IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ERIC DRAPER,

Plaintiff,

v.

JAMES B. BURKE and
DEBURGO REALTY, INC.,

Defendants.

OPINION AND ORDER

99-C-0472-C

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In this civil action for monetary relief, plaintiff Eric Draper contends that defendants James B. Burke and Deburgo Realty, Inc., discriminated against him on the basis of his race when he sought to rent an apartment, in violation of 42 U.S.C. §§ 1981, 1982 and 3604. Subject matter jurisdiction is present. See 28 U.S.C. § 1331. Now before the court is defendants' motion for summary judgment. Defendants contend that they are entitled to summary judgment because there were no apartments available at the time plaintiff sought one and because plaintiff was treated in the same manner as non-minorities who sought apartments. In addition, defendant Deburgo Realty argues that it is not liable for defendant Burke's actions because it has no ownership interest in defendant Burke's apartment building

and was not responsible for the rental of units there. Because I find there are genuinely disputed issues of material fact regarding whether an apartment was or would shortly become available at the time plaintiff sought one and whether plaintiff was treated in a manner inconsistent with treatment afforded other prospective renters, defendants' motion will be denied. In addition, I find there are genuine issues of material fact regarding whether defendant Deburgo Realty is liable for the actions of defendant Burke with respect to the rental of the apartment.

From facts proposed by the parties, I find that the following are undisputed and relevant to resolution of defendants' motion for summary judgment.

UNDISPUTED FACTS

Defendant Burke owns a 14-unit apartment building in Verona, Wisconsin. Defendant Deburgo Realty, Inc., is a Wisconsin corporation with its principal place of business in defendant Burke's building. Defendant Burke is the individual principally responsible for the rental of units there. Since 1976, he has rented units to individuals of different races, genders, and marital statuses. All rentals are oral month-to-month tenancies.

Plaintiff is an African-American male. On November 30, 1998, he was looking for an apartment to rent. He went to defendant Burke's building because it had an “Apartment for

Rent" sign outside and encountered a man fitting defendant Burke's description in the office of defendant Deburgo Realty. (Defendant Burke does not believe plaintiff came to his building on November 30, 1998. Because disputes of material fact are resolved in favor of the non-movant on a motion for summary judgment and because defendants argue that they are entitled to summary judgment on a different ground, I will assume that they concede for purposes of this motion that plaintiff sought an apartment and that the exchange between plaintiff and defendant Burke was as plaintiff describes). Plaintiff asked whether there were any apartments available. He did not specify what size apartment he sought or how much he could pay. He said only that he needed it as soon as possible. Defendant Burke told plaintiff that there were no apartments available because the last one had just been rented. Plaintiff asked if he could have an application, but defendant Burke refused to give him one. Defendant Burke said that he had not had time to take down the "Apartment for Rent" sign.

Plaintiff returned to work and described his encounter with Burke to his manager, Brian Montanye, who is white. On December 5, 1998, Montanye and plaintiff saw defendant Burke entering the building he owns. Montanye went inside to inquire about an apartment for rent. Montanye was told there was an apartment available and was shown a vacant apartment. He was also given an application and defendant Burke's business card. On November 30, 1998, there were two units in the building that are at the center of this controversy: unit 7 and unit

12. Unit 7 was occupied by Tim Barsness. On November 17, 1998, defendant Burke had served Barsness a five day notice to quit or pay rent, which he believed began the eviction process. After the five day period, defendant Burke sometimes evicts the tenant and sometimes does not, depending whether the tenant makes another promise to pay back and future rent. Barsness did not pay rent on December 1, 1998 or at any other time in December. On December 10, 1998, defendant Burke filed a small claims eviction action against Barsness seeking his removal from unit 7. Barsness had until January 5, 1999, to respond to that summons and complaint. Sometime between December 11, 1998 and December 30, 1998, Barsness voluntarily left unit 7. Following Barsness's departure, defendant Burke repaired damage Barsness had caused to the department.

In November 1998, unit 12 was occupied by Dean Johnson. On November 16, 1998, Johnson gave notice of his intent to vacate the apartment at the end of November 1998. Before deer hunting season began on November 21, 1998, Jeff Lease inquired about renting a unit in the building. Defendant Burke had known Lease's parents for many years. Defendant Burke showed Lease unit 12. Lease told defendant Burke that he might be interested in the apartment, but that he wasn't sure whether he could come up with the money so he would have to get back to defendant Burke in a few weeks. Defendant Burke had no further contact with Lease until sometime during the first week of December. Lease occupied unit 12 on December

14, 1998, but paid rent for the entire month of December.

