)

features, Harding counters that the Motion should be denied because BHDR continues to make the District unavailable to him for rent due to his handicap by not correcting the non-compliant features at the District identified in this action. (Doc. No. 25.) According to Harding, the FHA "clearly" imposes liability on owners, such as BHDR, who were not involved in design or construction of a non-compliant building, but who nonetheless offers to rent units in the non-compliant building. Further, Harding argues that the Court should give no deference to the HUD Letter and HUD FAQs. (*Id.*)

A. The FHA

"The FHA, as amended in 1988, prohibits discrimination based on handicap." *Barker v. Niles Bolton Assocs., Inc.*, 316 Fed. Appx. 933, 941 (11th Cir. 2009); *e.g.*, *Wood v. Briarwinds Condo. Ass'n Bd. of Dirs.*, 369 Fed. Appx. 1, 3 (11th Cir. 2010). The provisions of the FHA pertinent to this action are set forth below:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful–
>
> * * *
>
> (f) (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of– [the buyer or renter, or a person associated with the buyer or renter].
>
> (2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of– [the buyer or renter, or a person associated with the buyer or renter].
>
> (3) For purposes of this subsection, discrimination includes–
>
> * * *
>
> (C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30

> months after September 13, 1988, a failure to design and construct those dwellings in such a manner that--
>
> (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
>
> (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
>
> (iii) all premises within such dwellings contain the following features of adaptive design:
>
> (I) an accessible route into and through the dwelling;
>
> (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
>
> (III) reinforcements in bathroom walls to allow later installation of grab bars; and
>
> (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

42 U.S.C. § 3604(f); 24 C.F.R. §§ 100.201, *et seq.* "Discrimination" under § 3604(f) also includes: (1) "a refusal to permit" a reasonable modification "at the expense of the handicapped person . . . if such modification may be necessary" to afford the handicapped person "full enjoyment of the premises" (42 U.S.C. § 3604(f)(3)(A); 24 C.F.R. § 100.203); and (2) "a refusal to make reasonable accommodations in rules, policies, practices, or service" to permit a handicapped person an "equal opportunity to use and enjoy a dwelling" (42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204).

Courts taxed with construing section 3604(f) of the FHA (including this Court in its Motion to Dismiss Order) have found the provisions to be ambiguous as to the persons who may be held

liable for claims of housing discrimination premised on design and construction deficiencies. *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F.Supp. 2d 661, 664-65 (D. Md. 1998) (noting that the terms of the FHA do no "specify the parties who may be liable" for a "design and construct" violation, and holding that "those who are wrongful participants" in the design or construction may be liable); (Doc. No. 26 at 10-11 (resorting to legislative history of the FHA to assess viability of Harding's claim against BHDR)); *e.g.*, *Phillips v. Downtown Affordables, LLC*, Case No. 06-00402 DAE-BMK, 2007 WL 2668637, *5 (D. Haw. Sept. 5, 2007) (noting that the FHA is ambiguous in that it does not define "design" or "construct" and looking to other sources to determine Congressional intent). Accordingly, the Court rejects Harding's argument (which is based largely on the analysis of a dissenting opinion from a case decided by the Ninth Circuit Court of Appeals)[6] that the FHA unambiguously imposes liability on BHDR for offering to rent units at the District without first correcting all non-compliant features at the District.

B. HUD's Guidance

"No deference is to be given to an agency interpretation that is at odds with the plain meaning of the statute being interpreted." *Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1261-63 (11th Cir. 2002). Where, as here, "a statute is silent or ambiguous as to a specific issue, a court must consider the interpretation of an administrative agency" if Congress has given authority to the agency to interpret the statute and the guidance was provided in accordance with the

[6]Harding cites the dissenting opinion in *Garcia v. Brockway*, 526 F.3d 456, 469 (9th Cir. 2008), to argue that the "plain language" of the FHA refutes BHDR's arguments. (Doc. No. 67 at 3-4.) Like most of the cases cited by both parties, *Garcia* addressed the applicability of FHA's two-year statute of limitations. Accordingly, such cases have limited value to this Court's analysis. (Doc. No. 26 at 6-7 (declining to resolve motion to dismiss based upon case law concerning FHA's statute of limitations).)

grant of such authority. *See Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.* 467 U.S. 837, 842–843 (1984) ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").[7] Even if an agency's interpretation is not set forth in duly enacted regulations or issued in accordance with a specific grant of authority, if persuasive, courts still must afford appropriate deference to an agency's interpretation of an ambiguous statute. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *e.g., Reno v. Koray*, 515 U.S. 50, 61 (1995); *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 157 (1991) (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers").

Congress has given authority to HUD to construe and interpret the FHA. *Meyer v. Holley,* 537 U.S. 280, 287-88 (2003) (noting that HUD is "the federal agency primarily charged with the implementation and administration" of the FHA); *e.g., Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1355 (6th Cir. 1995) (deferring to HUD's consistent interpretation of the FHA "as prohibiting discriminatory practices relating to property and hazard insurance"); *United States v. Edward Rose & Sons*, 246 F. Supp. 2d 744, 750 (E.D. Mich. 2003) (deference to HUD's construction of the FHA) *aff'd in part*, 384 F.3d 258 (6th Cir. 2004); *but see, DiCenso v. Cisneros,* 96 F.3d 1004, 1007 (7th Cir. 1996) (declining to afford deference to HUD's informal opinion as to hostile housing environment sex discrimination where the framework for analysis of such claims

[7]In *Chevron*, the Unites States Supreme Court held that an agency's reasonable interpretation of an ambiguous statute, if contained in a duly enacted regulation, ***must*** be given effect by the courts. *Chevron*, 467 U.S. at 842-44.

was well-established under Title VII case law and HUD had "not even enacted" pertinent guidelines).

Here, HUD has provided informal guidance to the public concerning application of the FHA. Specifically, the HUD Letter and HUD FAQs buttress BHDR's construction of the statute as not imposing liability on owners of a building for merely failing to insure that the building complies with the design and construction requirements of the FHA.[8] For instance, in September of 1998, NARS requested guidance from the Secretary of HUD concerning the following question: "whether the purchaser of a multi-family housing building or of a single unit within such a building who was not involved in its design or construction could be held liable for the building's failure to satisfy the accessibility requirements" of the FHA? (Doc. No. 64-5 at 4-5.) In the HUD Letter, the Secretary of HUD provided the following response:

> The issue you have raised is a complex one. You may be assured that I share your desire that the public receive guidance on it as quickly as possible to minimize the impact of uncertainty upon purchasers of buildings or units that could be affected.
>
> As you noted in your letter, the Act contains broad statutory language: unlawful discrimination on the basis of handicap in connection with the design and construction of covered multifamily dwellings includes a failure to design and construct those dwellings in such a manner that they are readily accessible and usable by handicapped persons. In carrying out its responsibilities to administer and enforce this provision of the [FHA, HUD] is guided by two important considerations. First, [HUD] must ensure the involvement of all parties necessary to provide a complete remedy for a violation of the accessibility requirements of the Act. Second, [HUD] desires to provide needed assurances to third parties who purchase individual units within covered multi-family buildings.
>
> Clearly, final resolution of these interests will benefit from additional experience growing from the examination of the issues as it comes before us and the courts in cases. However, it is clear that there is a need for guidance in the interim;

[8]Neither party cited to the HUD Letter or HUD FAQS in their respective submissions concerning the Motion to Dismiss. (Doc. Nos. 17 & 25.)

> therefore, I am pleased to share with you the principles behind [HUD's] present enforcement policy:
>
> - A person or entity who has purchased an individual unit in a non-complying multi-family building without any involvement in the design or construction of the unit will not be considered an appropriate respondent to complaints. This practice is consistent with HUD v. Perland Corp. (HUD ALJ 05-9601517-8), the decision your letter references.
>
> - A person or entity that is not involved in the original design and construction of a building, but has acquired an ownership interest in the building, may be an appropriate respondent where they are necessary to assure that changes required to remedy violations can be accomplished. In addition, in certain situations, such as where there is continuity in operating ownership entities and there is *notice of potential legal obligations*, such persons may be liable under principles of successor liability. In such cases, [HUD] typically would not seek civil penalties where liability is based solely on the entity's role as successor.
>
> - A person or entity involved in the design or construction of the building may be held liable for violations of the Act.
>
> - A subsequent owner of a building that was designed and constructed properly could be liable if the owner makes structural changes to the building so that the building fails to meet the accessibility guidelines.
>
> These principles express the Department's current enforcement policy. I know that we are in agreement that our common goal is compliance with the accessibility guidelines in all of the nation's housing. . . .

(*Id.* (emphasis added).)

The position taken by the Secretary in the HUD Letter more than twenty years ago is consistent with guidance that HUD currently provides on its official website (the "Website") concerning potential liability of non-compliant building owners and enforcement of HUD's design and construction requirements. (Doc. No. 64-5 at 6-25.) Specifically, the answer on its Website to the question "Who can be sued for violations of the design and construction requirements of the

[FHA]?" largely mirrors the response provided by the Secretary in the HUD Letter. According to the HUD FAQs:

> The following persons and entities may be sued [for violations of the design and construction requirements]:
>
> 1. Any person or entity involved in the design and construction of the building may be held liable for violations of the Act.
>
> 2. A later owner of a building may be held liable ***if the later owner makes structural changes so that the building does not meet the access requirements.***
>
> 3. A person or entity that has bought a building or property after it was designed and constructed may be sued when that person or entity is necessary to provide authority to remedy violations.
>
> Individual owners or occupants of inaccessible units who were not involved in building, developing, or managing them, and who own only individual units will not be named in HUD complaints.

(Doc. No. 64-5 at 10 (FAQ 20) (emphasis added).)

Other HUD guidance indicates that liability of a building owner concerning "design and construction requirements" may be limited to providing reasonable accommodations or modifications at the request of a handicapped person. (*Id.* at 10-11 (FAQ 21) ("Depending which [provision of the FHA applies] . . . owners, managers and others may be required to provide reasonable accommodations in existing properties, or to permit reasonable structural modifications to existing properties which provide greater or different levels of accessibility than the design and construction requirements. . . ."); *id.* at 10 (FAQ 18) (advising that the "burden of compliance rests with the person or persons who design and construct covered multifamily dwellings").)

Prior to this Court's Motion to Dismiss Order, the case law concerning an owner's liability for HUD Regulation design and construction issues appeared to agree with HUD's consistent but

informal guidance in that such parties have been named only as "necessary parties" in suits against builders and designers, or have been found liable only when a plaintiff establishes the elements for successor or vicarious liability. (Doc. No. 26 at 7-12); *e.g. National Fair Hous. Alliance v. A.G. Spanos Const.*, 542 F.Supp.2d 1054, 1058, 1065-66 (noting joinder of owners as necessary parties, but not as defendants subject to liability for design and construction claims); *Silver State Fair Hous. Council, Inc. v. ERGS, Inc.*, 362 F.Supp. 2d 1218, 1222 (D. Nev. 2005) (rejecting developer's argument that it should not be liable when new owner of non-compliant building is "let off the hook" under the FHA). *See generally* William H. Danne, Jr., J.D., *Construction and Application of § 804(f) of Fair Housing Act (42 U.S.C.A. § 3604(f)), Prohibiting Discrimination in Housing Because of Individual's Disability*, 148 A.L.R. FED. 1 (1998) (summarizing cases decided with updates through 2012).

Given the ambiguity of the FHA, the reasonableness and consistency of HUD's position, and the absence of case law clearly supporting Harding's claim, the Court rejects Harding's argument that the HUD Letter and the HUD FAQs "must be rejected and afforded no deference."[9] (Doc. No. 67 at 10-11 (arguing that "any HUD guidance that interprets the FHA as exempting current owners from liability should be rejected as contrary to clear Congressional intent").) Rather, the Court finds

[9] HUD's informal interpretation is not at odds with the Legislative History cited in the Court's Motion to Dismiss Order. (Doc. No. 26 at 7-12.) The Legislative History does not speak directly to the specific issue of whether Congress intended that a person who innocently purchases a non-compliant building should be held liable for offering to rent dwellings in such a building without first remedying all non-compliant features. H.R. Rep. 100-711, at 23-24, 1988 U.S.C.C.A.N. 2173, 2184-85 (Jun. 17, 1988). Further, given the multiple enforcement mechanisms provided under the FHA, the FHA is not rendered "toothless" by a decision rejecting the notion that civil liability must be imposed on owners who unknowingly purchase a non-compliant structure, and then without a wrongful act or discriminatory intent, offer to rent dwellings in that structure without insuring complete compliance with the design and construction requirements of section 3604(f)(3)(C) and the HUD Regulations.

that the HUD Letter and HUD FAQs provide some persuasive guidance to the Court and support BHDR's arguments for entry of summary judgment in its favor in this action. *Skidmore*, 323 U.S. at 14; *e.g.*, *Martin*, 499 U.S. at 157.

C. The Motion to Dismiss Order

The Court's analysis is not inconsistent with its Motion to Dismiss Order. In the Motion to Dismiss Order, the Court held only that Harding's Second Cause of Action was "well-pled" in that liability ***may*** be imposed based on an owner's ***knowingly*** offering to rent a non-compliant dwelling. (Doc. No. 26 at 7-12.) Specifically, the Court noted that while the HUD Regulations cited in the Complaint are not "determinative of whether housing is accessible, . . . ***the degree of a landlord's failure to comply*** with the HUD Regulations ***may*** render housing inaccessible for all practical purposes and thus unavailable under Section 3604(f)(1)." (Doc. No. 26 at 8 (emphasis added).) The Court then referenced certain legislative history suggesting that the failure "to provide the accessible and adaptable features described in the HUD Regulations ***may*** amount to discrimination in 'privileges' and 'facilities' prohibited by Section 3604(f)(2)." (*Id.* at 11 (emphasis added)). The Court's Motion to Dismiss Order did not advocate a standard of strict liability on an owner for renting non-compliant housing; rather, some"degree" of wrongdoing is necessary.

The necessity of evidence concerning wrongdoing is illustrated by a well-reasoned opinion discussing the Court's Motion to Dismiss Order.[10] *National Fair Housing Alliance, Inc. v. S.C. Bodner, Co., Inc.*, 844 F.Supp.2d 940, 944-45 (S.D. Ind. 2012) (discussing *Harding v. Orlando*

[10]Although the Motion to Dismiss Order is an unpublished opinion, the decision has been cited by two federal district courts in the context of FHA housing discrimination actions. *S.C. Bodner, Co., Inc.*, 844 F.Supp.2d at 944-45 (denying building owner's motion to dismiss based in part on *Harding*, 2011 WL 1457164; *Solodar v. Old Port Cove Lake Point Tower Condo. Ass'n, Inc.*, No. 12-80040-CIV, 2012 WL 1570063, at *7 (S.D. Fla. May 2, 2012) (granting motion to dismiss FHA claim in part and rejecting plaintiff's reliance on *Harding*).

Apartments, LLC, No. 6:11-cv-85-Orl-19DAB, 2011 WL 1457164 (M.D. Fla. Apr. 15, 2011)). The *S.C. Bodner* Court cited *Harding* in support of its determination that a plaintiff may state a claim under subsection 3604(f)(2) of the FHA against an owner for offering "apartments for rent without making an effort to correct" ***known*** design and construction violations. *S.C. Bodner*, 844 F.Supp.2d at 944-945. The *S.C. Bodner* Court reasoned that "the extent of the owner's knowledge" of the alleged violations will ultimately determine whether the owner's failure to cure supports liability under subsections 3604(f)(2):

> The question at hand is whether an owner who knows or should know the building he owns was constructed in violation of subsection (f)(3)(C) is required to address those violations, or can he offer the apartments for rent without making an effort to correct the violations. And *the court sees the answer to that question as being tied to the extent of the owner's knowledge of those violations, which might reflect on intent.* Affording the Plaintiffs all factual inferences, as the court must at the motion to dismiss stage, it is certainly plausible that an owner could have purchased a post-1990 constructed apartment community knowing that its price reflected a lesser cost of construction due to noncompliance with subsection (f)(3)(C). Further, that owner could intend that the costs of compliance be passed on to those renters who may need certain modifications that otherwise would have been in place if subsection (f)(3)(C) had been complied with. It is not implausible to think that an owner might use subsection (f)(3)(A), which requires an owner to allow a renter to make reasonable modifications at their cost, as a shield and a means to shift the costs of subsection (f)(3)(C) compliance.

Id. at 945-46 (emphasis added) (declining to "read into the [FHA] a requirement of an 'affirmative act,' [by a building owner] when the same is unnecessary for the owners to have a discriminatory intent").

The *S.C. Bodner* Court's analysis of the "failure to correct" claim is consistent with decisions of the Eleventh Circuit Court of Appeals requiring proof of some "wrongdoing" before imposing liability under the FHA,[11] and it highlights the limited analysis conducted under Rule 12(b)(6).

[11] With respect to the design and construction requirements of section 3604(f)(3)(C), HUD (continued...)

Barker, 316 Fed. Appx. at 940-43 (rejecting plaintiff's argument that the trial court erred in failing to enter judgment against a designer for proven design violations where the evidence did not support a finding that the designer defendant wrongfully participated in the design violations); *e.g. Wood v. Briarwinds Condo. Ass'n Bd. of Dirs.*, 369 Fed. Appx. 1, 3 (11th Cir. 2010) (dismissing FHA claims where the complaint did not allege that the landlord "refused" the pro se plaintiff's request to remedy inaccessible features at an apartment complex, and plaintiff lacked standing to assert a claim that "the design of the guest parking spaces were discriminatory" because plaintiff never "used those parking spots or suffered any injury himself from their design").

Here, there is no evidence concerning any wrongful knowledge of the non-compliant features on the part of BHDR as alleged in the Complaint. Notably, Harding has pointed to nothing in BHDR's purchase of the District which could reflect some knowledge of the non-compliant features. For instance, there is no indication that: (1) the parties addressed FHA compliance in the sales transaction; (2) BHDR examined the District for purposes of determining compliance with HUD before the transaction or before Harding's visit to the District; or (3) BHDR purchased the District at a discount due to the existence of non-compliant features existing in the District. Similarly, there is no evidence that BHDR had a plan or practice to avoid the costs of correcting non-compliant features by requiring payment from handicapped tenants under section 3604(f)(C)(A). Thus, BHDR is entitled to summary judgment because: (1) Harding has failed to produce anything more than a

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[11](...continued)
issued the HUD Regulations "to assist *builders and developers* in complying with the FHA." *Barker*, 316 Fed. Appx. at 941 (citing 24 C.F.R. Ch. I, Subch. A., App. II (1991) (emphasis added)). The HUD Regulations are "not mandatory," but provide "one of several safe harbors for compliance with the FHA." *Id.* at 941-42. To establish liability under section 3604(f)(3)(C), it is not enough to prove the mere existence of non-compliant features; rather, liability must be based upon a defendant's "participation in actual wrongdoing." *Id.* at 942.

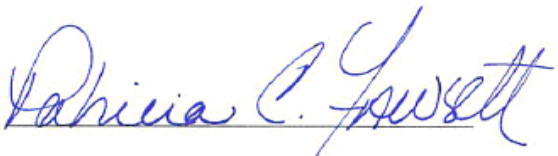
repetition of his conclusory allegations concerning BHDR's purported "knowledge" of the violations and "pattern" of discriminatory acts (*supra* ANALYSIS, Parts A & C); and (2) absent some wrongful conduct or discriminatory intent, the FHA does not impose liability on a person for unknowingly purchasing and then offering to rent a property that does not comply in all respects with the design and construction requirements of the FHA and HUD Regulations (*supra* ANALYSIS, Parts A & B).

CONCLUSION

Based on the foregoing, it is **ORDERED** and **ADJUDGED** that:

1. The Clerk of the Court is directed to strike from the record the Unauthorized Reply to Plaintiff James R. Harding's Response filed by Defendant Behringer Harvard District Reit, LLC (Doc. No. 74, filed Sept. 14, 2012);
2. The Motion for Summary Judgment and Memorandum in Support filed by Defendant Behringer Harvard District Reit, LLC (Doc. No. 64, filed Aug. 2, 2012) is **GRANTED**;
3. The Unopposed Motion for Bifurcated Trial filed by Defendant Behringer Harvard District Reit, LLC (Doc. No. 69, filed Sept. 7, 2012) is **DENIED as moot**;
4. Within ten days from the date of this Order, Plaintiff J.R. Harding shall file a Report with the Court advising whether it intends to seek relief from Defendant Orlando Apartments, LLC, and whether further proceedings are required before entry of judgment in favor of Defendant Behringer Harvard District Reit, LLC.

DONE and **ORDERED** in Chambers in Orlando, Florida on September _26_, 2012.



PATRICIA C. FAWSETT, JUDGE
UNITED STATES DISTRICT COURT

Copies furnished to:

Counsel of Record