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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FAIR HOUSING COUNCIL OF OREGON,

Plaintiff,

v.

CROSS WATER DEVELOPMENT, LLC, a
Washington Limited Liability Company;
MOSS & ASSOCIATES, INC., a Washington
Corporation; DNW, INC., a Washington
Corporation; R.L. OJA COMPANY, INC., a
Washington Corporation; BONNIE OJA, an
individual; ROBERT OJA, an individual,

Defendants.

Case No. C08-5755 FDB

ORDER GRANTING THE MOTIONS
TO DISMISS THE COMPLAINT
AGAINST ALL DEFENDANTS FOR
FAILURE TO STATE A CLAIM

This matter comes before the Court on the motions of all named Defendants to dismiss the complaint of Plaintiff Fair Housing Counsel of Oregon for failure to state a claim. The Court, having reviewed the motions and response thereto, is fully informed and hereby grants the motions to dismiss for the reasons that follow.

Introduction and Background

The Fair Housing Council of Oregon (FHCO) commenced this disabilities discrimination

1 action under the Federal Fair Housing Act, as amended by the Fair Housing Act Amendments Act
2 of 1988 (FHA), 42 U.S.C. §§ 3601-3619, and the Americans with Disabilities Act (ADA), 42
3 U.S.C. § 1281, et seq., to enjoin and remedy alleged violations of these civil rights laws by
4 Defendants in the design, construction, and operation of covered multifamily dwellings at the
5 Heritage Park Apartments, Vancouver, Washington.

6 The FHCO filed an administrative complaint with the Department of Housing and Urban
7 Development (HUD) on May 9, 2005. Pending the administrative proceedings, the Ninth Circuit
8 Court of Appeals held that in actions alleging violations of Fair Housing Act's (FHA)
9 design/construction requirements for handicapped access in multi-family dwellings, the FHA's
10 two-year limitations period governing private civil actions runs from conclusion of
11 design-and-construction phase, which occurs on date the last certificate of occupancy is issued.
12 Garcia v. Brockway, 526 F.3d 456, 460-61 (9th Cir. 2008). Because the administrative complaint
13 was filed beyond the two-year limitations period, HUD held the complaint untimely and dismissed
14 the action. FHCO then filed the instant action on December 17, 2008. All Defendants assert that
15 the action is barred by the statutes of limitations and move to dismiss the complaint pursuant to Fed.
16 R. Civ. P. 12(b)(6) for failure to state a claim.

17 **Rule 12(b)(6) Standards**

18 A motion under Rule 12(b)(6) should be granted only if “it appears beyond doubt that the
19 plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley
20 v. Gibson, 355 U.S. 41, 45-46 (1957); Edwards v. Marin Park, Inc., 356 F.3d 1058, 1061 (9th Cir.
21 2004). In testing the sufficiency of a claim against a Rule 12(b)(6) challenge, a court must “accept
22 all material allegations in the complaint as true and construe them in the light most favorable to the
23 plaintiff.” North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 580 (9th Cir. 1983). The court
24 need not, however, “accept legal conclusions cast in the form of factual allegations if those
25 conclusions cannot reasonably be drawn from the facts alleged.” Clegg v. Cult Awareness

1 Network, 18 F.3d 752 (9th Cir. 1994). A claim may be dismissed as a matter of law if there is a lack
2 of a cognizable legal theory or if there are insufficient facts alleged under a cognizable legal theory.
3 Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). The court must determine
4 whether or not it appears to a certainty under existing law that no relief can be granted under any set
5 of facts that might be proved in support of plaintiff's claims. De Le Crux v. Tormey, 582 F.2d 45,
6 48 (9th Cir. 1978).

7 **Tolling and the FHA Statute of Limitations**

8 Claims under the Fair Housing Act are subject to a two-year statute of limitations. See 42
9 U.S.C. § 3613(a)(1)(A); Tolbert v. State of Ohio Dep't of Transp., 172 F.3d 934, 939 (6th Cir. 1999).
10 The limitations period begins to run on the date of the last occurrence of discrimination. See Havens
11 Realty Corp. v. Coleman, 455 U.S. 363, 381 (1982). The date of the “last occurrence of
12 discrimination” in a claim of design and construction discrimination is the date of the issuance of
13 the last applicable certificate of occupancy. Accordingly, the two-year statute of limitations
14 commences to run on the date of the issuance of occupancy. Garcia v. Brockway, 526 F.3d 456,
15 460-61 (9th Cir. 2008).

16 Plaintiff concedes that the last certificate of occupancy for the Heritage Apartments was
17 issued on September 4, 2003. The action was filed in this Court on December 17, 2008, more than
18 five years after the two-year statute of limitations commenced to run. Ordinarily, the action would
19 be barred by the statute of limitations. Plaintiff, however, asserts that the action should be tolled
20 during the pendency of the administrative proceedings.

21 Pursuant to 42 U.S.C. § 3613(a)(1)(B), the time during which a complaint is pending with
22 HUD is not included in the computation of the two-year statute of limitations applicable to the
23 commencement of a district court action. However, 42 U.S.C. § 3610(a) of the FHA states:
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2 “An aggrieved person may not later than one year after termination of the alleged discriminatory
3 housing practice has occurred or terminated, file a complaint with the Secretary alleging such
4 discriminatory practice.”

5 The commencement of this one-year statute of limitations occurred on September 4, 2003;
6 the date of issuance of the last applicable certificate of occupancy. The administrative complaint
7 was filed with HUD on May 9, 2005, more than a year after commencement of the running of the
8 statute of limitations. Accordingly, the administrative action was barred by the statute of
9 limitations and HUD dismissed the complaint.

10 Plaintiff nonetheless, contends that it filed the HUD complaint “within the time frame
11 prescribed by HUD. Plaintiff filed its complaint within one year of the date of its injury.”

12 The Court is not persuaded by this argument. The time frame prescribed by statute is one
13 year from the date of the discriminatory practice. The date of discriminatory action or “injury” is
14 the date of issuance of the certificate of occupancy. Garcia v. Brockway, 526 F.3d 456, 460-61 (9th
15 Cir. 2008). The administrative complaint was not timely filed.

16 There being no timely filed administrative complaint with HUD, there is no basis for
17 application of the statutory tolling provision. See Gartrell v. Gaylor, 981 F.2d 254, 256-57 (5th
18 Cir.1993)(When an administrative remedy request is submitted after the limitations period has
19 expired, tolling does not apply to the period of time during which the grievance is pending).

20 Notwithstanding the foregoing, there are two doctrines which may apply to extend the
21 limitations period or preclude a defendant from asserting the defense - equitable tolling and
22 equitable estoppel. The federal version of these doctrines is concisely explained in Johnson v.
23 Henderson, 314 F.3d 409 (9th Cir. 2002). “Equitable tolling” focuses on whether there was
24 excusable delay by the plaintiff: If a reasonable plaintiff would not have known of the existence of
25 a possible claim within the limitations period, then equitable tolling will serve to extend the statute

1 of limitations for filing suit until the plaintiff can gather what information he needs. Id. at 414.
2 Equitable estoppel, on the other hand, focuses primarily on actions taken by the defendant to
3 prevent a plaintiff from filing suit, sometimes referred to as “fraudulent concealment.” Id. As
4 noted in Garcia v. Brockway, 526 F.3d 456, 466 n.8 (9th Cir. 2008), “equitable tolling simply
5 doesn't apply here, as this is not a case where the plaintiff was injured within the limitations period
6 yet unable to determine the source of his injury.” Concerning equitable estoppel, there is no
7 evidence that the Defendants took any action to prevent Plaintiff from filing a timely claim.

8 There is no basis for tolling the two-year statute of limitations applicable to the FHA claims
9 and as such they are subject to dismissal for failure to state a claim.

10 **ADA Statute of Limitations**

11 Plaintiff alleges the same set of facts concerning design and construction to support an
12 Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et. seq., claim. The statute of
13 limitations for an the ADA claim brought in Washington appears to be three years. See Pickern v.
14 Holiday Quality Foods, Inc., 293 F.3d 1133, 1137 n.2 (9th Cir. 2002)(state law tort claims statute of
15 limitations applicable to ADA claims).

16 Plaintiff’s ADA claim based on design and construction was filed beyond three years of the
17 date of the final certificate of occupancy. As stated by the Federal District Judge of Idaho, “[w]ith
18 respect to Plaintiff’s claims under the ADA for failure to design and construct an accessible rental
19 office, the applicable language of the ADA is substantially similar to the language of the Fair
20 Housing Act. In light of the similar language of the two statutes, as they relate to design and
21 construction claims, the Court is of the view that the same reasoning and analysis that the Court
22 applied to Plaintiff’s claims under the Fair Housing Act would apply to its claim under the ADA.”
23 U.S. v. Taigen & Sons, Inc., 303 F.Supp.2d 1129, 1149-50 (D. Idaho 2003). Accordingly, the date
24 of completion (or issuance of the certificate of occupancy) initiates the running of the statute of
25 limitations. Id., at 1150. See also Disabled in Action of Pennsylvania v. Southeastern

1 Pennsylvania Transportation Authority, 539 F.3d 199, 209-13 (3rd Cir. 2008)(ADA discrimination
2 acts occur and statute of limitations begins to run upon the completion of construction).

3 The analysis applicable to the FHA claim is equally applicable to the ADA claim and is
4 incorporated herein. Accordingly, there is no basis for tolling the statute of limitations and ADA
5 claim is time barred.

6 **Prevailing Defendant Attorney's Fees**

7 The Defendants seek an award of costs and attorney fees pursuant to 42 U.S.C. § 3613(c)(2)
8 and 42 U.S.C. § 2000(a)-3(b). A district court may exercise its discretion to award a prevailing
9 defendant attorneys' fees pursuant to 42 U.S.C. § 3613(c)(2) only “upon a finding that the plaintiff's
10 action was frivolous, unreasonable, or without foundation.” Christiansburg Garment Co. v. Equal
11 Employment Opportunity Commission, 434 U.S. 412, 421 (1978). District courts may award
12 attorneys' fees to prevailing defendants in civil rights cases only in “exceptional” or “extreme”
13 cases where the action was unreasonable, frivolous, meritless, or without foundation. Herb Hallman
14 Chevrolet, Inc. v. Nash-Holmes, 169 F.3d 636, 645-46 (9th Cir. 1999).

15 Defendants have not shown that Plaintiff's action was frivolous, unreasonable, or without
16 foundation. Therefore, the Court finds Plaintiff's action does not qualify as such an “exceptional”
17 or “extreme” case warranting an award of attorneys' fees and costs to Defendants.

18 **Conclusion**

19 Resolution of this motion is governed by Garcia v. Brockway, 526 F.3d 456 (9th Cir. 2008).
20 Plaintiff's claims accrued on the date of issuance of the certificate of occupancy and are time barred
21 by the applicable statutes of limitations. Plaintiff has failed to state a claim upon which relief can
22 be granted.

23 ACCORDINGLY;

24 IT IS ORDERED:

25 (1) Defendant Cross Water Development, R.L. Oja Company, Bonnie Oja and Robert

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Oja's Motion to Dismiss the Complaint [Dkt. # 12] is **GRANTED**.


(2) Defendant Moss and Associates, Inc.'s Motion to Dismiss the Complaint [Dkt. # 14] is **GRANTED**.

(3) Defendant DNW, Inc.'sd Motion to Dismiss the Complaint [Dkt. # 16] is **GRANTED**.

(4) Plaintiff's Complaint is dismissed in its entirety, with prejudice.

(5) The Defendants' request for an award of attorney's fees is **DENIED**.

DATED this 23rd day of March, 2009.


FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE