UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

and

SHARON SPEARS, CIERRA LEWIS,

Intervenors,

v. Case No. 05-C-0934

WALTER PERLICK FAMILY TRUST, ROBERT PERLICK, TONEY RUSSELL, PATRICIA RUSSELL,

Defendants.

ORDER

On February 15, 2007, plaintiff United States of America moved for summary judgment on its claim that the defendants violated the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-3619, by discriminating against intervenors Sharon Spears and Cierra Lewis on the basis of familial status and by engaging in a pattern and practice of familial status discrimination. For the reasons stated below, the court will grant summary judgment as to liability against each of the defendants except for Patricia Russell.

BACKGROUND

Defendant Walter Perlick Family Trust ("Trust") owns residential properties at 4215 West Martin Drive, Milwaukee, Wisconsin, 53218, and 4260 West Highland Boulevard, Milwaukee, Wisconsin, 53208. Defendant Robert Perlick is a co-trustee of the Trust. He makes the decisions and policies relating to the rental and management of the Trust's apartment buildings. Defendants Toney and Patricia Russell worked as resident managers of the apartment buildings from September 2003 until Toney Russell died on June 18, 2006.

On October 7, 2003, intervenor Sharon Spears responded to an advertisement for an apartment vacancy for a unit in the 4215 West Martin Drive building. She called the Russells' telephone number and spoke with Toney Russell. During the conversation, Russell asked Spears whether she had any children. Spears responded that she had one child, and Russell replied, "no kids." Spears sought clarification, and Russell said, "no kids allowed." The same day, Spears called her mother, Katharine Spears, for advice about the conversation. Katharine called the Russell's telephone number and spoke to Patricia Russell. Patricia asked Katharine how many people were in her family. Katharine stated that she was looking for an apartment for her and her child. According to Katharine, Patricia stated, "We don't rent to children," and when told that such a practice is illegal, Patricia replied, "I'm just doing what I was told." Patricia denies making those statements. According to Patricia, she started to mention that there were no kids

living in the building when Katharine started screaming at her. Patricia claims that she never told anybody that there were "no kids allowed" in the building.

Sharon Spears contacted the Metropolitan Milwaukee Fair Housing Council ("MMFHC"). MMFHC conducted two fair housing tests of the Trust's apartment buildings in October 2003. On October 15, 2003, Barbara Collins, a tester posing as a single mother with one daughter, called the Russells' telephone number. Collins spoke with Toney Russell, scheduled an appointment to view the apartment, but had to cancel. Collins called back on October 23, 2003, and asked if the apartment was still available. Toney Russell said that the apartment was available. Collins said that she was looking for an apartment for herself and her three-month old daughter and asked whether an apartment was available to show. Russell replied that an apartment was available to show but that she would need to be in his other building because the 4215 West Martin Drive building was a "senior building." Collins asked if there were units in the other building for rent. Russell responded that there were no apartments available in the other building.

On October 23, 2003, tester Pamela Zacharias, posing as a married woman in her mid-thirties without children, called the Russells' telephone number. Toney Russell answered the telephone and asked Zacharias how many people would live in the apartment. Zacharias indicated that the apartment was for her and her husband. Russell asked if it was for Zacharias and her husband only and whether they had any children. Zacharias indicated that the apartment was for her and her

husband alone, and she stated that she did not have children. Russell replied, "Okay, because this is a senior house." Zacharias set up an appointment to view the apartment.

On the evening of October 23, 2003, Zacharias met with Toney Russell and he showed her the apartment. While showing the unit, Russell said that no children were allowed to live in the building because they must live in the "other building." Russell stated that everyone in the building was over the age of 30, and there were no children living in the building.

On May 17, 2004, Sharon Spears filed a complaint of discrimination with the Department of Housing and Urban Development ("HUD") alleging that the defendants discriminated against her and her minor child on the basis of their familial status in violation of the FHA. The Secretary of HUD completed an investigation and determined that there was reasonable cause to believe that discriminatory housing practices had occurred. HUD issued a charge of discrimination against the defendants on July 14, 2005. On August 2, 2005, the defendants elected to have the claims resolved in federal court. The Secretary authorized the Attorney General to file an action in federal court on behalf of Spears and Lewis. On September 1, 2005, the United States of America filed this action against the defendants.

Spears and Lewis moved to intervene in the action, and on June 29, 2006, the court granted the unopposed motion. On October 26, 2006, Spears and Lewis also filed a separate action involving the same facts and claims. *See Spears v. Walter*

Perlick Family Trust, Case No. 06-C-1116 (E.D. Wis.). Spears and Lewis moved to consolidate the cases, and on February 12, 2007, the court granted the unopposed motion.

