

Who Wins the David and Goliath Dust-Up?

By Judith I. Johannsen

April is fair housing month, and in two of 2003's more noteworthy and interesting fair housing/discrimination cases, David versus Goliath was a recurrent theme.

In the first case, an Orthodox Jewish couple (David) received a notice from their condo association (Goliath) ordering them to remove their mezuzah (a small religious scroll about the size of a fountain pen) from the exterior frame of their front door. Having the scroll affixed to their entryway was in accordance with their religion but a violation of association rules. The association told the couple that if they refused to comply with the association's rules, they would be assessed fines for the violation. Despite the couple's best efforts to explain the significance of the mezuzah, the association remained steadfast – that religious *thing* had to go.

Fair housing laws prohibit discrimination against any person in the terms, conditions, privileges or services of a sale or rental based on religion. This couple believed that the condo association's actions were effectively making housing unavailable to them because of their beliefs, and to practice their religion they might need to move.

The couple filed a discrimination complaint with the Commission on Human Rights and Opportunities against the condo association with the help of the Anti-Defamation League and the Fair Housing Association of Connecticut in Bridgeport. The case's settlement required the association to pay the couple \$4,000, send them a written apology, attend a training seminar conducted by the Anti-Defamation League, and amend its rules prohibiting religious items on doors. David 1, Goliath 0.

In the second case, the borrower (David) had taken an unpaid medical leave from work because of her disabilities and consequently fell behind in her mortgage payments. The lender (Goliath) sent the borrower the required notices of default and cure and for potential acceleration of the mortgage balance. When the borrower couldn't cure the default, she asked the lender to make a reasonable accommodation for her as required under federal and state fair housing laws and the ADA (which laws are clear pronouncements of the commitment to end the exclusion of handicapped persons from the American mainstream by not subjecting disabled persons to rules or requirements different from those applied to people without disabilities and by providing a reasonable accommodation where necessary.)

The lender declined to alter its mortgage enforcement rules so the borrower filed suit against the lender claiming the lender had denied her the right to live in her dwelling.

The trial court ruled in favor of the lender holding that the reasonable accommodation provisions did not apply to mortgage *enforcement*. In the appeal that followed, our state Supreme Court found no federal or state provisions supporting the borrower's position that failure to provide a reasonable accommodation in the making or purchasing of loans, or providing other financial assistance for maintaining a dwelling previously acquired, constitutes discrimination. In fact, the Court cited a 1998 Second Circuit opinion, *Salute v. Stratford Garden Apartments*, 136 F.3d 301, stating "we think it is fundamental that the law addresses the accommodation of handicaps, not the alleviation of economic disadvantages that may be correlated with having handicaps," "that impecunious people with disabilities stand on the same footing as everyone else," and "the FHAA (Fair Housing Amendments Act of 1988) does not elevate the rights of the handicapped poor over the rights of the non-handicapped poor."

When the borrower's arguments failed under the fair housing laws, she then argued that under the ADA, discrimination includes a failure to make reasonable modifications in policies, practices, or procedures when necessary to afford goods, services, facilities, privileges, advantages or accommodations to disabled individuals, unless the entity can demonstrate that making such modifications fundamentally alters the nature of the goods, services, etc.

CT's Supreme Court determined that the ADA requires that disabled persons be afforded reasonable modifications in **accessing** certain goods and services, unless the modification impacts the very nature of the activity itself. In the case of a disabled golfer who requested a golf cart to play in tournaments because he had difficulty walking (*PGA Tour, Inc. v. Martin*, 532 U.S. 661, 2001), the United States Supreme Court ruled that the PGA had to allow Martin the use of a golf cart as a reasonable accommodation because it satisfied the 3 prong test of being reasonable, necessary, and not fundamentally altering the nature or the content of the game, which was shot making.

In this borrower's case, CT's Supreme Court ruled that while a lender **may not refuse access** to its mortgage services to the disabled, it was **not required to modify the content** of mortgage terms and conditions to accommodate disabled borrowers. Goliath prevailed.

The basic, simple legal truths drawn from these two cases are these: First, whether one is a David or a Goliath, federal and state fair housing laws mandate that discrimination on the basis of religion is unlawful; therefore, a condo association's self-styled rules are not an excuse to discriminate when those rules collide with fair housing laws. Second, the requirement of providing a reasonable accommodation for a disability pursuant to the Fair Housing Act and the ADA does not stretch to compel a lender to modify terms and conditions of an existing mortgage agreement to alleviate a disabled borrower's economic downturn.

David 1, Goliath 1; the winner? - fair housing.

Judith I. Johannsen is Assistant Counsel for the Connecticut Association of Realtors®, Inc.

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