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

The Secretary, United States Department of Housing and Urban Development, on behalf of: FAIR HOUSING COUNCIL OF SUBURBAN PHILADELPHIA, Charging Party, and FAIR HOUSING COUNCIL OF SUBURBAN PHILADELPHIA, Intervenor, v. JOSEPH TRABACCONE, LESLIE WOOD, and KATHERINE LOHRE, Respondents.	HUDALJ 09-M-084-FH-28

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSE OF LACK OF AGENCY

I. INTRODUCTION

The Charging Party in the above-captioned case, through its attorneys, submits this Memorandum of Points and Authorities in Support of its Motion to Strike Respondent Trabaccone and Respondent Wood's Affirmative Defense that Respondent Lohre was not their agent, in accordance with the Notice of Hearing and Order dated August 26, 2009.

It is the Charging Party's contention that Respondent Lohre (hereinafter "Lohre") was the agent of Respondents Trabaccone and Wood (hereinafter "Trabaccone and Wood") when she posted an advertisement on *craigslist.com* that specified "no children," for Unit 2F at 134 N. 21st Street, Philadelphia ("subject unit"), screened and interviewed

potential tenants, showed the apartment unit to interested individuals, rejected at least one prospective tenant who indicated she had a child, and passed prospective tenants on to Wood for her final approval. (Charge of Discrimination issued July 31, 2009, paragraphs 1 - 17).

Wood, as the property manager for 134 N. 21st Street which is owned by Trabaccone, instructed Lohre, a tenant of four years, that she had to find a replacement tenant in order to avoid the penalties and fees associated with breaking her lease. Wood advised Lohre that only if she found a replacement tenant would Lohre and her husband be released from their lease. To facilitate this process, Wood provided Lohre with a sample advertisement and instructed Lohre to screen prospective tenants before bringing them to Wood for final approval. In doing so, Lohre was responsible for advertising and showing the unit, as well as interviewing prospective tenants – all of which are activities for which a landlord is normally responsible. However, Wood retained ultimate authority to accept or reject any prospective tenant. Accordingly, Lohre was the agent of Trabaccone and Wood when she advertised and screened, interviewed and rejected prospective tenants for the subject unit.

FACTS

Trabaccone and Wood jointly filed an Answer to the Charge of Discrimination which the Charging Party received on or about September 1, 2009. While Trabaccone and Wood admit in their Answer, in response to paragraph (B)(3) of the Charge of Discrimination, that Lohre was an agent of Trabaccone and Wood (Answer, page 2, paragraph (B)(3)), they thereinafter affirmatively deny that Lohre was an agent of Trabaccone and Wood in response to paragraph (B)(6) of the Charge. (Answer, page 3, paragraph (B)(6) and page 6, paragraphs 1, 2 and 3, in response to Fair Housing Act violations). However, the Answer then goes on to admit facts which establish that Lohre, in fact, acted as the agent of Trabaccone and Wood.

According to Trabaccone and Wood, the facts are as follows. Lohre asked to be released "early" from the lease for the subject unit that she and her husband signed in 2004. (Answer, page 3, paragraph (B)(6)). Wood, who managed the property at 134 North 21st Street, agreed to allow Lohre to "re-rent" the apartment. (Answer, page 3, paragraph (C)(1)). Wood told Lohre "...if and when she found a new tenant, she was to

inform Leslie C. Wood." (Answer, page 3, paragraph (B)(6)). Trabaccone and Wood agreed that Lohre was to find someone to rent the unit, including advertising and interviewing prospective tenants, showing the subject unit to potential tenants, and providing the name of the "new" tenant to Wood. (Answer, pages 3-4, paragraphs (B)(6) and (C)(2) and (3)). Wood provided Lohre with a physical description of the subject unit and the rental price. (Answer, page 3, paragraph (B)(6)).

Trabaccone and Wood further admit that the subject unit was rented to a single woman without children, and there are no families with children currently living at 134 North 21st Street in Philadelphia ("subject property"). (Answer, page 6, paragraphs (C)(16) and (17)). In the past 15 years, other than the Lohres[1], who did not have children when they moved into the subject property, no families with children have lived in the subject property. (Answer, page 6, paragraph (C)(15).

Thus, Trabaccone and Wood acknowledge that Lohre was instructed to find a suitable replacement tenant for the subject unit, that Lohre would do all the things for which a landlord would customarily be responsible – advertise the unit, screen and interview prospective tenants, answer questions, show the unit to prospective tenants and provide the name of the "new" tenant to Wood. (Answer, pages 3-4, paragraphs (B)(6) and (C)(2) and (3)). If and when Lohre found a new tenant, she was to inform Wood. At that point, Wood would interview the individual and decide on whether to rent to the prospective tenant.

II. ARGUMENT

"Vicarious liability may rest upon the existence of either actual or an apparent agency relationship." Marya v. Slakey, 190 F.Supp.2d 95, at 101 (D. Mass. 2001), Inland Mediation Board v. City of Pomaona, 158 F. Supp.2d 1120, 1139-40 (C.D.Cal. 2001). It is well established that a principal is liable for the acts of his or her agent in fair housing discrimination cases. Hamilton v. Svatik, 779 F.2d 383 (7th Cir. 1985). Whether an agency relationship exists in a Fair Housing context is determined under federal, not state law. Harris v. Itzhaki, 183 F.3d 1043, 1054 (9th Cir. 1999), *see* Cabrera v. Jakabovitz, 24 F.3d 372, 386 n.13 (2d Cir. 1994), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d

[1] Katherine Lohre and her husband moved into the subject property in 2004 and gave birth to their child approximately four years later. They lived in the subject unit for several months with their child.

135 (1994); Northside Realty Assocs., Inc. v. United States, 605 F.2d 1348, 1354 n.13 (5th Cir.1979); Marr v. Rife, 503 F.2d 735, 740 (6th Cir. 1974).

HUD regulations define an agent under the Fair Housing Act as "*any person authorized to perform an action* on behalf of another person *regarding* ***any*** *matter related to the . . .rental of dwellings, including offers, solicitations or contracts and the administration of matters regarding such offers, solicitations or contracts or any residential real estate-related transactions*." 24 C.F.R. § 100.20 (emphasis added). HUD regulations parallel the Restatement (Second) of Agency, which federal courts look to for guidance on agency issues. Holley v. Crank, 258 F.3d 1127, 1130 (9th Cir. 2001), Marya v. Slakey, at 100. Since HUD is the agency responsible for enforcing the Fair Housing Act and enacting regulations consistent with it, HUD's regulations and its interpretation thereof are afforded "considerable deference." Holley, at 1130.

To ascertain that an agency relationship exists, the Slakey court identified certain criteria: (a) the alleged principal manifested that the agent should act for her; (b) the alleged agent manifested his acceptance of such authority; and (c) both parties understood that the alleged principal was to exercise a degree of control over the agent's activities while acting as the agent. *Id.* at 101. "However, the consent required to form an agency need not be expressly stated. 'Agency is a legal concept which depends on the manifest conduct of the parties, not on their intentions or beliefs as to what they have done'." Marya v. Slakey at 101, Interocean Shipping Co. v. Nat'l Shipping and Trading Corp., 523 F.2d 527, 537 (2d Cir. 1975), *cert. denied,* 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976) (quoting Restatement (Second) of Agency § 1, Comment B (1958)).

In the Slakey case, a prospective tenant alleged that she was discriminated against on the basis of her gender and national origin when her application to lease a room in a six-bedroom house in Amherst, Massachusetts was rejected. The six-bedroom house was rented by six individuals who had separate bedrooms and shared the common areas. Although the owner of the property ultimately signed a lease with each new tenant, all prospective tenants filling a vacancy were found and selected by the remaining tenants unanimously. When the tenants agreed on a suitable replacement tenant, they sent the person to the owner of the property, Defendant and Owner Linda Slakey ("Slakey"), for final approval. Plaintiff Kriti Arora ("Arora") alleged that Slakey was liable for

discrimination when the existing tenants who shared the house rejected Arora's application. Two of the remaining tenants rejected Arora's application, however, tenant Paul Norris expressed to the remaining tenants as well as Arora that he did not want to live with three Indian women.[2] Slakey's practice was to allow the remaining tenants to choose a replacement tenant and not to interject herself into the tenant selection process. However, Slakey retained the ultimate authority to accept or reject the prospective tenant proposed by the remaining tenants. Slakey spoke with Norris about the issue but did not interfere with the ultimate rejection of Arora's application.

The Slakey court rejected the defense that an agency relationship requires evidence of "continuous control and direction," but noted instead that the control may be "very attenuated."