DISPUTED FACTS

Defendant Burke denies plaintiff ever inquired about an apartment. Defendant Burke does not recall whether Montanye inquired about an apartment, but asserts that he did not have any apartments available on December 5, 1998 and would not have told Montanye that he did.

Defendant Burke does not recall Barsness's making any promise to pay after he was served with his quit or pay rent notice and has no record of any such promise. Barsness recalls such a promise.

Defendant Burke states that in November 1998, he reached an agreement with Lease regarding the rental of unit 12 to begin on December 1, 1998. In an affidavit dated January 12, 1999, Lease avers that he and defendant Burke agreed that defendant Burke would hold the apartment open for him until he could come up with money for the security deposit and first month's rent. In an affidavit dated March 24, 2000, Lease denies any such agreement was reached. Lease avers that defendant Burke told him in November 1998 that he had one unit available right away and that another one on the other side might also become available. Defendant Burke denies making such a statement.

OPINION

The standards governing motions for summary judgment are well known. On a motion for summary judgment, the moving party must show that there are no genuinely disputed issues of material fact and that he is entitled to judgment as a matter of law. See Celotex v. Catrett, 477 U.S. 317, 322 (1986). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party. See Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

42 U.S.C. § 3604 makes it unlawful

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available.

A prima facie case of discrimination under § 3604 is established by showing that (1) the plaintiff belongs to a minority; (2) the defendant was aware that plaintiff belongs to a minority; (3) the plaintiff was ready and able to accept the defendant's offer to rent; and (4) the defendant refused to rent to the plaintiff. See Hamilton v. Svatik, 779 F.2d 383, 387 (7th Cir. 1985).

Sections 1981 and 1982 forbid racial discrimination in leasing property and making

private contracts. To establish a prima facie case of discrimination under §§ 1981 and 1982 with regard to the rental of a property, the plaintiff must show that (1) the plaintiff belongs to a racial minority; (2) the plaintiff applied for and was qualified to rent the property; (3) the plaintiff was rejected; and (4) the rental opportunity remained thereafter. See id.

Defendants' motion for summary judgment is premised on the proposition that there were no apartments available or about to become available at the time plaintiff sought one and that liability under §§ 3604, 1981 and 1982 cannot attach under such circumstances. I find that there is a genuine dispute of fact regarding whether an apartment was or was about to become available. (In addition to arguing that an apartment was available, plaintiff argues that there is no availability requirement for violations of the acts to occur, but I need not address that argument). Defendant Burke's family friend, Jeff Lease, averred in one deposition that he had reached an agreement with defendant Burke that unit 12 would be held open for him; he averred in a later deposition that he had not reached any agreement with defendant Burke regarding the rental of unit 12. He also averred that defendant Burke had told him in mid-November that another unit (presumably unit 7) might be available on December 1, 1998. If a jury were to believe Lease's second story over his first and over defendant Burke's, it could conclude reasonably that defendant Burke had ample reason to believe at least one apartment was or shortly could become available at the time plaintiff sought one.

With regard to unit 7, defendant Burke himself testified that he could not recall Barsness's promising that he would make good on his past rent after defendant Burke had served him with a pay rent or quit notice on November 17, 1998. Even if defendant Burke anticipated that the eviction and apartment repair process would take several weeks, there was no reason for him to conclude that an apartment would not become available in the near future. Coupled with other undisputed circumstantial evidence of discrimination, such as the presence of the "Apartment for Rent" sign in front of the building, defendant Burke's refusal to give plaintiff a rental application, and his willingness to offer apartments to non-minorities just days before (Lease) and after (Montanye) plaintiff sought one, a jury examining the facts in the light most favorable to plaintiff could reasonably conclude that defendant Burke refused to rent to plaintiff because of his race. Because I find that a jury could reasonably conclude plaintiff was discriminated against because of his race, I need not address defendants' argument that plaintiff was not treated differently from non-minority applicants.

Defendants devote one sentence to their argument that defendant Deburgo Realty, Inc., should be dismissed from the case because it has no ownership interest in defendant Burke's building and is not responsible for the rental of units there. Defendants do not respond to plaintiff's argument that defendant Deburgo had actual or apparent authority to rent apartments at the building because defendant Burke (1) is both owner and president of

defendant Deburgo; (2) was in the Deburgo office when both Draper and Montanye inquired about apartments; and (3) gave Montanye the Deburgo business card along with his rental application. In light of defendants' failure to support their argument with case citations and to respond to plaintiff's argument, I assume for purposes of deciding this motion that they have waived it. See Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments that are not developed in any meaningful way are waived.")

ORDER

IT IS ORDERED that the motion for summary judgment of defendants James B. Burke and Deburgo Realty, Inc., is DENIED.

Entered this _____ day of June, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge