

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERTO FILHO,
Plaintiff,
v.
KAREN GANSEN, et al.,
Defendants.

Case No. 4:18-cv-00337-KAW

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Re: Dkt. No. 41

On July 13, 2018, Plaintiff Roberto Filho ("Plaintiff") filed his Second Amended Complaint. (Second Am. Compl., "SAC", Dkt. No. 40.) On July 30, 2018, Defendants Karen Gansen, Chinatown Community Development Center and William Penn Hotel ("Defendants") filed a Motion to Dismiss Plaintiff's Second Amended Complaint. (Defs.' Mot., Dkt. No. 41.) On August 13, 2018, Plaintiff opposed. (Pl.'s Opp'n, Dkt. No. 43.) Defendants replied on August 20, 2018. (Defs.' Reply, Dkt. No. 44.)

The Court finds this matter suitable for resolution without hearing pursuant to Civil Local Rule 7-1 (b), and hereby vacates the hearing initially set for September 20, 2018. (Dkt. No. 42.) Upon consideration of the parties' filings, and for the reasons stated below, Defendants' Motion to Dismiss is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

Plaintiff asserts that he is a permanently handicapped individual who has a physical disability which substantially limits his life activity. (SAC ¶ 6.) Plaintiff also states that his disability is traumatic brain injury (TBI), specifically, "damage to the right frontal and hemisphere of the brain that causes short term memory loss, dizziness, falling to the ground, uncontrollable mobility to walk, work, performing manual tasks, lack of concentration, anxiety, speech impairment, human immunodeficiency virus, chronic fibrosis, stage 3 of liver scar tissue damage,

1 and damage to the bladder tissue, frequent urination, dehydration and fatigue." (Id. ¶ 7.) On
2 January 16, 2018, Plaintiff filed a complaint against Karen Gansen, alleging that he was
3 unlawfully discriminated against based on disability, in violation of the Fair Housing Act
4 ("FHA"). (Compl., Dkt. No. 1.) On February 26, 2018, Defendant Karen Gansen filed a Motion to
5 Dismiss Plaintiff's Complaint. (Dkt. No. 9.) Plaintiff responded to this Motion to Dismiss with the
6 statement: "Plaintiff Robert Filho states that the complaint is good and ready and has enough facts
7 in the complaint. The plaintiff states that if the Honorable Judge Westmore requires any changes
8 to the compl[aint] the plaintiff asks the Honorable Judge Westmore to grant the plaintiff to amend
9 the complaint." (Dkt. No. 13-1 at 2.) This was not treated as a request for leave to amend by the
10 Court. Without obtaining leave to amend, Plaintiff filed his First Amended Complaint on April 2,
11 2018. (First Am. Compl., "FAC", Dkt. No. 24.) On April 12, 2018, Defendant Karen Gansen filed
12 a Motion to Dismiss Plaintiff's FAC. (Dkt. No. 30.) On June 4, 2018, the Court granted
13 Defendant's Motion to Dismiss Plaintiff's FAC, without prejudice and with leave to amend. (Dkt.
14 No. 38). On July 13, 2018, Plaintiff filed his SAC. (SAC.) In his SAC, Plaintiff only listed
15 William Penn Hotel and Chinatown Community Development Center as Defendants, both in the
16 header and in the list of the Defendants in paragraph 2. (SAC at 1, ¶ 2.) On July 30, 2018,
17 Defendants filed a Motion to Dismiss Plaintiff's SAC. (Defs.' Mot.)

18 **II. LEGAL STANDARD**

19 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss based
20 on the failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). A
21 motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the
22 complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

23 In considering such a motion, a court must "accept as true all of the factual allegations
24 contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The court may also
25 dismiss the case or a claim "only where there is no cognizable legal theory" or there is an absence
26 of "sufficient factual matter to state a facially plausible claim to relief." *Shroyer v. New Cingular*
27 *Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662,
28 677-78 (2009)).

1 Generally, if the court grants a motion to dismiss and dismisses a complaint, it should grant
2 leave to amend even if no request to amend is made "unless it determines that the pleading could
3 not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th
4 Cir. 2000). Moreover, dismissal with prejudice is proper only if amendment is futile or if the
5 "complaint could not be saved by any amendment." *United States v. Corinthian Colleges*, 655
6 F.3d 984, 995 (9th Cir. 2011).

7 **III. DISCUSSION**

8 Plaintiff's SAC is a marked improvement from his FAC. Moreover, upon review,
9 Plaintiff's SAC also sufficiently sets forth and alleges a valid FHA discrimination claim under the
10 theories of disparate treatment and failure to provide reasonable accommodations, but not
11 disparate impact. Consequently, Plaintiff's SAC still survives a Rule 12(b)(6) motion to dismiss
12 because under the appropriate case law, **only one** of those above-mentioned three theories — (1)
13 disparate treatment, (2) disparate impact, or (3) failure to provide reasonable accommodations —
14 must be satisfied in order to proceed with a FHA discrimination claim past the pleading stage.

15 **A. Whether Plaintiff's SAC States a Cause of Action for Violation of the FHA**

16 A plaintiff can establish an FHA discrimination claim by showing: (1) disparate treatment
17 or (2) disparate impact. *Avenue 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 502-
18 503 (9th Cir. 2016); *Pac. Shores Properties, LLC v. City of Newport Beach*, 746 F.3d 936, 938
19 (9th Cir. 2014); *Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir. 1997). Alternatively,
20 a plaintiff can also allege an FHA claim by: (3) proving that a defendant has failed to provide
21 reasonable accommodations in "rules, policies, practices, or services, when such accommodations
22 may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling."
23 *Dubois v. Assoc. of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2006)
24 (citing 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204); *Gamble*, 104 F.3d at 305 (citing *City of*
25 *Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994)).

26 **1. Disparate Treatment**

27 To allege discrimination under a theory of disparate treatment, the plaintiff generally must
28 demonstrate that the defendant treated him differently from similarly situated persons because of

1 his membership in a protected group. *Pac. Shores*, 746 F.3d at 938. This may be, for example, the
2 selective enforcement of an otherwise fairly-framed law or policy. *Id.* (citing *McDonnell Douglas*
3 *Corp. v. Green*, 411 U.S. 792, 802 (1973)). Alternatively, a plaintiff can prove disparate treatment
4 by providing direct or circumstantial evidence that impermissible discriminatory intent tainted the
5 defendant’s decisionmaking process. *Pac. Shores*, 746 F.3d at 938-39 (citing *Budnick v. Town of*
6 *Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008) (“When disparate treatment is claimed... a plaintiff
7 may also simply produce direct or circumstantial evidence demonstrating that a discriminatory
8 reason more likely than not motivated the challenged decision.”)).

9 Defendant argues that Plaintiff’s SAC makes no attempt to allege Defendant subjected him
10 to disparate treatment, and that there are no factual allegations in the SAC which might support
11 such a claim because Plaintiff’s SAC does not allege that he was treated differently than any of the
12 other tenants at his building due to his disability. (Defs.’ Mot at 6.) Defendant also points out that
13 Plaintiff’s SAC also fails to allege sufficient factual matter to permit the inference that Defendant’s
14 actions were more likely than not motivated by discriminatory criteria, specifically, that Plaintiff
15 was denied privileges given to other residents because of his disabilities. (*Id.*)

16 In response, Plaintiff states that he did allege facts showing disparate treatment in
17 paragraph 12 (Pl.’s Opp’n at 5), which states that “there were two avail units, room 403 and room
18 421 with a room with a private bathroom and plaintiff states that the defendant knew the plaintiffs
19 disability of bladder damage causing symptoms of chronic urination and diarrhea” of a high
20 frequency¹ “that such reasonable accommodation will help the plaintiff to make it to the bathroom
21 on time.” (SAC ¶ 12.) Plaintiff also argues that other disabled tenants are currently living in their
22 own rooms with a private bathroom, and that Defendants did not make any efforts to provide
23 reasonable accommodations with a room having a private bathroom and hence, Plaintiff was left
24 ignored. (Pl.’s Opp’n at 5.)

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27 ¹ Although Plaintiff mentions that he had urination and diarrhea at a frequency of “1000 times in a
28 day” (SAC ¶ 12) (Pl.’s Opp’n at 3, ¶ 12) the Court notes that is physically and theoretically
impossible. Thus, the Court will refer to Plaintiff’s complained-of urination and diarrhea as
occurring only at a “high frequency.”

1 The Court finds that the Plaintiff has sufficiently alleged disparate treatment. Plaintiff
2 alleges that Defendant gave other disabled tenants units with private bathrooms when they denied
3 him such a unit, even when Plaintiff said there were available units (e.g., rooms 403 and 421)
4 having private bathrooms. This is sufficient for alleging disparate treatment because Plaintiff need
5 only plead facts showing that he was treated differently, e.g. denied available units with private
6 bathrooms, on account of his disability. It also is irrelevant that other disabled tenants were given
7 units with private bathrooms because those tenants were still simply other individuals who did not
8 belong to the same protected class as Plaintiff did (e.g. a class of individuals having the disability
9 of TBI and bladder damage resulting in frequent urination and/or diarrhea). Plaintiff can also still
10 argue that he was treated differently than those disabled tenants due to having a different
11 disability. Essentially, Plaintiff has adequately alleged here that Defendant is engaged in selective
12 enforcement of the otherwise fairly-framed policy of distribution of units having private
13 bathrooms. Moreover, even though Plaintiff is not required to do so in order to adequately plead
14 disparate treatment because he has already shown different treatment from the Defendant
15 compared to similarly situated persons due to his disability, Plaintiff has further alleged here that
16 Defendant’s decision to deny him a unit with a private bathroom was tainted by a discriminatory
17 intent or reason because those units were available and given to other tenants.

18 **2. Disparate Impact**

19 To make out a prima facie case of disparate impact under the FHA, the City must show
20 both a statistical disparity and a policy or policies that caused the disparity. *City of Los Angeles v.*
21 *Bank of Am. Corp.*, 691 F. App'x 464, 465 (9th Cir. 2017) (citing *Tex. Dep't of Hous. & Cmty.*
22 *Affairs v. Inclusive Cmty. Project, Inc.*, 135 S.Ct. 2507, 2523 (2015)). In other words, to prevail
23 on a disparate impact theory, plaintiffs must allege sufficient facts to support a prima facie case of
24 discrimination, which consists of “(1) the occurrence of certain outwardly neutral practices, and
25 (2) a significantly adverse or disproportionate impact on persons of a particular type produced by
26 the defendants]’s facially neutral acts or practices.” *Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 976
27 (N.D. Cal. 2013) (citing *Gamble*, 104 F.3d at 306)).

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1 Defendant argues that disparate impact claims must allege the occurrence of outwardly
2 neutral practices with a significant adverse or disproportionate impact on persons of a particular
3 type produced by the defendant's facially neutral acts or practices, and that Plaintiff's SAC makes
4 no such allegations. (Def.'s Mot. at 6.)

5 In response, Plaintiff cites the same portion of his SAC as above. See (SAC ¶ 12.)

6 On balance, the Court finds that Plaintiff has not sufficiently plead disparate impact,
7 primarily because even though Plaintiff might have pointed to Defendant's outwardly-neutral
8 practices (e.g., denying units with private bathrooms to everyone if they are unavailable), Plaintiff
9 has not provided any statistical data that shows a disproportionate impact on persons of a
10 particular type (e.g., persons having the same disability as Plaintiff of TBI and bladder damage
11 resulting in frequent urination and/or diarrhea) produced by Defendant's facially neutral acts or
12 practices. Plaintiff's allegation that other disabled tenants were given units having private
13 bathrooms does not establish a statistical disparity because those tenants, unlike Plaintiff, are not
14 adversely or disproportionately impacted. Thus, Plaintiff must allege statistical data showing that
15 others similarly situated to him, or having disabilities similar or the same to his, suffer an adverse
16 or disproportionate impact due to Defendant's facially neutral acts or practices.

17 **3. Failure to Reasonably Accommodate a Disability**

18 To prevail on a FHA discrimination claim for failure to reasonably accommodate under 42
19 U.S.C. § 3604(f)(3), a plaintiff must prove all of the following elements: (1) that the plaintiff is
20 handicapped within the meaning of the FHA or 42 U.S.C. § 3602(h); (2) that the defendant knew
21 or should reasonably be expected to know of the handicap; (3) that accommodation of the
22 handicap may be necessary to afford the handicapped person an equal opportunity to use and
23 enjoy the dwelling; (4) that the accommodation is reasonable; and (5) that defendant refused to
24 make the requested accommodation. *Dubois v. Assoc. of Apartment Owners of 2987 Kalakaua*,
25 453 F.3d 1175, 1179 (9th Cir. 2006) (citing 42 U.S.C. § 3604(f)(3)(B)).

26 Defendant argues that there are no facts pled in Plaintiff's SAC that demonstrate that his
27 current room is not sufficiently close to the communal bathrooms of the building such that he
28 cannot utilize the facilities. (Def.'s Mot. at 7.) For example, Defendants state that Plaintiff does not

1 allege that there are frequently lines at the communal bathrooms and he cannot hold his urges long
2 enough to wait, or that the communal bathrooms are too far away from his unit for him to get to
3 when an urge to use the bathroom arises or that he must use the bathroom with such urgency that a
4 private bathroom is a medical necessity. (Id.) As a result, Defendants argue that absent this
5 showing of necessity, Plaintiff cannot show that Defendants discriminated against him by denying
6 his request for a unit with a private bathroom. (Id.) Defendants assert that while the luxury of an
7 in-unit bathroom is something that any resident might benefit from, Plaintiff has not alleged facts
8 which demonstrate that such an accommodation in this case was necessary. (Id.)

9 In response, Plaintiff states that at least in paragraphs 8, 10, 11, and 12, he provided
10 enough facts to state the cause of action of failure to provide reasonable accommodations. (Pl.'s
11 Opp'n at 4.) In those paragraphs and in the rest of his SAC, Plaintiff mentions:

12 (1) Plaintiff suffered from a handicap as defined by the FHA (Id. at ¶ 7) (stating his
13 disability is traumatic brain injury or TBI);

14 (2) Defendants knew or reasonably should have known of Plaintiff's handicap (Id. at ¶ 8)
15 (stating in his written request for a reasonable accommodation of a room with a private bathroom
16 to resident site manager Fowzia Amar, he attached a medical doctor letter for this reasonable
17 accommodation); (Id. at ¶ 9) (stating that he submitted to the Defendants in writing his disability
18 at the time he moved into the William Penn Hotel on October 15, 2015);

19 (3) Accommodation of the handicap is necessary to afford Plaintiff an equal opportunity to
20 use and enjoy the dwelling (Id. ¶ 10) (stating that accommodation of his disability is necessary to
21 afford an equal opportunity to use and enjoy his dwelling due to his medical condition which leads
22 to frequent and often uncontrolled urination - thus, a bathroom in very close proximity is
23 essential);

24 (4) The accommodation was reasonable (Id. at 11) (stating that on November 14, 2017,
25 resident site manager Fowzia Amar verbally informed plaintiff that they refused a **reasonable**
26 accommodation with a room having a private bathroom and that there were no available units);

27 and

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1 (5) Defendants refused to make such accommodation (Id. at ¶ 11) (stating that on
2 November 14, 2017, resident site manager Fowzia Amar verbally informed plaintiff that they
3 refused a reasonable accommodation with a room having a private bathroom and that there were
4 no available units); (Id. at ¶ 12) (stating that he was aware that there were two available units,
5 room 403 and room 421, both with private bathrooms and that Defendants knew of his disability
6 of bladder damage causing symptoms of chronic urination and diarrhea of a high frequency in a
7 day and night that such reasonable accommodations would help him to make it to the bathroom on
8 time).

9 Upon analysis of Plaintiff's SAC, the Court finds that Plaintiff has adequately alleged a
10 discrimination claim under the FHA for failure to reasonably accommodate. As demonstrated
11 immediately above, Plaintiff had sufficiently pled and alleged all five of the requisite components
12 for establishing a claim that Defendant has failed to provide reasonable accommodations. The
13 Court also finds Defendant's arguments unavailing because it would be unduly burdensome for
14 Plaintiff to prove at the pleading stage, especially without the benefit of discovery, the conditions
15 that Defendant asks Plaintiff to proffer here (e.g. there are frequently lines at the communal
16 bathrooms and he cannot hold his urges long enough to wait, that the communal bathrooms are too
17 far away from his unit for him to get to when an urge to use the bathroom arises, and that he must
18 use the bathroom with such urgency that a private bathroom is a medical necessity).

19 **B. Whether Defendant Karen Gansen Remains in the Action**

20 Defendant states that Defendant Karen Gansen was not named as a defendant in the SAC
21 and there are no allegations specifically made against her, thus, Plaintiff's claims against Karen
22 Gansen are dismissed as a matter of law as she is no longer a party to this action. (Defs.' Mot. at
23 7.) In response, Plaintiff states that "in 2nd Amend Complaint Karen Gansen is not listed as the
24 defendant [and the] only two defendants listed are William Penn Hotel and Chinatown
25 Community Development Center." (Pl.'s Opp'n at 4.)

26 The Court interprets this as an agreement between the parties that Karen Gansen should be
27 dismissed from this action. Accordingly, Defendant Karen Gansen is dismissed.

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IV. CONCLUSION

Accordingly, for the aforementioned reasons, the Court hereby:

GRANTS Defendants' Motion to Dismiss Plaintiff's SAC with respect to pleading disparate impact for Plaintiff's First Claim under the FHA; and

DENIES Defendants' Motion to Dismiss Plaintiff's SAC with respect to pleading (i) disparate treatment and (ii) failure to reasonably accommodate for Plaintiff's First Claim under the FHA. Moreover, because Plaintiff has sufficiently alleged an FHA claim under the two theories of (i) disparate treatment and (ii) failure to reasonably accommodate, leave to amend pleading the disparate impact theory is not warranted.

Furthermore, the claims against Defendant Karen Gansen are hereby DISMISSED WITH PREJUDICE and Defendant Karen Gansen is also hereby DISMISSED from this case.

Defendant shall file an Answer to Plaintiff's SAC no later than 14 days from the date of this Order.

IT IS SO ORDERED.

Dated: October 19, 2018



KANDIS A. WESTMORE
United States Magistrate Judge