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Reply Brief of Appellants, Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009) (No. 06-3376)

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No. 06-3376

In The
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Lynne Bloch, Helen Bloch, and
Nathan Bloch,

Plaintiffs-Appellants,

v.

Edward Frischholz, and
Shoreline Towers Condominium
Association, an Illinois not-for-profit
Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Case No. 05-C-5379
The Honorable Judge George Lindberg

REPLY BRIEF OF APPELLANTS

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Circuit Rule 26.1 Disclosure Statement

Short Caption: Bloch, et al. v. Frischholz and Shoreline Towers

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Standard of Review

The District Court's ruling in favor of summary judgment is reviewed de novo. Abdullahi v. City of Madison, 423 F.3d 763, 769 (7th Cir. 2005). On review, the court should determine whether there are *any* issues of material fact that require a trial. Waldridge v. Am. Hoeschst Corp., 24 F.3d 918, 920 (7th Cir. 1994)(emphasis added). At summary judgment a court must avoid the "temptation to decide which party's version of the facts is more likely true." Payne v. Pauley, 337 F.3d 767, 770 (7th Cir. 2003). If the District Court decides to rely on legal arguments or evidence not incorporated within the summary judgment motion, the court is obligated to consider the entire record to ensure no issue of material fact. Nabozny v. Podlesny, 92 F.3d 446, 450 (7th Cir. 1996).

I. DISTRICT COURT ERRED AT THE SUMMARY JUDGMENT STAGE IN APPLYING 3604.

When the District Court granted summary judgment in favor of Edward Frischholz and Shoreline Towers Condominium Association ("Defendants"), the court stated the Fair Housing Act, 42 U.S.C. § 3601, et seq.("Act"), "does not reach post-acquisition discrimination." R. 186. This blanket statement goes beyond the holding in Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n ("Halprin"). 388 F.3d 327(7th Cir. 2004). In Halprin, this Court acknowledged the language of 42 U.S.C. § 3604 may reach constructive eviction, and the facts of this case do not preclude 3604 applicability. 388 F.3d 329. The Record on Appeal show a rule or regulation used to take away Lynne Bloch, Helen Bloch, and Nathan Bloch's ("the Blochs" or "Plaintiffs") privilege of inhabiting their unit. R. 49, p. 82; Halprin, 388 F.3d 329. The Blochs remained in their units only after the passage of a revised rule allowing for the display of religious symbols, including mezozot. R. 19, p. 3. This revised rule originated from an

appearance before the District Court in this case, and differs from the proposed Amended Hallway Rule Defendants attached to *Defendants' Response in Opposition to Motion for Temporary Restraining Order* on September 20, 2005. R. 14, p. 14.[1] The Blochs assert that but for the filing of their federal complaint, Defendants would still use the Blochs adherence to the mitzvah of the Mezuzah restrict their privilege of inhabiting their units. Id.

A. Issues of Material Fact Exist Under 3604(a) Analysis.

Defendants interpretation and enforcement of the Hallway Rule in 2004, three (3) years after the Hallway Rule was passed, to preclude posting of mezuzot had the effect of making full use and enjoyment of units at Shoreline Towers "unavailable" to Jewish residents. 42 U.S.C. 3604(a); *Brief of Appellants*, p. 9.

As a preliminary matter, "constructive eviction" was raised in *Plaintiffs' Memorandum of Law in Response to Defendants Motion for Summary Judgment*. R. 132, p. 3 ("the [Halprin] court recognized that § 3604 may reach cases of constructive eviction… the [Halprin] court thus declined to foreclose the application of § 3604 to cases in which post-acquisition discrimination would result in exclusion"). The Blochs further asserted in their response memorandum that a 3604(a) violation occurred because the record evidenced "[d]efendants' continued removal or other interference with plaintiffs' mezuzah was an attempt to force plaintiffs to move from the premises." R. 132, p. 4; R. 170, para. 14. Therefore, issues relating to "constructive eviction" were clearly before the District Court.

[1] This calls into question Defendants "Statement of Facts" (*Brief of Appellees*, p. 10) concerning amended hallway rules because on September 20, 2005 Defendants filed an Amended Hallway Rule with the district court, then on September 22, 2005 Judge Denlow entered an order which included a "Revised Rule." R. 14, p. 14; R. 19, p. 3. This discrepancy alone creates an issue of material fact precluding summary judgment because the "Amended Hallway Rule" gives the Defendants discretion over sincerely held religious beliefs on proposed religious symbols and the "Revised Rule" gives the resident discretion over what reflects their religious beliefs. In short, the issue would be whether Defendants' approved the Amended Hallway Rule to control the content of religious expression or as a pretext for discrimination.

Without much effort, a long-list of cases can be produced applying 3604(a) to instances of post-acquisition discrimination. See *Brief of Appellants*, p. 10. Case law demonstrates instances where discriminatory conduct caused the loss or deprivation of housing. Id. In this case, a federal lawsuit was filed in order to secure the ability of the Blochs to remain in their home. R. 1; R. 19. Plaintiffs under the Act should not be without relief until after they are forced out of their homes in order to enforce their rights under 3604(a).

Issues of material fact exist because Defendants banned mezuzot, rendering full use unavailable, until the Blochs filed a federal lawsuit (R.1) to compel a Revised Rule recognizing all unit owner rights, regardless of race or religious beliefs, to full use and enjoyment of their units. R. 46; R. 19, p. 3. Any rule or regulation that creates an avenue to preclude posting of mezuzot limits the availability of housing at Shoreline Towers to Jewish individuals. R. 170-2, exh. 3, 7, 8, 9. The denial of the permanent ability to post a mezuzah on unit doorposts causes the Blochs, and other Jews, to look elsewhere for accommodations. R. 9; R.10; R.11; R. 170-2, exh. 7. The Blochs have resided at Shoreline Towers for over thirty (30) years, which firmly secures their right to remain in their unit while pursuing permanent relief from arbitrary determinations on their religious beliefs. R. 10, p. 1; R. 14, p. 14. Therefore, whether the Blochs would be constructively evicted from their units is not for Defendants or the District Court on summary judgment to determine; it is the job of the fact-finder.

It is important to note that recognizing the Blochs adherence to Jewish law does not ask this Court to evaluate, interpret, or determine the legitimacy of a mezuzah. See *Brief of Appellees*, p. 17-18. The Blochs are not asking the Court for judicial review of Jewish law; the Blochs only cite that such law exists. *Brief of Appellants*, p. 4. Defendants quote a United States Supreme Court opinion holding that "civil courts do not inquire whether the relevant

(hierarchical) church governing body has power under religious law" to decide disputes under religious law which "frequently necessitates the interpretation of ambiguous religious law and usage." *Brief of Appellees,* p. 17; citing Serbian Eastern Orthodox Diocese for U.S. of America and Canada v. Milivojevich, 426 U.S. 696, 708-709 (1976). By applying Milivojevich, Defendants ask this Court to not consider the issue of whether precluding mezuzot was religious discrimination because this Court should not review the Defendants' (apparently, the equivalent of "the relevant 'hierarchical' church governing body") determination of the "importance level" of Jewish residents posting mezuzot to their exterior doorposts. *Brief of Appellees,* p. 17. Defendants' argument illustrates material issues of whether Defendants may (and did) decide how residents at Shoreline Towers practice religious beliefs in their home, and what those beliefs may be. Defendants should have noted the directive in Milivojevich upon receipt of a July 28, 2004 from the Chicago Rabbinical Counsel (R.170-2, exh. 8), that "civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." Milivojevich, 426 U.S. at 709. However, Defendants' exercised power beyond that of our court system and continued to remove mezuzot. R. 52, p. 5-6.

There is no need to manufacture a factual dispute concerning requirements under Jewish law. The factual material issues concern whether Defendants' refused to recognize the existence of certain religious beliefs in order to discriminatorily enforce a homeowners association rule against a protected class of citizens. R. 182, para. 3. Issues of material fact exist when: Defendants' homeowners association interpreted and enforced a rule or regulation differently after three (3) years of the rule or regulations existence (R. 140, exh. 6, p. 6); the reinterpretation led to enforcement of the rule in a manner which caused Jewish residents to consider their units

uninhabitable (R. 170-2, exh. 7, p. 3); and Jewish residents proceeded to federal court in order to force a change in the rule to ensure they could remain in their units (R. 1; R. 19, p. 3). A jury should determine whether the reinterpretation and post-hallway renovation enforcement of the rule was done to make the Blochs residents uninhabitable; or whether Defendants interpreted and enforced the Hallway Rule in 2004 in order to constructively evict the Blochs from their units.

B. Issues of Material Fact Exist Under 3604(b) Analysis.

i. 3604(b) Is Applicable.

First, issues of the hostile environment created by Defendants actions in reinterpreting the Hallway Rule in 2004 to preclude posting of mezuzot are not new to this appeal. In fact, in Plaintiffs Surreply on the motion for summary judgment, the Blochs stated "[t]he gravaman of plaintiffs' complaint is that defendants intentionally, *and with racial animus*, enforced an Association rule." R. 168, p. 4 (emphasis added).[2] The "issue is one of statutory interpretation, which has been fully briefed," and the Court may address the issue. Republic Tobacco Co. v. North Atlantic Trading Co., 481 F.3d 442, 447 n. 3 (7th Cir. 2007).

Secondly, Defendants characterize their conduct as "isolated" and "innocuous" incidents. *Brief of Appellees*, p. 19. "Isolated" is not applicable when Defendants continuously removed mezuzot *over seventeen months*, including during the Shiva of Marvin Bloch. R. 52, p. 6; R. 10,

[2] The Blochs contest Defendants' case law on the subject of alleged "new arguments" applies to the instant case. Federal Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986) stated a motion for new trial and/or alter or amend judgment could not be used attack an affidavit for the first time; which has no application to this case. In Hindin/Owen/Engelke, Inc. v. GRM Industries, Inc., 869 F.Supp. 539 (N.D. Ill.1994), the district court stated a plaintiff waived using an alleged oral agreement in its motion for reconsideration to support the waiver of a contract requirement; which has no application to this case. Hicks v. Midwest Transit, Inc., 500 F.3d 647, 652 (7th Cir. 2007) stated a plaintiff could not argue a limitation on statute applicability on appeal; not applicable here where the reach or limitation of a statute has always been in issue. Finally, Aida Food and Liquor, Inc. v. City of Chicago, 439 F.3d 397, 402 (7th Cir. 2006) would not allow plaintiff to argue a city inspection was improper when the plaintiff never mentioned the city inspection prior to appeal. No new facts are raised in the instant appeal.

p. 4. “Isolated” does not apply to an unwavering and repeated commitment to preventing the posting of a small case of great religious significance to Jewish residents, containing a holy scroll reciting chapters from the Torah, to be placed on the right side of the doorpost to Jewish homeowners’ units. R. 170-2, exh. 7; R.170-2, exh. 14, p. 94. “Innocuous” is inapplicable because Defendants removed and confiscated the Blochs’ mezuzot while mourning from Dr. Marvin Bloch’s funeral. R. 10, p. 4; R. 170-2, exh. 13, p. 37, p. 48, ln. 19-24, p. 49, ln. 1-2, p. 51, ln. 1-13. It is far from inoffensive or harmless to *ignore* repeated attempts by Jewish scholars and leaders to not include religious articles, such as mezuzot, when enforcing the Hallway Rule after June 2004. R. 170-2, exh. 8, 9, 10, 14, p. 102, ln. 4-23; R. 11, para. 23. At the minimum, Defendants characterization of reinterpreting a rule to prevent certain residents in their association from displaying a religious item (for seventeen months) on the exterior doorpost of their own units, and force certain residents to live in violation of the religious mandates they are mandated to follow, demonstrates material issues to be decided by the jury. There are issues of material fact on whether Defendants created a hostile and uninhabitable living environment and deprived the Blochs of “the privileges of sale,” including the privilege to inhabit their dwelling. 42 U.S.C. 3604(b); see 24 C.F.R. 100.65(b)(4).

ii. 24 C.F.R. 100.65(b)(4) Is Valid And Applies To The Contested Facts.

First, Defendants argue that “the text of § 3604(b) is clear and unambiguous… and that § 3604(b) only applies to post-acquisition discrimination.” *Brief of Appellees*, p. 20-21. Plaintiffs agree that 3604(b) applies to post-acquisition discrimination, but assert that 24 C.F.R. 100.65 interprets 3604(b) to prohibit both pre-acquisition and post-acquisition discrimination. The Defendants argument that 3604(b) “applies only to post-acquisition discrimination” supports the

Blochs claims under 3604(b). Since Defendants acknowledge 3604(b) applies to post-acquisition discrimination, summary judgment should not have been granted on the Blochs' 3604 claims.

