

Case 4:04-cv-01290-WRW Document 42 Filed 11/22/2005 Page 1 of 5

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

UNITED STATES OF AMERICA

PLAINTIFF

vs

4:04CV01290-WRW

DONALD L. RAPP and E. JANE RAPP, and  
THE DONALD L. RAPP and E. JANE RAPP  
LIVING TRUST

DEFENDANTS

ORDER

This case involves the Fair Housing Act. Pending is separate Defendant, Donald L. Rapp's Motion for Partial Summary Judgment.<sup>1</sup> Donald L. Rapp argues that he never spoke to the Rios family, had nothing to do with renting the subject property, and is therefore not responsible for violating the Act. Plaintiff responded, arguing that agency principles apply in fair housing cases.<sup>2</sup>

Separate Defendant also contends that he is entitled to Summary Judgment because Plaintiff and Plaintiff Intervenors failed to comply with our Local Rule 56.1, which provides that a response to a Summary Judgment Motion should contain a statement of genuine issues in dispute.<sup>3</sup>

**Background**

The United States brought this lawsuit on behalf of the Rios family. Raquel Rios filed a complaint with the Department of Housing and Development ("HUD") alleging that Jane Rapp refused to rent a house to Ms. Rios because she is Hispanic. The house is owned by Donald Rapp

---

<sup>1</sup>Doc. No. 10.

<sup>2</sup>Doc. Nos. 31 and 32.

<sup>3</sup>Doc. No. 36.

Case 4:04-cv-01290-WRW Document 42 Filed 11/22/2005 Page 2 of 5

and Jane Rapp, husband and wife. At the time of the incident, this couple were beneficiaries of a living trust that includes all their assets.

After an investigation, the Secretary of HUD issued a Charge of Discrimination. When the dispute could not be resolved by HUD, the United States filed a Complaint on November 1, 2004.<sup>4</sup> The Rios family was granted permission to intervene on October 7, 2005.<sup>5</sup>

**Standard of Review:**

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds.<sup>6</sup> The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.<sup>7</sup>

The Court of Appeals for the Eighth Circuit has cautioned that summary judgment is an extreme remedy that should only be granted when the movant has established a right to the judgment beyond controversy.<sup>8</sup> I must view the facts in the light most favorable to the party opposing the motion.<sup>9</sup> The Eighth Circuit has also set out the burden of the parties in connection with a summary judgment motion:

---

<sup>4</sup>Doc. No. 1.

<sup>5</sup>Doc. No. 29.

<sup>6</sup>*Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56.

<sup>7</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

<sup>8</sup>*Inland Oil & Transport Co. v. United States*, 600 F.2d 725, 727 (8th Cir. 1979).

<sup>9</sup>*Id.* at 727-28.

Case 4:04-cv-01290-WRW Document 42 Filed 11/22/2005 Page 3 of 5

[T]he burden on the party moving for summary judgment is only to demonstrate, *i.e.*, "[to point] out to the District Court," that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.<sup>10</sup>

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.<sup>11</sup>

Whether an agency relationship exists is a mixed question of law and fact.<sup>12</sup> A determination that an agency relationship exists requires the application of a legal standard to a set of historical facts. If the facts are insufficient to support a finding of agency or if there is no dispute as to the facts, then it is a question of law.<sup>13</sup> Although the existence of an agency relationship is generally a question of fact, summary judgment may be appropriate if the evidence is conclusive.<sup>14</sup>

#### Discussion

The U. S. Supreme Court has made it clear that the principles of agency apply to Fair Housing cases. It noted that an action brought by a victim of housing discrimination is a tort action.<sup>15</sup> The Court further explained that when Congress creates a tort action, its legislation

---

<sup>10</sup>*Couns v. MK-Ferguson Co.*, 862 F.2d 1338, 1339 (8th Cir. 1988) (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988) (citations omitted)).

<sup>11</sup>*Anderson*, 477 U.S. at 248.

<sup>12</sup>*Cabrera v. Jakobovitz*, 24 F.3d 372, 385-86 (2d Cir. 1994).

<sup>13</sup> C.J.S. Agency § 547 (1973).

<sup>14</sup>*Children's Broadcasting Corp. v. Walt Disney Co.*, 245 F.3d 1008 (8th Cir. 2001).

<sup>15</sup>*Curtis v. Loether*, 415 U.S. 189, 195-196 (1974).

Case 4:04-cv-01290-WRW Document 42 Filed 11/22/2005 Page 4 of 5

incorporates tort-related vicarious liability rules.<sup>16</sup> Of course, principals are vicariously liable for fault of their agents.<sup>17</sup>

The discriminatory conduct of an apartment manager or rental agent is, as a general rule, attributable to the owner and property manager of the apartment complex, both under the doctrine of *respondeat superior* and because the duty to obey the law is non-delegable.<sup>18</sup>

Under the Fair Housing Act, a corporation and its officers are responsible for the acts of subordinate employees even though the acts were neither directed nor authorized. Courts have followed this rule because the statutory duty not to discriminate is non-delegable.<sup>19</sup>

Spouses have been found liable when one spouse engages in discriminatory conduct while renting jointly owned property.<sup>20</sup> This is consistent with the spirit of the Fair Housing Act and the FHAA, which places on all owners of rental property the responsibility for ensuring that the property complies with fair housing laws.<sup>21</sup>

Here, the facts are not conclusive on the question of agency. Separate Defendant has produced evidence that he never spoke with Ms. Rios, and that he is currently suffering from moderate to severe dementia, and, therefore, he argues, cannot be held liable for the conduct of his wife. However, it is indisputable that he jointly owned the subject property; that the lease

---

<sup>16</sup>*Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999).

<sup>17</sup>*Meyer v. Holley*, 537 U.S. 280 (2003).

<sup>18</sup>*Coates v. Bechtel*, 811 F.2d 1045, 1051 (7th Cir. 1987); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552 (9th Cir. 1980); *Saunders v. General Services Corp.*, 659 F. Supp. 1042, 1059 (E.D. Va. 1987).

<sup>19</sup>*Walker v. Crigler*, 976 F.2d 900 (4th Cir. 1992).

<sup>20</sup>*Cato v. Jilek*, 779 F. Supp. 937, 946 (N.D. Ill. 1991); *Izard v. Arndt*, 483 F. Supp. 261, 263 (E.D. Wis. 1980).

<sup>21</sup>*United States v. Reece*, 457 F. Supp. 43, 46 n. 7 (D. Mont. 1978).

Case 4:04-cv-01290-WRW Document 42 Filed 11/22/2005 Page 5 of 5

was in his name; and that rental checks were made out to him. Applying the above cited legal standards to the facts of this case, I cannot find, as a matter of law, that Mr. Donald Rapp is not liability.

The argument based on Local Rule 56.1 is not persuasive. Plaintiff responded to the alleged undisputed material facts of separate Defendant, by denying most of those facts.<sup>22</sup> However, Plaintiff failed to set out a statement of material facts it contends are at issue. Despite this failure, it appears that genuine issues of fact exist. The district court has considerable leeway in the application of its local rules.<sup>23</sup> Strict application of Rule 56.1 in this case is not warranted.

The Motion for Partial Summary Judgment is DENIED.

IT IS SO ORDERED this 22<sup>nd</sup> day of November, 2005.

/s/ Wm. R. Wilson, Jr.  
UNITED STATES DISTRICT JUDGE

---

<sup>22</sup>Doc. No. 30.

<sup>23</sup>*Martinez v. Union Pacific R. Co.*, 82 F.3d 223 (8th Cir. 1996).