COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD, TAYLOR BRYAN &
ELIJAH BRYAN,
Complainants

v. DOCKET NO. 09-BPR-00373

BERGANTINO REALTY TRUST, PAULINE M.
& ANGELO BERGANTINO, TRUSTEES &
JOHN FEDERICO,
Respondents

Appearances:

Patrick Vallely, Esq. and Katie M. Perry, Esq. for Taylor Bryan and Elijah Bryan
Robert Kirby, Esq. for Pauline M. and Angelo Bergantino
Michael D. Rubenstein, Esq. for John Federico

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 19, 2008, Taylor Bryan on behalf of herself and her minor child Elijah Bryan, filed a complaint with this Commission charging Respondents John Federico, Greater Metropolitan Real Estate and Armando Sabatino with discrimination in housing on the basis of family status and lead paint. In June 2010, the complaint was amended to dismiss Sabatino and to charge the proper owners of the property, Pauline M. & Angelo Bergantino[1], as Trustees of Bergantino Realty Trust. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified to public hearing. A public hearing was held before me on April 26 and 28, 2011. Evidence submitted at the public hearing

[1] The amended complaint omitted Greater Metropolitan Real Estate (GMRE) as a Respondent. Complainants' 11th hour motion to amend the complaint to include GMRE as a Respondent was denied because the case had proceeded through discovery without GMRE as a party and to amend the complaint on the eve of hearing would have constituted unfair surprise.

showed that the property in question is owned jointly by Pauline and Angelo Bergantino and is not part of the Bergantino Realty Trust. Therefore, the Bergantino Realty Trust is hereby dismissed as a party Respondent.[2] Thus, the remaining Respondents are the owners Pauline and Angelo Bergantino in their individual capacity as property owners,[3] and agent John Federico. After careful consideration of the record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Taylor Bryan (hereinafter "Bryan") currently resides in Newton, Massachusetts with her boyfriend Terrence Turner and her son, Complainant Elijah Bryan. Bryan has worked for the federal Department of Housing and Urban Development (HUD) for eleven years. In late 2008, Bryan was living and working in Rhode Island when she received a promotion to a position in HUD's Boston office. In January 2009, Bryan began to look for apartments in the Boston area for herself and her son, who was then five years old.

2. Respondents Pauline and Angelo Bergantino have jointly owned the rental property located at 26 Pearl Street, Somerville, Massachusetts since the 1970s. (Ex. 20) There is no evidence that the property is part of an entity called the Bergantino Family Trust. (Ex. 20) The property is a three-story building containing six rental units, including one-bedroom and two-bedroom apartments. The two-bedroom apartment on the first floor has been occupied by the same person for 25 years.

[2] Ex. 20; Finding of Fact #2.

[3] In view of their having participated in MCAD proceedings for the past two years, changing the Bergantinos' designation from trustees to individuals is merely technical and does not constitute unfair surprise.

3. Respondent John Federico is a part-time real estate agent at the Medford office of Greater Metropolitan Real Estate ("GRME"). Federico advertises and shows apartments to prospective tenants and receives a commission for each unit he rents.

4. William Brennan is the manager for the Medford office of GRME and is a licensed real estate agent. He receives commissions for any apartments he rents, as well as a percentage of the company's profits. Brennan is present in the Medford office on a daily basis.

5. Dan Flanagan, a part-time agent in the Medford office of GMRE, also advertised apartments at 26 Pearl Street on craigslist in January 2009.

6. Michael Rubenstein, who represents Respondent Federico in this proceeding, has been the broker of record for GMRE since January 2010. (Ex.4)

7. Paul Bergantino, son of Respondents Pauline and Angelo Bergantino, testified that his parents are elderly and in poor health and he was appearing on their behalf, although he has not been involved in their rental properties in many years and had no connection to the events at issue in this case. His parents never obtained certificates indicating that any of the apartments at 26 Pearl Street had been de-leaded or that they did not contain lead paint. (Ex.21)

8. In January 2009, when Complainant started looking for an apartment in the Boston area, she was dating Terrence Turner. Turner was then living in Boston and worked as a software engineer northwest of the city. Turner assisted Bryan in her apartment search, as it was more convenient for him to pre-screen Boston area apartments than for her to conduct a search from Rhode Island.

9. Bryan testified that she sought an apartment near Boston with two bedrooms, hardwood floors, located near a park, laundry facilities, and public transportation. Her price range was $1,000 to $1,200 per month. Bryan used only craigslist to find apartments.

10. In January 2009, the Bergantinos engaged the Medford office of GMRE to find tenants for two vacant units at 26 Pearl Street. I find that one of the units listed with GMRE was a two-bedroom unit that had just been vacated due to the tenants' concerns about asbestos. (Exs. 23, 26) The other available apartment was a one-bedroom unit. The Bergantinos did not give William Brennan authority to rent the units without their permission

11. William Brennan testified that he disseminates listings to the agents in the Medford office through memoranda, emails and by word of mouth. GRME agents use Postlets, an online real estate platform, to create real estate listings and distribute them to search engines, classifieds sites such as craigslist, and social media. Each agent in the Medford office creates his own ads and the agents compete with one another for the same listings.

12. GMRE's usual procedure is for prospective tenants to view an available apartment and to complete a rental application, if interested. The agent then performs a credit check and verifies the applicant's salary. Applications for apartments are then submitted to Brennan, who in turn, submits the applications to the property owner who makes the final decision about whether to rent to an applicant. Other agents may continue to show the apartment up until the lease is signed, because agreements often fall through before the signing.

13. On January 29, 2009, John Federico posted a listing on craigslist for a two-bedroom apartment on Pearl Street, Somerville with a monthly rent of $1,100. The apartment had a new kitchen, hardwood floors, and was near public transportation. The ad also specified that pets

were prohibited. On that day, Bryan and Turner were each at their respective place of employment. They viewed the listing and communicated with one another about the listing via telephone and email. Bryan was interested in the apartment because it met her basic criteria.

14. Turner called John Federico at 10:57 a.m.[4] on January 29 indicating that he was calling about the two-bedroom apartment on behalf of his friend, who resided with her five-year-old son. According to Turner, Federico responded that he would have to check with the landlord about the apartment's lead status and get back to him.

15. Federico corroborated Turner's testimony that he inquired about the two-bedroom apartment. However, Federico testified that Turner first raised the issue of whether the apartment was certified as free of lead paint, and Federico responded that he did not know and would contact his office to find out. Federico denied telling Turner that he would contact the owners, because he did not then know their identity. According to Federico, after speaking with Turner, he contacted GMRE's office manager, John Brennan, to inquire about the apartment's lead paint status. Brennan told Federico that he would get back to him, but did not do so.

16. Turner informed Bryan about his conversation with Federico. Bryan testified that she then called Federico to inquire about the apartment's lead status and Federico told her that the unit had been rented. She wondered how that had happened because Federico had not called Turner back with the lead paint information. Federico testified that he recalled talking to Bryan but did not remember the content of their conversation. I credit Bryan's testimony about the telephone call, but I find that her call to Federico likely came after Turner's second call to Federico, as described in Finding #17 below. Given that Federico was aware that Turner and

[4] The time of the call was noted in Turner's cell phone records (Ex.4)

Bryan were connected to one another, I find it unlikely that he would have told Bryan the apartment was taken, while subsequently telling Turner that he was still checking on its lead paint status.

17. Turner called Federico again at 3:07 p.m. that same day because he had not heard back from him. According to Turner, Federico told him that he did not yet know the lead status of the apartment. Turner asked if they could view the apartment anyway, and Federico told him that he was not comfortable showing the apartment without knowing the lead status.

18. Federico denied telling Turner or Bryan that he would not show them the apartment. Federico testified that he offered to show Bryan his other listings, but she declined. I do not credit this testimony.

19. Federico testified that within a few hours after Turner's first telephone call to him, he learned through office talk that a tenant had submitted an application on the two-bedroom apartment. He acknowledged that he told either Bryan or Turner that the apartment was "rented." However, Federico also testified that he did not recall which of the two vacant apartments had "an application on it," and he did not know which agent closed the deal or who had moved into the apartment. I find that Federico would ordinarily not have stated the apartment was "rented" at that point, as this would have been contrary to GMRE's practice of not taking the apartment off the market until a lease had been signed.

20. William Brennan testified that he did not recall speaking with Federico specifically about the listing at 26 Pearl Street nor did he recall any inquiries concerning prospective tenants. Brennan stated that he had no knowledge of telephone calls from Bryan or Turner about the premises.

21. Part-time GMRE agent, Dan Flanagan, knew in late January 2009 that his friend Zoya Derevyannich was looking for a one-bedroom apartment. In late January 2009, Flanagan showed Derevyannich the vacant one-bedroom unit at 26 Pearl Street. On January 30, 2009, Derevyannich completed a rental application, authorized a credit check and gave a deposit check of $1,000 to GMRE. (Exs.6, 7) On January 31, she gave Flanagan a copy of her pay stub. Only after receiving all of Derevyannich's information did Flanagan submit her rental application to William Brennan. Flanagan testified that he would not have told the other agents in the office that the apartment had an application on it before January 31, nor would he have told the agents that the apartment was "taken." I credit his testimony.

22. Despite the Respondents' no pet policy, Brennan offered Derevyannich's application to Pauline Bergantino, who rejected the application because Derevyannich owned a cat. Derevyannich's application does not specify which apartment she was seeking. However, Flanagan testified that she sought a one-bedroom unit and her deposit of $1,000, equal to one month's rent, reflected that she had applied for a one-bedroom unit listed at $1,000 per month, and not the two-bedroom unit which listed at, $1,100 per month .

23. On February 10, 2009, Bryan and Turner observed that Federico posted an advertisement on craigslist for a two-bedroom apartment that was identical to the posting that had appeared on January 29, 2009. (Ex. 5) Bryan and Turner did not call to inquire about the apartment because, as Turner testified, they believed it would be a waste of time. I credit their testimony. Federico testified that he reactivated the advertisement because the apartment "went back on the market." I do not credit Federico's testimony that the apartment went back on the market, and I find that the apartment was never off the market.

24. On February 21, 2009, agent Dan Flanagan obtained an application and request for a credit check for the two-bedroom apartment at 26 Pearl Street from Grigory Goryachev. (Ex. 10) Goryachev was to be the sole occupant. Flanagan referred Goryachev's application to Brennan, who in turn contacted Angela Bergantino. Bergantino approved Goryachev as a tenant and he signed a lease on February 22, 2009,[5] (Ex. 13) and moved into the unit on March 1, 2009.

25. I find that Goryachev's was the only application taken for the two-bedroom apartment at 26 Pearl Street advertised by GMRE agents. I also find that the apartment was vacant from January 29, 2009 until Goryachev moved in on March 1, 2009.

26. Bryan and Turner testified that in February or March of 2009, they decided to live together in the hope that they would have a better chance finding an apartment as a couple than she had as a single mother and because by pooling their resources, they would be better off financially. After deciding to live together, they retained the services of a real estate agent and began to look for larger, nicer units. The agent located an apartment for them in April or May 2009. In July 2009, Bryan, her son and Turner moved into a three-bedroom unit in Newton, with a monthly rent of $1,900. They paid the rental agent a finder's fee of $1,900.

27. Bryan testified credibly that during her apartment search, her round trip commute from Providence to Boston was over two hours, and parking and gas were costly. On occasion, traffic delays caused her to be late picking up her son from day care, which was upsetting to him. On other occasions, she had to enlist the help of family members to retrieve her son from day care. She testified that she feared her son would think she did not care about him when she was unable to pick him up. Given the long commute, she was only able to spend about an hour each

[5] The date written on the lease is February 22, 200*8*, but the parties stipulated that this was a typographical error and the correct year was 2009.

day with her son and they missed each other a lot. I credit her testimony that this was a very stressful time for her. She also testified that this period of time was difficult for her mother, with whom she was living temporarily, and who was in the process of losing her own home. Bryan was concerned her employer might view her family issues as negatively affecting her job performance.

28. Bryan testified credibly that she felt the humiliation of discrimination when she was denied the opportunity to view the apartment at Pearl Street. She testified that her job gave her the financial means to provide her son with nice things and a wonderful environment near a park, yet she was getting nowhere with her apartment search. The lengthy apartment search caused her to be depressed and stressed and affected her entire family. I credit her testimony.

29. Turner testified that when Bryan saw the same apartment listed on craigslist after being told it was already rented, her apartment search turned from something exciting to something she dreaded and she became more depressed about the situation, and frustrated with her commute to Providence and taking her child to day care.

30. On or about the same week that Bryan inquired about the Pearl Street apartment, Bryan and Turner attended an open house for an apartment in Watertown or Belmont. Bryan was told by the property owner that she could not live there with her son. She filed an MCAD complaint against the owner of that apartment, and voluntarily resolved that claim.

31. Turner testified credibly that during Bryan's apartment search he inquired about five or six potential apartments with no luck. He attributed the lack of success to a combination of unsuitable apartments and landlords' resistance to renting to someone with a child.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c.151B §4(11) makes it unlawful for an owner or real estate broker, or other person having the right of ownership or possession or right to rent or lease or sell multiple dwelling housing accommodations, to deny to or withhold such accommodations from any person because such person had a child or children who shall occupy the premises with such person. The presence of lead paint in a dwelling unit does not constitute a defense to a charge of discrimination on the basis of children. G.L.c. 111 §199A; Canady v. Shillingford, 23 MDLR 30 (2001)

To establish a prima facie case of housing discrimination on the basis of children on account of the presence of lead paint, where Complainant is deterred from submitting an application, she must show that (1) she is a member of a protected class; (2) she attempted to apply for an apartment for which the Respondents were seeking applicants, and; (3) she was deterred from applying under circumstances which give rise to an inference of unlawful discrimination. See Wheelock College v. MCAD, 371 Mass 130 (1976), Smith v. Cao, 29 MDLR 179 (2007); Garay v. Soumas, 13 MDLR 1065, 1081-81 (1991)

A prima facie case, once established, "creates a presumption of discrimination." Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000). This presumption may be rebutted if the landlord can articulate "a legitimate, nondiscriminatory reason for its decision backed by credible evidence that the reason or reasons advanced were the real reasons." Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass 437, 441-442 (1995), quoting Wheelock College v. Massachusetts Comm'n Against Discrimination, supra at 138.

Complainants have met their burden of establishing a prima facie case of unlawful housing discrimination. In January 2009, both Bryan and Turner informed agent John Federico that Bryan was seeking an apartment for herself and her five-year-old child. Federico advised them he would determine if the apartment contained lead and he did not get back to Turner, as promised. Later that day Federico falsely represented to Bryan that the apartment had been rented.[6] These facts are sufficient to establish a prima facie case of housing discrimination based on the lead paint law and family status.

The burden of production shifts to Respondents to articulate a legitimate, non-discriminatory reason for refusing to show Bryan the apartment. Federico denied that Ms. Bryan's young child and concern about lead paint were factors in his refusing to show them the apartment. Instead, he testified that he believed the apartment in question had already been rented. However, I found Federico's testimony in this regard to be contradictory and not credible. He acknowledged that there were two available apartments at 26 Pearl Street at the time of Bryan's inquiry and that he did not know which of the two apartments had "an application on it." He also testified that he inquired of the office manager as to whether the apartment contained lead, but never heard back.

The evidence demonstrates that the two-bedroom apartment remained on the market for several weeks after Bryan's inquiry and was not rented until February 22, 2009. The evidence showed that an application of Zoya Derevyannich was submitted for *a one-bedroom* apartment on January 30, 2009. Even if Federico believed that Derevyannich's application was for the two-bedroom apartment, he would not have known about it until the day after Bryan's inquiry at the earliest. Moreover, Federico acknowledged that he did not know which of the two apartments

[6] It is irrelevant whether Turner or Federico first mentioned the issue of lead paint

was "rented" on January 29, 2009. There is sufficient evidence that Federico's articulated reason for refusing to show Bryan the apartment, that it was already rented, was false and a pre-text for discrimination on the basis of family status and the presence of lead paint, in violation of M.G.L. c. 151B §4(11) and c.111 §199A. Federico is liable for his direct actions in violation of the fair housing laws.

There is longstanding precedent that the duty to comply with fair housing laws and to ensure equal access to housing may not be delegated by a property owner. Marr v. Rife, 503 F.2d 735 (6th Cir. 1974); U.S. v. Real Estate Development Corp., 347 F.Supp. 776 (N.D. Miss. 1972); U.S. v. L. & H. Land Corp., 407 F.Supp. 576 (S.D. Fla. 1975); Baker v. Collazo, 4 MDLR 1421 (1982). This is because the right of equal access to housing is an important one. The Bergantinos' obligation to obey the law extends beyond their own actions to those to whom they entrusted the rental of their property. As owners of the property, they have a non-delegable duty to ensure that any interested party is considered for tenancy without regard to his or her membership in a protected class. Baker v. Collazo, supra. at 1434.

While Bryan never met or dealt with the Bergantinos regarding the rental of the property at 26 Pearl Street, it is undisputed they are the owners of record of the property. The law is clear that a property owner need not have overtly committed discriminatory acts nor engaged in any specific conduct relating to the alleged discriminatory acts to be liable for such acts. As owners of the property, Pauline and Angelo Bergantino cannot evade liability for unlawful acts by Federico, merely because they did not make the unlawful representations. Therefore, I conclude that the Bergantinos are liable for any discriminatory acts of Federico, under a theory of non-delegable duty.

Pauline and Angelo Bergantino, as the owners of the property, may also be held liable for violation of M.G.L. c. 151B, § under an agency theory. Principals may be held liable for the discriminatory acts of their agents that are committed within the agent's scope of authority. Rome v. Transit Express, 19 MDLR 159, 160 (1997), citing O'Leary v. Fish, 245 Mass. 123, 124 (1923).

An agency relationship is established where the principal indicates to the agent that he or she consents to having the latter act on his or her behalf, and the agent similarly consents to act for the principal. Luna v. Lynch, 7 MDLR at 1720. In the instant case, the evidence indicates that although the Bergantinos handled the actual rental of apartments, Federico clearly had the actual authority to take telephone inquiries, schedule showings of the Bergantinos' apartments and to refer eligible applicants to the office manager. The evidence supports the inference that the Bergantinos were aware of and consented to this arrangement, and I conclude that Federico was acting within the scope of his authority. Thus, the Bergantinos are liable for the unlawful actions of Federico while acting as their agent.

For all the reasons discussed above, I conclude that the Respondents Pauline Bergantino, Angelo Bergantino and John Federico have violated G.L. c.151B §4(11) and c. 111 §199A and that they are jointly and severally liable for unlawfully deterring Complainants from renting the apartment on the basis of children and the presence of lead paint, in violation of G.L.c. 151B §4(11) and c. 111 §199A.

IV. DAMAGES

Upon a finding of unlawful discrimination, the Commission is authorized to grant remedies to effectuate the purpose of c. 151B and to make the Complainants whole. Bournewood Hospital v. MCAD, 371 Mass. 303, 315-6 (1976). This includes an award of damages to

Complainants for emotional distress suffered as a direct and probable consequence of their unlawful treatment by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

Bryan testified credibly that because of her lengthy apartment search, she had to commute from Providence to Boston, which took over two hours, and that parking and gas were costly. She was sometimes late picking up her son from day care, which upset both of them, and sometimes had to enlist family members to retrieve her son. Bryan feared that her relationship with her son would suffer on account of perceived neglect, and the fact that she was not able to spend much time with him. She testified that they missed each other a lot and this was a very stressful time for her and her mother, who had her own financial troubles and had to step in when Bryan was not available to pick up her son. Bryan also expressed concern that her employer might view these distractions as negatively affect her performance in her new position. She testified credibly that she felt the sting and humiliation of discrimination at being denied the opportunity to view the apartment at Pearl Street. The fact that she was stymied in her apartment search caused her great frustration, since she had the financial means to secure satisfactory housing. The lengthy search caused her to be depressed and stressed.

Turner testified credibly that after Complainant understood she had been lied to about the availability of the Pearl Street apartment, her search for housing went from a positive, exciting experience to a task that she dreaded. He observed that she became more depressed about the situation.

While it is likely that a portion of Bryan's emotional distress was due to the cumulative effects of rejection by other landlords who did not want to rent to a tenant with a child, I conclude Bryan did suffer some emotional distress as a result of Federico's lie and refusal to show her an available apartment. I conclude that Bryan is entitled to an emotional distress award in the amount of $5,000.00 to compensate her for the distress caused by the unlawful conduct of Respondents.

V. ORDER

For the reasons stated above, it is hereby ORDERED that:

1) Respondents immediately cease and desist discriminating on the basis of familial status and lead paint under M.G.L. c.151B §4(11) and c.111§199A.

2) Respondents pay to Complainant Taylor Bryan the sum of $5,000.00 in damages for emotional distress, with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 6th day of October 2011

JUDITH E. KAPLAN,

Hearing Officer