IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KOUA VANG and
DIA M. VANG

Plaintiffs,

v.

ANCHORBANK, S.S.B.,

Defendant.

OPINION AND
ORDER

99-C-790-C

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In this civil action, plaintiffs Koua Vang and Dia Vang contend that defendant Anchorbank, S.S.B., discriminated against them on the basis of their race and national origin, in violation of 42 U.S.C. § 3605 and 42 U.S.C. § 1982, by refusing to grant them a home construction loan if plaintiffs acted as their own general contractors although they granted loans to white borrowers who would act as their own general contractors. The case is before the court on defendant's motion for summary judgment and plaintiffs' motion to supplement their response to the motion for summary judgment.

I conclude that plaintiffs have raised triable questions about defendant's policy of allowing exceptions to its general prohibition against lending money to persons who wanted to

act as their own general contractor. The practice has so much potential for discrimination as to warrant a public review, particularly in light of plaintiffs' showing that only white borrowers have received the benefit of the exceptions and that plaintiffs were never given the opportunity to qualify for them.

Before I make any findings of fact it is necessary to decide plaintiffs' motion to supplement. Plaintiffs want an order permitting them to supplement their summary judgment response with defendant's response to plaintiffs' request for admissions. Defendant opposes the motion as untimely and because they question the authenticity of an exhibit attached to the motion. Although the responses should have been elicited before the summary judgment deadline, I am not prepared to exclude it on that ground. Defendant has had a fair opportunity to object to the information and explain why it should not be given weight. The document plaintiffs want to introduce is not subject to a hearsay objection because it was prepared and produced by defendant. The weight to be given to it is another question that will be discussed later in the opinion.

From the parties' proposed findings of fact, I find that the following facts are material and undisputed.

UNDISPUTED FACTS

Plaintiffs Koua Vang and Dia Vang are Hmong. Defendant AnchorBank, S.S.B. is a financial institution doing business in the state of Wisconsin. Ed Prisk was a loan officer and employee of the bank. Steven Swed was Assistant Vice President and Regional Lending Manager with responsibility for approving residential loans for the Monona branch of Anchorbank.

Plaintiff Koua Vang's first contact with defendant was in 1994, when Prisk processed and approved a lot loan for him. (In the rest of this opinion, I will refer to Koua Vang simply as plaintiff as he played the major role in trying to obtain the loan at issue.) A relative had suggested that plaintiff go to Prisk for the loan. Prisk informed plaintiff at the time that defendant was one of the few banks that permitted homeowners to act as their own general contractors. At the time, defendant's lending policy allowed self-contracting in homebuilding on an exception basis. It had been in effect since November 1, 1993. Prisk was familiar with this policy.

Sometime in December 1995, plaintiff met with Prisk to discuss pre-qualification and submitted an application for loan pre-qualification, dated December 8, 1995. Plaintiff told Prisk that he wanted to act as his own general contractor. Prisk discussed the possibility of hiring a builder as a general contractor for the construction of plaintiff's home. Prisk told plaintiff that he would contact builders to help plaintiff and recommended two in particular.

Plaintiff understood that Prisk was encouraging him to use a builder as a general contractor. Prisk pre-qualified plaintiff for a loan in the amount of $175,000. After that, plaintiff had no conversations with Prisk until December 1997.

Effective February 1996, defendant's lending policy for self-contracting jobs became more restrictive because defendant had learned that many self-contractors had difficulty finishing their buildings promptly, tended to have high cost overruns and, generally, lacked the knowledge and ability to carry such a large project through to completion. Defendant's experience was that such loans had a high probability of becoming problem loans.

In December 1997 or early 1998, plaintiff telephoned Prisk and advised him that he was ready to build a house and wanted to file an application for a home construction loan. In 1998, defendant considered the following factors in determining whether to approve a construction loan to someone acting as his own general contractor: 1) whether the individual had a background in a building trade; 2) whether the individual had contacts or connections with members of the trades that work in the home construction business; 3) whether the applicant had property management experience; and 4) whether the individual had significant financial reserves and a low loan to value ratio.

As of March 1998, plaintiff did not have the background in a building trade that would have qualified him for the first exception. Plaintiff had never built a house and did not have

experience, training or education as a general contractor in building a house.

Before granting a self-contract loan to a person with "contacts or connections," defendant would have wanted proof that the borrower had an immediate relative who was a general contractor or had an employer who was a general contractor or had actual employment experience as a general contractor or subcontractor. As of March 1998, plaintiff had no relatives or friends who were or had been general contractors. At no time before filing the present lawsuit did plaintiff inform Prisk that he had relatives who were general contractors or subcontractors in the building trades.

A borrower can also qualify for a self-contracting loan by meeting the fourth exception, having significant financial reserves and a low loan to value ratio. To determine loan to value ratio, the mortgage amount requested is divided by the cost or the appraised value of the home, whichever is lower. In conducting an appraisal to determine the value of the property and home upon completion, defendant considers the current value of the land and the value of the construction itself, which includes the cost and quality of the materials, as well as the plans and style of the home, the square footage and exterior and interior dimensions and layout. Plaintiff sought to borrow approximately $176,000 from defendant. His lots have never been appraised and he did not provide adequate information for defendant to determine the value of the proposed home, thereby making it impossible to determine the loan to value ratio. Prisk told

plaintiff that he needed the missing information as soon as possible if plaintiff were to obtain a loan.

On February 2, 1998, plaintiff met again with Prisk. Plaintiff brought along the December 1995 application, with certain items crossed out or whited-out. Prisk did not accept the application because it was missing information regarding plaintiff's wife's employment and did not include a breakdown of bids that plaintiff had received regarding costs for constructing the house. Prisk told plaintiff the application was incomplete. He gave plaintiff a complete loan package, which included a checklist for loan applications.

Plaintiff met with Prisk on March 24, 1998. This time he brought a new loan application with him. Again, Prisk found the materials to be incomplete because 1) they did not include supporting tax returns or a year-to-date profit-loss statement; 2) they lacked a specific cost breakdown of all home construction costs; 3) plaintiff had not completed the back side of the General Contractor's Draw Request form, which identified subcontractors and subcontractor bid amounts prior to March 24; 4) the bid sheet was incomplete; and 5) the application lacked specifications such as the source of lumber and plumbing fixtures, as well as whether exterior walls would be 2x4 or 2x6 construction, all of which is necessary so that the bank can determine the quality of the construction.

Prisk was aware that plaintiff was a lawyer by occupation and not in the building trades.

At no time before filing this lawsuit did plaintiff tell defendant that his occupation involved real estate property management and development, although such information might have qualified him for the bank's third exception. Plaintiff did not submit any documents to Prisk indicating this fact. Plaintiff did advise Prisk at the March 24, 1998 meeting that he had experience with remodeling apartments and an office. Although plaintiff listed in his loan application a number of properties he owned, he did not provide information about who managed those properties and Prisk did not ask him about his property management experience.

At the March 24, 1998 meeting, Prisk discouraged plaintiff from acting as his own general contractor. Prisk informed plaintiff about concerns defendant had regarding the ability of a self-contractor to finish home construction in a timely manner as well as the possibility that plaintiff could be injured during the construction of the home. Plaintiff acknowledged that this was a legitimate concern but he maintained his position that he wished to be his own general contractor and so advised Prisk.

Prisk concluded at the March 24 meeting that the information plaintiff had provided was incomplete and that a decision whether to make the construction loan could not be made. Prisk did not give plaintiff any deadline by which to complete his loan application but he did tell plaintiff that he needed to submit the loan application as soon as possible if he wanted loan approval. Prisk told plaintiff at the conclusion of the March 24, 1998 meeting that he would

discuss plaintiff's request to be his own general contractor with his supervisor, Regional Manager Steven Swed, to determine whether anything could be done in the interim while waiting for the remainder of the information from plaintiff.

On March 26, 1998, plaintiff called Prisk to inquire about the status of the construction loan. He reiterated that he wished to act as his own general contractor. He told Prisk he had spoken with Windsor Homes but that he did not wish to pay Windsor for its contractor fee. Plaintiff told Prisk that if he was not permitted to act as his own general contractor, he would obtain a loan elsewhere.

Immediately following the March 26, 1998 telephone conversation with plaintiff, Prisk spoke with Swed. On the basis of the incomplete loan application materials submitted by plaintiff and information provided by Prisk, Swed concluded that defendant could not go forward with making the construction loan, for two reasons: 1) plaintiff's application materials were incomplete; and 2) plaintiff did not meet any of the exceptions to defendant's policy prohibiting individuals from acting as their own general contractors in constructing a home. However, Swed decided at that point that even if plaintiff had completed his loan application, defendant would not have issued him a construction loan if he was acting as his own general contractor.