However, Defendants interpretation that 3604(b) "applies only to post-acquisition discrimination" may demonstrate ambiguity "with respect to the specific issue" of the coverage of 3604(b). Chevron, U.S.A., Inc. v. Natural Resources Defense Council, at al., 467 U.S. 837, 842 (1984). When a statute is ambiguous, then the Court must ask "whether the agency's answer is based on a permissible construction of the statute." Id. at 843. The Department of Housing and Urban Development's ("HUD") interpretation is reasonable and HUD's interpretation should be given "*considerable weight"*. Id.(emphasis added). Therefore, 24 C.F.R. 100.65 interprets 3604(b) to include the right to be free from discrimination both before and *after* occupancy.

II. ISSUES OF MATERIAL FACT REMAIN FOR THE FACT FINDER.

On a motion for summary judgment, the non-moving party does not have to persuade the court in their cause, but need only to demonstrate there is *a pending dispute of material fact*. Waldridge, 24 F.3d 920 (emphasis added); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986)(quoting First Nat. Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968). The District Court erred in its review of the facts and evidence before the court at the summary judgment stage of litigation.

A. Issues of Material Fact Evident In Common Elements Interpretation

The Defendants characterize Jewish residents posting of mezuzot as an attempt "to control or usurp ownership of the common elements to the exclusion of all other unit owners." *Brief of Appellees*, p. 21-22. The issue in this case is not whether Defendants have the authority "to provide for the operation, care, upkeep, maintenance, replacement and improvement of the common elements." 765 ILCS 605/18.4(a). Issues of material fact arise when a property owners

association uses their authority as a pretext to discriminate against a protected class of members by determining how they can practice their religion at their own homes. R. 14, exh. 4; R. 170-2, exh. 20; R. 52, p. 6.

A fiduciary relationship exists between Defendants and the Blochs where Defendants are bound to act in good faith and with due regard to the interests of the Blochs. Wolinsky v. Kadison, 449 N.E.2d 151, 157 (Ill.App.Ct. 1983). Therefore, the issue for the jury is whether Defendants were reasonable in their exercise of authority under 765 ILCS 605/18.4(a). Scialabba v. Sierra Blanca Condominium No. 1 Ass'n, 2001 WL 803676 at *7 (N.D.Ill. 2001). The Hallway Rule should be scrutinized to determine if it was in fact reasonable in both "purpose and application." Apple II Condominium Association v. Worth Bank and Trust Co., 277 Ill.App.3d 345, 659 N.E.2d 93 (1st Dist. 1995). Defendants' contention that they acted appropriately because Associations in Illinois may adopt a "no dog" policy (Board of Directors of 175 East Delaware Place Homeowners Association v. Hinojosa, 287 Ill.App.3d 886, 889, 679 N.E.2d 407, 409 (1st Dist. 1997)) or prohibit leasing of units (Apple II, 679 N.E.2d 407) is inapplicable. The Blochs do not want a pet, and do not own their units for investment purposes. A jury should decide issues of whether Defendants reinterpreted the Hallway Rule (with uncompromised enforcement from June 2004 until after this lawsuit was filed in September 2005 (R. 170-2, exh. 14, p. 94, ln. 4-23; R. 19, p.3) to remove mezuzot and make the Blochs home uninhabitable and hostile; or whether the Blochs practice of posting mezuzot in contravention to Defendants enforcement of the Hallway Rule was done to usurp control of a common element for their exclusive benefit.[3]

[3] It is difficult to understand how the Blochs position on the Hallway Rule was "for their exclusive benefit" considering the Illinois State Legislature's decision to amend 765 ILCS 605/18.4(h) to state "No rule or regulation shall prohibit any reasonable accommodation for religious practices, including the

Material issues on the common elements interpretation and its application to the Hallway Rule preclude summary judgment. First, mezuzot were allowed on doorframes prior to the hallway renovation. R. 14, exh. 4; R. 170-2, exh. 12, p.61, ln. 15-21. Second, a Board member (other than Lynne) thought it was wrong for Defendants to prohibit someone from putting up a mezuzah, as did the "personal expression committee." R. 170-2, exh. 12, p. 60-61, p. 192, p. 196, ln. 23-24; p. 197, ln. 1-3. Third, Defendant unreasonably impaired religious expression rights guaranteed by the First Amendment to the Constitution of the United States." 765 ILCS 605/18.4(h)(1999). Fourth, the Declaration expressly lists numerous common elements examples, but makes no mention of doorframes of units. R. 111-2, p. 7-8. Fifth, the Hallway Rule in issue states makes no mention of unit doorframes; it states "[m]ats, boots, shoes, carts or objects of any sort are prohibited outside Unit entrance doors." R. 111-9, p. 6. Sixth, a charge or expense connection with limited common elements charged only against the unit which limited common element assigned. R. 111-3, p. 5. As a result, a jury should determine if Defendants acted reasonably in prohibiting mezuzot because there are issues of material fact surrounding Defendants control of the common elements to such a provocative and all encompassing extent.

B. Reasonable Jury Could Find In Blochs Favor.

It is reasonable for a jury to determine that Defendants discriminated against the Blochs because Defendants: enforced a rule to prohibit the posting of mezuzot from June 2004 until September 2005 (R. 19, p. 3; R. 52, p. 6); the rule was enforced for three (3) years prior to June 2004 without affecting the posting of mezuzot (R. 32, p. 3); the rule makes no mention of doorposts (R. 111-9, p. 6); there is no express mention of the doorposts belonging to the common elements (R. 111-2, p. 7-8); Defendants repeatedly had mezuzot removed and confiscated (R.

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attachment of religiously mandated objects to the front-door area of a condominium unit." IL Legis. 94-729 (2006).

170-2, exh. 14, p. 94, ln. 4-11); mezuzot were removed and confiscated while the Blochs were at the funeral of their husband and father (R. 10, p. 4); Defendants were continuously made aware of the religious significance of mezuzot to the Blochs (R. 170-2, exh. 8, 9, 10); Defendants were unwavering in the execution of the rule to prohibit mezuzot for seventeen (17) months (R. 170-2, exh. 14, p. 111, ln, 11-12); and any acceptable amended rule to allow the posting of religious articles, such as mezuzot, only came after an appearance in federal court during the case at bar. See R.19; R. 46.

More importantly, Defendants description of the Blochs arguments as "pure artifice" further demonstrates the gulf of misunderstanding by Defendants on religious and racial discrimination. *Brief of Appellees*, p. 25. The issue is not "whether placement of mezuzot is a religious law or religious custom." Id. It is not the place of a court, or Defendants, to believe if the mezuzah is a religious law or religious custom; it is solely for the Blochs. Milivojevich, 426 U.S. at 709. The material issues are whether Defendants acted unreasonably in enforcing a neutral rule in contravention to the known religious beliefs of the Blochs, and other Jewish residents, to create a hostile and uninhabitable environment, and subject Jewish residents to disparate treatment because of their religious beliefs. R. 170-2, exh. 14, p. 102, ln. 18-23; 170-2, exh. 8, exh. 12, p. 60, ln. 13-24, p. 197, ln. 1-8.

Finally, Defendants assert the Hallway Rule is unambiguous and not susceptible to more than one meaning because of the words "objects of any sort are prohibited outside Unit entrance doors." *Brief of Appellees*, p. 25. It is wholly reasonable that "objects of any sort" would not include mezuzot *on door*frames because there is another rule stating "[s]igns or name plates must not be placed on Unit doors." R. 111-9, p. 6. It is reasonable that "*outside* Unit entrance doors" would not include doors, doorframes, door jams, or doorknobs. Id. It is reasonable for a jury to

determine that the Defendants time-consuming resistance to allow religiously mandated articles *on* the front door area of the Unit enforce "*outside* Unit entrance doors" to include every tangible aspect of *the* door (while having *another* rule prohibiting certain items *on* the door) was a pretext to discriminate against the Blochs.

III. ISSUES OF MATERIAL FACT EXIST UNDER 3617.

A. Validity of Regulation 100.400(c)(2).

Defendants have questioned the validity of Regulation 100.400(c)(2). *Brief of Appellees*, p. 29-30. Through Regulation 100.400(c)(2), HUD has interpreted 42 U.S.C. § 3617 to prohibit:

> [t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of such persons, or visitors or associates of such persons. 24 C.F.R. 400.100(c)(2).

Under Chevron, the issues are: whether relief under 3617 is predicated upon a proper claim under another section of the FHA; and whether 3617 bars post-acquisition discrimination. 467 U.S. at 842. With regard to both, Congressional intent is unclear. In fact, courts vary widely in their interpretations of the statute's language. Compare U.S. v. Koch, 352 F. Supp. 2d 970, 978 (D. Neb. 2004), Halprin 388 F.3d at 330. However, HUD's interpretation of 3617 is reasonable. Numerous courts have certified the validity of Regulation 100.400(c)(a), see Koch 352 F. Supp. 2d at 980; Bryant v. Polston, 2000 WL 1670938, at *4 (S.D. Ind. 2000); Ohana v. 180 Prospect Place Realty Corp., 996 F.Supp. 238, 242 (E.D.N.Y. 1998), and no federal appellate court has held it to be invalid. Halprin, 388 F.3d at 330.

Defendants claim it is a "gross misapplication" of 3617 and 100.400(c)(2) in cases without "physical violence" and "overt acts of hatred." *Brief of Appellees*, p. 30. Defendants argue it would be a great disservice to apply 3617 and 100.400(c)(2) to this case because the Hallway Rule was facially neutral. Id. However, it would be a disservice to the Fair Housing Act

and victims of discrimination to allow egregious acts of discrimination to go unpunished because they were executed under the color of a neutral rule. There is "no acceptable place in the law for partial racial discrimination." Smith v. Sol D. Adler Realty Co., 436 F.3d 344, 350 (7th Cir 1970). To advocate that partial discrimination through neutral rules, or racial and religious slurs, is not "actual hatred" necessary for protection under the Fair Housing Act would destroy the ability to "provide… for fair housing throughout the United States." 42 U.S.C. § 3601. Therefore, the Court should apply 3617 and 100.400(c)(2) in this case to the material facts in the entire record.

B. Sufficient Showing Of Intentional Discrimination

"[C]ourts should be careful in a discrimination case as in any case not to grant summary judgment if there is an issue of material fact that is genuinely contestable, which an issue of intent often though not always will be." Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1396 (7th Cir. 1997). Affidavits and deposition testimony, for example, may be sufficient to make intent or motivation a disputed fact requiring denial of summary judgment against a defendant. See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc., 991 F.2d 1249, 1261 (7th Cir. 1993). In this case, both parties have submitted plausible evidence to support their positions on the issue of intent, and the material evidence conflicts; whether Defendants intended to discriminate against the Blochs through rigidly enforcing the Hallway Rule to prohibit mezuzot is more properly for the finder of fact and not upon a motion for summary judgment. U.S. v. Cicero, 1997 WL 337379 at *2 (N.D.Ill. 1997).

Whether "objects of any sort" was intended to include mezuzot is relevant to whether Defendants discriminated against the Blochs, or otherwise interfered with their housing rights under 3617. Up until the spring of 2004, mezuzot were affixed to the exterior doorposts of unit

entrances and undisturbed by the Board, the Association, and building management. R. 140, exh. 6, p. 6. The Blochs contend that the Hallway Rule was never intended to cover, thought of as covering, nor understood to apply to religious articles such as mezuzot. R. 170-2, exh. 12, p. 3. Therefore, enforcement of the Hallway Rule after renovation to prohibit mezuzot, which would only affect Jewish residents, can be viewed as a direct discriminatory act against the Blochs or circumstantial evidence of the discriminatory intent of Defendants. It is a genuine issue of material fact which a jury should determine at trial.

The Blochs' have demonstrated discriminatory intent. The evidence needs to be only suggestive. Phillips v Hunter Trails Community Assn., 685 F.2d 184, 190 (7th Cir. 1982). Knowledge of the discriminatory impact is suggestive of intent. Hispanics United v Village of Addison, 988 F.Supp. 1130, 1159 (N.D. Ill 1997). Defendants implemented the Hallway Rule with knowledge of the rule's adverse impact on Jews. R. 170-2, exh. 7,8, 9,10. The Blochs notified Defendants that removal of the mezuzot would adversely impact members of the Jewish faith. R. 170-2, exh. 7, 8, 9, 10. Members of the board believed enforcement against religious symbols would violate the unit owners' rights. R. 170, para. 7. Despite knowing the impact of the Hallway Rule on Jewish residents, Defendants still removed mezuzot. R. 170, para. 11. The evidence in the record is sufficient to allow a reasonable jury to find discriminatory intent on behalf of Defendants. Therefore, the District Court erred in determining at the summary judgment stage that there were no issues of material fact in the entire record.

C. Disparate Impact Argument Not Waived.

Defendants argue that this Court is precluded from considering disparate impact arguments or claims in the instant appeal. *Brief of Appellees*, p. 34-35. Although consideration of disparate impact does involve preclusion, the issues of disparate impact for the Court to consider

involve the Defendants decision in June 2004 to use a 2001 rule to *preclude* Jewish residents from adhering to their religiously mandated beliefs in their home. R. 52, p. 6. All disparate impact issues are properly before this Court.

The Record on Appeal includes the District Court's Order of August 7, 2006. R. 186. In the text of that Order, the District Court discussed disparate under 3617. Id., p. 3. This Court has held that "[i]f the court elects to rely on legal arguments not incorporated in… the summary judgment motion, the court is obligated to consider the entire record 'to ensure no issue of material fact'." Nabozny, 92 F.3d at 450. Therefore, the District Court's statement that the Blochs offered no "evidence of the disparate impact they claim" (R. 186, p. 3) instructs this Court to consider the "entire record" in the light "most favorable to the non-movant" on the issue of disparate impact. Nabozny, 92 F.3d at 450; citing Roger v. Yellow Freight Systems, Inc., 21 F.3d 146, 148-49 (7th Cir. 1994).

i. Analysis of Material Issues Under Disparate Impact

The Court must consider how strong the showing of discriminatory effect. Metropolitan Housing Development Corp. v Village of Arlington Heights, 558 F.2d 1283, 1290 (7th. Cir. 1977). Jewish residents were disproportionately impacted by the Hallway Rule's interpretation after the hallway renovation. R. 170-2, exh. 8, 9, 10. In fact, there is another case before this Court which arises out of removing mezuzot at Shoreline Towers Condominium Association. See Gassman v. Frischholz, et al., Appeal No. 07-2213. As stated before, practitioners of Judaism are required to display a mezuzah because failing to display a mezuzah causes excommunication from heaven. R. 170-2, exh. 8; R. 170-2, exh. 7, p. 3.

The Court must consider if there is *some* evidence of discriminatory intent. Arlington Heights, 558 F.2d 1290 (emphasis added). Defendants continuously enforced the Hallway Rule

with knowledge of the rule's adverse impact on Jews. 170-2, exh. 7, 8, 9, 10. Defendants continuously refused to come to a reasonable solution to allow religiously mandated objects on doors. R. 170-2, exh. 14, p.102, ln 4-23, exh. 12, p. 192, ln. 20-24.p. 195, ln. 1-7. Defendants ignored the Blochs attempts to inform Defendants that removal of the mezuzot adversely impacted Jewish residents. R. 170-2, exh. 7, 8, 9. In the pleadings, Defendants arguably scoff at the Blochs adherence to the religiously mandated practice of posting a mezuzah. R. 178, para. 3. And in light of Defendants argument for the application Milivojevich, Defendants' proposition that they should determine whether a practice is religiously mandated, without any review of their determinations, is suggestive of intent to discriminate against those religious beliefs inconsistent with Defendants. See e.g. R. 14, exh. 1, p. 14.

The Court must consider the defendant's interest in taking the action. Arlington Heights, 558 F.2d 1290. The uncompromising and strict enforcement of the rule from June 2004 until September 12, 2005 was not just extreme, but far from the easiest alternative for a homeowners association attempting to protect their *hallways* and serve their members. R. 127, para. 20, 26. Defendants' position is not substantiated solely because Defendants voted against less restrictive and less discriminatory option. *Brief of Appellees*, p. 37; R. 170-2, exh. 14, p.102, ln 4-23, exh. 12, p. 192, ln. 20-24, p. 195, ln. 1-7. Defendants have no legitimate interest because: the Blochs objected to the Hallway Rules reinterpreted enforcement in June 2004 (R. 170-2, exh. 12, p. 59); a personal expression committee was formed but did not pass a nondiscriminatory amended rule (R. 170-2, exh. 12, p. 195, ln. 1-7); the Board (i.e. Defendants) proposed a rule in which Defendants would be in the position of a religious governing body with the power to approve whether the "religious symbol reflects his sincerely help religious belief" (R. 14, exh. 1); The

revised Hallway Rule currently in force was drafted after the filing of the Blochs' federal complaint. R. 19.

The Court must also consider if the plaintiff seeks to compel the defendant or merely restrain the defendant. Arlington Heights, 558 F.2d 1290. The Blochs complaint was filed to ensure Defendants *permanently* cease removing mezuzot from doorposts. R. 32. This involves permanently securing, and not subjecting religious beliefs to discretionary approval (R. 14, p. 14), the right for *all religiously mandated symbols* to be displayed on the front door area. See e.g. 765 ILCS 605/18.4(h). Defendants' argument on this factor is tantamount to characterizing the Blochs as advocating the First Amendment to the Constitution only applies to Jewish persons. *Brief of Appellees*, p. 38. The Court should disregard Defendants argument that the Blochs only support religious expression for Jewish residents.

IV. ISSUES OF MATERIAL FACT EXIST UNDER 1982.

It is well-settled in this circuit that that under 42 U.S.C. § 1982 "race is an impermissible factor" and "it cannot be brushed aside because it was neither the sole reason for discrimination nor the total factor of discrimination." 42 U.S.C. § 1982; Sol D. Adler, 436 F.3d at 349-50. Summary judgment should be precluded under 1982 because issues of material fact exist as to whether Defendants used the Jewish race as a factor in their decision to continuously enforce the Hallway Rule to preclude the posting mezuzot on unit doorframes.

Defendants assert that the Hallway Rule was nondiscriminatory on its face, applied to all units, and was enforced to protect the hallways. *Brief of Appellees*, p. 39. However, this argument fails because there are material issues surrounding Defendants decision to enforce the rule beginning in June of 2004. A jury should determine if Defendants used the Jewish race as a factor in their decision. Up until the spring of 2004, mezuzot were affixed to the exterior

doorposts of unit entrances and undisturbed by the Board, the Association, and building management. R. 140, exh. 6, p. 6. Lynne Bloch voted on the Hallway Rule and has always contended the Hallway Rule was never intended to cover, thought of as covering, nor understood to apply to religious articles such as mezuzot. R. 170-2, exh. 12, p. 3. Defendants were notified that removal of mezuzot would adversely impact members of the Jewish race. R. 170-2, exh. 7, 8, 9, 10. Members of the Board believed removing mezuzot would violate the unit owners' rights and expressed this to the Board. R. 170, para. 7. Defendants continuously had mezuzot removed despite knowing the effect on residents of the Jewish race. R. 170, para. 11.

Therefore, any material disputes on the issue of racial discrimination in violation of 1982 should be decided by a jury at trial.

CONCLUSION

The Blochs claims should be reinstated and the Summary Judgment reversed. This case is not about neighbors quarreling, or limitless claims of discrimination, or "battling the Board of Directors." This case contains issues of material fact on whether Defendants used their authority as a pretext to discriminatorily enforce a Hallway Rule because of the effect it would have on the Blochs and other Jewish residents. Despite the animated rhetoric of the Defendants, this Court should recognize that the material issues surrounding Defendants decision to preclude the Blochs and other Jewish residents from posting mezuzot.

This case is about the rights of condominium unit owners to be free from religious and racial discrimination in their homes, without the fear that a majority of their homeowner's association board will selectively interpret and enforce rules and regulations to cause their removal from their homes. A jury should determine whether the Blochs are "unhappy or disgruntled," or whether a rule was selectively and discriminatorily used to exclude the Blochs

from the association, the board, and their homes. The Hallway Rule became a mezuzot ban on the directive of the Defendants three (3) years after its enactment, and a jury should determine whether that was because Defendants knew the Blochs race and religion, how they practiced their religion in their home, the effect of their enforcement of the Hallway Rule, and considered the Blochs race and religion when enforcing the rule. For the reasons set forth in this *Reply of Appellants* and the *Brief of Appellants*, this Honorable Court must reverse Summary Judgment in favor of Defendants and remand the case to the District Court for trial.

Dated: November 30, 2007

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B), as measured by word count provided by Microsoft Word XP, because it contains Five Thousand Four Hundred and Twelve (5, 412) words, and in accordance with the provisions of Federal Rule of Appellate Procedure 32(a)(7)(b)(3)(iii).

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I hereby verify that to the best of my knowledge, the disk that accompanies this brief is virus free.

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CERTIFICATE OF COMPLIANCE WITH RULE 31(e)

Pursuant to Circuit Rule of Appellate Procedure 31(e), I hereby certify that the brief and appendix have been submitted in digital form and hereby comply with Rule 31(e) requirements.

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CERTIFICATE OF FILING AND PROOF OF SERVICE

The undersigned does certify that 15 copies of the foregoing Plaintiffs-Appellants Reply Brief and accompanying diskette were filed with Mr. Gino J. Agnello, Clerk of the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Room 2722, Chicago, IL 60604 by personal delivery on November 30, 2007.

I further certify that on November 30, 2007, two copies of the foregoing Plaintiffs-Appellants Reply Brief and an accompanying diskette were sent via U.S. Mail, first class postage prepaid to:

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