UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, U.S. Department of Housing and Urban Development, on behalf of Victor Rolon-Cruz and Maria E. Hernandez-Rolon, Charging Parties, v. Palacios del Río II, Inc. Homeowners Association, and Desarrolladora del Río, Inc. Respondents	)	HUDALJ 08-046-FH FHEO No. 04-06-0142-8

PARTIAL INITIAL DECISION ON MOTION FOR DEFAULT AND REQUEST FOR INQUEST ON DAMAGES AGAINST RESPONDENT PALACIOS DEL RIO II, INC. HOMEOWNERS ASSOCIATION

On October 1, 2008, the Secretary of Housing and Urban Development (the "Secretary"), through his Counsel, brought an oral Motion for Default Decision and Request for Inquest on Damages (the "Secretary's Motion") against Respondent Palacios del Rio II, Inc. Homeowners Association ("PHA" or the "Association"), at a telephonic Status Conference before the Undersigned. For the reasons contained herein, the Secretary's Motion for Default is **GRANTED** and an **INQUEST FOR DAMAGES** is set for **December 4, 2008**, in or around San Juan, Puerto Rico. An order regarding the Inquest for Damages will issue separately. This Court's Notice of Hearing and Order issued on October 2, 2008, having been overcome by the foregoing events, is moot.

I. BACKGROUND

This matter was initiated on June 16, 2008, by the Secreta0ry on behalf of Victor Rolon-Cruz ("Rolon") and Maria E. Hernandez-Rolon ("Hernandez") [collectively "Complainants"], by the filing of a Charge of Discrimination against two named Respondents: PHA and Desarrolladora del Rio, Inc. (Desarrolladora).[1] The Charge of Discrimination (the "Charge") was brought pursuant to 42 U.S.C. § 3610(g) (1) and (2) of the Fair Housing Act as amended in 1988 (the "Act"). The Charge alleges, among other things, that Respondent PHA refused to allow Rolon to retain balustrades at the entrance of his home, which he requires because of his mobility impairment.

Although Respondent's Answer was due on or before July 21, 2008, PHA made no such filing. Instead, on July 24, 2008, counsel for PHA filed a Notice of Appearance and Motion for Extension of Time to file an Answer. As grounds for the extension, said motion indicated that PHA had only recently retained counsel and that it had discussed the possibility of settlement with the Secretary. By Order dated August 5, 2008, the Court indulged Respondent's request and granted PHA an additional 35 days to file its answer – on August 24, 2008.

Despite being granted the 35 day extension, PHA did not file its Answer in a timely manner. Thereafter, the Secretary filed a Motion for Default Decision on August 28, 2008. On September 2, 2008, the Court received a second "Request for Additional Time" from PHA dated August 22, 2008. In that Request, PHA asked that the time for filing its answer be further extended until September 15, 2008, and offered as follows:

> . . . there is the possibility of reaching a settlement in this case, but it has to be previously approved [by] the Association in a meeting duly convened and held. Due to the absenteeism of many co-owners in these vacation months, the number of members at any meeting would not be enough to reach a valid resolution. Therefore, the meeting for dealing with the settlement better be held, and will actually be held in September; and an additional time to file respondent's herein's answer is hereby requested until September 15, 2008.

[1] The Secretary and Desarrolladora entered into a Consent Order, signed by the Honorable Susan L. Biro, Chief Administrative Law Judge, Environmental Protection Agency (on behalf of the Department of Housing and Urban Development) on September 11, 2008. Respondent Desarrolladora is not subject to this decision or any order contained herein.

On September 5, 2008, the Secretary filed an Affidavit in Further Support of his Motion for Default Decision and Opposing Palacio's Request for Additional Time. In the Affidavit, signed by the Secretary's Counsel, Lorena Alvarado, the Secretary represented that contrary to PHA's representation in its request, PHA had refused to engage in good faith negotiations to amicably settle this matter and that there had been no contact between the parties (to that point) since July 23, 2008, at which point PHA's Counsel indicated an interest in settlement and promised to return with an offer, but had failed to do so.

By Order dated September 8, 2008, this Court *again* indulged PHA by granting an additional 22 days and requiring PHA to file its Answer on or before September 15, 2008. This Court also counseled PHA that:

> On or before September 15, 2008, Respondent PHA shall file its Answer in this matter, meeting all the requirements of the Rules with the docket clerk, *regardless of the state of any settlement discussions or the availability of members of its Association.* Should PHA fail to file its Answer in a timely manner, this Tribunal *sua sponte* or at HUD's Request will reconsider the appropriateness of entering a default decision in this matter against PHA and may enter such default without further notice to Respondent.

Notwithstanding this Court's admonition, PHA again failed to file its Answer in a timely fashion.

On October 1, 2008, PHA and the Secretary came before the Undersigned for a telephonic Prehearing Conference to discuss outstanding issues in the case. An additional 16 days had passed beyond the date PHA had been ordered to file its Answer and no Answer had been filed. During said Conference, Counsel for the Secretary renewed the Secretary's Motion for Default Decision and sought an Inquest for Damages, stating the Secretary had received no communication from PHA since July 23, 2008. Counsel for PHA replied by setting forth, in part, the merits of the case, and by stating his limited association with the case. He also stated, very strongly, that PHA has no interest in settling this matter. In one final attempt to allow Respondent PHA to respond to the Secretary's Charge, this Court granted PHA an additional 7 days to file an Answer. To date, PHA has not filed its Answer. It has had, at least, a total of *110 days* (with *80 days* of additional time) to do so.[2]

[2] As such, a hearing on this matter has not occurred within the 120 days required under 42 U.S.C. § 3612(g)(1). However, PHA has made that hearing impracticable by refusing to file an answer within its allotted time

II. DISCUSSION

A. PHA is Deemed to Have Admitted All Matters of Fact Contained in the Charge

HUD's regulations provide that a Respondent may file an answer within 30 days after the service of the Charge. 24 C.F.R. § 180.420(a). The regulations give notice to a respondent that:

> Failure to file an answer within the 30 day period following service of the charge or notice of proposed adverse action shall be deemed an admission of all matters of fact recited therein and may result in the entry of a default decision.

24 C.F.R. § 180.420(b). In addition, this regulatory provision was highlighted in the Notice sent to PHA on June 16, 2008, along with the Charge. Section II(A) of the Notice advised PHA that:

> [i]f you decline to file an answer by the date specified above, it shall be deemed an admission of fact recited in the Charge of Discrimination and may result in the entry of a default decision.

Moreover, the provision has also been repeated in at least two of this Court's previous orders and in the Secretary's Motion for Default Decision Against PHA filed on August 28, 2008. As such, Respondent PHA is very familiar with the regulation at issue and has, nonetheless, chosen not to file an Answer.

Based upon Respondent PHA's failure to answer the Charge of Discrimination, this Court **FINDS** that Respondent PHA is deemed to have admitted all matters of fact recited in the Charge:

1) Complainant Rolon is a 74 year old man who suffers from numerous medical conditions which substantially impair his mobility. He has been diagnosed with disk disease, lumbar spinal stenosis, osteoarthritis, joint degeneration, as well as emphysema and coronary artery disease. As a result of these ailments, Rolon is unsteady when walking and when he maneuvers steps. He must use a railing for support. He also uses a cane to ambulate. Rolon co-owns and resides in a detached single family home in a gated community in Palacios del Rio Development II, ("Palacios"), Toa Alto, Puerto Rico. Charge ¶ 7 p. 2.

2) Complainant Hernandez is Rolon's wife. She resides with her husband and co-owns the residence. She suffers from various ailments, including diabetes and hypertension. Charge ¶ 8 p. 2.

3) Respondent PHA is a homeowner association incorporated January 21, 2004, consisting of families who own single family homes in a gated community. Association members share common areas. Charge ¶ 10 p. 3.

4) Respondent Desarrolladora is Palacios' Developer and it acted as the homeowners association until May 25, 2005, when management of the homeowners association was transferred to a board composed of persons who had purchased homes in Palacios. Charge ¶ 9 p. 2.

5) On or about July 24, 2004, Complainants purchased their home in Palacios. At the time Complainants resided in Chicago, Illinois and were prepared to move to their new home after the construction of two balustrades by the front steps, required to prevent injury to Rolon. Charge ¶ 11 p. 3.

6) Olga Rolon Hernandez ("Olga Rolon"), Complainants' daughter, submitted a letter on her parents' behalf to Gladys Rodriguez, the broker for the developer's on-site lender, explaining her father's disabilities and his need to have two balustrades constructed by the front steps of the house to prevent him from slipping and falling. Hearing no objections, Olga Rolon paid Kilo Family Construction to build the balustrades. Charge ¶ 12 p. 3.

7) The balustrades are 2.5 to 3 feet high and 11 feet long; the top railings are approximately 6 inches wide, accommodating Rolon, who needs to lean on but cannot grasp the railing because of his arthritic hands. They are made of cement similar to the home and painted peach and white to blend with the home's façade. The balustrades do not protrude onto any common areas. Charge ¶ 13 p. 3.

8) Complainants moved into their new home on or about October 4, 2004, following the construction of the balustrades. Charge ¶ 14 p. 3.

9) In a letter to Complainants dated October 12, 2004, the administrator for Desarrolladora, Sonia Fadul, stated that Complainants were to immediately remove the balustrades because they did not comply with the Association's construction rules. Charge ¶ 15 p. 3.

10) In a letter dated October 18, 2004, Olga Rolon responded to Ms. Fadul's letter stating that her father was disabled, that he walks with a cane, and that a fall could be fatal to him. She explained that the balustrades were constructed to ensure that her father had something to lean on so that he would be safe. Olga Rolon also indicated that there were other homes in the development with altered façades and those homeowners had not been required to remove their alterations. Charge ¶ 16 p. 3.

11) By letter dated November 3, 2004, Ms. Fadul, acknowledging receipt of Olga Rolon's October 18th letter, reiterated that the Associations rules prohibited the

construction of protrusions from the front of Association homes. Ms. Fadul again requested that Complainants remove the balustrades. Charge ¶ 17 p. 3.

12) By letter dated April 19, 2005, legal counsel representing the Association advised Complainants to immediately remove the balustrades. The letter further stated that if Complainants failed to comply, the matter may result in court action, and they would be responsible for legal costs and attorneys fees. Charge ¶ 18 p. 4.

13) Complainants were greatly distressed with the threat of legal action. Rolon's medical conditions were exacerbated requiring additional treatment. On May 30, 2005, he was treated at the Veteran's Administration hospital as an outpatient for chest pains, shortness of breath and neck pain, which he attributed to stress induced by the Respondents' refusal to allow him to keep the balustrades. Hernandez was also treated for changes to her medical conditions as the result of stress created by Respondents' threats. Charge ¶ 19 p. 4.

14) Complainants engaged legal counsel who sent letters on May 4, and May 16, 2005, offering to meet with the Association to review available options. Counsel stated in the latter correspondence that the Association had failed to take into account Rolon's disability and advised that there were laws against disability discrimination and that a disabled person had a right to a reasonable accommodation when such an accommodation may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling. Both letters were left unanswered by the Association. Charge ¶ 20 p. 4.

15) On May 25, 2005, the administration of the Homeowners Association moved from Respondent Desarrolladora del Rio, Inc. to a Board consisting of homeowners. Charge ¶ 21 p. 4.

16) On July 22, 2005, the administrator, Lourdes Soto, acting on behalf of the new Homeowners Association, sent a letter to Complainants, referencing the October 12, 2004, letter and again requesting that they remove the balustrades because they violated the purchase agreement's restrictive covenants. Charge ¶ 22 p. 4.

17) On August 15, 2005, Complainants through legal counsel, wrote to the president of the Association stating that Rolon was disabled and entitled to a reasonable accommodation under the Federal Fair Housing Act and was protected by state law against discrimination. Complainants received no response to this letter. Charge ¶ 23 p. 4.

18) Rolon filed a discrimination complaint with HUD on November 21, 2005. After the complaint was filed, Respondent PHA convened a general extraordinary assembly of its members on February 28, 2006. Complainants were present at the assembly and explained their request for a reasonable accommodation. A vote was taken and a majority of the homeowners rejected Complainants' request for a reasonable accommodation allowing the balustrades. Charge ¶ 24 p. 4.

19) The Association's rejection embarrassed and humiliated Complainants, leaving them feeling ostracized from the other homeowners and their neighbors. Charge ¶ 25 p. 4.

B. Fair Housing Amendments Act of 1988 Claim

The Fair Housing Act was enacted to ensure the removal of artificial, arbitrary, and unnecessary barriers which operate invidiously to discriminate on the basis of impermissible characteristics. Secretary of HUD v. Ocean Sands, Inc., HUDALJ 04-90-0231-1, p. 13 (September 3, 1993) (citing U.S. v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975). The Act was designed to prohibit "all forms of discrimination, sophisticated as well as simple-minded." Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974).

The Fair Housing Amendments Act of 1988 ("FHAA" or the "Act") extended the Fair Housing Act's reach by making it unlawful 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" on the basis of that person's handicap. 42 U.S.C. § 3604(f)(2). "The FHAA, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to *end the unnecessary exclusion of persons with handicaps from the American mainstream.*" Smith & Lee Assocs. v. City of Taylor, 102 F.3d 781, 794 (6th Cir. 1996) (citing House Comm. on the Judiciary, Fair Housing Amendments Act of 1988, H.R. Rep. No. 711, 100th Cong., 2d Sess. 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2179 (footnote omitted [hereinafter "H.R. No. 711"]) (emphasis in original). In amending the Act, Congress recognized that people with disabilities are subject to artificial, arbitrary, and unnecessary barriers preventing them from making full use of housing. Ocean Sands, HUDALJ 04-90-0231-1 at 13.

Discrimination under the Act is defined to include refusing to make reasonable accommodations in "rules, policies, practices, or services" when necessary to afford a person with a handicap "equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Because handicapped persons have special needs, Congress recognized that more than a mere prohibition against disparate treatment was necessary in order that handicapped persons receive equal housing opportunities. Secretary of HUD v. Dedham Housing Authority, HUDALJ 01-90-

0424-1, p. 6 (Nov. 15, 1991); H.R. No. 711. Accordingly, handicap discrimination includes compliance with certain affirmative obligations. Ocean Sands, HUDALJ 04-90-0231-1 at 13. See also Smith & Lee Assocs., 102 F.3d at 795 (citing Proviso Ass'n of Retarded Citizens v. Village of Westchester, 914 F. Supp. 1555, 1563 (N.D. Ill. 1996)). Pursuant to 42 U.S.C. § 3604(f)(3)(A), unlawful discrimination against a handicapped person includes "a refusal to permit, at the expense of the handicapped person, *reasonable* modifications of existing premises occupied or to be occupied by such person if such modifications may be *necessary* to afford such person full enjoyment of the premises. . . . " (Emphasis added).

A reasonable accommodation is one which would not impose undue hardship or burden upon the respondent and would not undermine the basic purpose the accommodation seeks to achieve. U.S. v. Village of Marshall, 787 F. Supp. 872, 878 (W.D. Wis. 1991) (citing Majors v. Housing Authority of Dekalb, 652 F.2d 454, 457 (5th Cir. 1981); Doherty v. Southern College of Optometry, 862 F.2d 570, 575 (6th Cir. 1988)). An accommodation is necessary to afford equal opportunity when it is shown that but for the accommodation, individuals "will be denied an equal opportunity to enjoy the housing of their choice." Smith & Lee Assocs., 102 F.3d at 795.

> A case of handicap discrimination under 42 U.S.C. § 3604(f)(3) is made by proving that:
>
> 1. The Complainant has a handicap as defined in 42 U.S.C. § 3602(h) or is a person associated with a handicapped person;
> 2. the Respondent knows of the Complainant's handicap or should reasonably be expected to know of it;
> 3. modification of existing premises or accommodation of the handicap may be necessary to afford the Complainant an equal opportunity to use and enjoy the dwelling; and
> 4. the Respondent refused permission for such modifications, or refused to make such accommodation.

U.S. v. California Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1380 (9th Cir. 1997).

As defined by this statute, "'[h]andicap' means, with respect to a person-- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment." 42 U.S.C. § 3602(h). Pursuant to 24 C.F.R. § 100.201, a "*[p]hysical...impairment* includes: (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special

sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine. . . ." (Emphasis in original). *Major life activities* means functions such as caring for one's self, performing manual tasks, *walking*, seeing, hearing, speaking, breathing, learning and working." 24 C.F.R. § 100.201 (emphasis added and in original). Finally, to qualify as handicapped, a claimant must establish that the limitation on the major life activity is "substantial." Regional Economic Community Action Program, Inc. v. City of Middletown, 294 F.3d 35, 48 (2nd Cir. 2002). "To be substantially limited ..., an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of *central importance to most people's daily lives.*" Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002) (emphasis added). The impairment's impact must also be "permanent or long-term." Id.

1. Complainant Rolon Has a Handicap as Defined in 42 U.S.C. § 3602(h); Complainant Hernandez is a Person Associated with a Handicapped Person.

Given the facts admitted by Respondent PHA's default, it is well-established that Complainant Rolon is handicapped as defined in 42 U.S.C. § 3602(h). The admitted facts demonstrate that: a) Complainant Rolon suffers from numerous medical conditions which substantially impair his mobility; b) he has been diagnosed with disk disease, lumbar spinal stenosis, osteoarthritis, joint degeneration, as well as emphysema and coronary artery disease; c) he is unsteady when walking and when he maneuvers steps; d) he must use a railing for support; e) he uses a cane to ambulate; and, f) *he is disabled and a fall could be fatal to him.* In needing a railing for support and a cane for proper ambulation, Complainant Rolon cannot walk without assistance and is therefore restricted from doing activities that are of central importance to most people's daily lives under Toyota Motor Mfg., Ky., Inc. In addition, given the complexities of Complainant Rolon's diagnoses and his comorbid conditions, his disabilities can be categorized as long-term thereby fulfilling any "permanent or long-term" requirement. Moreover, the length and duration of such are not rebutted by Respondent PHA. As such, Complainant Rolon has a physical impairment which substantially limits one or more of his major life activities. In this case, that major life activity is *walking*. 24 C.F.R. § 100.201. He is therefore handicapped as defined in 42 U.S.C. § 3602(h).

Respondent PHA has further conceded that Complainant Hernandez is Rolon's wife and that she resides with her husband and co-owns the residence. By virtue of her relationship with Rolon and her cohabitation with him, the Court thereby concludes that she is "associated with" Complainant Rolon under 42 U.S.C. § 3604(f)(1)(C).

2. Respondent PHA Knows of Complainant Rolon's Handicap.

The facts admitted by Respondent PHA, summarized on pages 4, 5, and 6 of this opinion, particularly paragraph numbers 6, 10, and 11 on page 5, establish that Respondent PHA knows of Complainant Rolon's Handicap.

3. Complainant Rolon Required a Necessary Modification of the Premises to Use and Enjoy the Dwelling.

The limitations imposed by Complainant Rolon's handicap (summarized supra) require the modification of his dwelling. The record establishes that the balustrades are 2.5 to 3 feet high and 11 feet long, with top railings that are approximately 6 inches wide. The balustrades are present because Complainant Rolon needs to lean on them, but cannot grasp them because of his arthritic hands. Mr. Rolon's daughter, Olga Rolon, has explained that her father required something to lean on so that he would be safe. In addition, Respondent PHA has, by its default, admitted that a fall could be fatal to Complainant Rolon.

Given his medical condition, it is hard to imagine how Mr. Rolon would even enter his home were it not for the balustrades. It is tautological that if Mr. Rolon cannot enter his home, he cannot take advantage of what his home has to offer. Consequently, the evdience has established that the balustrades are necessary for Complainant Rolon to enjoy the housing of his choice.

4. Respondent PHA Refused to Permit the Reasonable Modification and Refused to Make a Reasonable Accommodation in Rules, Policies, Practices or Services.

Through its actions, Respondent PHA has consistently demanded that Complainants take down the balustrades and has refused to make any accommodation to its rules, policies, practices or services. See Section II(A) supra (particularly paragraphs 9, 11, 12, 16, and 18). Noteworthy here is that Olga Rolon, Complainants' daughter, paid for the balustrades – at no cost to Respondents.

Moreover, Respondent PHA has not demonstrated that it would suffer any "undue hardship" should the balustrades continue as they are. Indeed, the facts admitted by default establish otherwise: 1) there are other homes in the development with altered façades and those homeowners have not been required to remove their alterations; 2) the balustrades are made of cement similar to the home and painted peach and white to blend with the home's façade; and, 3) the balustrades do not protrude onto any common areas. Complainants appear to have taken reasonable steps to avoid causing any such hardship on the surrounding community and on Respondents in particular.

Through its actions, Respondent PHA has engaged in discriminatory housing practices in violation of 42 U.S.C. §§ 3604(f)(2) and 3604(f)(3)(A) & (B).

C. Holding and Order

After a careful review of the record, and based on the above, the Court **HOLDS** as follows:

Respondent PHA has

1. Engaged in discriminatory housing practices in violation of 42 U.S.C. § 3604(f)(2);
2. engaged in discriminatory housing practices in violation of 42 U.S.C. § 3604(f)(3)(A); &,
3. engaged in discriminatory housing practices in violation of 42 U.S.C. § 3604(f)(3)(B).

It is therefore **ORDERED:**

1. Respondent PHA, its agents, employees and successors, and all other persons in active concert or participation with them, are enjoined from discriminating because of handicap against any person in any aspect of the rental, sale, use or enjoyment of a dwelling; and,

2. Respondent PHA, its agents, employees and successors, and all other persons in active concert or participation with them, are enjoined from taking any legal action, or other action, to have the balustrades removed.

A separate order will be issued, if warranted, after the Inquest for Damages.

/s /

Alexander Fernández
Administrative Law Judge

Dated: October 24, 2008