In the instant case, Trabaccone and Wood admit that they instructed Respondent Lohre to find a replacement tenant by advertising, interviewing, showing the unit, answering questions and providing the name of the "new" tenant to Wood, and acknowledged that the ultimate control over leasing the subject unit was with Wood. In fact, Respondent Lohre did find a "suitable" tenant for the subject unit and introduced the prospective tenant, the tenant currently occupying the subject unit, to Respondent Wood, who then signed a lease with the tenant. As in the Slakey case, Respondent Wood allowed Lohre to advertise and select a suitable tenant. If Wood did not approve of the tenant Lohre had selected, the subject unit would not have been leased to that tenant. Wood and Lohre understood that Lohre would find the replacement tenant and pass that person along to be assessed by Wood for ultimate approval of tenancy. This retention of control over the leasing process is what establishes the agency relationship between Respondents Trabaccone and Wood and Respondent Lohre.

In another case, the court found property owners liable for the actions of a tenant who assisted the owners of an apartment building by showing vacant apartments to prospective tenants. Harris v. Itzhaki, 183 F.3d 1043, (9th Cir. 1999). Although the tenant did not receive any benefit for her assistance, the court found there were sufficient facts to determine that an agency relationship existed between the tenant and the owners

[2] Two Indian women already lived in the property. Norris stated the he did not want one culture to dominate in the house.

under the HUD regulations which define agency. In the instant case, Trabaccone and Wood knew that Lohre was actually receiving a benefit for finding a replacement tenant – being released from her lease without financial penalty.

In another case, it was held that the landlord was liable for the acts of a neighbor. The court found that an agency relationship existed due to the conduct of the parties. *See* Wright v. Owen, 468 F. Supp. 1115 (E.D. Mo. March 1979). In the Wright case, the landlord requested that the vacating tenant fill the vacancy and that she should consult a neighbor regarding the selection of the new tenant. The departing tenant placed an advertisement in the newspaper and provided her contact information and the contact information for the neighbor. The court found that the neighbor had treated prospective Black and White tenants differently and found the landlord liable for the discriminatory actions of the neighbor.

It should also be noted that in a case where familial status discrimination was established through the use of testers an owner's direct participation in discriminatory practices is not necessary for an award of punitive damages in a fair housing case if the owner neglects his/her duties under law or engages in knowledgeable inaction. See Southern California Housing Rights Center v. Krug, 564 F.Supp.2d 1138 (W.D. Ca. 2007). See also Hamilton v. Svatik, 779 F.2d 383 (7th Cir. 1985) (finding that an owner could be found liable for acts of an agent even where owner had no direct involvement in the management of the rental dwelling).

Trabaccone and Wood admit that Lohre was authorized to advertise, answer questions, show the unit, screen and interview prospective tenants, and provide the name of the "new" tenant to Wood. HUD regulations define an agent as any person authorized to perform actions on behalf of another, in **any** matter related to the rental of dwellings. (emphasis added) 24 C.F.R. § 100.20. Lohre was empowered by Trabaccone and Wood to find a suitable tenant and, in so doing, became their agent.

Finally, it should be noted that Lohre had no motive to insert the "no children" language in the advertisement, as Trabaccone and Wood suggest. Why would Lohre try to further limit the tenant criteria to individuals without children when her primary, if not sole motive, was to find a replacement tenant as quickly as possible? Lohre and her husband wanted to be released from the lease as soon as possible - the bigger the tenant

pool, the better for the Lohres. It is illogical that Lohre decided to include the "no children" language in the advertisement, without being instructed to do so by Wood. Respondent Wood actually lives in the property and would be more likely to have a motive not to have children living in the building.

For the foregoing reasons, the Charging Party prays that the court will grant its Motion to Strike Affirmative Defenses.

Respectfully submitted,

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September 22, 2009

CERTIFICATE OF SERVICE

I hereby certify that the attached "**Motion To Strike Affirmative Defense**", and "**Memorandum of Points and Authorities in Support of Motion To Strike Affirmative Defense** " was served on behalf of the Charging Party in the matter of The Secretary, United States of Housing and Urban Development (Charging Party), and Fair Housing Council of Suburban Philadelphia (Intervenor), v. Joseph Trabaccone, Leslie Wood, and Katherine Lohre, **HUDALJ 09-M-084-FH-28,** on this 22nd day of September, 2009, to the parties in the following manner:

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