United States Court of Appeals
For the First Circuit

No. 17-1819

ANITA M. BARROW,

Plaintiff, Appellant,

v.

B. GRANT WILLIS, individually and professional capacity; MARGARET GIFFORD, individually and in her professional capacity as a Broker at Sothby International Realty, Inc.; SOTHEBY INTERNATIONAL REALTY, INC., HERBERT A. BARROW, JR.; WILLINDA POWELL GRAY; MICHELLE MALDONADO, ESQ., individually and in her capacity as Executrix; GEORGE J. MACKOUL, ESQ., individually and professional capacity; BRIAN MOONEY, individually and in his professional capacity at Mooney Planning Collaborative, LLC and SDSB Investment Group, LLC; MOONEY PLANNING COLLABORATIVE, LLC; MICHAEL C. HARLOW, individually and in his professional capacity at SDSB Investment Group, LLC; SDSB INVESTMENT GROUP, LLC; MUTUAL BANK; BRUCE DUPHILLY, individually and in his professional capacity at Mutual Bank; JOHN AND JANE DOE; JENNIFER S.D. ROBERTS, and/or her agents and/or assigns individually and/or professional capacity as an attorney and Court appointed Commissioner; DOUGLAS AZARIAN, individually and professional capacity as a Broker at Kinlin Grover Real Estate; FALMOUTH REALTY INVESTMENTS, LLC; DAVID H. BENTON, individually and in his professional capacity at Falmouth

Realty Investments, LLC; BARNSTABLE COUNTY DEPARTMENT OF HEALTH AND ENVIRONMENT; KENDALL AYRES, individually and or his agents and/or assigns in their professional capacity; KINLIN GROVER REAL ESTATE,

Defendants, Appellees.

Before

Howard, Chief Judge,
Kayatta and Barron, Circuit Judges.

JUDGMENT

Entered: October 15, 2018

Appellant Anita Barrow has filed opposed motions requesting (1) an extension of the September 10, 2018 briefing deadline and (2) leave to file an oversized brief. In an August 30, 2018 order, the court instructed appellant that her brief must be received by September 10, 2018, that no further extensions would be allowed, and that the appeal would be subject to dismissal if the brief was not filed in accordance with the order. Appellant failed to comply with the order. Consequently, the appeal is dismissed with prejudice. See 1st Cir. R. 3.0(b).

By the Court:

Maria R. Hamilton, Clerk

cc:
Anita M. Barrow
Katherine Land Kenney
Barton E. Centauro
Jennifer C. Sheehan
Ryan D. McCarthy
George J. MacKoul
Marissa I. Delinks
William T. Bogaert
Jason W. Canne
Mary E. O'Neal
Anthony V. Bova II
Seth Gabriel Roman
Diane M. Mulligan
Thomas Edward Pontes

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANITA M. BARROW, **Plaintiff,** **v.** **HERBERT A. BARROW, JR., et al,** **Defendants.**	**Civil Action No. 16-11493-FDS**

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR *LIS PENDENS*, PLAINTIFF'S MOTIONS TO STRIKE, AND DEFENDANTS' MOTIONS TO DISMISS

SAYLOR, J.

This action arises out of the partition by sale of a property in Falmouth, Massachusetts, formerly owned by Emma Barrow, the mother of plaintiff Anita Barrow. Plaintiff is proceeding *pro se*.

In her will, Emma Barrow granted a life estate in the Falmouth property to one of her daughters, Willinda Powell Gray. Anita, Willinda, and a third sibling named Herbert Barrow were devised equal shares of the proceeds from the sale of the property as remaindermen. Willinda occupied the property after Emma's death, but allowed the property to fall into a state of disrepair. Willinda also failed to pay the mortgage on

the property, and took out a new loan, secured by the property, on which she subsequently defaulted.

The property was ultimately sold for substantially less than its fair market. Anita then filed this action, contending that her siblings and various other individuals—those allegedly involved in either the decline in the property's value or its ultimate sale—discriminated against her in violation of federal and state law on the basis of race. Defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted. For the reasons stated below, the motions will be granted.

I. Background

A. Factual Background

Emma Barrow died on July 9, 2006. (Compl. ¶ 55). In her will, Emma devised her property in Falmouth, Massachusetts, to her three children. (Compl. ¶ 33, 35, 48). She granted defendant Willinda Powell Gray—the half-sister of Anita Barrow and Herbert Barrow—a life tenancy in the property. The will further provided that upon Willinda's option or at her death, the property was to be sold, with the proceeds divided equally between Willinda, Herbert, and Anita or their issue. (Compl. Ex. 2). She named Michelle Maldonado, Willinda's daughter, as executor of her estate. (Compl. ¶ 49).

Willinda began living on the property shortly after Emma's death in 2006. (Compl. ¶ 56, 61). Maldonado

obtained an appraisal of the property on August 7, 2007, and an inspection of the property on September 7, 2007. (Compl. ¶ 56–57). At the time of Maldonado's final accounting in July 2010, the property had a fair market value of $625,000. (Compl. ¶ 5).

In October 2009, Willinda took out a $23,506 loan from the Barnstable County Department of Health and Environment ("BCDHE") for improvements to the house. (Compl. ¶ 91). The County—through Kendall Ayres, the administrator of the Barnstable County Community Septic Management Loan Program—filed a betterment lien against the property for the value of the loan. (*Id.*). According to the complaint, the encumbrance violated the terms of Emma Barrow's will. (Compl. ¶ 92). The complaint also alleges that Ayres and BCDHE made the loan without adequately determining Willinda's ability to repay. (Compl. ¶ 93). Willinda defaulted on that loan in May 2010. (Compl. ¶ 93).

At some point, Willinda renounced her life tenancy. In May 2014, the Barnstable County Probate Court issued a warrant of sale for the property. (Compl. ¶ 154). The court appointed Jennifer Roberts to act as commissioner for the sale. (Compl. ¶ 6).

According to the complaint, on July 1, 2014, Maldonado used a void and fraudulent deed to list the property for sale with Douglas Azarian at Kinlin Grover Realty. (Compl. ¶ 51, 70). Also according to the complaint, the deed overstated the powers of the executor to sell the property. (Compl. ¶ 148). On July 3, Anita travelled to Cape Cod; she stayed there for two

weeks while trying to stop the sale of the property. (Compl. ¶ 123). On July 19, Maldonado, along with defendants Herbert, Willinda, and Azarian, attempted to sell the property "in a wasted condition" to defendant SDSB Investment Group for $385,000. (Compl. ¶ 52). George Mackoul, an attorney, represented Herbert, Gray, and Maldonado in that sale. (Compl. ¶ 70). It appears that the sale to SDSB fell through.

Throughout this time, Willinda continued to either live in or rent out the property. (Compl. ¶ 115). The complaint alleges that she failed to maintain the property and let it fall into a state of disrepair. (Compl. ¶ 115, 137). An inspection in August 2014 found a variety of problems, some cosmetic, some structural, and some potentially hazardous. (Compl. ¶ 117). The property was apparently also infested with rodents and had problems with mold. (Compl. ¶ 118).

Willinda also failed to pay the mortgage on the property. (Compl. ¶ 40). In September 2014, she received a notice of the right to cure the default from defendant Mutual Bank. (Compl. ¶ 95). The notice stated that the bank intended to commence foreclosure proceedings in February 2015 if all arrearages were not paid in full. (*Id.*) The bank did not send a notice of the right to cure to Anita. (Compl. ¶ 126).

Willinda filed a partition action in the probate court in November 2014. According to the complaint, the filing was a ruse, intended to divest Anita of her inheritance through the foreclosure of the property in February 2015. (Compl. ¶ 46). The bank allegedly

"seized" the property on February 13, 2015. (Compl. ¶ 131). At some later point, Anita and Herbert apparently began making some payments on the mortgage. (Compl. ¶ 134–35).

In June 2015, Roberts, acting as commissioner, selected Margaret Gifford, a broker and realtor at Sotheby International, to sell the property. (Compl. ¶ 79–81). In July 2015, Roberts allegedly prevented Anita from having the overgrown lawn cut and weeded while the property was listed for sale. (Compl. ¶ 172). Roberts told Anita that she had no authority over the condition of the property and that Roberts would request an injunction if necessary to prevent her from having any involvement with the property during the listing and sales process. (Compl. ¶ 173). In response, Anita told Roberts to stop discriminating against her. (Compl. ¶ 174). Mackoul then told Anita that he would bring her behavior to the attention of the Probate Court if she continued to attempt to interfere in the sale of the property. (Compl. ¶ 175).

The property was ultimately sold on December 4, 2015, to defendant Falmouth Realty Investments for $385,261.14. (Compl. ¶ 110). The complaint alleges that that sale was unlawful because Emma's will required that the consent of all beneficiaries be obtained if the property was to be sold to any of the beneficiaries, and no inquiry was made as to whether Herbert and Willinda were affiliated with Falmouth Realty Investments. (Compl. ¶ 19). Renovations began shortly after the sale, and the property is now listed for sale at $759,000 by Sotheby International. (Compl. ¶ 20).

In April 2016, after Anita made clear her intentions to file a lawsuit, Roberts requested that the Probate Court "enjoin all funds due to plaintiff" resulting from the sale of the property. (Compl. ¶ 170). Roberts stated that until any such proceedings were complete, it would be impossible to determine the proceeds available for distribution, given the costs that the estate would have to incur in litigating such an action. (Compl. ¶ 171).

The complaint does not specifically allege the race of Anita Barrow. It appears, however, that she is African-American.

B. Procedural Background

On July 18, 2016, plaintiff filed the complaint in this action. The complaint alleges that defendants discriminated against her on the basis of her race in violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.* (Count 1); 42 U.S.C. §§ 1981, 1982, and 1983 (Count 2); and Massachusetts General Laws chapter 151B (Count 3). The complaint also asserts a number of state-law tort claims for breach of fiduciary duty (Count 4); waste (Count 5); and fraud (Count 6). It also asserts an action to quiet title (Count 7).

On August 31, 2016, defendants Mutual Bank and Bruce Duphilly, as well as defendant Douglas Azarian and defendants David Benton and Falmouth Realty, moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

On September 7, 2016, plaintiff filed a motion for a memorandum of *lis pendens* as to the Falmouth property.

On September 8, 2016, defendants Kendall Ayers and BCDHE moved to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) for lack of jurisdiction and failure to state a claim upon which relief can be granted, respectively.

On September 9, 2016, defendant Roberts; defendants Gifford and Sotheby International Realty; defendants Barrow, Harlow, Maldonado, Mooney, Mooney Planning Collaborative, Gray, and SDSB Investment Group; and defendant George Mackoul all moved to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

On September 23, 2016, plaintiff moved to strike the motions to dismiss filed by defendants Mutual Bank, Bruce Duphilly, Douglas Azarian, Falmouth Realty, and David Benton. On October 5, she moved to strike the motions to dismiss filed by defendants BCDHE and Kendall Ayers. On October 18, she moved to strike the motion to dismiss filed by defendants Barrow, Harlow, Maldonado, Mooney, Mooney Planning Collaborative, Gray, and SDSB Investment Group.

II. Legal Standard

On a motion to dismiss, the court "must assume the truth of all well-plead[ed] facts and give plaintiff the benefit of all reasonable inferences therefrom."

Ruiz v. Bally Total Fitness Holding Corp., 496 F.3d 1, 5 (1st Cir. 2007) (citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). To survive a motion to dismiss, the complaint must state a claim that is "plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555 (citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). Dismissal is appropriate if the facts as alleged do not "possess enough heft to show that plaintiff is entitled to relief." *Ruiz*, 521 F.3d at 84 (quotations and alterations omitted).

III. Analysis

A. Plaintiff's Motion for a Memorandum of *Lis Pendens*

Plaintiff has moved for the issuance of a memorandum of *lis pendens* to be recorded in the registry of deeds. "A memorandum of *lis pendens* is a notice recorded in the chain of title to real property warning all persons that such property is the subject matter of litigation and that any interest acquired during the pendency of the suit is subject to its outcome." *RFF Family P'ship v. Link Dev., LLC*, 849 F. Supp. 2d 131, 137 (D. Mass. 2012) (citing Mass. Gen. Laws ch. 184, § 15).

Motions for memoranda of *lis pendens* shall be granted if "the subject matter of the action constitutes a claim of right to title to real property or the use and occupation thereof or the buildings thereon." Mass. Gen. Laws ch. 184, § 15.

This action does not involve a claim of right to title or to the use or occupation of property. Emma Barrow's will devised to plaintiff a share of the *proceeds* from the sale of the Falmouth property, but gave plaintiff no right to the property itself. The complaint centers around plaintiff's apparent frustrations with the way in which the property was sold—specifically, her allegations that the defendants discriminated against her by contributing, in various ways, to the sale of the property for less than its fair market value, thereby reducing her expected inheritance. Plaintiff does not appear to contend that she has a right to title or to use or occupy the Falmouth property. Furthermore, and in any event, the request will be mooted by the dismissal of the complaint. Accordingly, plaintiff's motion for a memorandum of *lis pendens* will be denied.

B. Plaintiff's Motions to Strike

In September and October 2016, plaintiff filed a series of motions to strike defendants' motions to dismiss. Plaintiff's motions contend that defendants' motions raise legally insufficient claims and defenses and that they are improper under Rule 8, as they do not specifically admit or deny the factual allegations raised in the complaint.

As an initial matter, motions to strike under Rule 12(f) apply only to pleadings, and a motion to dismiss is not a pleading. *See Turner v. Hubbard Sys., Inc.*, 153 F. Supp. 3d 493, 495 (D. Mass. 2015); Fed. R. Civ. P. 7(a).[1] Motions to strike are not proper vehicles for objecting to legal arguments raised in motions to dismiss. *See Turner*, F. Supp. 3d at 496. Thus, to the extent that plaintiff contends that the defendants' motions are improper because they raise legally insufficient defenses, her motions will be construed as oppositions to the defendants' motions to dismiss rather than motions to strike.

Furthermore, while it is true that Rule 8 requires responsive pleadings to admit or deny the factual allegations asserted, a Rule 12(b) motion to dismiss is not a responsive pleading. *See* Fed. R. Civ. P. 7(a), 8(b). In fact, a Rule 12(b) motion to dismiss *must* be made *before* any responsive pleading. Fed. R. Civ. P. 12(b). Defendants' motions are therefore not improper under Rule 8. Plaintiff's motions to strike will accordingly be denied.

C. Defendants' Motions to Dismiss

1. Fair Housing Act Claim

The FHA prohibits, among other things, race discrimination in the "terms, conditions, or privileges of

[1] Motions to strike may also be used to object to the use of inadmissible affidavit evidence on a motion for summary judgment. *See Facey v. Dickhaut*, 91 F. Supp. 3d. 12, 19 (D. Mass. 2014).

sale or rental of a dwelling," as well as in the availability or terms or conditions of residential real estate related transactions, 42 U.S.C. §§ 3604(b), 3605(a). To prove a violation of the FHA, the plaintiff must show either that defendants acted with discriminatory intent, or that their actions have a disparate impact based on race. *Macone v. Town of Wakefield*, 277 F.3d 1, 5 (1st Cir. 2002). The complaint here fails to allege sufficient facts to meet either of those requirements.

First, despite its considerable length, the complaint does not allege facts sufficient to demonstrate that any of the defendants acted with a discriminatory intent. "A plaintiff can show discriminatory intent by either direct or indirect evidence." *Pina v. Town of Plympton*, 529 F. Supp. 2d 151, 155 (D. Mass. 2007) (internal quotation marks omitted). Here, the complaint does not allege either. For example, the complaint alleges that Willinda, Herbert Barrow, and Mackoul discriminated against plaintiff when they permitted the property to be foreclosed upon because they did so intending "to deprive Plaintiff of her rights to a fair sale of the property under state law." (Compl. ¶ 203(d)).[2] Even if true, the complaint does not allege facts suggesting that defendants intended to deprive her of those rights *because of her race.* Plaintiff does not allege, for example, any statements suggesting racial animus or any instances in which the defendants treated individuals of other races differently.

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[2] Presumably, if Herbert Barrow is Anita's brother, he is likewise African-American.

The complaint also alleges that defendant Roberts, the court-appointed commissioner, discriminated against plaintiff by refusing to permit her to inspect the property or arrange for maintenance services. Again, there is no specific factual allegation that Roberts did so because of her race. To the contrary, the complaint suggests that Roberts denied plaintiff access to the property because she was not an owner of the property itself, and thus lacked the authority to access the property or participate in the sale. (Compl. ¶ 173). There is no evidence suggesting that Roberts's stated reason was pretextual or that racial animus motivated her conduct.

The complaint also fails to allege sufficient facts to show that the conduct of the defendants disparately impacts African-Americans. *See Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (holding that disparate-impact claims are cognizable under the FHA). A plaintiff can make out a claim for disparate impact by showing that the defendants' actions "actually or predictably [result] in racial discrimination." *Macone*, 277 F.3d at 7 (alteration in original) (internal quotation marks omitted). "In order to properly assert a disparate impact claim, plaintiff[] must plead (1) a specific and actionable policy, (2) a disparate impact, and (3) facts raising a sufficient inference of causation." *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 255 (D. Mass. 2008). Here, the complaint fails on all three prongs.

First, the complaint does not point to any specific policies of any of the defendants that result in racial

discrimination. It alleges only that defendants, in various ways, acted to deprive plaintiff of the full value of her inheritance; there is no allegation of an unlawful practice or policy. A single decision relevant to a single piece of property, without more, is not evidence of a policy contributing to a disparate impact. *See Inclusive Cmties. Project*, 135 S. Ct. at 2523 ("[A] plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all.").

Second, the complaint alleges no specific facts showing a disparate impact. A showing of disparate impact is usually made using statistical evidence. *See Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1286 (11th Cir. 2006) ("Typically, a disparate impact is demonstrated by statistics."). Here, the only allegation of discrimination in the complaint consists of vague and general references to academic literature suggesting that partition sales of coastal properties may disparately impact African-Americans and deprive them of inherited wealth. (Compl. ¶¶ 177–182). Such general references to academic literature, without any tie to the acts or practices of any defendant in this specific case, are insufficient to state a claim for relief that is plausible on its face. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (dismissing complaint because plaintiffs failed to plead enough facts to "nudge[] their claims across the line from conceivable to plausible").

Third, the complaint fails to allege any facts from which an inference of causation can be drawn. "A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection [between the defendants' conduct and a discriminatory effect] cannot make out a prima facie case of disparate impact." *Inclusive Cmties. Project*, 135 S. Ct. at 2523. Even if the Court assumes, as a general matter, that partition sales disparately impact African-American heirs, plaintiff has failed to show that any policies or practices of the defendants caused or contributed to such a discriminatory effect.

In addition to its substantive protections, the FHA also makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed . . . any right protected by" the FHA. 42 U.S.C. § 3617. To prove an interference claim under § 3617, a plaintiff must show (1) that she is a member of an FHA-protected class; (2) that she exercised a right protected by the FHA; (3) that the defendants' conduct was motivated, at least in part, by intentional discrimination; and (4) that the defendants' conduct constituted coercion, intimidation, threat, or interference on account of having exercised a right protected by the FHA. *South Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F. Supp. 2d 85, 95 (D. Mass. 2010).

The complaint alleges that defendants Roberts and Mackoul unlawfully threatened legal action against plaintiff in order to interfere with her attempts

to exercise her rights under the FHA. (Compl. ¶¶ 170–176). According to the complaint, Roberts and Mackoul threatened legal actions in response to plaintiff's attempts to obtain access to the property prior to its sale and again after she made clear her intention to bring a housing discrimination claim. However, there is no allegation that plaintiff actually exercised or attempted to exercise a right protected by the FHA, or any specific allegation that the defendants were motivated by an intent to either discriminate against her or to interfere with her exercise of FHA rights.

In essence, plaintiff appears to contend that the defendants violated the FHA for two reasons: first, because their conduct, in various ways, deprived her of the full value of her expected inheritance, and second, because they participated in a process that (on a nationwide basis) has adversely impacted African-American heirs as a general matter. However, the actual conduct alleged in the complaint does not constitute actionable discrimination under the FHA. Accordingly, the Fair Housing Act claim (Count 1) will be dismissed.

2. Civil Rights Act Claims

a. Section 1981

Section 1981 guarantees "equal rights under the law." 42 U.S.C. § 1981. It "prohibits both public and private racial discrimination in certain specified activities." *Garrett v. Tandy Corp.*, 295 F.3d 94, 98 (1st Cir. 2002). One such specified activity is the ability to enjoy

"the full and equal benefit of all laws and proceedings for the security of persons and property." To prove a violation under § 1981, plaintiff must show that (1) she is a member of a racial minority; (2) the defendants discriminated against her on the basis of race; and (3) their discrimination concerned at least one of the activities the statute describes. *Id.* Furthermore, the discrimination must be purposeful. *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982) (holding that § 1981 "can be violated only by purposeful discrimination).

The claim here fails at the second prong. For the reasons discussed above, the allegations of the complaint are simply insufficient to demonstrate that any of the defendants acted with the purpose of discriminating against her on the basis of her race. Whatever her frustrations concerning her inability to participate in the property's sale, or the low selling price, nothing in the circumstances surrounding the sale of the property suggests that the unfavorable terms of the sale were in any way related to intentional acts of race discrimination.

b. Section 1982

Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real property." 42 U.S.C. § 1982. As with § 1981, only purposeful discrimination can rise to the level of a § 1982

violation. *City of Memphis v. Greene*, 451 U.S. 100, 135 (1981) (White, J., concurring). Again, the complaint fails to allege facts showing that any of the defendants were motivated by racial animus or the intent to discriminate on the basis of race.

c. Section 1983

Section 1983 provides a private remedy against individuals who, acting under color of state law, cause a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). It is unclear from the complaint which defendants are the intended subjects of the § 1983 claim, but the only defendants who could plausibly qualify are the Barnstable County Department of Health and Environment ("BCDHE") and Kendall Ayres, the administrator of the Barnstable County Community Septic Management Loan Program.

It is also unclear from the complaint what constitutional or other violation plaintiff intends to allege. Section 1983 does not itself confer any rights; rather, it is a "mechanism for enforcing individual rights 'secured' elsewhere, *i.e.*, rights independently 'secured by the Constitution and laws' of the United States."

Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002). To the extent that the complaint alleges violations of the Fair Housing Act, § 1981, or § 1982, the claims fail for the reasons set forth above. The complaint alleges that BCDHE and Ayres discriminated against plaintiff by (1) permitting Willinda to take out a loan to make improvements on the property—a loan on which she later defaulted—without first adequately determining her ability to pay and (2) maintaining a lien against the property over plaintiff's objections. (Compl. ¶ 93). Even assuming that plaintiff has standing under the FHA to bring claims related to a loan given to Willinda secured by property plaintiff did not own, the complaint again fails to allege any facts suggesting that the defendants were motivated by racial animus.

Accordingly, the claim for violations of the Civil Rights Act of 1866 (Count 2) will be dismissed.

3. State-Law Claims

Having dismissed all of plaintiff's federal-law claims, this Court declines to exercise jurisdiction over plaintiff's state-law claims. In deciding whether to retain supplemental jurisdiction over state-law claims after dismissing the foundational federal claims, courts are to consider factors such as "the interests of fairness, judicial economy, convenience, and comity." *Camelio v. American Federation*, 137 F.3d 666, 672 (1998). "'Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a

surer-footed reading of applicable law. Certainly, if federal claims are dismissed before trial, . . . the state claims should be dismissed as well.'" *Id.* (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). As this case has yet to even enter discovery, and because there appears to be no unfairness to the parties from having the state court decide the remaining state-law issues, retention of the state-law claims would be inappropriate under the circumstances.

IV. Conclusion

For the foregoing reasons:

1. Plaintiff's motion for a memorandum of *lis pendens* (Docket No. 21) is DENIED;
2. The motion to dismiss of defendants Duphilly and Mutual Bank (Docket No. 11) is GRANTED;
3. The motion to dismiss of defendant Azarian (Docket No. 15) is GRANTED;
4. The motion to dismiss of defendant Benton and Falmouth Realty Investments (Docket No. 18) is GRANTED;
5. The motion to dismiss of defendant Kendall Ayres (Docket No. 25) is GRANTED;
6. The motion to dismiss of defendant Barnstable County Department of Health and Environment (Docket No. 26) is GRANTED;
7. The motion to dismiss of defendant Roberts (Docket No. 30) is GRANTED;

8. The motion to dismiss of defendant Barrow, Harlow, Maldonado, Mooney, Mooney Planning Collaborative, Gray, and SDSB Investment Group (Docket No. 35) is GRANTED;

9. The motion to dismiss of defendant Mackoul (Docket No. 37) is GRANTED;

10. Plaintiff's motion to strike the motions to dismiss of defendants Mutual Bank, Duphilly, Azarian, Falmouth Realty Investments, and David Benton (Docket Nos. 40, 41) is DENIED;

11. Plaintiff's motion to strike the motions to dismiss of defendants Barnstable County Department of Health and Environment and Kendall Ayres (Docket No. 45) is DENIED;

12. Plaintiff's motion to strike the motions to dismiss of defendants Barrow, Harlow, Maldonado, Mooney, Mooney Planning Collaborative, Gray, and SDSB Investment Group (Docket No. 50) is DENIED;

13. Plaintiff's motion in opposition (Docket No. 51) is DENIED[3]; and

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[3] Plaintiff styled this document (Docket No. 51) as a "Motion in Opposition to all Defendants' Ongoing Violation of 42 U.S.C. § 3617 and to Clarify the Record in Support of Plaintiff's Cross Motion to Strike Pursuant to Fed. R. Vic. P. 12(f) and 42 U.S.C. § 3617 Pursuant to New HUD Regulations Amending 24 C.F.R. 100." As far as this Court can discern, it is in essence an opposition to defendants' motions to dismiss and a memorandum in support of her motions to strike. It does not appear to request any new or additional relief. However, to the extent that it does, that relief is denied for the reasons stated above.

14. Plaintiff's motion for expedited relief and for supplemental jurisdiction over pending state court action is DENIED as moot.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated:
November 29, 2016

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANITA M. BARROW, **Plaintiff,** **v.** **HERBERT A. BARROW, JR., et al.,** **Defendants.**	**Civil Action No. 16-11493-FDS**

ORDER OF DISMISSAL

SAYLOR, DJ.

In accordance with the Court's Memorandum and Order of July 5, 2017, it is hereby ORDERED that the above-entitled action be dismissed.

SO ORDERED.
BY THE COURT:

July 6, 2017
Date

/s/ Lisa Pezzarossi
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANITA M. BARROW,	)	**Civil Action No.**
Plaintiff,	)	**16-11493-FDS**
v.	)	
HERBERT A. BARROW, JR., et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER ON DEFENDANT WILLIS'S MOTION TO DISMISS

SAYLOR, J.

This action arises out of the partition by sale of a property in Falmouth, Massachusetts, formerly owned by Emma Barrow, the mother of plaintiff Anita Barrow. Plaintiff is proceeding *pro se*.

In her will, Emma Barrow granted a life estate in the Falmouth property to one of her daughters, Willinda Powell Gray. Anita, Willinda, and a third sibling named Herbert Barrow were devised equal shares of the proceeds from the sale of the property as remaindermen. Willinda occupied the property after Emma's death, but allegedly allowed the property to fall into a state of disrepair. Willinda also allegedly failed to pay the mortgage on the property, and took out a new loan, secured by the property, on which she subsequently defaulted.

The property was ultimately sold for substantially less than its fair market value. Anita then filed this action, contending that her siblings and various other individuals—those allegedly involved in either the decline in the property's value or its ultimate sale—discriminated against her on the basis of race in violation of federal and state law. This Court has already granted the motions to dismiss of all other defendants named in this case. Defendant B. Grant Willis has now moved to dismiss the claims against him for the failure to state a claim upon which relief can be granted. For the reasons stated below, the motion will be granted.

I. Background

A. Factual Background

The facts are set out fully in this Court's prior Memorandum and Order on Plaintiff's Motion for *Lis Pendens*, Plaintiff's Motion to Strike, and Defendants' Motion to Dismiss. (*See* Docket No. 58 at 2-5). As is relevant here, the facts are as follows.

Anita Barrow is an African-American woman. (Compl. ¶ 33). Defendant Grant Willis is an attorney in Falmouth, Massachusetts, who represented Anita's mother, Emma Barrow, in preparing her will. (*Id.* at ¶¶ 64-65). The will devised Emma's property in Falmouth to her three children. (*Id.* at ¶ 33, 35, 48). The will granted Willinda Powell Gray—the half-sister of Anita and Herbert Barrow—a life tenancy in the property. The will further provided that upon Willinda's option or at her death, the property was to be sold, with

the proceeds divided equally between Willinda, Herbert, and Anita or their issue. (*Id.* Ex. 2). She named Michelle Maldonado, Willinda's daughter, as executor of her estate. (*Id.* at ¶ 49).

Following Emma's death, Willis represented Maldonado, as executor, in the probate of Emma's estate. (*Id.* at ¶ 5). The complaint alleges that Willis prepared and recorded in the Barnstable County Registry of Deeds an Executor's Deed, which was a "void instrument" that included "discriminatory provisions to the detriment of the Plaintiff." (*Id.* at ¶¶ 52, 66). The complaint further alleges that Maldonado used the Executor's Deed to attempt to sell the property to SDSB Investment Group "to the detriment of Plaintiff, in a wasted condition for $385,000.00 without the knowledge or consent of Plaintiff. . . ." (*Id.* at ¶¶ 52). The property was ultimately sold to Falmouth Realty Investments for $385,261.14. (*Id.* at ¶¶ 19, 196).

B. Procedural Background

On July 18, 2016, plaintiff filed the complaint in this action. The complaint alleges that the twenty named defendants discriminated against her on the basis of her race in violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.* (Count 1); 42 U.S.C. §§ 1981, 1982, and 1983 (Count 2); and Massachusetts General Laws chapter 151B (Count 3). The complaint also asserts a number of state-law tort claims for breach of fiduciary duty (Count 4); waste (Count 5);

and fraud (Count 6). It also asserts an action to quiet title (Count 7).

On November 29, 2106, this Court granted the motions to dismiss of all other named defendants. On January 13, 2017, the Court entered a default as to defendant Willis, who, at that time, had not submitted either an answer or motion to dismiss. On February 15, 2017, plaintiff filed a motion for default judgment as to Willis. On April 12, the Court issued Willis an order to show cause why default judgment should not enter against him. On May 3, counsel entered an appearance on behalf of Willis and filed a response to the order to show cause and an opposition to the motion for default judgment. Willis demonstrated good cause why default judgment should not enter against him, stating that he has been in ill health and that the summons was served upon him when he was in the process (at age 75) of closing down his solo law practice and reviewing each client file in his office. On May 4, the Court set aside the earlier default entered against him and denied plaintiff's motion for default judgment.

On May 25, 2017, defendant Willis filed a motion to dismiss the claims against him. For the reasons stated below, that motion will be granted.

II. Legal Standard

On a motion to dismiss, the court "must assume the truth of all well-plead[ed] facts and give plaintiff the benefit of all reasonable inferences therefrom." *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5

(1st Cir. 2007) (citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). To survive a motion to dismiss, the complaint must state a claim that is "plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555 (citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcrofi v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). Dismissal is appropriate if the facts as alleged do not "possess enough heft to show that plaintiff is entitled to relief." *Ruiz*, 521 F.3d at 84 (quotations and alterations omitted).

III. Analysis

A. Fair Housing Act Claim

The FHA prohibits, among other things, race discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling," as well as in the availability or terms or conditions of transactions relating to residential real estate. 42 U.S.C. §§ 3604(b), 3605(a). To prove a violation of the FHA, the plaintiff must show either that defendants acted with discriminatory intent or that their actions have a disparate impact based on race. *Macone v. Town of Wakefield*, 277 F.3d 1, 5 (1st Cir. 2002). The complaint here fails to allege sufficient facts to meet either of those requirements.

First, despite its considerable length, the complaint does not allege facts sufficient to demonstrate that Willis acted with a discriminatory intent. "A plaintiff can show discriminatory intent by either direct or indirect evidence." *Pina v. Town of Plympton*, 529 F. Supp. 2d 151, 155 (D. Mass. 2007) (internal quotation marks omitted). Here, the complaint does not allege either. The complaint alleges that Willis composed and filed a fraudulent deed, "which included discriminatory provisions to the detriment of Plaintiff, in violation of her rights to fair terms, conditions, and privileges of sale of the Property under Fair Housing law." (Compl. ¶ 66). Even if true, the complaint does not allege facts suggesting that Willis intended to deprive her of those rights *because of her race*. The complaint does not specify what the allegedly discriminatory terms were. Instead, plaintiff appears to contend that the deed was invalid because it overstated the powers of the executrix, Michelle Maldonado, in selling the property and the rights of Willinda in occupying the property. Again, however, even if those allegations are true, they do not amount to race discrimination. There is nothing in the complaint to suggest that the alleged defects in the deed were in any way motivated by racial animus.

The complaint also fails to allege sufficient facts to show that the Willis's conduct disparately impacts African-Americans. *See Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (holding that disparate-impact claims are cognizable under the FHA). A plaintiff can

make out a claim for disparate impact by showing that a defendant's actions "actually or predictably [result] in racial discrimination." *Macone*, 277 F.3d at 7 (alteration in original) (internal quotation marks omitted). "In order to properly assert a disparate impact claim, plaintiff[] must plead (1) a specific and actionable policy, (2) a disparate impact, and (3) facts raising a sufficient inference of causation." *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251, 255 (D. Mass. 2008). Here, the complaint fails on all three prongs.

First, the complaint does not point to any specific policy that results in racial discrimination. As to defendant Willis, the complaint alleges only that he created and recorded a defective deed on a single occasion. A single act relevant to a single piece of property, without more, is not evidence of a policy contributing to a disparate impact. *See Inclusive Cmties. Project*, 135 S. Ct. at 2523 ("[A] plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all.").

Furthermore, the complaint alleges no specific facts showing a disparate impact. A showing of disparate impact is usually made using statistical evidence. *See Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1286 (11th Cir. 2006) ("Typically, a disparate impact is demonstrated by statistics."). Here, the only allegation of discrimination in the complaint consists of vague and general references to academic literature

suggesting that partition sales of coastal properties may disparately impact African-Americans and deprive them of inherited wealth. (Compl. ¶¶ 177–182). Such general references to academic literature, without any tie to the acts or practices of defendant Willis himself, are insufficient to state a claim for relief that is plausible on its face. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (dismissing complaint because plaintiffs failed to plead enough facts to "nudge[] their claims across the line from conceivable to plausible").

Finally, the complaint fails to allege any facts from which an inference of causation can be drawn. "A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection [between the defendants' conduct and a discriminatory effect] cannot make out a prima facie case of disparate impact." *Inclusive Cmties. Project*, 135 S. Ct. at 2523. Even if the Court assumes, as a general matter, that partition sales disparately impact African-American heirs, plaintiff has failed to show that any policies or practices of defendant Willis caused or contributed to such a discriminatory effect. The motion to dismiss will therefore be granted as to Count One.

B. The Civil Rights Act Claims

1. Section 1981

Section 1981 guarantees "equal rights under the law." 42 U.S.C. § 1981. It "prohibits both public and private racial discrimination in certain specified

activities." *Garrett v. Tandy Corp.*, 295 F.3d 94, 98 (1st Cir. 2002). One such specified activity is the ability to enjoy "the full and equal benefit of all laws and proceedings for the security of persons and property." To prove a violation under § 1981, plaintiff must show that (1) she is a member of a racial minority; (2) the defendants discriminated against her on the basis of race; and (3) their discrimination concerned at least one of the activities the statute describes. *Id.* Furthermore, the discrimination must be purposeful. *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982) (holding that § 1981 "can be violated only by purposeful discrimination).

The claim here fails at the second prong. For the reasons set forth above, the allegations of the complaint are simply insufficient to demonstrate that defendant Willis acted with the purpose of discriminating against plaintiff on the basis of her race. Whatever her frustrations concerning her inability to participate in the property's sale, or the low selling price, nothing in the circumstances surrounding the sale of the property suggests that the unfavorable terms of the sale were in any way related to intentional acts of race discrimination.

2. Section 1982

Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real

property." 42 U.S.C. § 1982. As with § 1981, only purposeful discrimination can rise to the level of a § 1982 violation. *City of Memphis v. Greene*, 451 U.S. 100, 135 (1981) (White, J., concurring). Again, the complaint fails to allege facts showing that defendant was motivated by racial animus or the intent to discriminate on the basis of race.

3. Section 1983

Section 1983 provides a private remedy against individuals who, acting under color of state law, cause a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). It is unclear from the complaint which defendants are the intended subjects of the § 1983 claim, but as there is no allegation that Willis was acting under color of state law, there can be no claim against him under § 1983. Accordingly, the motion to dismiss will granted as to Count Two.

B. State-Law Claims

Having dismissed all of plaintiff's federal-law claims, this Court declines to exercise jurisdiction over plaintiff's state-law claims. In deciding whether to retain supplemental jurisdiction over state-law claims

after dismissing the foundational federal claims, courts are to consider factors such as "the interests of fairness, judicial economy, convenience, and comity." *Camelio v. American Federation*, 137 F.3d 666, 672 (1998). "'Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if federal claims are dismissed before trial, . . . the state claims should be dismissed as well.'" *Id.* (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). As this case has yet to even enter discovery, and because there appears to be no unfairness to the parties from having the state court decide the remaining state-law issues, retention of jurisdiction over the state-law claims would be inappropriate under the circumstances.

IV. Conclusion

For the foregoing reasons the motion to dismiss of B. Grant Willis is GRANTED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
Dated: July 5, 2017 United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANITA M. BARROW	)	
	)	
Plaintiff,	)	
v.	)	**Civil Action No.**
HERBERT A. BARROW, JR., et al.	)	**16-11493-FDS**
	)	
Defendants.	)	

MEMORANDUM AND ORDER ON DEFENDANT AZARIAN'S MOTION FOR ATTORNEYS' FEES

SAYLOR, J.

This action arises out of the partition by sale of a property in Falmouth, Massachusetts, formerly owned by Emma Barrow, the mother of plaintiff Anita Barrow. In her will, Emma Barrow granted a life estate in the Falmouth property to one of her daughters, Willinda Powell Gray. Anita, Willinda, and a third sibling named Herbert Barrow were devised equal shares of the proceeds from the sale of the property as remaindermen. Willinda occupied the house for some time, and it fell into a state of disrepair. The property was ultimately sold for substantially less than its fair market value. Plaintiff, proceeding *pro se*, then filed this action contending that her siblings and various other individuals involved in either the decline in the property's value or its ultimate sale—including Douglas Azarian, a real estate agent who listed the property for

sale—discriminated against her on the basis of race in violation of state and federal law, including the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.*, and the Civil Rights Act, 42 U.S.C. §§ 1981, 1982, and 1983.

On August 31, 2016, Azarian moved to dismiss the claims against him for the failure to state a claim upon which relief can be granted, which the Court granted. Azarian then moved for attorneys' fees. For the reasons stated below, that motion will be granted in part and denied in part.

I. Background

A. Factual Background

The facts are set out fully in this Court's prior Memorandum and Order on Plaintiff's Motion for *Lis Pendens*, Plaintiff's Motion to Strike, and Defendants' Motions to Dismiss. (*See* Docket No. 58 at 2-5). As is relevant here, the facts are as follows.

Anita Barrow is an African-American woman. (Compl. ¶ 33). Her mother, Emma Barrow, died on July 9, 2006. (Compl. ¶ 55). In her will, Emma devised her property in Falmouth, Massachusetts, to her three children. (Compl. ¶ 33, 35, 48). She granted defendant Willinda Powell Gray—the half-sister of Anita Barrow and Herbert Barrow—a life tenancy in the property. The will further provided that upon Willinda's option or at her death, the property was to be sold, with the proceeds divided equally between Willinda, Herbert, and Anita or their issue. (Compl. Ex. 2). She named

Michelle Maldonado, Willinda's daughter, as executor of her estate. (Compl. ¶ 49).

According to the complaint, on July 1, 2014, Maldonado used a void and fraudulent deed to list the property for sale with Douglas Azarian at Kinlin Grover Realty. (Compl. ¶ 51, 70). Also according to the complaint, the deed overstated the powers of the executor to sell the property. (Compl. ¶ 148). On July 3, Anita travelled to Cape Cod; she stayed there for two weeks while trying to stop the sale of the property. (Compl. ¶ 123). On July 19, Maldonado, along with defendants Herbert, Willinda, and Azarian, attempted to sell the property "in a wasted condition" to defendant SDSB Investment Group for $385,000. (Compl. ¶ 52). It appears that the sale to SDSB fell through.

The property was ultimately sold, through a different realtor, to Falmouth Realty Investments for $385,261.14. (*Id.* at ¶¶ 19, 79-81, 196).

B. Procedural Background

On July 18, 2016, plaintiff filed the complaint in this action. The complaint alleges that defendants discriminated against her on the basis of her race in violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.* (Count 1); 42 U.S.C. §§ 1981, 1982, and 1983 (Count 2); and Massachusetts General Laws chapter 151B (Count 3). The complaint also asserts a number of state-law tort claims for breach of fiduciary duty (Count 4); waste (Count 5); and fraud (Count 6). It also asserts an action to quiet title (Count 7).

On August 31, 2016, defendant Douglas Azarian, as well as a number of other defendants, moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. On September 23, 2016, plaintiff moved to strike that motion to dismiss. This Court denied the motion to strike and granted the motion to dismiss on November 29, 2016.

On December 29, 2016, Azarian moved for an award of attorneys' fees pursuant to the Fair Housing Act, 42 U.S.C. § 3613(c)(2), the Civil Rights Act, 42 U.S.C. § 1988(b), and sanctions pursuant to Fed. R. Civ. P. Rule 11. For the reasons stated below, that motion will be granted in part and denied in part.

II. Analysis

A. Attorneys' Fees

The FHA and the Civil Rights Act both authorize attorneys' fees for prevailing parties. *See* 42 U.S.C. § 3613(c)(2) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs."); 42 U.S.C. § 1988(b) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . ."). In *Christiansburg Garment Co. v. Equal Employer Opportunity Comm'n.*, 434 U.S. 412, (1978), the Supreme Court held that when a defendant is the prevailing party in an action brought under Title VII of the Civil Rights Act of 1964, fees should be assessed against the plaintiff only if the plaintiff's claims were "frivolous, unreasonable,

or groundless, or [if] the plaintiff continued to litigate after [they] clearly became so," *or* if the claims were brought or continued in bad faith. *Id.* at 422. The Supreme Court subsequently extended *Christiansburg* to claims for fees under § 1988(b) of the Civil Rights Act. *See Hughes v Rowe*, 449 U.S. 5, 14 (1980). Other courts have applied the same standard to claims brought under the FHA as well. *See, e.g., Taylor v. Harbour Pointe Homeowners Ass'n*, 690 F.3d 44, 50 (2d Cir. 2012); *Bryant Woods Inn, Inc. v. Howard Cnty., Md.*, 124 F.3d 597, 606 (4th Cir. 1997).

In applying the *Christiansburg* standard, courts must "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, [her] action must have been unreasonable or without foundation." *Christiansburg Garment Co.*, 434 U.S. at 421-22. Rather, an assessment of fees against a plaintiff is only appropriate if the plaintiff filed an action with "absolutely no factual basis for the allegations made" and/or continued to litigate "after it became clear that the claims were baseless." *Fidelity Guarantee Mortg. Corp. v. Reben*, 809 F.2d 931, 935 (1st Cir. 1987).

District courts generally have broad discretion as to the amount of any fee award. *Gabriele v. Southworth*, 712 F.2d 1205, 1506 (1st Cir. 1983). The prevailing party has the burden of substantiating the requested fees with detailed billing records and hourly rates. *Spooner v. EEN, Inc.*, 664 F.3d 62, 68 (1st Cir. 2011). A district court need not accept the hours and rates offered by the prevailing party. Indeed, the

attorneys' records should be "scrutinized with care." *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950 (1st Cir. 1984).

1. Method for Calculating Attorneys' Fees

In the First Circuit, courts follow the so-called "lodestar" method for calculating reasonable attorneys' fees. *Tennessee Gas Pipeline Co. v. 104 Acres of Land*, 32 F.3d 632, 634 (1st Cir. 1994); *see also Spooner*, 644 F.3d at 67-69. The lodestar method involves "multiplying the number of hours productively spent by a reasonable hourly rate to calculate a base figure." *Torres-Rivera v. O'Neill-Cancel*, 524 F.3d 331, 336 (1st Cir. 2008) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

In fashioning the lodestar, the first step is to calculate the number of hours reasonably expended by the attorneys for the prevailing party, excluding those hours that are "excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434; *see also Grendel's Den*, 749 F.2d at 950 (explaining that a court should subtract "hours which [are] duplicative, unproductive, excessive, or otherwise unnecessary"). "The court has a right—indeed, a duty—to see whether counsel substantially exceeded the bounds of reasonable effort." *United States v. Metropolitan Dist. Comm'n*, 847 F.2d 12, 17 (1st Cir 1988) (internal quotation omitted); *see also Dixon v. International Bhd. of Police Officers*, 434 F. Supp. 2d 73, 81-82 (D. Mass. 2006) (reducing an

award in part because an average of 32.8 hours drafting a summary judgment motion was excessive). Further, a court may disallow or discount requests where the records are "too generic and, thus, insufficient as a practical matter to permit a court to answer questions about excessiveness, redundancy, and the like." *Torres-Rivera*, 524 F.3d at 336.

After determining the number of hours reasonably expended, a court's second step in calculating the lodestar requires a determination of a reasonable hourly rate—a determination that is benchmarked to the "prevailing rates in the community" for lawyers of like "qualifications, experience, and specialized competence." *See Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 295 (1st Cir. 2001). In determining a reasonable hourly rate, a court must consider "the type of work performed, who performed it, the expertise that it required, and when it was undertaken." *Grendel's Den*, 749 F.2d at 950-51. It is well-established that the moving party bears the burden of establishing an attorney's level of skill and experience, and when a party fails to provide documentation as to the attorney's qualifications, a court may reduce the hourly rate. *See, e.g.*, *Martinez v. Hodgson*, 265 F. Supp. 2d 135, 142 (D. Mass. 2003).

After determining the reasonable number of hours and hourly rate, the court may adjust the lodestar upward or downward based on a number of factors. *Spooner*, 644 F.3d at 68. Those factors include (1) "a [party's] success claim by claim"; (2) "the relief actually achieved"; and (3) "the societal importance of the right

which has been vindicated." *Coutin v. Young & Rubicam P.R.*, 124 F.3d 331, 338 (1st Cir. 1997).

"A request for attorney[s'] fees should not result in a second major litigation." *Hensley*, 461 U.S. at 437 (noting that "[i]deally, of course, litigants will settle the amount of a fee"). In response to litigants' propensity to turn fee requests into a second round of litigation, the First Circuit has indicated that district courts are not required to engage in a minutely detailed analysis of fee requests. *See Metropolitan Dist. Comm'n*, 847 F.2d at 16 ("Consistent with this flexible paradigm, we perceive no need for the district court to drown in a rising tide of fee-generated minutiae . . . [and] a judge [should not] become so deluged with details that he is unable to view the claims for fees in perspective.") (internal quotation marks omitted)). The court has explained:

> Although there is some burden on the district court to explain why it makes a substantial adjustment, up or down, of a diary-supported bill, we have never required that district courts set forth hour-by-hour analyses of fee requests. What we expect the trial court to do is make concrete findings, supply a clear explanation of its reasons for the fee award, and most of all, retain a sense of overall proportion. In certain cases, these objectives may be better met by concentrating on what was necessary to be accomplished rather than on a welter of time sheets.

Id. (citations, alterations, and internal quotation marks omitted).

2. Whether an Award of Fees is Appropriate

As noted above, attorneys' fees should be assessed against plaintiff only if her claims were "frivolous, unreasonable, or groundless, or [if] the [she] continued to litigate after [they] clearly became so," *or* if the claims were brought or continued in bad faith. *Christansburg Garment Co.*, 434 U.S. at 422. Here, plaintiff's claims against Azarian were indeed groundless. As noted in the Court's earlier memorandum and order on defendants' motions to dismiss, the lengthy complaint was entirely devoid of any allegation that Azarian acted with the intent to discriminate against plaintiff based on her race or that he acted pursuant to any facially neutral policy that had a disparate impact on African-Americans. The complaint thus fell far short of stating a plausible claim for relief under either the FHA or the Civil Rights Act. There was absolutely no factual basis for the allegation that Azarian engaged in any kind of discriminatory conduct. Accordingly, an award of fees is appropriate under the circumstances.

3. The Amount of Fees

The fees requested by Azarian are summarized in the table below.

Lawyer	Hours	Hourly Rate ($)	Fee Billed ($)
Original Motions (Excluding Fee Petition)			
Mary E. O'Neal	13.7	350	4,795.00
	12.7	375	4,762.50
Anthony V. Bova II	42	215	9,030.00
	6.2	225	1,395.00
Total	**74.6**	**–**	**$19,982.50**
Fee Petition			
Mary E. O'Neal	10	375	3,750.00
Anthony V. Bova II	2.2	225	495
Total	**12.2**	**–**	**$4,245.00**
Total Hours and Fees Requested	**86.8**		**$24,227.50**

Azarian's lead attorney, Mary E. O'Neal—a partner at the firm of Conn Kavanaugh Rosenthal Peisch & Ford, LLP, in Boston—has billed a total of 36.4 hours at a rate of either $350 or $375 per hour. Anthony V. Bova II, an associate at that firm, has billed a total of 52.6 hours at a rate of either $215 or $225 per hour.

a. Hours Reasonably Expended

Azarian contends that his attorneys should be compensated for 86.8 total hours spent litigating the motion to dismiss, plaintiff's motion to strike, and the

motion for fees. In support of that request, his attorneys have submitted an affidavit summarizing their hours, billed in tenths-of-an-hour increments.

It appears that the hours billed are somewhat excessive. For example, Attorney O'Neal billed two-tenths of an hour, or twelve minutes, to review an e-mail from Azarian regarding service and to enter the date on which the answer was due into her calendar. In addition, it appears that she spent more than eight hours reviewing and editing the motion to dismiss that was drafted by Attorney Bova. Attorney Bova, in turn, billed approximately 14 hours to review the complaint and draft a memorandum to Attorney O'Neal, as well as an additional approximately 25 hours to draft and edit the memorandum in support of the motion to dismiss. Attorney Bova also billed more than an hour for drafting a letter to plaintiff and sending a few emails regarding plaintiff's noncompliance with Local Rule 7.1.

Furthermore, the vagueness of the time entries provided makes it difficult for the Court to determine what specific tasks they performed and how efficiently they performed them. Their hours, at least as documented in the affidavits provided to the Court, are entered on a once-per-day basis and often include numerous individual tasks, making it impossible to discern how much time was allocated to which tasks. For example, in one entry, Attorney O'Neal billed three hours for editing the motion to dismiss, preparing the motion for filing, and sending several emails. On another occasion, Attorney O'Neal billed three hours for

reviewing a memorandum from Attorney Bova, analyzing the issues presented in the memorandum, and sending two emails. Finally, Attorney O'Neal billed 10 hours for drafting the motion for attorneys' fees itself, with absolutely no specification regarding how much time was spent on what tasks. Attorney Bova billed an additional 2.2 hours for the motion for attorneys' fees, again with no specification regarding how that time was spent.

Given the vagueness of the billing information provided and what appear to be somewhat inflated hours, the Court will reduce each attorney's hours. Accordingly, Attorney O'Neal's 36.4 hours will be reduced by approximately 30 percent to 25 hours, and Attorney Bova's hours will be reduced by approximately 40 percent from 52.6 hours to 31 hours.

b. Reasonable Hourly Rates

Next, the Court must determine the reasonableness of the requested rates as benchmarked against "prevailing rates in the community." *See Gay Officers League*, 247 F.3d at 295. Attorney Mary E. O'Neal has requested an hourly rate of $350 per hour for approximately half of her representation, and then at a rate of $375 per hour to reflect an increase in her rates in September 2016. Attorney Bova has requested a rate of $215 for half of his representation, and then at a rate of $225 to reflect a similar increase in his rates.

O'Neal and Bova have supported their billing rates by providing an affidavit stating that they are

experienced attorneys and that their rates are "fair and reasonable." O'Neal further stated that she typically bills clients $415 per hour, but billed Kinlin Grover Realty Group—Azarian's employer and a long-time client of O'Neal's—$350 at the commencement of the matter and $375 as of September 2016. That may all be true, but the Court's determination of the reasonableness of the requested rate must be "based on evidence other than the attorneys' affidavits." *Deary v. City of Gloucester*, 9 F.3d 191, 198 (1st Cir. 1993). The attorneys have failed to provide any additional information to support their requested rates, and Azarian, as the moving party, has therefore not met his burden of establishing that the requested rates are in fact reasonable under the circumstances.

Furthermore, in determining a reasonable hourly rate, a court must consider "the type of work performed, who performed it, the expertise that it required, and when it was undertaken." *Grendel's Den*, 749 F.2d at 951. As to who performed the work, the affidavit submitted by attorney O'Neal states that she is a partner with approximately 20 years of experience—primarily in employment law and business litigation—and that attorney Bova is an associate with approximately three years of experience (as of the commencement of this case). As to the type of work performed and the expertise required, those factors suggests that the requested rates should be reduced. While the complaint was lengthy and rather difficult to parse, the legal issues involved were straightforward and required no special expertise to address. Accordingly, the Court

will reduce O'Neal's rate to from $350 and $375 to $300 for all work performed, and will reduce Bova's rate from $215 and $225 to $175 for all work performed. That results in a base award of $12,925.

c. Adjustment

The base lodestar amount may be adjusted upward or downward based on a number of factors including claim-by-claim success and the results obtained. *Coutin*, 124 F.3d at 338. Here, defendant succeeded in having every claim against him dismissed. Any further reduction in the award is therefore unnecessary. Furthermore, under the circumstances, the Court declines to upwardly adjust the lodestar amount—which "represents a presumptively reasonable fee," *Lipsett v. Blanco*, 975 F.2d 934, 937 (1st Cir. 1992).

4. Conclusion

In summary, the Court finds that a reasonable award of attorneys' fees under the circumstances is as follows: attorney O'Neal will be compensated for 25 hours of work at a rate of $300 per hour and attorney Bova will be compensated for 31 hours of work at a rate of $175 per hour, for a total of $12,925.

B. Sanctions

Rule 11 of the Federal Rules of Civil Procedure authorizes courts to impose sanctions against attorneys or unrepresented parties for filing pleadings, written

motions, or other papers that: (1) are "presented for any improper purpose, such as to harass," (2) contain claims not "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law," or (3) contain factual contentions (or denials) without evidentiary support. Fed. R. Civ. P. 11(b), (c). "The imposition or a Rule 11 sanction usually serves two main purposes: deterrence and compensation. . . . Encompassed within these objectives are several related subsidiary goals, e.g., punishing litigation abuse and facilitating case management." *Navarro-Ayala v. Nunez*, 968 F.2d 1421, 1426 (1st Cir. 1992) (internal citations omitted). The Advisory Committee notes regarding the 1993 amendments to Rule 11 set forth the following non-exhaustive list of factors to be considered in determining whether sanctions are warranted:

> "[w]hether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; [and] what amount is needed to deter similar activity by other litigants. . . ."

Fed. R. Civ. P. 11 Advisory Committee's Note (1993).

While *pro se* litigants are generally to be treated with more leniency than those represented by counsel, the "right of self-representation is not a license not to comply with relevant rules of procedural and substantive law." *Eagle Eye Fishing Corp. v. United States Dept. of Commerce*, 20 F.3d 503, 506 (1st Cir. 1994) (internal quotation marks omitted). Rule 11 sanctions may be imposed against *pro se* litigants, particularly where they repeatedly assert baseless claims or file claims solely for the purpose of harassing others. *See Jones v. Social Sec. Admin.*, 2004 WL 2915290, at *4 (D. Mass. Dec. 14, 2004).

1. Whether Sanctions are Appropriate

As stated above, Rule 11 sanctions serve two main purposes: deterrence and compensation. *See Navarro-Ayala v. Nunez*, 968 F.2d at 1426. Here, those purposes are sufficiently served by the award of attorneys' fees. Under the *Christiansburg* standard, fee awards assessed against plaintiffs serve to deter the filing of frivolous and groundless claims. Furthermore, the fee award is adequate compensation for having to defend against the frivolous claims. Accordingly, the Court declines to impose any additional sanction under Rule 11.

IV. Conclusion

For the reasons stated above, the motion of defendant Douglas Azarian for attorneys' fees is GRANTED in the amount of $12,925, and is otherwise DENIED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: July 10, 2017

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANITA M. BARROW,	)	
	)	
Plaintiff,	)	**Civil Action No. 16-11493-FDS**
v.	)	
HERBERT A. BARROW, JR., et al,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER ON DEFENDANT AYERS'S MOTION FOR SANCTIONS

This action arises out of the partition by sale of a property in Falmouth, Massachusetts, formerly owned by Emma Barrow, the mother of plaintiff Anita Barrow. Plaintiff, proceeding *pro se*, filed this action contending that her siblings and various other individuals involved in the property's alleged decline in value and its ultimate sale—including Kendall Ayers, an employee of Barnstable County who, according to the complaint, filed a betterment lien against the property—discriminated against her on the basis of race in violation of state and federal law, including the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.*, and the Civil Rights Act, 42 U.S.C. §§ 1981, 1982, and 1983.[1]

[1] In the complaint, defendant's name is spelled "Ayres," however it appears that the proper spelling is "Ayers."

On September 8, 2016, Ayers moved to dismiss the claims against him for failure to state a claim upon which relief can be granted, which the Court granted. Ayers then moved for an order of sanctions against plaintiff, pursuant to Fed. R. Civ. P. 11, in the amount of his reasonable attorneys' fees and costs.

Rule 11 of the Federal Rules of Civil Procedure authorizes courts to impose sanctions against attorneys or unrepresented parties for filing pleadings, written motions, or other papers that: (1) are "presented for any improper purpose, such as to harass," (2) contain claims not "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law," or (3) contain factual contentions (or denials) without evidentiary support. Fed. R. Civ. P. 11(b), (c). Where the sanctions sought are attorneys' fees and costs, courts generally require that the party seeking sanctions support the requested amount with affidavits and other relevant materials detailing the fees and costs incurred in the representation. *See Cardillo v. Cardillo*, 360 F. Supp. 2d 402, 406 (D. Mass. 2005); *Hochen v. Bobst Group, Inc.*, 198 F.R.D. 11, 18 (D. Mass. 2000).

Here, Ayers has not submitted any documentation detailing either the total amount of fees and costs incurred, the hours worked and rates charged by his attorneys, or the reasonability of the hours worked and rates charged. Accordingly, Ayers's motion for attorneys' fees and costs will be DENIED. The denial is without prejudice to its renewal with appropriate supporting materials.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
Dated: July 10, 2017 United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANITA M. BARROW,	)	
Plaintiff,	)	**Civil Action No.**
v.	)	**16-11493-FDS**
HERBERT A. BARROW, JR., et al,	)	
Defendants.	)	

MEMORANDUM AND ORDER ON DEFENDANT BARNSTABLE COUNTY DEPARTMENT OF HEALTH AND ENVIRONMENT'S MOTION FOR SANCTIONS

This action arises out of the partition by sale of a property in Falmouth, Massachusetts, formerly owned by Emma Barrow, the mother of plaintiff Anita Barrow. Plaintiff, proceeding *pro se*, filed this action contending that her siblings and various other persons involved in the property's alleged decline in value and its ultimate sale—including the Barnstable County Department of Health and Environment ("BCDHE"), which, according to the complaint, filed a betterment lien against the property—discriminated against her on the basis of race in violation of state and federal law, including the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.*, and the Civil Rights Act, 42 U.S.C. §§ 1981, 1982, and 1983.

On September 8, 2016, the BCDHE moved to dismiss the claims against it for failure to state a claim upon which relief can be granted, which the Court granted. The BCDHE then moved for an order of sanctions against plaintiff, pursuant to Fed. R. Civ. P. 11, in the amount of its reasonable attorneys' fees and costs.

Rule 11 of the Federal Rules of Civil Procedure authorizes courts to impose sanctions against attorneys or unrepresented parties for filing pleadings, written motions, or other papers that: (1) are "presented for any improper purpose, such as to harass," (2) contain claims not "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law," or (3) contain factual contentions (or denials) without evidentiary support. Fed. R. Civ. P. 11(b), (c). Where the sanctions sought are attorneys' fees and costs, courts generally require that the party seeking sanctions support the requested amount with affidavits and other relevant materials detailing the fees and costs incurred in the representation. *See Cardillo v. Cardillo*, 360 F. Supp. 2d 402, 406 (D. Mass. 2005); *Hochen v. Bobst Group, Inc.*, 198 F.R.D. 11, 18 (D. Mass. 2000).

Here, the BCDHE has not submitted any documentation detailing either the total amount of fees and costs incurred, the hours worked and rates charged by its attorneys, or the reasonability of the hours worked and rates charged. Accordingly, the BCDHE's motion for attorneys' fees and costs will be DENIED. The denial is without prejudice to its renewal with appropriate supporting materials.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANITA M. BARROW,	)	
Plaintiff,	)	**Civil Action No. 16-11493-FDS**
v.	)	
HERBERT A. BARROW, JR., et al,	)	
Defendants.	)	

MEMORANDUM AND ORDER ON DEFENDANT MACKOUL'S RENEWED MOTION FOR ATTORNEYS' FEES

This action arises out of the partition by sale of a property in Falmouth, Massachusetts, formerly owned by Emma Barrow, the mother of plaintiff Anita Barrow. Plaintiff, proceeding *pro se*, filed this action contending that her siblings and various other individuals involved in the sale of the property—including George MacKoul, an attorney who represented plaintiff's siblings and the executrix of Emma Barrow's estate—discriminated against her on the basis of race in violation of state and federal law, including the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq.*, and the Civil Rights Act, 42 U.S.C. §§ 1981, 1982, and 1983.

On September 9, 2016, MacKoul moved to dismiss the claims against him for failure to state a claim upon which relief can be granted, which the Court granted.

MacKoul has moved for attorneys' fees pursuant to the Fair Housing Act, 42 U.S.C. § 3613(c)(2) and the Civil Rights Act, 42 U.S.C. § 1988(b), both of which authorize attorneys' fees for prevailing parties. Plaintiff has not opposed the motion.

On a motion for attorneys' fees, the prevailing party has the burden of substantiating the requested fees with detailed billing records and hourly rates. *See Spooner v. EEN, Inc.*, 664 F.3d 62, 68 (1st Cir. 2011); *Martinez v. Hodgson*, 265 F. Supp. 2d 135, 142 (D. Mass. 2003). MacKoul has submitted an affidavit from Marissa Delinks, his counsel, indicating her background and experience and her hourly rates, and including detailed billing records. The time spent is not obviously unreasonable. The claims in this matter were clearly without any basis in fact or law, and were dismissed by the Court for failure to state a claim. Moreover, the underlying dispute involved a matter of at least moderate complexity, and the claims asserted here required some degree of legal and factual analysis even to prepare a motion to dismiss. Finally, as noted, plaintiff has not opposed the motion. The fees in question appear to be reasonable under the circumstances.

Accordingly, the motion of defendant George MacKoul for attorneys' fees is GRANTED. Defendant MacKoul is hereby awarded his reasonable attorneys' fees as the prevailing party under 42 U.S.C. § 3613(c)(2) and 42 U.S.C. § 1988(b) in the amount of $20,052.

So Ordered.

/s/ F. Dennis Saylor IV
F. Dennis Saylor IV
United States District Judge

Dated:
November 28, 2017

United States Court of Appeals
For the First Circuit

No. 17-1819

ANITA M. BARROW,

Plaintiff, Appellant,

v.

B. GRANT WILLIS, individually and professional capacity; MARGARET GIFFORD, individually and in her professional capacity as a Broker at Sothby International Realty, Inc.; SOTHEBY INTERNATIONAL REALTY, INC., HERBERT A. BARROW, JR.; WILLINDA POWELL GRAY; MICHELLE MALDONADO, ESQ., individually and in her capacity as Executrix; GEORGE J. MACKOUL, ESQ., individually and professional capacity; BRIAN MOONEY, individually and in his professional capacity at Mooney Planning Collaborative, LLC and SDSB Investment Group, LLC; MOONEY PLANNING COLLABORATIVE, LLC; MICHAEL C. HARLOW, individually and in his professional capacity at SDSB Investment Group, LLC; SDSB INVESTMENT GROUP, LLC; MUTUAL BANK; BRUCE DUPHILLY, individually and in his professional capacity at Mutual Bank; JOHN AND JANE DOE; JENNIFER S.D. ROBERTS, and/or her agents and/or assigns individually and/or professional capacity as an attorney and Court appointed Commissioner; DOUGLAS AZARIAN, individually and professional capacity as a Broker at Kinlin Grover Real Estate; FALMOUTH REALTY INVESTMENTS, LLC; DAVID H. BENTON, individually and in his professional capacity at Falmouth

Realty Investments, LLC; BARNSTABLE COUNTY DEPARTMENT OF HEALTH AND ENVIRONMENT; KENDALL AYRES, individually and or his agents and/or assigns in their professional capacity; KINLIN GROVER REAL ESTATE,

Defendants, Appellees.

Before

Howard, Chief Judge,
Kayatta and Barron, Circuit Judges.

ORDER OF COURT

Entered: December 7, 2018

Appellant Anita Barrow's "Motion for Impoundment o[f] Medical Records To Be Submitted in Support of Her Forthcoming Motion for Reconsideration of the 10/15/2018 Panel Order To Dismiss With Prejudice For Failure to Timely File the Brief" and "Motion to Impound Medical Information and Keep It Private According to Provisions of the ADA[,]" construed as motions to seal pursuant to 1st Cir. R. 11.0(c), are granted.

Appellant's "Motion for Reconsideration of the 10/15/2018 Panel Order to Dismiss With Prejudice for Failure to Timely File the Brief" and amended motion, construed together as a petition for panel rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure, are denied because they fail to state any points of law or fact that appellant believes the court

overlooked or misapprehended when it entered judgment dismissing the appeal. See Fed. R. App. P. 40(a)(2).

Appellant's "Cross-Motion to Require Kinlin Grover to Provide Certification to the Court of the Nature of Its Business Relationship to Douglas Azarian" is denied.

Appellant's "Motion to Permit Appellant to Complete the Table of Contents and Authority to Perfect the Completed Brief Within (7) Days" is denied as moot.

By the Court:

Maria R. Hamilton, Clerk

cc:
Anita M. Barrow
Katherine Land Kenney
Barton E. Centauro
Jennifer C. Sheehan
Ryan D. McCarthy
George J. MacKoul
Marissa I. Delinks
William T. Bogaert
Jason W. Canne
Mary E. O'Neal
Anthony V. Bova II
Seth Gabriel Roman
Diane M. Mulligan
Thomas Edward Pontes

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT
DEPARTMENT

Barnstable Division **Docket No. BA14E0060PP**

Herbert A. Barrow, Jr.
Willinda Powell Gray,
Petitioners

v.

Anita M. Barrow,
Respondent

DECREE (Amended)

(On Petitioners' Petition to Partition filed November 6, 2014
On Respondent's Counterclaim filed January 6, 2015)

These matters came before the court for a one day trial on September 12, 2016. The Petitioners, Herbert A. Barrow, Jr. and Willinda Powell Gray (hereinafter "Petitioners"), appeared and were represented by Attorney George J. MacKoul. The Respondent, Anita M. Barrow (hereinafter "Respondent"), failed to appear for trial.

After trial, and upon consideration of the evidence and all reasonable inferences drawn therefrom, the Court hereby enters the following Decree.

1. The Report of Commissioner, Jennifer Roberts, Esquire, of December 10, 2015 is approved and accepted.

2. The net proceeds from the sale of the subject property in the amount of $263,166.21 were deposited with the Court on December 10, 2015.

3. The Commissioner's fees and expenses of $32,979.44 are fair and reasonable. The Commissioner has received $23,340.57 from the net proceeds of the sale to date. She shall be paid $9,638.87 thirty (30) days from the date of entry of this Decree.

4. The remaining proceeds of the sale shall be distributed as follows:

a. Anita Barrow:	$85,395.78
b. Herbert Barrow:	$93,895.78
c. Willinda Powell Gray	$74,235.78

5. Any interest accruing on the deposit of $263,166.21 shall be distributed equally to the parties, in addition to the above disbursements.

6. The partition of the subject property located at 260 Sippewisset Road, Falmouth, Massachusetts is confirmed and effectual forever.

7. The Memorandum of Decision and Order of December 29, 2016 is incorporated into this Amended Decree. Accordingly, Anita Barrow's share of the proceeds shall be reduced by the amount of $29,505.96 which shall be paid in equal shares to Herbert Barrow and Willinda Powell Gray pursuant to their Motion to Alter and Amend filed November 7, 2016.

December 29, 2016
Nunc Pro Tunc to
October 28, 2016

/s/ Arthur C. Ryley
Arthur C. Ryley, Associate Justice
Barnstable Probate and
Family Court

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT
DEPARTMENT

Barnstable Division Docket No. BA14E0060PP

Herbert A. Barrow, Jr.
Willinda Powell Gray,
Petitioners

v.

Anita M. Barrow,
Respondent

MEMORANDUM OF DECISION & ORDER
(On Petitioners' Motion to Alter and Amend the Judgment filed November 7, 2016)

On September 12, 2016, the Petitioners, Herbert A. Barrow, Jr. and Willinda Powell Gray (hereinafter "Petitioners"), appeared before the Court (Ryley, J.) for trial on the Petition to Partition dated November 6, 2014 and were represented by Attorney George J. MacKoul. The Respondent, Anita M. Barrow (hereinafter "Respondent"), failed to appear. Subsequent to the Court's entry of Judgment on October 28, 2016, Petitioners filed a Motion to Alter and Amend the Judgment on November 7, 2016. The Court hereby enters the following Order and Rationale;

* * *

Respondent's actions reiterate the pattern of difficult behavior Respondent has participated in since the commencement of these proceedings.

In addition to Respondent's pattern of filing frivolous pleadings which fail to include a legitimate cause of action, Respondent has a history of not appearing before the Court when ordered to do so. Respondent failed to appear at a Motion Hearing on October 15, 2015, a Motion Hearing on November 30, 2015, and a Status Hearing on March 4, 2016. Further, on July 7, 2016, Petitioner, Mr. Barrow traveled from the state of Washington and rearranged his travel and work schedule as a geologist in order to appear for trial. Petitioners also incurred travel expenses and two nights in hotel expenses for their witness to travel from Northbridge, Massachusetts to appear at trial. On the scheduled date of trial, Respondent again failed to appear. Instead, Respondent submitted a letter prepared by her physician to the Court by email on the eve of trial alleging that she was unable to travel to Cape Cod. Respondent also filed a lawsuit in federal district court naming twenty two defendants, essentially including any individual who had even the slightest involvement with the sale of the property. Since the commencement of these proceedings, Petitioners have repeatedly incurred unnecessary expenses as a result of Respondent's frustrating actions.

Settlement Offers

Petitioners made four valid and fair settlement offers to Respondent as provided for by the Court's Pre-Trial Order dated March 31, 2016. Three of four offers presented by Attorney MacKoul were ignored and one offer was rejected by Respondent with an

unreasonable counteroffer. On April 22, 2016, Petitioners made their first settlement offer of $2,500.00 and an equal division of the proceeds from the sale of the property, along with a waiver of any rights of either party to attorney's fees and costs. Petitioners received no response to this offer. On May 9, 2016, Petitioners made a second offer and increased the payment offer to $5,000.00. Again, Petitioners received no response. On May 16, 2016, Petitioners made a third offer of $7,500.00 in conjunction with the equal division of proceeds and the waiver of attorney's fees and costs. Respondent responded to this offer with an unreasonable counteroffer, demanding $208,333.00, or "one-third of the attested value of the property in 2010." On June 2, 2016, Petitioners made a fourth offer of $10,000.00 and an equal division of the proceeds of the sale with a waiver of rights to attorney's fees. Petitioners received no response to the fourth and final offer.

Attorney's Fees and Costs

To date, Petitioners have incurred $88,050.26 in attorney's fees and costs for their representation in this matter. Petitioner, Herbert Barrow also incurred $2,160.89 in out-of-pocket costs as a result of traveling to Massachusetts from the State of Washington for the postponed trial of July 7, 2016. Further, Petitioners incurred $5,900.00 in fees as a result of the expert witness, Neal Mitchell's services, which included inspecting, writing a report and preparing to testify at the July 7, 2016 trial date, which was postponed due to Respondent's failure to appear. In total, Petitioners have

incurred expenses in the amount of $96,111.15 as a result of these proceedings.

As detailed above, Respondent agreed with the Court's decision to sell the property for $385,000.00, bringing ready, willing and able buyers before the Court to effectuate said sale. Yet, when Commissioner sold the property as ordered by the Court, Responded proceeded by filing several unreasonable motions including a Motion to Order the new owner of the property to maintain the home in its current condition until the conclusion of this litigation. Respondent has objected to almost every Order of the Court in this case. She has filed her own Motions, marked them for hearing, then failed to appear on them. She repeatedly requested continuances of the case and demanded that the trial be "stayed" so that she could have the matter transferred to the Federal District Court in Boston. She filed a 68 page civil rights law suit in federal district court naming Petitioners, their attorney, Commissioner and 20 more individuals as defendants. That case has been dismissed.

The Court finds that the Respondent has acted in bad faith throughout these proceedings with the intent to deprive Petitioners of their fair share of the proceeds of the sale of the property while they incurred significant attorney's fees and Respondent represented herself *pro se.* Respondent agreed from the beginning of this ease to sell the subject property for $385,000.00 yet she did everything within her power to interfere with the sale, and drive up the cost of litigation for her brother and sister, out of spite.

In consideration of the evidence and all reasonable inferences draw therefrom, it is hereby ordered and adjudged as follows:

1. Petitioners' Motion to Alter and Amend the Judgment is hereby **ALLOWED** and Respondent is assessed attorney's fees and costs in the amount of $29,505.96, which shall be deducted from Respondent's share of the sale proceeds. In arriving at this figure, the Court has carefully reviewed the time and billing statements of Petitioner's counsel, Attorney George MacKoul, which the Court finds to be fair and reasonable. The sum of $29,505.96 represents all expenses incurred by the Petitioners from and after the date of April 21, 2016 which is the date they sent Respondent their first Offer of Settlement. The Offer was fair and reasonable and exceeded the amount Respondent obtained under the Court's Judgment. The Court has considered Ordering the Respondent to pay for all fees and costs incurred by the Petitioner's in this matter, but declines to do so.

December 29, 2016

/s/ Arthur C. Ryley
Arthur Ryley, Associate Justice
Barnstable Probate and
Family Court

Pages: 1–116
Exhibits: 26

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. BARNSTABLE PROBATE AND FAMILY COURT

* * * * * * * * * * *

WILLINDA POWELL-GRAY AND HERBERT BARROW

v.

ANITA BARROW

Docket No. BA14E0060PP

* * * * * * * * * * *

PETITION FOR PARTITION HEARING
BEFORE THE HONORABLE ARTHUR C. RYLEY

APPEARANCES:
For the Petitioners:
George J. MacKoul and Associates, P.C.
540 Main Street, Suite 8
Hyannis, Massachusetts 02601
By: George J. MacKoul, Esq.

For the Respondent:
By: Anita Barrow, Pro Se

Barnstable, Massachusetts
September 12, 2016

Cambridge Transcriptions
Approved Court Transcriber

[2] INDEX

PAGE:

* * *

[12] THE COURT: I saw that. I have a copy of several –

MR. MACKOUL: Right. And that –

THE COURT: There are 22 defendants.

MR. MACKOUL: Right. And the response that she gave the extension on, when she filed it on the fourth of August, there was a 21-day response. I was on vacation on the twenty-sixth. I asked her for more time to respond.

Just to give you an idea of juggling so much here, she refused and gave everyone a deadline on the ninth, which was this Friday, which was the time that I had to get ready for this trial to file a motion to dismiss, which I had to file. There is – I would give you –

THE COURT: Give me the deadline for the motion to dismiss in the federal court was –

MR. MACKOUL: Was on the ninth, and if I – if the Court would be so indulged, I would like to give you our – my lawyer's response in this case, into the federal case, as well as my own response on behalf of my clients and two of the other defendants, which if you read through those, read through those things, you will clearly see that she was plainly and clearly misusing the Federal Court system, has been misusing it, and is going to probably have to account for that to a federal judge in about 30 days. On top of that, she's been filing multiple things with the Appellate Court, the motion to stay recently.

[13] So it's just – we're sort of a little bit confused and confounded on how it is that she's able to maintain litigation in three courts over the last 30 days, and on top of that, I believe Mr. Barrows has found that she's

now currently engaged in Federal Court in New Jersey? Is that correct?

MR. BARROW: District Three, Federal Court, on the foreclosure matter with Hudson Savings Bank

(indiscernible).

MR. MACKOUL: Which, ironically, she filed in 1993 against the bank on a counter-claim in Federal Court, which is pending there.

Also, if Your Honor would like, we have a very interesting thing. This was the last civil rights claim she filed in New Jersey. This is a Federal District Court judge in New Jersey who filed orders back in 2006 of litigation she started on a civil rights claim in 2002. In the decision here by District Judge Lifland, he reports the same pattern of behavior, of filing notes and medical issues and tying up the Federal Court with unnecessary things. I don't know if that would assist the –

THE COURT: Are you offering that as an exhibit?

MR. MACKOUL: I would like to offer that as an exhibit, yes.

THE COURT: Hearing no objection, I will take this as

* * *

[20] So you're saying there was an attempt to sell the property.

MR. MACKOUL: Yes, Your Honor.

THE COURT: There was a purchase and sales that was drafted, which was not executed because there was a problem with the ability of the seller to convey the property.

MR. MACKOUL: Correct.

THE COURT: Then there was an attempt to sell it –

MR. MACKOUL: Correct.

THE COURT: – between the siblings.

MR. MACKOUL: Correct.

THE COURT: And that failed.

MR. MACKOUL: Yes. And if Your Honor would like, that is very well-detailed in the two motions to dismiss to Judge Saylor up in Federal District Court, and narrated quite nicely in those two responses I sent to you.

THE COURT: Okay. All right.

MR. MACKOUL: Wherein she's alleged in Federal Court civil rights violations based on that, and it really just fleshes it out, as you just said.

THE COURT: All right, so what you just described to me is more fully described in one of the exhibits that's already been introduced.

MR. MACKOUL: Correct.

THE COURT: All right. So that brings us, I imagine,

* * *

[46] So – and I can't explain that, but –

Q Correct. I think she – I believe, if I remember, she did – if you'd understand – did you understand from your talk with the Appeals Court that she filed that as a final interlocutory order by the Court and wanted the full panel, or was that on another appeal that she filed?

A That was a different appeal.

Q That was –

A That was the spring.

Q Okay. And I noticed that your bill – is this the final accounting for your firm – let me just ask you this. You've been – unfortunately, you and I were both sued in Federal District Court over this matter, and I'm sure that your firm incurred legal fees over that. Are you asking the judge, or will be – will you be asking the judge for your legal fees and your defense as a defendant in the Federal Court matter?

A I would ask the Court to consider – since filing my report back in December, I have – my firm, mostly me – have spent another $10,688.87 in time.

THE COURT: Do you happen to have those bills?

THE WITNESS: I have a draft bill.

BY MR. MACKOUL:

Q And this is – let me ask you a couple questions. Do you have a deductible on your – is this (indiscernible)

* * *

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

Barnstable Division Docket No. BA14E0060PP

Herbert A. Barrow, Jr.
Willinda Powell Gray,
Petitioners

v.

Anita M. Barrow,
Respondent

PROCEDURAL HISTORY, FINDINGS OF FACT, RATIONALE, AND CONCLUSIONS OF LAW
(On Petitioners' Petition to Partition filed November 6, 2014
On Respondent's Counterclaim filed January 6, 2015)

* * *

Respondent has also filed a lawsuit in federal district court naming twenty two defendants, essentially including any individual who had even the slightest involvement with the sale of the property. Some, but not all, of the defendant's named in Respondent's federal lawsuit include the Petitioners and the Commissioner. Since the commencement of these proceedings, Petitioners have repeatedly incurred unnecessary expenses as a result of Respondent's frustrating actions.

D. Commissioner's Fees

The Commissioner deposited $263,166.21 with the Court on December 10, 2015 representing the net proceeds from the sale after deducting the Commissioner's

reasonable fees and costs of $23,340.57. From May 14, 2015 to December 9, 2015, Commissioner spent over sixty four hours dedicated to preparing this property for sale. Commissioner's duties included, but were not limited to, collaborating with an independent attorney to evict a tenant residing at the property and hiring a cleaning company, landscaping service, and "junk" removal company to assist in transforming the property to a marketable condition. Further, Commissioner solicited recommendations and interviewed three brokers to determine where to list the property for sale. After choosing a broker, Commissioner worked in conjunction with the broker to ensure the property was successfully marketed, which resulted in the ultimate sale of the home for $385,000.00. Commissioner also maintained communication with the parties and actively responded to Respondent's disruptive actions. The Commissioner has incurred additional fees and costs of $9,638.87 from December 9, 2015 to the date of trial. The Commissioner's fees and costs are fair and reasonable.

E. Jury Trial

The Probate and Family Court has exclusive jurisdiction to hear this matter and therefore neither party is entitled to a jury trial. Pursuant to the Petition to Partition statute, a judge of the Probate and Family Court is given the authority to determine whether any waste may have occurred. Despite her claims, Respondent is not entitled to a jury trial on the issue of waste.

F. Division of Proceeds

The parties are each entitled to one third of the net proceeds of the sale of the property, subject to the following adjustments:

a. The Commissioner shall be paid an additional $9,638.87 from the proceeds for her fees and costs from December 9, 2015 to September 12, 2016.

b. Respondent, Anita Barrow, shall be reimbursed $3,720.00 representing her payment of the mortgage on the subject property for a period of six months. This amount shall be deducted from Ms. Powell Gray's share of the proceeds.

c. Petitioner, Herbert Barrow, shall be reimbursed $3,720.00 representing his payment of the mortgage on the subject property for a period of six months. This amount shall be deducted from Ms. Powell Gray's share of the proceeds.

d. Petitioner, Herbert Barrow, shall be reimbursed $500.00 for money he paid to remove the tenants from the subject property, and an additional $8,000.00 for costs he incurred to prepare the subject property for sale. This amount shall be deducted from the proceeds prior to division.

e. After making the above adjustments, the parties shall be entitled to the following amounts:

a. Anita Barrow:	$85,395.78
b. Herbert Barrow:	$93,895.78
c. Willinda Powell Gray:	$74,235.78

f. Any interest accruing on the deposit of $263,166.21 shall be distributed equally to the parties, in addition to the above disbursements.

IV. CONCLUSIONS OF LAW

1. "Any petition for partition may be filed in the probate court for any county where any part of the land included in the petition lies, or in the land court for any land within the commonwealth." G. L. c. 241, § 2.

2. "The court in which a petition has been brought under this chapter shall have jurisdiction in equity over all matters relating to the partition, and, in case of sale, over the distribution of the proceeds thereof; also to hear and determine all matters of accounting between the parties to the petition in reference to the common land, and to appoint 1 or more receivers to take possession of the common land or any part thereof, and collect rents and profits therefrom. The jurisdiction may be exercised upon petition according to the usual course of proceedings in that court. Such receiver shall give bond in such amount and with such sureties as the court shall order, and shall distribute the rents among the co-tenants, or otherwise hold or dispose of the same in such manner as the court shall determine by its decree." G. L. c. 241, § 25.

3. "In partition proceedings the court may order the commissioners to sell and convey the whole or any part of the land which cannot be divided advantageously, upon such terms and conditions and with such securities for the proceeds of the sale as the

court may order, and to distribute the proceeds so as to make the partition just and equal." G. L. c. 241, § 31.

4. "Reasonable expenses and charges of partition proceedings, including . . . the fees of counsel [and] of the commissioners, . . . shall be determined by the court, and in case of sale paid by the commissioners out of the proceeds . . . " G. L. c. 241, § 22.

5. A life tenant owes no fiduciary duty to a remainderman. See Alford v. Thibault, 83 Mass. App. Ct. 822, 824-827 (2013).

* * *

Mr. Neal Mitchell's Report

46. To determine the condition of the home in 2008 when Ms. Powell Gray assumed her life estate, Mr. Neal Mitchell, a structural engineer, inspected the subject property and reviewed earlier reports prepared by professionals who had previously inspected the property.

47. After his investigation and review of the record, Mr. Mitchell prepared his own report. Mr. Mitchell's report addresses three reports prepared by other professionals in previous years. Namely, a report prepared by Jim Orphanos of Certified Inspection Associates, Inc. dated September 10, 2007, a Federal Building Inspection dated June 8, 2014 and a report prepared by Ken Amelin of Mid Cape – Home Inspection Services dated August 14, 2014.

48. Mr. Orphanos' Report indicates the property was in a deteriorating condition when Ms. Powell Gray assumed her life estate. Mr. Orphanos' Report further indicates no changes in the property occurred due to Ms. Powell Gray's occupation of the property.

49. At the time Mr. Orphanos conducted the initial report in 2007, the problems with the property that Respondent complains of were already in existence. The report addresses several capital improvement issues, specifically, that the roof was aged and fully depreciated and that the electric service cables were frayed and deteriorated. Further, Mr. Orphanos' Report indicates the home had signs of wood destroying inspects and rodent infestation, signs of previous water penetration in the basement, missing and fallen shingles, and insufficient insulation in the attic.

50. Mr. Orphanos' 2007 Report indicates a clear need for a plumber, electrician, carpenter and landscaper to make necessary repairs and suggest upgrades to the property.

51. The Federal Building Report dated June 8, 2014 also indicates most of the problems associated with the property existed when Ms. Powell Gray moved into the property.

52. Ken Amelin's Report in 2014 essentially repeats the same general issues referenced in Mr. Orphanos' Report of 2007.

53. According to the conclusions provided in Mr. Mitchell's recent Report, which the Court finds to be credible, the property was already in a state of

disrepair on the day Ms. Powell Gray stepped into the home. Mr. Mitchell's Report indicates that when Ms. Powell Gray assumed her life estate, she was living in a home that was already in a "wasted" condition. Respondent essentially expected for Ms. Powell Gray to use her own personal money to maintain, repair and upgrade a "wasted" home in order to increase its value, and therefore the value of Respondent's one-third interest.

* * *

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1306

HERBERT A. BARROW, JR., & another[1]

vs.

ANITA M. BARROW.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

* * *

1. Jurisdiction. Anita argues that the Probate and Family Court lacked jurisdiction of her counterclaims seeking damages for the torts of waste, fraud, and breach of fiduciary duty. That proposition may be correct as regards damages, but a court hearing a petition for partition has jurisdiction in equity over all

[1] Willinda Powell Gray.

matters relating to the petition. See G. L. c. 241, § 25. Accordingly, the judge could properly resolve the issues of waste and breach of fiduciary duty insofar as they related to the petition (and in particular to the equitable distribution of the proceeds of the property sale), but he could not resolve Anita's fraud counterclaims.

The judge explained these limitations to Anita at a hearing on April 15, 2015. He further informed her of her option, if she wished to resolve all of her counterclaims together and to obtain a jury trial on them, to seek dismissal of the petition and seek to have the entire case heard in Superior Court.[3] Anita declined this invitation, stating that it would be "fine" for

* * *

stating that Anita was suffering from fatigue, "[s]he is concerned about traveling . . . under these circumstances," and "we are requesting that [the judge] consider rescheduling her appointment." This failed to comply with the judge's order that, if Anita requested a continuance based on a medical emergency, "the nature of the emergency must be clearly identified by the treating physician and the reasons [she] is unable to attend [c]ourt hearings must be fully and completely explained."

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[3] Anita's answer, filed in January, 2015, agreed that a partition and sale of the property was appropriate. In this connection, we note the claim in her brief that as of February, 2015, her siblings could not pursue partition because a mortgagee bank assertedly had the right to seize the property. Anita waived this argument by failing to raise it below; we therefore do not address it further.

7. Appellate attorney's fees and costs. Herbert and Willinda assert that Anita's appeal is frivolous and ask that she be ordered to pay their appellate attorney's fees and costs. See Mass. R. A. P. 25, as appearing in 376 Mass. 949 (1979). We agree that the appeal is frivolous.[14] Herbert and Willinda are

* * *

Amended decree affirmed.

Order entered September 11, 2017, denying motion to docket exhibits, attachments, correspondence, and letters affirmed.

Order entered September 11, 2017, denying cross motion for costs, fees, and sanctions affirmed.

By the Court (Agnes, Sacks & Ditkoff, JJ.[15]),
/s/ Joseph F. Stanton

Clerk

Entered: January 29, 2019.

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[14] * * * [Anita] did everything within her power to interfere with the sale, and drive up the cost of litigation for her brother and sister, out of spite." On appeal, Anita does not challenge any of these findings or the amounts awarded.

[15] The panelists are listed in order of seniority.