

COOK COUNTY COMMISSION ON HUMAN RIGHTS

69 West Washington, Suite 3040
Chicago, Illinois 60602

Juan and Sara MIRANDA, Complainants)	
)	
v.)	Case No. 2014H001
)	
Aneta PESCATORE and Iryna HUTNYK,)	Entered: October 16, 2014
Respondents)	
)	

ORDER

On December 16, 2013, Complainants Juan and Sara Miranda (individually, “Juan” and “Sara,” collectively “the Mirandas”) filed a complaint against Respondent Aneta Pescatore (“Pescatore”) and Respondent Iryna Hutnyk (“Hutnyk”) (collectively “Respondents”). This complaint alleges source-of-income discrimination by Pescatore, as the seller of a house that the Mirandas tried to purchase, in violation of the Cook County Human Rights Ordinance (“Human Rights Ordinance”). *See* Cook County Code of Ordinances (“County Code”), § 42-38(b)(1). The complaint also charges Hutnyk, as Pescatore’s realtor, with unlawfully “aiding and abetting” a violation of the Human Rights Ordinance. *See id.* at § 42-41(b).

The Mirandas’ claims arise from their unsuccessful bid to purchase a house from Pescatore using a Veterans Administration-guaranteed home loan (“VA-Guaranteed Loan”), which the Mirandas characterize as a source of “income.” Hutnyk conveyed the Mirandas’ last best offer to her client, and Pescatore turned it down in favor of an all-cash offer by a buyer without a real estate agent, which would net Pescatore more money on the transaction.

The Cook County Commission on Human Rights (“Commission”) investigated the Mirandas’ complaint, and now dismisses for lack of substantial evidence of a violation of the Human Rights Ordinance. A VA-Guaranteed Loan is not a “source of income” for the purposes of the Human Rights Ordinance. Even if it were, this case establishes a more basic principle with respect to housing discrimination: the Human Rights Ordinance does not prohibit a seller from accepting a higher or better offer when selling a house in Cook County. Moreover, in the absence of actionable discrimination, the derivative “aiding and abetting” claim cannot stand.

Background

In September 2013, the Mirandas attended an open house at the property owned by Pescatore at 2811 N. 75th Avenue, Elmwood Park, Illinois (“the Property”). Pescatore had listed the Property for \$339,000. Deciding it was their “dream house,” the Mirandas obtained pre-approval for a VA-Guaranteed Loan and offered to purchase it. Compl. ¶ A.

The VA Loan

A VA-Guaranteed Loan originates from a commercial lending institution like any other home mortgage, but as a benefit to veterans, the federal government guarantees a portion of the mortgage against default by the veteran. *See, e.g.*, U.S. Department of Veterans Affairs, “Home Loan Guaranty,” available online at http://www.benefits.va.gov/BENEFITS/factsheets/homeloans/VA_Guaranteed_Home_Loans.pdf (visited Oct. 6, 2014). Because this guarantee reduces the lender’s risk of loss, VA-Guaranteed Loans typically enjoy more favorable terms than conventional home loans, such as a lower interest rate. Just like any other borrower, however, a veteran with a VA-Guaranteed Loan is required to repay the home loan to the commercial lender and is subject to foreclosure if he or she defaults. But in the event of a default, the VA steps in and pays the lender (up to) the guaranteed portion of the loan. *Id.*

Also like any other mortgage, the time that it takes to close a real estate transaction financed with a VA-Guaranteed Loan is not solely determined by the buyer and seller. Whatever the buyer’s and seller’s timelines, the purchase property first must be appraised and the loan underwritten before the commercial lender will escrow the funds to close the transaction. This process can take as little as two weeks and as long as several months. Johnson Interview (Oct. 10, 2014) (Guaranteed Rate loan officer).

Having served in the U.S. Armed Forces, Juan was eligible for a VA-Guaranteed Loan. On September 16, 2013, the Mirandas were pre-approved for the loan by Erik Johnson, Vice-President of Mortgage Lending at Guaranteed Rate, Inc. The Mirandas’ loan officer informed them that they would qualify for financing on the full amount of the list price (\$339,000). Complainants’ Written Statement (“Cp. St.”) ¶ 1. This pre-approval did not obviate the lender’s customary responsibility to appraise the property and underwrite the loan. Johnson Interview (Oct. 10, 2014).

The Negotiations

On September 17, 2013, the Mirandas, through their realtor, Liz Palomar (“Palomar”), made an offer of \$300,000 for the Property. Compl. ¶¶ D, K. Palomar emailed the offer and the lender’s pre-approval letter to Hutnyk. Palomar also communicated that the Mirandas’ loan officer considered them “excellent candidates” for the loan. *Id.* ¶ G.

The next day, on September 18, Hutnyk responded, emailing in relevant part:

[T]he seller feels that since this is a VA loan for full financing rather than a commercial loan that it might take longer to close. In order for her to seriously consider it [*i.e.* the offer] she would like it to be closer to the asking price.

Id. ¶ H. The Mirandas’ loan officer attempted to contact Hutnyk to address Pescatore’s alleged concerns about the length of time to close a real estate transaction financed with a VA-Guaranteed Loan, but he got no response and never spoke to either woman. *Id.* ¶¶ I, J.

Although not documented in the realtors’ email exchange, Pescatore and Hutnyk assert that on September 18, the Mirandas “were informed there were several offers on the [P]roperty

and . . . were requested to submit the highest and best offer to be compared against the other buyers.” Resp. ¶2.h. Regardless of whether and when they were informed of the competition, on September 20, 2013, the Mirandas raised their offer to \$310,000.

The Commission’s investigation found that, in addition to the Mirandas’ VA-Guaranteed Loan financed offer, Respondents also received two higher offers with pre-approval for conventional financing: one at \$325,000 (received on September 19) and one at \$339,000 (received on September 20), *i.e.* the full asking price. Documents Submitted by Respondents (“Rp. Docs.”). Also on September 20, Pescatore received an all-cash verbal offer for the Property at \$310,000 from an unrepresented buyer. Investig. Rep., p. 7 (summarizing verbal communications with Respondents’ attorney).

The Outcome

On September 21, 2013, the Mirandas learned that they had lost out on their dream house. Pescatore accepted the all-cash offer. Hutnyk emailed Palomar, stating that “[they] discussed all the offers last night and [Pescatore] wanted to sleep on it, but this morning she made a decision. Unfortunately, she accepted another offer, one that is more solid and made her more comfortable.” Compl. ¶M. Palomare then (belatedly) conveyed to Hutnyk that the Mirandas were willing to go higher than \$310,000. *Id.* ¶ O. Hutnyk allegedly replied that Pescatore “had received an offer that was closer to the asking price.”

Discussion

The Human Rights Ordinance prohibits the sellers of real property from “mak[ing] any distinction, discrimination, or restriction in the price, terms, conditions, or privileges of any real estate transaction, on the basis of unlawful discrimination.” County Code, § 42-38(b)(1). As used in the ordinance, “unlawful discrimination” includes “discrimination against a person *because of* . . . that person’s . . . *source of income*.” *Id.* at § 42-31 (emphasis added). “Source of income” is defined broadly to mean “the lawful manner by which an individual supports himself or herself and his or her dependents.” *Id.* This protection against unlawful discrimination in housing applies to the sale and brokering of residential real estate located in Cook County. *See id.* at § 42-38(a) (defining “real estate transaction”).

There is no dispute as to jurisdiction because the Property is located in Elmwood Park, which is in Cook County. The success of the Mirandas’ claim against Pescatore turns first on whether the seller’s decision was motivated by non-discriminatory financial concerns, rather than the buyer’s source of income and, alternatively, on whether a VA-Guaranteed Loan is a source of income for the purpose of the Human Rights Ordinance at all.

The Human Rights Ordinance also creates an additional civil rights protection against those who “aid[] and abet[]” unlawful discrimination. Section 42-41(b) provides: “No person shall aid, abet, compel, or coerce a person to commit a violation under this article.” This cause of action, however, is derivative of an underlying violation of the anti-discrimination provisions of the Human Rights Ordinance and cannot be found independently where there is insufficient evidence of a substantive violation. As such, the Mirandas’ claim against Hutnyk is entirely dependent on their claim against Pescatore.

The Mirandas' Offer Was the Least Financially Attractive Offer Pescatore Received

The Mirandas believe that Pescatore violated the Human Rights Ordinance by rejecting their purchase offer. From the Mirandas' perspective, Pescatore chose with whom to engage in a residential real estate transaction solely on the basis of the putative buyer's source of income. They frame the case as pitting a VA-Guaranteed Loan against conventional mortgage financing. *See, e.g.*, Cp. St. p. 5, I ¶ 1 (“Ms. Hutnyk made clear that simply because we were using a VA Loan for full financing rather than a conventional loan, the seller wanted us to make [a higher offer].”); *id.* pp. 5-6, I-II (pointing to the seller's nonresponse to the Mirandas' loan officer's efforts to address Pescatore's expressed concern regarding the closing time of VA-Guaranteed Loans and the seller's refusal to negotiate further when the Mirandas tried to raise their \$310,000 offer).

The Commission's investigation, however, demonstrates this to be untrue. Pescatore received conventionally financed offers for the Property as well. From Pescatore's perspective, these offers were better than both the Mirandas' initial offer and their subsequent offer – not because the Mirandas' offers involved a VA-Guaranteed Loan, but because the offers Pescatore had in hand were \$15,000 or \$29,000 higher than the Mirandas' best offer. The Mirandas may complain that they were never given a third chance to increase their offer yet again to be financially competitive, but that is a complaint shared by every hopeful home buyer who is outbid, regardless of his or her source of income.

The Human Rights Ordinance does not grant certain purchasers with particular sources of income a special right to bid with full knowledge of the seller's other offers. Instead, the anti-discrimination principle of the law requires only that all purchasers labor under the same market constraints. The Mirandas did not lead with an offer at the full limit of their financing and, like all home buyers using any source of income, did so at the risk of being outbid without the opportunity to sweeten the deal from a better informed position.

Moreover, the all-cash offer that Pescatore actually accepted for the Property was also better than the Mirandas' best offer – not because the Mirandas' offer was financed – but because it left more money in Pescatore's pocket. The accepted offer of \$310,000 was from a buyer without a realtor. That buyer's lack of representation saved Pescatore \$7,750 on commission at the closing. Resp. ¶ 2.q. In other words, the Mirandas' \$310,000 offer was really only worth only \$302,500 to Pescatore because she would have owed Palomar \$7,750 if the deal had closed with the Mirandas.¹

¹ If anyone had reason to claim discrimination based on source of financing, it would be the two putative purchasers who bid more than \$310,000, but whose offers were based on conventionally financed loans rather than cash. The Commission, however, would find such an argument similarly unconvincing. Deals involving third-party financing, whether conventional or VA-Guaranteed, are uncertain and thus more costly to close from the seller's perspective. This is because they are dependent on an appraisal by the third-party financier and underwriting of the loan, even when the borrower is pre-approved. Such deals can fall apart even after the buyer and seller have agreed to the sale (*e.g.*, the third-party financier refuses to fund the buyer because the purchase property appraises for less than the accepted offer), and even in the best of circumstances take time to close. Certainty in a real estate transaction (*e.g.*, because the next highest offer may no longer be available to a seller if a riskier deal falls through) and the

The Mirandas lack substantial evidence of unlawful source of income discrimination because there is insufficient evidence that their offer was the most financially competitive of the offers received by Pescatore for the Property. In the absence of such evidence, Pescatore's assertion that she selected the offer on a non-discriminatory basis that maximized her financial gains, minimized her costs and was most certain to close quickly is un rebutted. A home seller's rational economic decision to accept an offer that is worth more money is not discrimination "because of" the rejected offeror's membership in a protected class.

A VA-Guaranteed Loan is Not a Source of Income

The foregoing analysis proceeded from the Mirandas' assumption that a "buyer's source of financing" in a residential real estate purchase "constitute[s] the buyer's source of income." Cp. St. p. 2, ¶2. The Commission finds, however, that a putative home purchaser's source of *financing* – whether that financing is a VA-Guaranteed Loan or a conventional mortgage – is not the putative home purchaser's source of *income* for the purposes of the Human Rights Ordinance.

The Human Rights Ordinance defines the term "source of income" broadly. County Code, § 42-38(a) ("the lawful manner by which an individual supports himself or herself and his or her dependents"). In analyzing the general meaning of "income," the Illinois Supreme Court has used the basic definition of "something that comes in as an increment or addition[,] a gain or recurrent benefit that is usually measured in money[.]" *In re Marriage of Rogers*, 213 Ill. 2d 129, 136-37 (2004) (quoting Webster's Third New International Dictionary 1143 (1986)). "Income" has "likewise been defined as 'the money or other form of payment that one receives, usually periodically, from employment, business, investments, royalties, gifts and the like.'" *Id.* (quoting Black's Law Dictionary 778 (8th ed. 2004)). Put another way, income "increases the recipient's wealth." *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 280-81 (2d Dist. 2006).

As shown below, the defining characteristics of a "source of income" are, *inter alia*, (1) payments, typically to the person claiming such payments as income, (2) of a non-temporary nature (*i.e.* once given, the payments permanently belong to the recipient). A loan that must be repaid, whether conventional or VA-Guaranteed, lacks these indicia of income and is more properly characterized as a debt than a source of income.

Both the Internal Revenue Service and the Social Security Administration have issued guidance (for purposes of taxation and eligibility for disability benefits, respectively) stating that money a person borrows and is obligated to repay does not count as "income." *See, e.g.*, Internal Revenue Service, "Topic 160 - Form 1099-A (*Acquisition or Abandonment of Secured Property*) and Form 1099-C (*Cancellation of Debt*)" (Aug. 19, 2014), online at <http://www.irs.gov/taxtopics/tc160.html> (visited Oct. 6, 2014) ("If you borrow money from a lender to purchase property . . . you are not required to include the loan proceeds in gross income

minimization of the cost to carry a property from the acceptance of the offer to the close (*e.g.*, reducing the number of additional mortgage or real estate tax payments the seller must make) have a tangible financial value to the seller. Where Pescatore, like most investment sellers, preferred certainty and the minimization of costs to carry the Property, the all-cash deal was the most financially attractive of the four offers she received.

because you have an obligation to repay the lender later.”); 20 C.F.R. § 416.1103 (excluding money borrowed and proceeds of a loan from the category of income for the purpose of determining eligibility for federal supplemental security income for the aged, blind and disabled).

A helpful comparison is available in the child support context, where courts often are asked to determine a parent’s “income” for purposes of calculating the percentage of the parent’s income that he or she must pay towards legal support obligations. After reviewing the Illinois cases involving loans, the First District Appellate Court concluded that the “determining factor” is whether repayment is required. *In re Marriage of Baumgartner*, 384 Ill. App. 3d 39, 48-53 (1st Dist. 2008). Applying this principle, the Court established that “a residential mortgage loan, made by a *bona fide* lender, does not constitute income.” *Id.* at 53. Compare *In re Marriage of Rogers*, 213 Ill. 2d 129, 139-40 (2004) (where a father received from his parents regular “loans” which he was never required to repay, the Illinois Supreme Court concluded that the “loan” was “in name only” and should be treated like a gift, as “income” for child support purposes).

In the context of the Human Rights Ordinance, the paradigmatic case of source-of-income discrimination is against the recipient of means-based government assistance. For example, this Commission recently recognized unemployment compensation benefits – payments that an individual who recently lost his job receives from the government in lieu of wages – as a protected source of income. See *Moore v. East Lake Management Group, Inc.*, 2010H002 (CCHRC March 24, 2014) (violation of § 42-38(b)(1) where landlord rejected rental application because unable to confirm complainant’s unemployment benefits would be extended through end of one-year lease). Similarly, the Chicago Commission on Human Relations (“Chicago Commission”) has acknowledged several types of government welfare benefits as “income” within the City of Chicago’s Fair Housing Ordinance (“Chicago Ordinance”).² See, e.g., *Jones v. Shaheed*, CCHR No. 00-H-82 (March 17, 2004) (Social Security disability income); *McCutcheon v. Robinson*, CCHR No. 95-H-84 (May 20, 1998) (public aid income). In all these cases, the government makes a payment to the recipient of these sources of income, and the recipient retains this sum of money to use as a replacement for wages without being indebted to the government or needing to pay back the welfare at some future date certain.

To support their theory that VA-Guaranteed Loans are “income,” the Mirandas rely on two Chicago Commission cases: *Pierce v. New Jerusalem Christian Devel. Corp.*, CCHR No. 07-H-12/13 (Feb. 16, 2011), and *Small v. Univ. Village et. al.*, CCHR No. 03-H-4 (Aug. 21, 2003). Neither case, however, is binding on this Commission, and both are distinguishable.

Pierce, for example, involved the City of Chicago’s Choose to Own Housing Voucher Choice Home Ownership Program (“Choose to Own”), which provided low-income families with vouchers to finance a portion of their mortgage. CCHR No. 07-H-12/13 at *5. The Chicago Commission found these vouchers comparable to the federally-funded Section 8 vouchers used by low income renters, which it previously had decided were protected as

² This precedent is particularly helpful here because the Chicago Ordinance defines “source of income” using language identical to that in the County’s Human Rights Ordinance.

“income.”³ *Id.* at *5, 10. *See Godinez v. Sullivan-Lackey*, 352 Ill. App. 3d 87, 91 (1st Dist. 2004) (affirming Housing Choice Vouchers as a protected “source of income” under the Chicago Ordinance).

VA-Guaranteed Loans are nothing like either Section 8 Housing Choice Vouchers or the Choose to Own home-purchase vouchers. Those programs provide recipients with an outright subsidy: the government pays directly for eligible persons’ housing expenses without any terms for repayment of the subsidy. In contrast, the veteran must repay the commercial lender of a VA-Guaranteed Loan. The Veterans Administration does not itself provide any government money to veterans who use VA-Guaranteed Loans. And for over 98 percent of loans, the government does not make any payments to the lender. The Veterans Administration only pays if the lender loses money after a foreclosure, and that is a rare occurrence for VA-Guaranteed Loans, which have an atypically low default rate. *See, e.g.*, U.S Department of Veterans Affairs, “VA Guarantees 20 Millionth Home Loan” (Oct. 26, 2012), online at <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2400> (visited Oct. 7, 2014) (“Mortgages guaranteed by VA have had the lowest foreclosure rate for the last 17 quarters and the lowest delinquency rate for the last 14 quarters compared to all other types of home loans in the nation, including prime loans, according to a report by the Mortgage Bankers Association.”); Military.com, “VA Loans Have Lowest Foreclosure Rate,” online at <http://www.military.com/money/va-loans/home-purchase/va-loans-have-lowest-foreclosure-rate.html> (visited Oct. 16, 2014) (according to the Mortgage Bankers Association’s National Delinquency Survey, VA-Guaranteed Loans have had the lowest foreclosure rate for five years – only 1.98 percent – even better than the 2.47 percent rate for prime loans, which have very strict credit and underwriting requirements).

Complainants also highlight the Chicago Commission’s treatment of a government-provided no-interest loan in the New Homes for Chicago Housing Program (“New Homes”). Cp. St. pp. 1-2 (citing *Small v. Univ. Village et. al.*, CCHR No. 03-H-4 (Aug. 21, 2003)). New Homes is “purchase price assistance” for residential real estate in the form of “a deferred fully forgivable loan that is subject to repayment” at 3 percent or less, but only if the house is sold before the 30-year term ends. City of Chicago, “New Homes Chicago,” online at http://www.cityofchicago.org/city/en/depts/dcd/supp_info/new_homes_for_chicago0.html (visited Oct. 7, 2014). In *Small*, the Chicago Commission held that if respondent blocked complainant’s unit purchase because a portion of the income she planned to use would come from the New Homes program, then that would be source-of-income discrimination. CCHR No. 03-H-4 at *5-6.

Once again, VA-Guaranteed Loans are distinguishable for the absence of a government payment to the veteran (or, in the vast majority of cases, to anyone else) and the repayable nature of the veteran’s debt to the commercial lender. In contrast, the New Homes program is intended to be a pure subsidy with the repayment provision existing only as a disincentive for program

³ “Section 8” is common short-hand for the Housing Choice Voucher program of Section 8 of the Housing Act of 1937, 42 U.S.C. § 1437f. For an overview of that program, *see* U.S. Department of Housing and Urban Development, “Housing Choice Fact Sheet,” online at http://portal.hud.gov/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8 (visited Oct. 6, 2014).

participants to quickly resell homes purchased with public subsidies. The repayment obligation for New Homes participants decreases over time and is prorated according to the number of years a program participant lives in the house, *i.e.*, if the home is sold after 10 years of residency, the program beneficiary would be obligated to repay 2/3 of the loan. Baxte Interview (Sept. 30, 2014) (City of Chicago Dept. of Planning and Development).

Protecting against housing discrimination based on lawful source of income is an important priority of this Commission and Cook County Government. This kind of protection is only offered by a small (but growing) number of state and local governments. That it is a serious public policy problem is apparent from the cases, which show that blatantly discriminatory statements by respondents are still common. *See, e.g., Hoskins v. Campbell*, CCHR No. 01-H-101 (April 16, 2003) (respondent hung up on complainant after telling her, “We don’t take Section 8. We only take working people.”); *Keith Short & Fair Housing Justice Ctr. v. Manhattan Apts., Inc.*, 916 F. Supp. 2d 375, 384 (S.D.N.Y. 2012) (in response to plaintiff’s inquiry about some listed apartments, landlord’s agent told him, “those apartments are not available for people on programs. They’re only for people who are working people.”). Unfounded negative stereotypes about people who need to rely on government housing assistance unfairly restrict their opportunities.

At the same time, courts and agencies try to balance this effort to improve housing opportunities with the legitimate income concerns of landlords and home-sellers. For example, an agency might distinguish “between landlords who object to Section 8 tenants and landlords who object to the burdens of Section 8 compliance.” *See Godinez v. Sullivan-Lackey*, 352 Ill. App. 3d 87, 92 (1st Dist. 2004) (opining on review of a Chicago Commission on Human Relations decision that “source of income” housing discrimination does not lie where a landlord demonstrates “that complying with the Section 8 program will impose more than a *de minimus* burden on him”). *See also Keith Short*, 916 F. Supp. 2d at 392-93 (suggesting in dicta that there may be some circumstances where it does not violate the source-of-income law for “a landlord or realtor [to] prefer a so-called free-market client over . . . a person receiving government rental assistance . . . such as if the apartment was available immediately and government subsidy applications would take too long to process or if preference was given to “persons who could put down cash immediately”).

In the instant case, the Mirandas’ Complaint is deficient on both ends: a VA-Guaranteed Loan is not a “source of income” within the Human Rights Ordinance and, even if it was, the Human Rights Ordinance does not require sellers to choose a lower offer and thus lose substantial profits on a home sale.

Aiding and Abetting Requires an Underlying Substantive Violation of the Human Rights Ordinance

The aiding and abetting charge against Hutnyk for representing a violator of the Human Rights Ordinance in a residential real estate transaction cannot stand absent substantial evidence that Pescatore violated the anti-discrimination provisions of the Human Rights Ordinance. Given the lack of substantial evidence with respect to the Mirandas’ charge against Pescatore, their derivative action against Hutnyk must also be dismissed.

Conclusion

For the foregoing reasons, the Commission orders that Complaint No. 2014H001be DISMISSED for LACK OF SUBSTANTIAL EVIDENCE of a violation of the Human Rights Ordinance. In accordance with CCHR Pro. R. 480.100(A), any party may file a request for reconsideration with the Commission within 30 days of the date of this order.

October 16, 2014

By delegation:



Ranjit Hakim
Executive Director of the Cook County
Commission on Human Rights