UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROBERT PADGETT, LISA ARELLANO, and THE FAIR HOUSING COUNCIL OF GREATER SAN ANTONIO,

Plaintiffs,

v.

TEXAS REGIONAL ASSET MANAGEMENT LLC, VESTA CORPORATION d/b/a FIRST VESTA CORPORATION, EL PATRIMONIO APARTMENTS LP, and GATES OF CAPERNUM APARTMENTS LP,

Defendants.

Civil No. 5:18-CV-396-OLG

ORDER

This case is before the Court on Defendants' Motion to Dismiss for Failure to State a Claim (docket no. 21). The Court finds that the motion should be DENIED.

Background

Plaintiffs are a fair housing advocacy group and two former residents of two multifamily apartment complexes owned and operated by Defendants: the El Patrimonio Apartments in McAllen, Texas, and the Gates of Capernum Apartments in San Antonio. Docket no. 1 at ¶¶ 11-13. Plaintiffs allege that Defendants maintained and enforced rules at both apartment complexes, and at other properties managed by Defendants Texas Regional Asset Management LLC (TRAM) and Vesta Management TX LLC (Vesta), that restricted the activities of families with children in violation of the Fair Housing Act, 42 U.S.C. § 3604(a)-(c). Docket no. 1 at ¶¶ 29-36; 46-52. Plaintiff Robert Padgett alleges that, after allowing his children to play near his rental unit at the El Patrimonio Apartments—within his earshot and under the supervision of another

adult—he was fined $250 in March 2015 for violating the apartment complex's rules against unsupervised children, and informed that the rules prohibited his children from being anywhere on the property absent supervision from an immediate, blood relative. Docket no. 1 at ¶ 37-38. Padgett alleges that he purchased a money order to pay the fine, but was not required to pay it after he informed Defendants' managerial agent that he had spoken to an attorney about the complex's rules regarding children. Docket no. 1 at ¶ 39.

Plaintiff Lisa Arellano alleges that, in 2015, property managers at the Gates of Capernum Apartments visited her apartment and threatened her with fines and eviction after her children were on her apartment's patio at 7:00 p.m., while Arellano was inside the apartment watching them through an open window. Docket no. 1 at ¶¶ 49-50. On another occasion, Arellano alleges, she was again threatened with fines and eviction after she and her children were cooking together on her apartment's patio at 8:30 p.m.—in violation of the complex's curfew that prohibited children from being outdoors after 8:00 p.m., regardless of whether supervised or unsupervised. Docket no. 1 at ¶ 51. Arellano also complains of apartment rules that prohibited residents below the age of 18 from using the apartment complex pool without supervision. Docket no. 1 at ¶ 52.

Plaintiff the Fair Housing Council of Greater San Antonio (FHCOGSA) alleges that it undertook an investigation into other properties owned and managed by Defendants and identified at least eight other apartment complexes that maintained similar rules restricting families with children. Docket no. 1 at ¶¶ 55-63. Plaintiffs filed administrative complaints with the U.S. Department of Housing and Urban Development (HUD) in March 2016, which remain pending. Docket no. 1 at ¶¶ 64-67. In their Complaint in this Court, Plaintiffs allege that Defendants' rules regarding children constitute family status discrimination and assert claims under the Fair Housing Act, 42 U.S.C. §§ 3604(a)-(c), 3617. Docket no. 1 at ¶ 76.

In their Motion to Dismiss, Defendants argue that none of Plaintiffs' claims are viable because they relate only the post-acquisition habitability of their rental units, and do not allege any discrimination related to initial acquisition of the units. Docket no. 21 at 2-3, 4-6 (citing *Cox v. City of Dallas, Tex.*, 430 F.3d 734, 739 (5th Cir. 2005)). Defendants similarly argue that Plaintiff's claims under 42 U.S.C. § 3617 also fail because they do not relate to the initial acquisition of the rental unit and "[t]he Fifth Circuit has suggested that it sees a connection between the scope of Sections 3604 and 3617." Docket no. 21 at 6-7. Finally, Defendants alternatively argue that Plaintiffs' Section 3617 claims should be dismissed because Plaintiffs have failed to allege that they engaged in any activity protected under the FHA or that they were subjected to any adverse action as the result of that protected activity. Docket no. 21 at 7-9.

Legal Standards and Analysis

Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief[,]" and Rule 12(b)(6) provides that a complaint may be dismissed if it "fails to state a claim upon which relief can be granted[.]" Courts apply these rules through the two-pronged process outlined by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). First, the Court must identify the complaint's factual allegations, which are assumed to be true, and distinguish them from any statements of legal conclusion, which are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 678, 680-81. Second, the Court must assess whether the assumed-as-true factual allegations set forth a plausible claim to relief. This is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense" to determine whether "the well-pleaded facts . . . permit the court to infer more than the mere possibility of misconduct[.]" *Iqbal*, 556 U.S. at 679. Ultimately, the claim is

subject to dismissal if it lacks "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

The Fair Housing Act, 42 U.S.C. § 3604(a)-(c), prohibits refusing to sell or rent a dwelling; discriminating against any person in the terms, conditions, or privileges of a sale or rental; or making any statement indicating a preference in the connection with the sale or rental of a dwelling on the basis of, *inter alia*, family status. The Fair Housing Act also, at 42 U.S.C. § 3617, prohibits coercing, threatening, or interfering "with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by" various provision of the FHA, including Section 3604.

In *Cox v. City of Dallas, Tex.*, 430 F.3d 734 (5th Cir. 2005), residents of the City of Dallas's Deepwood neighborhood sued the City of Dallas, asserting a number of claims, including racial discrimination claims pursuant to 42 U.S.C. § 3604. *Cox*, 430 F.3d at 740. Through their FHA claims, the *Cox* plaintiffs sought to recover damages to compensate them for the diminished value of their property resulting from the City's failure to prevent illegal dumping in their neighborhood over the course of several decades. The district court granted summary judgment in the city's favor on the FHA claims, and the Fifth Circuit affirmed, reasoning that the plaintiffs' claim that "the dump makes it more difficult for them to sell their houses and lowers the value of their houses . . . is not a claim of 'unavailability' or 'den[ial]' of housing under" Section 3604. *Cox*, 430 F.3d at 740. The Fifth Circuit in *Cox* drew from a Seventh Circuit case in which that Court observed that Section 3604(a) "is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons, but it does not protect the intangible interests in . . . already-owned property[.]" *Cox*, 430 F.3d at 740 (quoting *Southend*

Neighborhood Imp. Ass'n v. St. Clair County, 743 F.2d 1207, 1210 (7th Cir. 1984)). The Fifth Circuit in *Cox* therefore concluded, in accord with the conclusions of several other courts of appeal, that Section 3604(a) "gives no right of action to current owners claiming that the value or 'habitability' of their property has decreased due to discrimination in the delivery of protective city services." *Cox*, 430 F.3d at 742-43.

The Southern District of Texas has characterized the Fifth Circuit's *Cox* opinion as aligning it with the Seventh Circuit in "concluding that the FHA does not protect post-acquisition occupancy of housing." *Cox v. Phase III, Investments*, CIV.A. H-12-3500, 2013 WL 3110218, at *9 (S.D. Tex. June 14, 2013). The Fifth Circuit's *Cox* opinion, however, was more circumspect: The court made clear that its holding did not circumscribe Section 3604 relief to prospective renters and homeowners only, and emphasized that "it is not to say that a current owner or renter evicted or constructively evicted from his house does not have a claim" under Section 3604(a). *Cox*, 430 F.3d at 742; *see also Hood v. Pope*, 627 Fed. App'x 295, 299 (5th Cir. 2015) (noting that "it is not necessarily the case that a current owner has no claim for attempted and unsuccessful discrimination relating to the initial sale or rental of the house" (internal quotation marks omitted)). Even the cases which the Southern District Court characterized as finding Section 3604 "inapplicable to post-acquisition discrimination" have recognized that the FHA may nonetheless reach cases of constructive eviction. *Phase III, Investments*, 2013 WL 3110218, at *9. More to the point, this is not a case in which the complained-of conduct affected housing "in some remote and indirect manner"; rather, the challenged practices—housing providers' enforcement of allegedly discriminatory lease requirements and apartment complex rules—squarely "implicate 'the terms, conditions, or privileges of sale or rental of a dwelling,'" as well as "'the provision of services or facilities in connection therewith.'" *Jersey Heights*

Neighborhood Ass'n v. Glendening, 174 F.3d 180, 192-93 (4th Cir. 1999). This case therefore poses no danger of "draw[ing] . . . outlying official decision[s] into the orbit of section 3604(a)" or "warp[ing] th[e FHA] into a charter of plenary review." *Jersey Heights*, 174 F.3d at 192. Assuming the truth of Plaintiffs' factual pleadings, Defendants conditioned Plaintiffs' tenancies upon their compliance with policies that denied families with children equal access to and enjoyment of their rental units, prohibiting households with children—but not other households—from being outdoors after 8 p.m., prohibiting households with children from being in outdoor areas even within their rental units after 8 p.m., prohibiting children from being outdoors or in common areas without the immediate physical supervision of a blood relative as opposed to some other adult guardian, and threatening to initiate eviction proceedings against or contact law enforcement regarding any parent or child who violated these rules. Docket no. 1 at ¶¶ 31-54. Section 3604 prohibits discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling"; even the most restrictive readings of this language do not permit a housing provider to enforce discriminatory lease terms or apartment complex rules simply because a tenancy has already been formed. *See, e.g.*, 24 C.F.R. § 100.65 (b)(4).

The Court finds that Plaintiffs' claims are not subject to dismissal simply because the discriminatory acts they allege occurred post-acquisition.

Conclusion and Order

It is therefore ORDERED that Defendants' Motion to Dismiss (docket no. 21) is DENIED.

SIGNED this 6 day of March, 2019.

ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE