2006

Plaintiffs' Memorandum of Law in Response to Defendants Motion for Summary Judgement, Second Amended Complaint, Bloch vs. Frischholz, Docket No. 1:05-cv-05379 (Northern District of Illinois Sept 16, 2005)

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Lynne Bloch, Helen Bloch, and Nathan Bloch,	)	
Plaintiffs,	)	No. 05 C 5379
vs.	)	Judge: George W. Lindberg
Edward Frischholz and Shoreline Towers Condominium. Association, an Illinois not-for-profit Corporation,	)	Magistrate: Judge Arlander Keys
Defendants,	)	Plaintiffs Demand Trial by Jury

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

A party seeking summary judgment must prove, through "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits … that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is appropriate only when the record "viewed in the light most favorable to the non-moving party, reveals that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Williams v. Derifield, 2005 WL 3455867 (N.D. Ill., Dec. 13, 2005). When a movant "fails to meet this strict burden of proof, the Court cannot enter summary judgment for the movant even if the opposing party fails to respond to the motion." Sullivan v. Central States Southeast, No. 96-CV-4331-JPG, 1998 WL 476184, at *1 (S.D. Ill. June 17, 1998); Cooper v. Lane, 969 F.2d 368, 371 (7th Cir. 1992).

II. PLAINTIFFS ARE ENTITLED TO RELIEF UNDER SECTIONS 3604(a) AND (b) OF THE FAIR HOUSING ACT.

A. Section 3604 of the Fair Housing Act Provides Relief for Post-Acquisition Discrimination

Defendants contend that summary judgment is appropriate as to Plaintiffs' claims under

sections 3604(a) and (b) of the Fair Housing Act ("FHA") because those sections only regulate conduct leading up to and/or during the sale or rental of property, and not to alleged conduct that occurs afterwards. See Defs.' Mem. Supp. Summ. J. at 5-6. In so doing, Defendants misinterpret the plain language of §3604, ignore numerous cases holding otherwise, and misconstrue Seventh Circuit law on the issue. Contrary to Defendants' arguments, §§3604 (a) and (b) provide relief for post-acquisition discrimination.

The plain language of §3604 prohibits discrimination related to housing accessibility, even where the discrimination occurs after the sale or rental of property. Section 3604 makes it unlawful:

> "(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) 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 therewith, because of race, color, religion, sex, familial status or national origin."

42 U.S.C. §§3604(a)-(b) (emphasis added). Undoubtedly, making a dwelling "unavailable" to any person on a discriminatory basis, as prohibited by §3604(a), can be accomplished after the sale or rental of property. Similarly, the "the privileges of sale or rental of a dwelling" protected by §3604(b) can certainly include the privilege of inhabiting the dwelling. Nowhere does the language of either subsection limit applicability to discrimination occurring prior to or during the acquisition of property. In fact, in 24 C.F.R. 100.65, the United States Department of Housing and Urban Development ("HUD") interprets discrimination in "terms, conditions, and privileges and in services and facilities" to include "[l]imiting *the use* of privileges, services or facilities associated with a dwelling… of an owner, tenant, or a person associated with him or her." 24 C.F.R. 100.65(b)(4)(emphasis added).

Indeed, numerous courts have found that §3604 applies or may apply to post-acquisition discrimination. In George v. Colony Lake Property Owners Assoc., No. 05 C 5899 (N.D. Ill. June 16, 2006)., this Court recently denied a motion to dismiss by defendants contending that §3604 did not bar post-acquisition discrimination. The plaintiffs in George, landlords and renters in a housing subdivision that is predominantly white, argued that a proposed subdivision bylaw

would effectively remove all renters, who are predominantly African American, from the subdivision. In denying the motion to dismiss, this Court noted that §3604 may apply to cases of actual or constructive eviction. George, at 4. In U.S. v. Koch, 352 F. Supp. 2d 970, 978 (D. Neb. 2004), the court held that "a broad interpretation of the FHA that encompasses post-possession acts of discrimination is consistent with the Act's language [and] its legislative history…" Koch, 352 F. Supp. 2d at 978. The court then concluded that the plaintiff had stated an actionable claim in alleging that the defendant landlord subjected numerous female tenants to discriminatory harassment during their tenancies. Id. at 980. Other courts have also found that §3604 applies to post-acquisition discrimination. See, e.g., Neudecker v. Boisclair Corp., 351 F.3d 361 (8th Cir. 2003) (finding that discrimination that occurred during plaintiff's tenancy was actionable under §3604); Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997) (finding that landlord who sexually harassed plaintiff during tenancy committed violation under §3604); Woods-Drake v. Lundy, 667 F.2d 1198 (5th Cir. 1982) (finding that landlord's threat to evict plaintiffs was "prohibited by the express terms" of §3604(b)).

Defendants' reliance on Halprin v. The Prairie Single Homes of Dearborn Park Assoc., 388 F.3d 327 (7th Cir. 2004), for the proposition that §3604 does not bar post-acquisition conduct, is misguided. Although the court in Halprin denied relief under §3604 to the plaintiffs there, who were "complaining not about being prevented from acquiring property but about being harassed by other property owners," Halprin, 388 F.3d at 329, the court did so on the ground that the Fair Housing Act is focused on the "exclusion" of minorities, and not conduct that falls short of exclusion, such as "quarrels between neighbors." Id. Accordingly, the court recognized that §3604 may reach cases of constructive eviction--though, significantly, the court did not limit the reach of §3604 to such cases. Id.; see also George, No. 05 C 5899, at 4 (N.D. Ill. June 16, 2006). In recognizing the statute's potential reach, the court thus declined to foreclose the application of §3604 to cases in which post-acquisition discrimination would result in exclusion. Id. Finally, the court identified cases in which acts of post-sale discrimination have been litigated successfully under the FHA. Id.

Thus, contrary to defendants' assertions, Halprin supports the application of §3604 to discrimination that jeopardizes access to housing, even where the housing has already been acquired. See Halprin, 388 F.3d at 329. When discrimination on a basis prohibited by §3604

prevents or will prevent a tenant or owner from continuing to occupy a dwelling, it may make the dwelling "unavailable" within the meaning of §3604(a) or deny "the privileges of sale or rental" within the meaning of §3604(b). Id. In accordance with Halprin, the plain language of §3604, HUD's interpretation of the FHA, and numerous courts'--including interpretations by this Court--indicate that §3604 provides relief for post-acquisition discrimination that results, or will result,[1] in exclusion.

B. Plaintiffs Can Prove Discrimination Under Sections 3604(a) and (b)

The record indicates that defendants' continued conduct amounts to, or will amount to, violations of §3604. Consequently, defendants cannot demonstrate that they are entitled to summary judgment as to plaintiffs' §3604 claims.

To prove a violation of §3604(a), plaintiffs must show that defendants' conduct made or will make plaintiffs' dwelling "unavailable" on the basis of race, religion or another prohibited basis. 42 U.S.C. §3604(a). To prove a violation of §3604(b), plaintiffs must show that defendants' conduct deprived them of "the privileges of sale or rental of a dwelling"--which include the privilege of inhabiting the dwelling, see Halprin, 388 F.3d at 329 and the use of the dwelling, see 24 C.F.R. 100.65(b)(4)--on a prohibited basis. 42 U.S.C. §3604(b). The facts in the record support plaintiffs' ability to do both. Defendants' continued removal or other interference with plaintiffs' mezuzah was an attempt to force plaintiffs to move from the premises. See Plaintiffs' L.R. 56.1(b)(3)(B) Statement Of Facts That Show That Defendants Are Not Entitled to Judgment On The Pleadings And Not Entitled to Summary Judgment (hereinafter "Plaintiffs' Statement of Facts") paragraph 14. It is reasonable to believe that defendants were aware of the effect of their actions on Jews in particular, but continued to discriminate by enforcing the bylaws in a way that resulted in unfair treatment. Id.

III. PLAINTIFFS ARE ENTITLED TO RELIEF UNDER §3617 OF THE FAIR HOUSING ACT.

Section 3617 makes it unlawful:

> To coerce, intimidate, or interfere 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

[1] This Court and other courts have allowed §3604 claims to proceed on the basis that prohibited discrimination will prevent a claimant from continuing to occupy a dwelling. See e.g., George; Koch, 352 F.Supp.2d at 973; Neudecker, 351 F.3d at 364.

> encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

42 U.S.C. §3617. Defendants contend: (1) that plaintiffs cannot sustain a prima facie case under §3604 and therefore additional relief under §3617 is unavailable; and (2) the Seventh Circuit contemplated one scenario in which a claim under §3617 may stand on its own and that, because facts here do not present the same scenario, plaintiffs' claims under §3617 must fail. See Defs.' Mem. Supp. Summ. J. at 7-9. Because defendants' arguments are completely without merit, and because plaintiffs can demonstrate discrimination under §3617, defendants cannot show that they are entitled to summary judgment on plaintiffs' §3617 claims.

A. Section 3617 On Its Own Bars Acts of Post-Acquisition Discrimination

Plaintiffs have demonstrated that they are entitled to relief under §3604 and, therefore, relief under §3617 is potentially available to them. However, even if plaintiffs are not entitled to relief under §3604, which they are, relief under §3617 is not foreclosed.

The meaning of §3617 is governed by Regulation 100.400(c)(2)[2] issued by the U.S. Department of Housing and Urban Development ("HUD"), which the Supreme Court has

[2] Significantly, defendants do not challenge the validity of the regulation in their brief, or even mention the regulation. Although the Seventh Circuit in Halprin questioned the validity of the regulation, it did not rule on the issue since the defendants there failed to challenge it. See Halprin, 388 F.3d at 330. In numerous cases after Halprin, courts confronted with claims supported by the regulation have allowed such claims to proceed. See, e.g., East-Miller v. Lake County Highway Dept., 421 F.3d 558, 562 n.1 (7th Cir. 2005); United States v. Altmayer, 368 F. Supp. 2d 862, 862 n.1 (N.D. Ill. 2005).

Even if defendants had questioned the validity of Regulation 100.400(c)(2), they would fail. In Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1985), the Supreme Court established a two-step analysis for courts determining the validity of an agency's statutory interpretation. Courts must first ask the question "whether Congress has directly spoken to the precise question at issue." Id. If Congressional intent is clear, the court and the agency "must give effect to the unambiguously expressed intent of Congress." However, if the statute is "silent or ambiguous with respect to the specific issue," then the court must ask the question "whether the agency's answer is based on a permissible construction of the statute." Id. at 843.

The questions at issue here are: whether relief under §3617 is predicated upon a proper claim under another section of the FHA; and whether §3617 bars post-acquisition discrimination. With regard to both, Congressional intent is unclear. In fact, courts have varied widely in their interpretations of the statute's language. Compare Koch at 978, Halprin at 330. However, HUD's interpretation of §3617 is reasonable. Numerous courts have certified the validity of Regulation 100.400(c)(a), see U.S. v. Koch, 352 F. Supp. 2d 970, 980 (D. Neb. 2004); 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. See Halprin, 388 F.3d at 330.

designated as the ultimate interpreter of the FHA, and whose interpretations are to be afforded great deference in interpreting the Act's provisions. Trafficante et al., v. Metropolitan Life Insur. Co., 409 U.S. 205, 210 (1972). Through Regulation 100.400(c)(2), HUD has interpreted §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. 100.400(c)(2).

The plain language of the regulation in no way predicates relief under §3617 upon the establishment of a claim under one of the FHA's other sections. Furthermore, the language prohibits discrimination disrupting a person's "enjoyment of a dwelling" *post-acquisition*.

Accordingly, the Seventh Circuit in Halprin found that Regulation 100.400(c)(2) "cut loose" §3617 from providing legal protection only against conduct that interferes with one or more sections of the FHA enumerated in §3617, including §3604. Halprin, 388 F.3d at 329. The court also found that pursuant to Regulation 100.400(c)(2), §3617 bars post-acquisition discrimination. Id. As a general matter, §3617 on its own affords protection against post-acquisition discrimination, defendants' misconstructions of Halprin notwithstanding. Thus, relief under §3617 is not foreclosed to plaintiffs even if plaintiffs are not entitled to relief under §3604.

B. Plaintiffs Can Satisfy All Elements Required to Demonstrate Discrimination Under Section 3617

To survive summary judgment on plaintiffs' §3617 claim for interference, plaintiffs must show: (1) they are protected individuals under the FHA; (2) they engaged in the exercise of or enjoyment of fair housing rights; (3) defendants' conduct at issue was motivated in part by an intent to discriminate, or their conduct produced a disparate impact; and (4) defendants coerced, threatened, intimidated, or interfered with plaintiffs on account of their protected activity under the FHA. Krieman v. Crystal Lake Apartments Ltd., 05 C 0348, 2006 WL 1519320 at*9 (N.D. Ill. May 31, 2006)(citing East-Miller v. Lake County Highway Dept., 421 F.3d 558, 563 (7th Cir. 2005)).

Defendants do not dispute that plaintiffs are Jews who placed a mezuzah on their

doorpost in the sincere belief that doing so was required by Jewish law. Defendants also do not dispute that plaintiffs continued to replace their mezuzah on their doorpost after defendants repeatedly took it down. Plaintiffs are protected individuals who engaged, and continue to engage, in protected activity.

Furthermore, defendants intentionally and overtly discriminated against plaintiffs, as well as other Jewish tenants, in their interpretation and enforcement of the condominium association rule at issue ("hallway rule"). Dr. Chiarelli, a board member at all relevant times, testified that when the hallway rule was passed, he did not believe the rule banned mezuzot. See Plaintiffs' Statement of Additional Facts, Para. 11. He also testified that the Board's initial enforcement of the hallway rule related simply to removing all items from the hallways so that the hallways could be renovated. Id. He further testified that, prior to the renovation, hallway items including mezuzot were not removed. Id.

Moreover, in or around July 2004, and after the hallways had been renovated, Dr. Chiarelli headed a committee created by the Board to investigate the types of items, mezuzot included, the association should permit in limited common elements. Id. Subsequently, Dr. Chiarelli proposed a rule on behalf of the committee that would have allowed plaintiffs to display their mezuzah. Id. The Board voted the proposal down. Id. Dr. Chiarelli testified that, at that time, he believed that prohibiting the display of mezuzot violated unit owners' rights. Id. He further testified:

> Q: Did you share that opinion with members of the board?
> A: Yes.
> ***
> Q: How many conversations did you have about that issue, your belief that it's wrong?
> A: Several.
> ***
> Q: Were you able to present your proposal to the board in its entirety, either at one point or another?
> A: Yes.
> Q: Do you recall there ever being an official vote on whether or not the rules and regulations would be interpreted and enforced in such a way that would prevent unit owners from placing mezuzot on their door, specifically,

> mezuzot?
>
> A: To my knowledge, there was never any discussion—any extensive discussion regarding any special exceptions.

Id. Nevertheless, the Board banned the display of mezuzot outside unit owners' doors, blatantly disregarding the objections of its Jewish residents, Dr. Chiarelli's proposal, and the Board's prior allowance of such displays. Clearly, defendants, and particularly defendant Frischholz, were motivated by an intent to discriminate. At the very least, the Board was fully aware that a complete ban on all items in the hallways impacted Jewish residents differently.

Finally, Dr. Chiarelli testified that the management committee of Shoreline Towers was directed to remove mezuzot at the Board's behest. Id. This is precisely how plaintiffs' mezuzah was removed from their doorpost on numerous occasions. See Plaintiffs' Statement of Facts, Para. 20. Those continuous removals are clearly the interference and harassment that §3617 contemplates. Because plaintiffs can satisfy all elements required to maintain their §3617 claims, defendants cannot be entitled to summary judgment on these claims.

Although defendants argue that, based on Halprin, this case does not present a scenario for which §3617 offers relief, such is not the case. The court in Halprin ruled that homeowners stated a claim under §3617 by alleging "a pattern of harassment, invidiously motivated, and … backed by the homeowners' association to which the plaintiffs belong[ed]." 388 F.3d at 330. Defendants' continuous and repeated removal of plaintiffs' mezuzah, especially during the funeral of Dr. Bloch, and defendants' continued harassment of plaintiff Lynne Bloch in board meetings and in other personal interactions, indicate that the same has occurred here.

IV. PLAINTIFFS' INJURY INVOLVES IMPAIRMENT OF PROPERTY INTEREST WITHIN REACH OF §1982.

Defendants' characterization of Plaintiffs' Complaint as not based on race is erroneous. Count 3 of Plaintiffs' Complaint at ¶¶31-32 states that Defendants' prohibition against the placement of a Mezuzah on the exterior doorway and the removal of mezuzot from the Subject Property "because of race" constitutes a violation of §1982.

The Supreme Court considered whether Jews may assert a claim of racial discrimination under §1982 in Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987). There, a Jewish congregation brought suit alleging violation of §1982 when their synagogue was desecrated. The Court found that Congress passed §1982 with the intent to "protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Id. at 617, quoting Saint Francis College v. Al Khazraji, 481 U.S. 604 (1987). The Court concluded that Jews constitute a group that Congress intended to protect when it passed the statute and thus are protected under §1982. Id. at 617.

Also, the courts have found support in the legislative history for the position that §1982 protects a Jewish person's use of property. Whisby-Myers v. Kiekenapp, 293 F.Supp.2d 845 (N.D. Ill. 2003). In Whisby-Myers, this court found that intimidating conduct based on race deprived the African-American plaintiffs of their property rights and violated §1982. The court based its reasoning in part on an analogy of the facts in that case to those in U.S. v. Brown, 49 F.3d 1162, 1167 (6th Cir. 1995), where it was held that conduct that deprived Jewish members of a synagogue of the right to use the property was a violation of §1982. Whisby-Myers, 293 F.Supp.2d at 849.

Defendants rely on Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1973) for their position that §1982 claims must be based on race. The court in Clark recognized that the scope of §1982 is "far reaching," and declared that the statute must be granted "a sweep as broad as its language." Id. at 329, quoting Jones v. Mayer Co., 293 U.S. 409, 20 L.Ed.2d 1189 (1986). This decision construes §1982 as a tool with broad application in combating all forms of discrimination and the effects of such discrimination on property ownership, and thus in fact supports Plaintiffs' position.

V. A REQUEST FOR A PERMANENT INJUNCTION IS NOT MOOTED BY VOLUNTARY CESSATION OF ACTIVITY OR A CHANGE IN STATE LAW.

A voluntary cessation of the illegal conduct does not moot the Plaintiffs' claim for a permanent injunction. A case only becomes moot when the issues presented are no longer live. County of Los Angeles v Davis, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383, (1979). A voluntary cessation of activity does not moot the case, unless 1) there is no reasonable expectation that the violation will recur, and 2) events have completely eradicated the effects of the alleged violation.

Id. at 631, 99 S. Ct. 1383; see also Halet v Wend Investment Co., 672 F.2d 1305, 1307 (9th Cir. 1982) (applying this standard to a case under the Fair Housing Act).

After much outside pressure and court intervention, Defendants ceased removing the Mezuzah. That action by itself does not nullify the case under the Davis test. Instead, there must be a reasonable expectation that the violation will not recur. Here there is great likelihood that Defendants will repeat their illegal actions. This is true even though Illinois amended Section 18.4(h) of the Illinois Condominium Property Act to explicitly protect the display of religious objects on the exterior of apartment doors. Defendants demonstrated a propensity to disregard both the agreements between the parties and the law. In June of 2005, Defendants removed the Mezuzah during the mourning period when the Plaintiffs were sitting *shiva*. See Plaintiffs' Statement of Additional Facts, Para. 20. This despite the fact there was a verbal agreement between the parties to allow the Mezuzah to be displayed during this time. Id. at Para. 18. Additionally, Defendants were notified by Plaintiffs a year earlier in 2004 that Defendants' conduct was against Jewish law and illegal. Id. at Para. 8. Despite these communications, Defendants continued to violate the law until October, 2005, when Defendants' were pressured into changing their by-laws. Even after the change in the by-laws the Defendants have continued to harass the Plaintiffs. Id. at Para. 34-36. The Defendants' past behavior has indicated that there is a reasonable expectation that violations of Plaintiffs' rights will reoccur. The amendment to Illinois law does not provide adequate assurance, because this only makes the law more explicit. Defendants' actions were illegal under the pre-amendment law. Since Defendants have not complied with the law in the past or even their own agreements, there is no assurance that the Defendants will comply with the amended law.

The case is not moot under the Davis test. Defendants' cessation does not moot the case unless there is no reasonable expectation of a reoccurrence and events have eradicated the violation. There is a reasonable expectation that Defendants will renew their efforts to remove the Mezuzah.

VI. DAMAGES FOR EMOTIONAL DISTRESS, MENTAL ANGUISH, HUMILIATION, AND EMABARRASSMENT ARE AVAILABLE UNDER THE FAIR HOUSING ACT AND §1982 WITHOUT CONSULTING A PHYSICIAN.

Actual and compensatory damages are available to Plaintiffs for violations of Fair Housing Act and violations of §1982, even if a physician has not been consulted. This circuit has

allowed damages under violations of §1982 and §3612 for humiliation, and humiliation "can be inferred from the circumstances as well as established by the testimony." Seaton v Sky Realty Company, 491 F.2d 634, 636 (7th Cir. 1974). Defendants cite Healy v CTP, Inc. to argue that speculation and conjecture are not a suitable basis for damages. 1994 WL 846898 *4 (N.D. Ill. 1994). This argument is not relevant, because Plaintiffs' claims are for past events and not based on speculation or conjecture. The Healy case was addressing a separate issue of damages for lost sales commissions in a claim for wrongful termination. In that case monetary damages could not be calculated, because future sales were not known. In contrast, Plaintiffs here have suffered the actual damages of humiliation, embarrassment, mental anguish, and emotional distress. See Plaintiffs' Statement of Additional Facts, Para. 24 and Para. 30. Plaintiffs' claim for damages is based on past experience. Id. at Para. 24. There is no speculation or conjecture about future events in the claim. Accordingly, the Seaton case allowed for damages for past humiliation under the Fair Housing Act and §1982. Additionally, evidence of damages can be shown from the circumstances or established by testimony.

Plaintiffs have stated their experiences of emotional distress, mental anguish, humiliation, and embarrassment. See Plaintiffs' Statement of Additional Facts, Para. 24 and Para. 30. This testimony is sufficient to make out a claim for damages under the Fair Housing Act and §1982.

VII. THE §18.4 VIOLATION OF THE ILLINOIS CONDOMINIUM PROPERTY ACT IS A FIRST AMENDMENT VIOLATION, AND DOES NOT REQUIRE THE RESTRICTION TO BE "DISCRIMINATORY," OR "ARBITRARY."

A. The First Amendment Applies to Disputes Between Tenants and Condo Associations.

The protections of the First Amendment can be extended to interactions between private parties by statute. The Illinois legislature has exercised this power and extended First Amendment protections to disputes between tenants and condo associations. Normally, the right of free speech only protects infringement from governmental actors. Hudgens v. NLRB, 424 U.S. 507, 513, 96 S. Ct. 1029, 1033 (1976). However, statutory law may extend free speech and other First Amendment protections to disputes between private parties. Id. at 513, 96 S. Ct. at 1033. The Illinois legislature accepted this invitation and extended free exercise of religion and free speech protection by statute. The Illinois Condominium Property Act states that "no rule or regulation may impair any rights guaranteed by the *First Amendment of the Constitution*." 765

Ill. Comp. Stat. Ann. 605/18.4(h) (2005) (emphasis in original). The statute is a permissible extension of First Amendment protections to disputes between private parties.

The extended First Amendment does protect the acts of the Plaintiffs. The Supreme Court has interpreted the First Amendment in disputes between a private individual and the government to protect an individual's right to display signs on their property. In City of Ladue v. Margaret P. Gilleo, the Court struck down a municipal statute that prohibited the display of most signs on private property. 512 US 43. 59. 114 S. Ct. 2038, 2047 (1994). The regulation imposed by Defendants is analogous to the restriction sought to be impose by the city of Ladue. Since the regulation would be invalid if enacted by a government, the regulation enacted by the condominium association is invalid under the First Amendment.

B. First Amendment Protections Do Not Require Restrictions to be "Discriminatory" or "Arbitrary."

Defendants argued that a restriction must be discriminatory or arbitrary to be invalid. However, the restriction does not need to be either, but instead only needs to violate the First Amendment.

Defendants' first assertion was that the restriction must be discriminatory. No authority is cited in support of this assertion. Regardless, Defendants' precluding Plaintiffs from displaying their mezuzot was discriminatory in that it flew in the face of the Illinois Condominium Act's adoption of the First Amendment. Furthermore, Defendants' assertion that the restriction be discriminatory is not the law under the First Amendment. A content neutral restriction can violate the First Amendment. In City of Ladue it was held that content neutral prohibitions can suppress too much speech, and a discriminatory purpose is not needed. Id. at 55, 114 S. Ct. 2046. Thus, for the determination of whether there was a violation of the Illinois Condominium Property Act, it does not matter whether the regulation was discriminatory or not.

Defendants' second assertion was that the restriction must be arbitrary. Defendants cited the case of Apple II Condominium Association v.Worth Bank & Trust, Co., 659 N.E.2d 93, 99 (Ill. App. Ct. 1995). This case held that a condominium regulation will be upheld unless it "is arbitrary, against public policy or violates some fundamental constitutional right of the unit owners." Id. at 99. The holding in Apple II Condominium Association does not apply to this case, because the court was addressing a condominium regulation that did not violate a fundamental constitutional right. Plaintiffs have argued that the condominium regulation violates

their fundamental right to free speech and to freely exercise their religion. See Plaintiffs' Complaint at ¶ 25. The test to be applied is the test under the First Amendment. A court will only review a regulation for arbitrariness if there is no constitutional right at issue. Thus, for the determination of whether there was a violation of the Illinois Condominium Property Act, it does not matter whether the regulation was arbitrary or not.

Respectfully submitted,
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By:

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