On February 15, 2007, the United States moved for summary judgment. The defendants filed a brief in opposition, and Spears and Lewis filed a brief in support of the government's motion. Spears and Lewis urge the court to grant the motion for summary judgment and to schedule a trial on the amount of damages.

ANALYSIS

Summary judgment is proper where the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court construes all facts and draws all reasonable inferences in the light most favorable to the nonmoving party. *Butera v. Cottey,* 285 F.3d 601, 605 (7th Cir. 2002).

The defendants do not contest that Toney Russell, the Trust, and Robert Perlick are liable for compensatory damages. The defendants advance two arguments: 1) Robert Perlick and the Trust are not liable for punitive damages or civil penalties; and 2) a genuine issue of material fact precludes summary judgment against Patricia Russell.

Both the United States of America and the intervenors contend that the issue of punitive damages and civil penalties is not before the court. The court is obliged to agree. In its motion for summary judgment, the government did not ask the court to assess punitive damages or civil penalties against any defendant nor did the government seek a determination that such remedies were proper. Punitive damages and civil penalties were not addressed in the government's motion, and the defendants themselves did not move for summary judgment on the issue.

The only issue raised by motion that is in dispute is whether the court should grant summary judgment against Patricia Russell. For the purposes of summary judgment, the court accepts Patricia Russell's version of the facts: Russell asked how many people were in the caller's family and stated that there were no kids currently living in the building. The caller started screaming at Russell, truncating any further explanation. Russell would have shown the apartment to the caller if the caller calmed down and requested to see the apartment. At the time that she spoke with the caller, she did not know that her late husband Toney told others that there were "no kids allowed" in the building.

Construing all facts and drawing all reasonable inferences in Russell's favor, the court is obliged to deny the motion for summary judgment with respect to Patricia Russell. The United States is correct in the following respect: given all of the circumstances in this case, a reasonable jury could find that Russell's statement that there were no kids living in the building would discourage a reasonable listener with

children from applying to rent an apartment in violation of 42 U.S.C. § 3604(a) or convey a preference for not renting to families with children in violation of 42 U.S.C. § 3604(c). Russell's statement is similar to statements made in *U.S. v. Badgett*, 976 F.2d 1176 (8th Cir. 1992), a case in which a leasing agent told a prospective tenant who had a five-year-old daughter that the complex had no playground equipment and no other children of the same age so her daughter would have no playmates. *Id.* at 1178. The Eighth Circuit described these statements as "discouraging information" that qualifies as "steps [taken] to discourage families with children from living in its housing." *Id.* at 1180. However, the cases cited by the United States do not demonstrate that Russell's statements *necessarily* violate the FHA. "[S]tanding alone, an inquiry into whether a prospective tenant has a child does not constitute an FHA violation." *Soules v. U.S. Dept. of Housing and Urban Development*, 967 F.2d 817, 824 (2d Cir. 1992). Similarly, the United States has not shown that the statement that "no kids live in the building" necessarily violates the FHA. Consider, for example, a gossipy landlord who discloses to a prospective tenant the occupation, marital status, age, and number of children of each of the current tenants. In this context, the landlord's statement that no kids live in the building may not have the effect of discouraging an application or conveying a preference. In another context, a landlord who loves children may say, "sadly, no kids live in the building, but the neighborhood is great for children because there are

parks and schools nearby." Such a statement would not convey a preference to rent to persons without children.

In this case, if a jury were to believe Russell's version of the conversation, it may find that the caller, Katharine Spears, erroneously believed that Russell stated that no kids were *allowed* to live in the building. The jury may find that the caller's "screaming" prevented Russell from correcting the caller's mistaken perception of Russell's words and meaning. The jury may conclude that a reasonable listener would not have interpreted Russell's comment as a stated preference for tenants without children. The witnesses to the conversation, Katharine Spears and Patricia Russell, may each describe their perceptions of the conversation, and a jury may judge the credibility of those perceptions. Because there is a genuine issue of material fact regarding what exactly Patricia Russell said and how a reasonable listener would construe Russell's statement, the court denies the motion for summary judgment with respect to Patricia Russell.

Accordingly,

IT IS ORDERED that the United States of America's motion for summary judgment be and the same is hereby **GRANTED** in part and **DENIED** in part; the court grants the United States of America's motion for summary judgment against

defendants Robert Perlick, the Trust, and Toney Russell as to liability and denies the motion with respect to Patricia Russell.

Dated at Milwaukee, Wisconsin this 16th day of May, 2007.

BY THE COURT:

s/ J. P. Stadtmueller
J. P. Stadtmueller
U.S. District Judge