2017 IL App (1st) 161808-U

No. 1-16-1808

Order filed September 13, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DARNESHA GRAYS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2015 CH 01388
	)	
CHICAGO COMMISSION ON HUMAN	)	
RELATIONS and 8 EAST NINTH LLC,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendants-Appellees.	)	Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The determination of the City of Chicago Commission on Human Relations finding no substantial evidence of housing discrimination based on plaintiff's source of income is reversed and remanded.

¶ 2 Plaintiff Darnesha Grays appeals from an order of the circuit court of Cook County affirming the determination of the City of Chicago Commission on Human Relations (the Commission) finding no substantial evidence of housing discrimination based on Grays' source

of income. On appeal, Grays contends that the Commission (1) erred in dismissing her claim based on the affirmative defense of business necessity; (2) acted arbitrarily and capriciously in raising the business necessity defense *sua sponte*; (3) erred in not allowing her to rebut the affirmative defense of business necessity with a less discriminatory alternative; and (4) failed to conduct an adequate or reasonable investigation by not considering specific evidence she submitted with her request for review. For the reasons that follow, we reverse and remand.

¶ 3 In January 2013, Grays filed a complaint with the Commission, alleging that 8 East Ninth LLC had discriminated against her on the basis of her source of income. Grays reported that she receives a two-bedroom Housing Choice Voucher, commonly known as Section 8 rental assistance (see 42 U.S.C. § 1437f (2012)), which is administered by the Chicago Housing Authority. Grays alleged that on or about July 19, 2012, she contacted 8 East Ninth LLC and spoke with a man named Kevin Reichert about renting a two-bedroom unit in a building known as Astoria Tower. Grays explained to Reichert that she was a Section 8 voucher holder, that she was a student with no income, and that student loans / financial aid and the voucher would be her primary means of paying rent. Reichert told Grays he was "pretty sure they accepted Section 8" and emailed Grays an application. Grays then called back and asked about utilities. Reichert told Grays that the utility package was between $130 and $180 per month, and that while a Section 8 voucher may pay the entire rent, in order to qualify for tenancy, Grays would have to have an income of three times the monthly rent. Grays estimated that this amount would be $57,000 annually. Grays asked Reichert "was it even worth applying for this apartment since there was no way she could meet that income criteria." Reichert responded that he could not give an answer since he did not know Grays' situation, but stated that the income requirements were strictly

adhered to for applicants. Grays alleged that at this point, she felt frustrated, discouraged, and angry that 8 East Ninth LLC wanted her to pay an application fee, knowing they would deny her based on her source of income since a Section 8 voucher holder is unlikely to make such a substantial amount of income.

¶ 4 Grays alleged that 8 East Ninth LLC's facially-neutral policy requiring prospective tenants to have an income of three times the amount of monthly rent had a disparate impact on Section 8 voucher holders, and that therefore, the policy violated the Chicago Fair Housing Ordinance. Grays sought judgment declaring that 8 East Ninth LLC's discriminatory housing practices violated the Chicago Fair Housing Ordinance; enjoining 8 East Ninth LLC from discriminating based on source of income; and awarding her compensatory and punitive damages to fully compensate her for all actual and emotional injuries caused by 8 East Ninth LLC's discriminatory conduct.

¶ 5 In its answer to the complaint, 8 East Ninth LLC stated that it accepts Section 8 vouchers and admitted that it emailed Grays an application. 8 East Ninth LLC denied or indicated it did not have sufficient knowledge to admit or deny the remaining allegations.

¶ 6 The Commission conducted an investigation of Grays' complaint. In its investigation summary, it set forth the parties' positions and reviewed information gleaned from relevant documents and from interviews with Grays and Reichert.

¶ 7 Grays gave a statement consistent with the allegations in her complaint. She asserted that she was discouraged from applying for housing based on 8 East Ninth LLC's minimum income policy and that the facially-neutral policy requiring that tenants make three times the monthly rent has a disparate impact on Section 8 voucher holders.

¶ 8 Reichert acknowledged receiving a telephone call from Grays, but reported that he did not recall the substance of their conversation. Reichert indicated to the investigator that two-bedroom units at Astoria Tower rented for around $2,500, that tenants were required to "make three times the monthly rent in income on an annual basis," that utility packages for two-bedroom apartments cost an additional $135 per month, and that tenants were responsible for paying for their own electricity and internet. Reichert reported that he emailed Grays an application but did not hear back from her. He stated that had Grays applied, her application would have been subject to a credit check, background check, and verification of residency and income.

¶ 9 In a section of the investigation summary titled "Comparative Data," the investigator noted that 8 East Ninth LLC had identified one tenant living in Astoria Tower who was participating in the Section 8 voucher program. The tenant's contract revealed the tenant's lease term spanned from July 2013 to July 2014. 8 East Ninth LLC asserted that it accepted Section 8 vouchers, that it never received an application from Grays, and that therefore, it did not reject her application based on her source of income.

¶ 10 The investigator reviewed five evidentiary documents in the investigative summary. The first, a rent burden worksheet submitted by Grays, listed her monthly income as $108.08. The second, an application checklist submitted by 8 East Ninth LLC, included a notation that in order to qualify for tenancy, an applicant "must have gross wages of 3 times monthly rent." The third document was Reichert's email to Grays, attaching the application and stating that the move-in fee was $400 and the application fee was $50. The fourth, a rent reasonableness determination submitted by the Commission and dated November 5, 2013, indicated that the Chicago Housing

Authority would have paid $2,200 or $2,500 for a two-bedroom unit at Astoria Tower. Finally, the fifth document was an email from the Chicago Housing Authority to the Commission, dated November 7, 2013, stating that tenants have to pay a minimum of $75 toward rent, utilities, or both. The email also stated that in most instances, tenants cover some portion of the rent and all of the utilities, and that for tenants with very low to no reported income, the Chicago Housing Authority will sometimes offer a utility stipend that covers a portion of the utilities greater than the $75 tenant contribution.

¶ 11 In its determination, the Commission found no substantial evidence of discrimination based on source of income. The Commission noted that the Section 8 voucher program is intended to assist low-income families whose incomes do not exceed 80% of the area median income; that in 2012, the Cook County median income was $75,800; that 80% of that median income is $60,640; and that where an apartment is priced at $2,200, a policy requiring three times that rent in monthly income would require an income of $79,200 per year. Given this equation, the Commission found that "it appears" the policy would exclude all Section 8 voucher holders and thus, though facially neutral, the policy "would appear to have a disparate impact on families whose source of income includes a [Section 8] Voucher."

¶ 12 The Commission proceeded to find as follows:

> "Disparate impact may be justified by a showing of business necessity. A minimum income requirement may be an appropriate business necessity to provide a property owner with reasonable assurance that renters have sufficient income to meet the obligations of tenancy. As such, a complainant wishing to

> proceed with a claim of housing discrimination must show that he or she was otherwise qualified for the housing opportunity in question.
>
> The evidence shows that the Chicago Housing Authority would have subsidized the rent range of $2,200 to $2,500 at Astoria Tower. However, according to her Rent Burden Worksheet, [Grays'] monthly income, excluding the voucher, was $108. The utility package for a two-bedroom unit at Astoria Tower was $135. According to Reichert, in addition to the utility package, tenants at Astoria Tower are responsible for their own electricity. According to the Chicago Housing Authority, [Grays] would have to pay, at minimum, $75 towards the rent, utilities or both. Based on the information appearing on [Grays'] Rent Burden Worksheet, it does not appear that [Grays] would have been able to meet her tenancy obligations beyond what her voucher covered."

Based on its determination that there was no substantial evidence of ordinance violations, the Commission dismissed the case.

¶ 13 Grays submitted a request for review, asserting that the Commission investigator erred by failing to convey to Chicago Housing Authority staff that Astoria Tower's utility package was mandatory and included gas and water, which are basic necessities. Grays also claimed that the investigator made a material error by failing to consider her college financial aid. She attached a document showing student loan and grant disbursements, which also indicated that her enrollment status was withdrawn, "effective 09/13/2012." Grays stated in her request for review that the $108.08 monthly income listed on her rent burden worksheet was for a part-time job she had held in downstate Illinois and at which she would no longer be employed. Finally, Grays

alleged that the Commission investigator improperly considered the fact that Astoria Tower rented a unit to a Section 8 voucher holder in July 2013, as that person's tenancy began a year after Grays made her inquiries.

¶ 14 The Commission denied Grays' request for review, stating as follows:

> "The Commission finds that it did not commit material error when it dismissed [Grays'] complaint because, due to insufficient income, she was not qualified to rent an apartment in Respondent's building. [Grays'] complaint alleged that Respondent refused to rent an apartment to her based on its minimum income requirement, which she alleged has a disparate impact on [Section 8] Voucher holders. If a complainant shows that a challenged practice had a disparate impact on a protected class, then the question is whether there is a business necessity or justification for the practice."

The Commission went on to observe that a property owner or manager is entitled to reasonable assurance that tenants have sufficient income to meet the obligations of tenancy aside from the rent. Noting that Grays had provided evidence of a monthly income of $108, the Commission found that even if she was not required to pay any utilities, her income was insufficient to support a tenant in housing, aside from the rent. The Commission stated that Grays' failure during the investigation to provide any documentation of the amount of student financial aid she was receiving prevented it from considering that form of income in its analysis. Finally, the Commission rejected as unfounded Grays' argument that the investigator improperly relied on evidence that 8 East Ninth LLC rented to a different Section 8 voucher holder, since there was no evidence that the Commission relied on such evidence in making its determination.

¶ 15 Grays thereafter filed a petition for writ of *certiorari* in the circuit court. She argued that the Commission improperly utilized the income stated on her rent burden worksheet without conducting further investigation and that the Commission improperly raised "business necessity *** as an affirmative defense *sua sponte* in violation of [its] own regulations." The circuit court affirmed the Commission's decision. Grays filed a motion to reconsider, which the court also denied. This appeal followed.

¶ 16 A three-part standard of review applies in administrative review cases. *Cinkus v. Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008). The applicable standard depends upon whether the question presented is one of fact, law, or a mixed question of fact and law. *Id*. An agency's findings on questions of fact are deemed *prima facie* true and correct and will not be overturned unless they are against the manifest weight of the evidence and the opposite conclusion is clearly evident (*id*.), or unless the agency exercised its authority in an arbitrary or capricious manner (*Powell v. City of Chicago Human Rights Comm'n*, 389 Ill. App. 3d 45, 54 (2009)). In contrast, an agency's decision on a question of law, such as the interpretation of the meaning of the language of a statute, is subject to *de novo* review. *Cinkus*, 228 Ill. 2d at 210. A third standard applies to mixed questions of fact and law, which are "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." (Internal quotation marks omitted.) *Id*. at 211. When reviewing mixed questions, we will reverse only if the agency's decision is clearly erroneous, that is, when we are left with the "definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Id*.

¶ 17 Grays' first three contentions on appeal are that the Commission (1) erred in dismissing her claim based on "business necessity," an affirmative defense she asserts 8 East Ninth LLC waived by failing to raise during the Commission proceedings; (2) acted arbitrarily and capriciously in raising the business necessity defense *sua sponte*; and (3) erred in not allowing her to rebut the affirmative defense of business necessity with a less discriminatory alternative.

¶ 18 In their briefs, both the Commission and 8 East Ninth LLC assert that Grays has waived these arguments because she failed to raise them during the administrative proceedings. See *Khan v. Department of Healthcare & Family Services*, 2016 IL App (1st) 143908, ¶ 25. However, waiver is an admonition to the parties rather than a limitation on a reviewing court's jurisdiction, and may be relaxed in administrative review cases where the interests of justice so require. *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 279 (1998). We find that this is such a case and elect to reach Grays' contentions.

¶ 19 In cases involving claims of disparate impact, "business necessity" is an affirmative defense that must be pled and proven by the defendant. *Lewis v. City of Chicago, Illinois*, 560 U.S. 205, 213 (2010); see also City of Chicago Commission on Human Relations Regulation 210.250(a)(3) (2015) ("Any affirmative defenses must be stated in the response in order to be considered in determining whether there is substantial evidence of an ordinance violation."). Where a responding party fails in its answer or response to set forth facts constituting an affirmative defense that would likely take the opposite party by surprise, the defense is waived and cannot be considered even if the evidence suggests its existence. *Vanlandingham v. Ivanow*, 246 Ill. App. 3d 348, 357 (1993). A tribunal cannot raise an affirmative defense *sua sponte*. *Haas v. Cravatta*, 71 Ill. App. 3d 325, 328 (1979).

¶ 20 Here, 8 East Ninth LLC did not raise the affirmative defense of business necessity in its response. Rather, it was the Commission that introduced the idea into the proceedings when it held, without prompting, that the disparate impact caused by 8 East Ninth LLC's policy of requiring tenants to have an income of three times the amount of monthly rent was justified by business necessity. By invoking this affirmative defense in its decision, the Commission acted as an adversary rather than an impartial arbiter, took Grays by surprise, and denied her the opportunity to introduce evidence that would rebut the affirmative defense. See *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515 (2015) (if a defendant establishes that the disparate impact of a challenged practice is necessary to achieve one or more substantial, legitimate, and nondiscriminatory interests, a plaintiff may nevertheless prevail by proving that those interests could be served by another practice that has a less discriminatory effect). We find that the Commission erred as a matter of law when it raised and then decided the instant case on the basis of business necessity. Accordingly, we reverse and remand the cause for a new hearing on Grays' complaint. See *Anderson v. Human Rights Commission*, 314 Ill. App. 3d 35, 49, 52 (2000) (remanding for a new hearing where the original administrative proceedings were not fair and impartial).

¶ 21 Given our disposition, we need not consider Grays' contention that the Commission erred by failing to conduct an adequate or reasonable investigation.

¶ 22 For the reasons explained above, we reverse the judgment of the circuit court and remand the case to the Commission for a new hearing on Grays' complaint.

¶ 23 Reversed and remanded.