Prisk telephoned plaintiff on March 26 and informed him that defendant would not

agree to have him act as his own general contractor. Prisk told plaintiff that he needed someone to oversee the construction of the home because plaintiff was not a member of a home building trade or experienced in such a trade. Plaintiff and his wife would have completed the application process had Prisk not told them that they would not be given a self-contract construction loan even if they completed the process. Plaintiffs' only interest in the loan was for a self-contract project.

No one from defendant has ever made any comments to plaintiff or his wife about being from Laos or from Asia. Prisk has never made any comments to them that they found to be derogatory regarding their race or national origin. Prisk followed the same procedure with plaintiff as he followed with other individuals coming to defendant for home construction loans when the prospective borrower inquired about acting as his or her own general contractor.

In 1998, defendant made 84 home mortgage loans to applicants who indicated that they were of "Asian or Pacific Islander" ethnic descent. It is not known whether any of these loans were for applicants acting as their own general contractors. The Monona branch of the bank where Prisk and Swed worked closed eight loans with members of the Hmong community in 1998. Again, it is not known whether any of these loans were for applicants acting as their own general contractors.

In 1998, defendant made 71 construction loans to persons who wanted to act as their

own contractors. All of those persons identified themselves as white. During 1998, Prisk recommended approval of the two to three other self-contract loans that he received from persons who wanted to act as their own general contractors.

Prisk did not provide plaintiff any written criteria that defendant used to determine whether a borrower would be permitted to act as his or her own general contractor. No such written criteria exist. Plaintiff and his wife did not learn of defendant's criteria for obtaining a self-contract loan until defendant responded to the complaint that plaintiff had filed with the Equal Rights Division and that organization had issued a determination.

Plaintiff has done his own remodeling, re-shingling, deck replacement and office partitioning. Also, he has done a variety of property repairs, including plumbing, electrical, drywall, flooring, landscaping, driveway and roofing repairs. Before 1998, plaintiff took some courses at MATC in electrical wiring and plumbing. Additionally, plaintiff has had significant experience working with members of the construction trades. Although as of March 1998, plaintiff and his wife had no relatives or friends who had been general contractors in building a home, they have relatives who are employed in the field, including one who works in the home construction business and another who works in the roofing business and they have a friend who is a plumber. All of these persons were available to assist plaintiff and his wife in their home construction. Plaintiff did not tell Prisk or Swed about his experience in remodeling and

repair work.

OPINION

42 U.S.C. § 3605 makes it illegal for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status or national origin.

As I understand plaintiffs' claim, it is that defendant discriminated against them on the basis of their race and national origin when it refused to grant them a construction loan for a residence on which plaintiff would be the general contractor, while granting such self-contract loans to white applicants. The difficulty with such a claim is that the undisputed facts show that defendant made its decision on the basis of its belief that plaintiff did not have any qualifications that would justify an exception to defendant's regular lending policy. It appears, in fact, that plaintiffs' claim is somewhat more nuanced. It is that they were treated differently from non-Hmong loan applicants because defendant never advised them of the exceptions they would have to meet in order to obtain a self-contract loan and never gave plaintiff a fair opportunity to say whether he had the experience and qualifications to handle his own construction project.

It is undisputed that defendant never provided plaintiff with a written statement of the qualifications that would warrant an exception to defendant's general reluctance to lend money for self-contract construction projects. It is unknown whether defendant even had any kind of set policy. As plaintiffs point out, a policy of unwritten exceptions can be an effective means of masking discriminatory intent. The statement that defendant provided to the Equal Rights Division indicates that all of the borrowers who received self-contract loans were white. Plaintiffs' submission of defendant's statement raises the implication that plaintiffs were treated differently because of their race. At the least, the picture is sufficiently muddy to require a trial. Plaintiffs' failure to complete their application is not fatal to their claim. They were told that they would not qualify for a self-contract loan; that was the only kind of loan they wanted; and once they had been told they could not get one they had no incentive to complete the loan application process.

ORDER

IT IS ORDERED that defendant AnchorBank, S.S.B.'s motion for summary judgment is DENIED.

Entered this 1ST day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge