

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

|                                        |   |                             |
|----------------------------------------|---|-----------------------------|
| BROOKSEGE HOMEOWNERS ASSOCIATION, INC. | : | JUDGES:                     |
|                                        | : | Hon. W. Scott Gwin, P.J.    |
|                                        | : | Hon. John W. Wise, J.       |
|                                        | : | Hon. Patricia A. Delaney J. |
| Plaintiff-Appellee                     | : |                             |
| -VS-                                   | : |                             |
|                                        | : | Case No. 22 CA 00053        |
| SYLVIA STAFFORD, et al.                | : |                             |
|                                        | : |                             |
| Defendants-Appellants                  | : | <u>O P I N I O N</u>        |
|                                        | : |                             |

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| CHARACTER OF PROCEEDING: | Appeal from the Licking County Common Pleas Court, Case No. 2020 CV 457 |
|--------------------------|-------------------------------------------------------------------------|

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| JUDGMENT: | Affirmed |
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| DATE OF JUDGMENT ENTRY: | July 31, 2023 |
|-------------------------|---------------|

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Defendant-Appellant Sylvia Stafford appeals the October 19, 2021, decision of the Licking County Common Pleas Court granting summary judgment in favor of Appellee Brooksedge Homeowners Association.

STATEMENT OF THE CASE AND FACTS

{¶2} The relevant facts and procedural history, as set forth in the record, are as follows:

{¶3} Plaintiff-Appellee Brooksedge Homeowners' Association, Inc. is a nonprofit corporation that operates 360 homes at the Brooksedge Homeowners' Association, located in Pataskala, Ohio. Brooksedge is governed by a Declaration of Covenants, Easements, Restrictions, Assessment Liens and Brooksedge Association. The Declaration at Article I, Section F provides, in pertinent part: "[n]o trade or commercial activity shall be conducted upon any Lot, nor shall anything be done thereon which may become an annoyance or nuisance to any other owners of any of said Lots in the subdivision."

{¶4} Article II, Section B provides for violations of the Declaration and authorizes enforcement by proceedings at law or in equity. Further, it provides that "[n]o failure to object to any violations of any restrictions or to enforce any restriction shall be deemed a waiver of the right to do so thereafter, either as to the same violations or as one occurring prior or subsequent thereto."

{¶5} On June 18, 2019, Samuel L. Stafford, now deceased, purchased the property located at 708 Woodington Drive, Pataskala, Ohio. The property is situated within Brooksedge and is subject to the Declaration. Mr. Stafford, his daughter,

Defendant-Appellant Sylvia Stafford, Ms. Stafford's younger brother, and Ms. Stafford's son moved into the property.

{¶6} On June 25, 2019, Ms. Stafford began operating a daycare service, Sylvia's Home Away from Home, out of the property. Ms. Stafford admits running the business from her home for up to six children between the hours of 8:00 AM and 5:30 PM.

{¶7} On June 25, 2019, Brooksedge sent the Staffords a warning letter giving them notice of the Declaration's rules governing home businesses. The letter indicated that the Staffords were violating the rule by running a daycare business.

{¶8} Ms. Stafford admits she received the letter, however, she continued to run the business up to at least the date of her deposition on February 25, 2021.

{¶9} Brooksedge sent two additional warning letters.

{¶10} On April 9, 2020, following Ms. Stafford's refusal to abate the violations, Brooksedge filed its Complaint for injunctive relief pursuant to R.C. § 5312.13 and the Declaration at Article II, Section B. Brooksedge also asserted a claim for attorney's fees under R.C. § 5312.11(A)(3).

{¶11} On May 11, 2020, Defendant filed an Answer and counterclaim. Ms. Stafford asserted a claim for selective enforcement and a claim for violation of the Ohio Fair Housing Laws found in R.C. §§ 4112.02(H)(1), (H)(12), (H)(18)(a), and (H)(19) for failure to accommodate a disability. Ms. Stafford alleged that there are other home businesses within Brooksedge.

{¶12} In her deposition testimony, Ms. Stafford explained that she learned of these alleged businesses after doing a little bit of research on Nextdoor and Facebook. This was her only research. She admitted she did not conduct follow up on the list of

businesses she asserts Brooksedge failed to take enforcement actions against. She further admitted she did not know if Brooksedge had attempted enforcement. She also testified that she is unaware if those businesses are still operating or when they operated.

**{¶13}** In response to this claim, Brooksedge supplied evidence of enforcement action being taken against other home businesses, including daycares, within Brooksedge.

**{¶14}** As for Ms. Stafford's claim for violation of the Ohio Fair Housing Laws, Ms. Stafford alleges that Brooksedge has failed to provide a reasonable accommodation for a disability. Ms. Stafford fails to allege what disability requires the reasonable accommodation. Ms. Stafford testified that she suffers from various medical ailments and her son is autistic. Ms. Stafford admitted in her deposition that she was unsure whether she was asserting the claim on behalf of herself or her son. She testified that her son does not tend to like being in big crowds or different places. However, she also admitted that healthcare providers have not told her to not work outside of the home.

**{¶15}** Further, Ms. Stafford provided a letter from her doctor stating that "[s]he has traditionally worked out of her home as a childcare provider to allow for oversight of her son while working." A letter from Ms. Stafford's son's physician states that her son has conditions making it, "unsafe for him to be unsupervised." Ms. Stafford's son is not a party in this case.

**{¶16}** On March 16, 2021, Plaintiff-Appellee filed a Motion for Summary Judgment on all claims.

**{¶17}** On April 15, 2021, Defendant-Appellant filed a memorandum in opposition to Plaintiff's motion for summary judgment.

{¶18} On April 22, 2021, Plaintiff-Appellee subsequently filed a response to Defendant's memorandum in opposition.

{¶19} Notwithstanding Plaintiff's Motion for Summary Judgment, by agreement of the Parties, the discovery deadline was extended to July 30, 2021.

{¶20} On September 24, 2021, the trial court held a telephone status conference with the Parties during which, by mutual agreement, the discovery deadline was extended to December 17, 2021.

{¶21} On October 19, 2021, the trial court entered summary judgment in favor of Plaintiff-Appellee on the Complaint finding Appellant's daycare business, run from her home, was prohibited by the Declaration. As such, Appellee was entitled to injunctive relief and attorney fees. Judge Branstool further decided that Appellee was entitled to summary judgment on Appellant's selective enforcement claim because there was no valid evidence that Appellee failed to uniformly and consistently enforce the prohibition on home businesses. In addition, Judge Branstool found Appellee was entitled to summary judgment on Appellant's fair housing discrimination claim because Appellant failed to put forth evidence demonstrating that the accommodation she requested was both necessary and reasonable.

{¶22} On November 10, 2021, Defendant-Appellant filed a Notice of Appeal and a simultaneous Motion for Stay.

{¶23} On February 15, 2022, this Court *sua sponte* dismissed the Appeal (Case No. 2021 CA 00086) for lack of a final appealable order. After a decision was issued by the trial court on July 8, 2022, following an evidentiary hearing on the fees request, Defendant-Appellant refiled her appeal on August 3, 2022 (Case No. 2022 CA 00053).

{¶24} On November 2, 2022 this Court *sua sponte* dismissed Case No. 2022 CA 00053 for want of prosecution.

{¶25} On November 7, 2022, Defendant-Appellant filed a Motion for Reconsideration.

{¶26} On December 13, 2022, this Court granted the Motion for Reconsideration and reopened the instant appeal.

{¶27} Appellant now raises the following assignments of error for review:

ASSIGNMENTS OF ERROR

{¶28} “I. THE GRANT OF SUMMARY JUDGMENT WAS IN [SIC] APPROPRIATE AS A MATTER OF LAW DUE TO THE TRIAL COURT'S APPLICATION OF THE INCORRECT FRAMEWORK AS IT RELATES TO FAILURE TO PROVIDE A REASONABLE ACCOMMODATION AND ITS FAILURE TO FIND THAT APPELLEE WAIVED ITS RIGHT TO ENFORCE THE DECLARATIONS.

{¶29} “II. GRANT OF SUMMARY JUDGMENT WAS INAPPROPRIATE WHEN THERE REMAINS GENUINE ISSUES OF MATERIAL FACT IN DISPUTE NAMELY THAT APPELLANT HAS QUALIFIED DISABILITIES AND SUCH DISABILITIES WARRANT A REASONABLE ACCOMMODATION AND THAT APPELLANT'S ACTIVITIES DO NOT DIFFER FROM OTHER SIMILARLY SITUATED NEIGHBORS.

{¶30} “III. GRANT OF SUMMARY JUDGMENT WAS IN [SIC] APPROPRIATE WHERE THERE IS AN ABUSE OF DISCRETION WHEN THE TRIAL COURT GRANTED SUMMARY[SIC] PRIOR TO THE END OF DISCOVERY.”

Standard of Review

{¶31} Civil Rule 56 states, in pertinent part:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶32} A trial court should not enter summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Inds. of Ohio, Inc.*, 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist. 1999).



{¶33} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 738 N.E.2d 1243 (2000)

I., II.

{¶34} In her first and second assignments of error, Appellant argues the trial court erred in its determination that Appellant has a qualified disability and that Appellee denied her a reasonable accommodation under the Fair Housing Act. We disagree.

{¶35} Appellant herein asserts claims under the Fair Housing Act and Ohio law based on Appellee's alleged failure to accommodate her disability pursuant to R.C. § 4112.02(H) and selective enforcement.

{¶36} **Declaration**

{¶37} A declaration, such as the one in this case, is a contract. *Lisy v. Mayfair Estates Homeowners Assn.*, 12th Dist. Summit No. 25392, 2012-Ohio-68, 2012-Ohio-68, ¶ 29. Declarations and bylaws are contracts between the association and the purchaser and are subject to the traditional rules of contract interpretation. *Nottingdale Homeowners' Assn., Inc. v. Darby*, 33 Ohio St.3d 32, 35-36, 514 N.E.2d 702 (1987).

{¶38} The construction of a written contract is a matter of law to be resolved by the court. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 667 N.E.2d 949 (1996). Thus, when reviewing issues of contract interpretation, this Court applies a de novo standard of review. *Merritt v. Anderson*, 12th Dist. No. CA2008–04–101, 2009–Ohio–1730, ¶ 18. Any factual findings by the trial court must be accorded appropriate deference. *Graham* at 313, 667 N.E.2d 949.

{¶39} “In construing the terms of a written contract, the primary objective is to give effect to the intent of the parties, which we presume rests in the language that they have chosen to employ.” *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, ¶ 29; *Assured Administration, LLC v. Young*, 12th Dist. Warren No. CA2019-04-039, 2019-Ohio-3953, ¶ 17.

{¶40} A contract that is, by its terms, clear and unambiguous requires no interpretation or construction and will be given the effect called for by the plain language of the contract. *Cooper v. Chateau Estate Homes, L.L.C.*, 12th Dist. No. CA2010-07-061, 2010-Ohio-5186, ¶ 12. A contract is ambiguous if its provisions are susceptible of two or more reasonable interpretations. *Covington v. Lucia*, 151 Ohio App.3d 409, 784 N.E.2d 186, 2003-Ohio-346, ¶ 18 (10th Dist.). Whether a contract's terms are clear or ambiguous is a question of law for the court. *Cooper* at ¶ 12.

{¶41} Where a contract's terms are clear and unambiguous, its interpretation is as a matter of law, not fact, and may be adjudicated by summary judgment. *Dutch Maid Logistics, Inc. v. Acuity*, 8th Dist. Cuyahoga Nos. 91932 and 92002, 2009-Ohio-1783, ¶ 19. We, therefore, interpret the terms of the association's declaration and bylaws de novo. *Continental W. Condo. Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 660 N.E.2d 431 (1996); *Georgalis v. Cloak Factory Condominium Unit Owners' Assn.*, 8th Dist. Cuyahoga No. 109300, 2021-Ohio-66, ¶¶ 13-14.

{¶42} Here, the Declaration, Article I, Section F provides, in pertinent part:

No trade or commercial activity shall be conducted upon any Lot, nor shall anything be done thereon which may become an annoyance or nuisance to any other owners of any of said Lots in the subdivision.

{¶43} The Declaration also specifically contains a non-waiver provision. The Declaration, Article II, Section B, provides:

No Failure to object to any violations of any restrictions or enforce any restrictions shall be deemed a waiver of the right to do so thereafter, either as to the same violations or as one occurring prior or subsequent thereto.

{¶44} We find the express terms of the Declaration are clear and unambiguous. The Declaration clearly and unambiguously states that “no trade or commercial activity shall be conducted on any lot” in the subdivision. Such restrictions have been held to be enforceable in subdivisions of a residential character. See *Dixon v. Van Sweringen Co.* (1929), 121 Ohio St. 56, 166 N.E. 887; *Kokenge v. Whetstone* (1938), 60 Ohio App. 302, 20 N.E.2d 965; *Glassburn v. Fair* (1970), 24 Ohio App.2d 40, 263 N.E.2d 570. Further, “[w]hile restrictions are to be strictly construed in favor of the free use of land, they will be enforced where their meaning is unambiguous.” *Devendorf v. Akbar Petroleum Corp.* (1989), 62 Ohio App.3d 842, 845, 577 N.E.2d 707, 709, citing *Ritzenthaler v. Pepas* (1958), 107 Ohio App. 385, 389, 159 N.E.2d 472, 475. Obviously, where Appellant is running a daycare out of her home and is providing a service for monetary gain, she is running a business on her lot in contravention of the unambiguous restrictions contained in the Declaration.

**{¶45} Waiver and Selective Enforcement**

{¶46} While labeled as a claim for selective enforcement, Appellant actually argues that Appellee waived enforcement of the restriction on conducting trade or commercial activity through its failure to consistently enforce such restriction on other individuals within Brooksedge, whom she claims are operating residential businesses.

{¶47} Upon review, we find Appellant's claims of waiver-selective enforcement fail for lack of evidentiary support.

{¶48} Appellant's motion in opposition to Appellee's motion for summary judgment failed to present sufficient evidence to support her claims that there are other people in Brooksedge running businesses from their homes, and that Appellee failed to uniformly and consistently enforce the restriction against those home businesses.

{¶49} In her deposition, when questioned about her claims as to other home business and her knowledge of same, Appellant stated that she did not know if the alleged businesses were still operating or even when and how long each operated. She further admitted she did not know if Brooksedge had taken enforcement action against any of these alleged businesses.

{¶50} Appellant admitted she had no basis other than her allegations that restrictions had not been enforced against other daycares or businesses:

Q: Okay. And what type of research did you do to obtain that information?

A: Nextdoor and Facebook.

Q: Did you search anywhere else that you recall?

A: No.

Q: At No. 12 here it says that no enforcement of those businesses has been done by the association, do you see that?

A: Yes.

Q: Where did you obtain that information?

A: Court records.

Q: Okay. And where did you find court records or how did you look for those?

A: Online.

Q: And how did you do that search? Did you search by the person's name? Did you do it by the business name? How did you search for those?

A: I didn't specifically search for them. It was my friend that I said earlier, so I wasn't the one specifically.

Q: So you obtained that information from her after she did a search; am I understanding that properly?

A: Yes.

Q: Do you know if Ms. Harris has any specialized knowledge that would help her in a search like that?

A: Not to my knowledge.

{¶51} (See Tr. at 22, 23).

{¶52} Appellee, in its motion, put forth evidence in the form of emails and enforcement letters demonstrating that it had in fact taken enforcement action against other home businesses.

{¶53} Because Appellant failed to present evidence in support of her waiver/selective enforcement claims, the trial court did not err by entering summary judgment for Appellee on Appellant's waiver/selective enforcement counterclaim.

**{¶54} The FHAA and R.C. § 4112.02**

{¶55} The FHAA prohibits discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap....” 42 U.S.C. § 3604(f)(2). “Discrimination” is “[a] refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be made necessary to afford such person equal opportunity to use and enjoy a dwelling[.]” § 3604(f)(3)(B).

{¶56} Claims brought under R.C. §4112.02(H) are analyzed using the same standard as is applied to an FHAA claim, and courts consider them together. *See Means v. City of Dayton*, 111 F.Supp.2d 969, 973 (S.D. Ohio 2000).

{¶57} In order to prevail, a plaintiff in an FHAA case must prove that:

- (1) he or she suffers from a disability within the meaning of the FHAA;
- (2) the defendant knew or reasonably should have known of the disability;
- (3) the requested accommodation may be necessary to afford “an equal opportunity to use and enjoy the dwelling;”
- (4) the accommodation is reasonable; and
- (5) the defendant refused to make the accommodation.

{¶58} *Overlook Mut. Homes, Inc. v. Spencer*, 415 F. App'x 617, 621 (6th Cir. 2011) (citing *DuBois v. Ass'n. of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2005)); see also *Hollis v. Chestnut Bend Homeowners Ass'n.*, 760 F.3d 531, 541 (6th Cir. 2014) (citing *Overlook*); *Norwich Apts II v. Sanders*, 6th Dist. No. L-19-1263, 2020-Ohio-4540, 159 N.E.3d 340, ¶ 21; *Giebeler v. M & B Assoc.* (C.A.9, 2003), 343 F.3d 1143, 1147, quoting *United States v. California Mobile Home Park Mgt. Co.* (C.A.9, 1997), 107 F.3d 1374, 1380.

**{¶59} Reasonable Accommodation**

{¶60} Appellant herein argues that under R.C. §4112.02(H), Appellee failed to provide her with a reasonable accommodation under Ohio law based on her disability.

{¶61} “Disability,” as used in Chapter 4112, means “a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment, or being regarded as having a physical or mental impairment.” R.C. §4112.01(A)(15).

{¶62} Upon review, we find that Appellant herein failed to meet the first two elements of an FHAA claim: (1) that she suffers from a disability within the meaning of the FHAA; and (2) that Appellees knew or reasonably should have known of their disability.

{¶63} Appellant, in her Motion in Opposition to Appellee’s Motion for summary judgment, failed to put forth evidence as to who suffers from the alleged disability, her or her son; failed to state exactly what that disability is; and failed to show that such disability is a disability within the meaning of the FHAA.

{¶64} During her deposition, Appellant was unable to articulate who had the disability and/or the exact nature of the disability:

Q: Are you claiming that you have a specific medical condition or disability of some kind that requires some accommodation by the board?

A: I do have a medical disability, but my son has one that is the utmost part of why I'm at home.

Q: And I just want to clarify one point. You said that you do have a qualifying medical disability but that is not what you're seeking an accommodation for, is that correct?

A: I don't really know how to answer that question just yet.

Q: I'm just trying to clarify whether you're seeking an accommodation for your own medical condition or whether it's solely the medical condition of your son just so we know and have some clarity as to your claim.

A: As a combined we both have medical conditions that contribute and benefits me from working from home

{¶65} (See Tr. at 28, 29-30).

{¶66} Additionally, she fails to provide evidence that Appellees were made aware of such disability or that she ever requested an accommodation. Appellee, in its Motion for Summary Judgment, asserts that the first time it was made aware of Appellant's request for an accommodation was when she filed her counterclaim.

{¶67} The Sixth Circuit has stressed that a plaintiff asserting a failure to accommodate claim under the FHAA has the burden of establishing that his requested accommodation was denied. In *Overlook Mutual Homes, Inc. v. Spencer*, 415 Fed. Appx.



617 (6th Cir.2011); *Turner v. Am. Bldg. Condominium Corp.*, S.D.Ohio No. 1:12-CV-291, 2014 WL 4774003, \*9.

{¶68} “Until an accommodation request is denied, there is no discrimination under [42 U.S.C. 3604(f)(3)(B) ].” *Prindable v. Assoc. of Apt. Owners of 2987 Kalakaua* (D.Haw. 2304 F.Supp.2d 1245003), 304 F.Supp.2d 1245, 1258, citing 42 U.S.C. 3604(f)(3)(B); see also *Bryant Woods Inn, Inc. v. Howard Cty., Maryland* (C.A.4, 1997), 124 F.3d 597, 602; *Reid v. Plainsboro Partners, III*, 10th Dist. Franklin No. 09AP-442, 2010-Ohio-4373, ¶ 52.

**{¶69} Reasonable and Necessary**

{¶70} The elements of necessity and equal opportunity are closely related. *Hollis*, *supra*, 760 F.3d at 541. An accommodation is necessary if without the requested accommodation the plaintiff will “likely be denied an equal opportunity to enjoy the housing of [his] choice.” *Hollis*, 760 F.3d at 541 (quoting *Smith & Lee Assocs., Inc.*, 102 F.3d at 795). “The necessity element is, in other words, a causation inquiry that examines whether the requested accommodation or modification would redress injuries that otherwise would prevent a disabled resident from receiving the same enjoyment from the property as a non-disabled person would receive.” *Hollis*, 760 F.3d at 541; *Whiteaker v. City of Southgate*, 2023 WL 317457, \*5.

{¶71} Appellant failed to provide evidentiary support for her claim that due to her disability it is medically necessary for her to work from home. During her deposition Appellant admitted that no doctor had ever told her she must work from home due to her own medical conditions:

Q: Have you received any letters from healthcare providers telling you that it's advisable for you to work - to not work outside of the home? Have you ever been told that by a medical provider?

A: No. We have discussed it, and it's been preferred to a lot better, but I don't think anybody can tell you.

{¶72} (See Tr. at 34-35).

{¶73} We further find that Appellant has further failed to show that such accommodation, had it been properly requested, is reasonable and necessary to afford an equal opportunity to use and enjoy her dwelling.

{¶74} To prove that an accommodation or modification is necessary, Appellant "must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice." *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1155 (9th Cir. 2003) (quoting *Smith & Lee Assoc., Inc. v. City of Taylor, Mich.*, 102 F.3d 781, 795 (6th Cir. 1996)). "Without a causal link between defendants' policy and the plaintiff's injury, there can be no obligation on the part of defendants to make a reasonable accommodation." *Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d at 1380. Plaintiffs bear the burden of demonstrating causation, as well as that the accommodation or modification "seems reasonable on its face." *Ramos v. Neumann*, 417 F. App'x 640, 641 (9th Cir. 2011) (citing *Giebeler*, 343 F.3d at 1155-56). If Plaintiffs establish those elements, only then does the burden shift to Defendant to establish that it is not reasonable. *Id.*

{¶75} With regard to this portion of her housing claims, it is unclear how denying Appellant the right to run a daycare out of her home will deny her an equal opportunity to enjoy the housing of her choice. She has not demonstrated that, but for her requested

accommodation, she would be denied an equal opportunity to enjoy her home as a non-disabled person could. See *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002).

{¶76} Appellant has the right and the ability to continue to live in her house, just not the right to run a daycare from her home under the Declaration which clearly states “no trade or commercial activity shall be conducted upon any Lot.”

{¶77} Based on the foregoing, we find that the record does not include any facts to show that Appellant has been discriminated against in any manner or that she has a disability within the meaning of R.C. §4112 or the FHA. Accordingly, Appellant cannot establish the elements of a failure to accommodate claim under the FHA or Ohio law.

{¶78} As to Appellant’s claim that the trial court’s application of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 794 (1973), was incorrect, and that the court should have applied *Hollis v. Chestnut Bend Homeowners Assn.*, 760 F.3d 531, 541 (6th Cir. 2014) instead, we find same to be unpersuasive in this case.

{¶79} Appellant argues the burden shifting framework which was established by the United States Supreme Court in *McDonnell Douglas* was originally designed to address employment discrimination under Title VII and has been modified as a standard among other types of discrimination cases. Appellant maintains that using the *Hollis* framework for analyzing reasonable accommodation claims eliminates a discriminatory intent that must be shown under the *McDonnell Douglas* test.

{¶80} We find that the trial court’s analysis comported with that as set forth in *Hollis*, *supra*, wherein the Court explained:

An FHA reasonable modification plaintiff, like an FHA reasonable-accommodation plaintiff, must prove both the reasonableness and necessity of the requested modification. And although we sometimes refer to those as the "operative elements," other equally important elements also comprise the claim. In addition to proving reasonableness and necessity, an FHA reasonable-accommodation or reasonable-modification plaintiff also must prove that she suffers from a disability, that she requested an accommodation or modification, that the defendant housing provider refused to make the accommodation or to permit the modification, and that the defendant knew or should have known of the disability at the time of the refusal. See *Overlook Mut. Homes, Inc. v. Spencer*, 415 F App'x 617, 621 (6th Cir. 2011) [\*\*14] (citing *DuBois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2005)). The burden is on the plaintiff to establish each element. See *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1044-45 (6th Cir. 2001); see also *Smith & Lee Assocs* 102 F.3d at 796 n.11

{¶81} See *Hollis v. Chestnut Bend Homeowners Ass'n* (6th Cir. 2014), 760 F.3d 531, 541.

{¶82} The trial court below found, as did we, that Appellant failed to prove that she suffers from a disability, that she requested an accommodation or modification based on such disability, that Appellee refused to make the accommodation, or that Appellee knew or should have known of the disability at the time of the refusal.

{¶83} Appellant herein could not simply rely on the allegations in her counterclaim. Once a moving party has satisfied its burden under Civ.R. 56, “the nonmoving party is not permitted to rest upon the allegations or denials contained in his or her pleading, but must come forth with specific facts showing the existence of a genuine issue for trial.” (Citations omitted.) *Buzzard v. Pub. Emp. Retirement Sys. of Ohio*, 139 Ohio App.3d 632, 635, 745 N.E.2d 442 (10th Dist.2000).

{¶84} Based on the foregoing, we find the trial court did not err in rendering summary judgment on the claims brought under R.C. Chap. 4112.

### III.

{¶85} In her final assignment of error, Appellant argues that the trial court erred in granting Summary Judgment prior to the end of the discovery cut-off deadline. We disagree.

{¶86} “Parties who find themselves in a position of having to respond to a motion for summary judgment before adequate discovery has been completed must seek their remedy through Civ.R. 56(F). A party who fails to seek such relief does not preserve his right to challenge the adequacy of discovery upon appeal.” *Security Natl. Bank and Trust Co. v. Jones* (July 6, 2001), Clark App. No. 2000–CA–59; see *Clark Cty. Solid Waste Mgt. Dist. v. Danis Clarkco Landfill Co.* (1996), 109 Ohio App.3d 19, 36, 671 N.E.2d 1034; *Maschari v. Tone*, 103 Ohio St.3d 411, 414, 2004–Ohio–5342, 816 N.E.2d 579 (upholding a grant of summary judgment prior to the completion of discovery where the non-moving party failed to file a motion under Civ.R. 56(F), where she only claimed that discovery was necessary to prepare for trial - not to respond to the motion, and where she did not schedule the depositions until after the deadline for responding to the summary judgment

motion); *Temple v. City of Dayton*, 2nd Dist. Montgomery No. 20211, 2005-Ohio-57, ¶¶ 18-19.

{¶87} In addition, there is no indication that Appellant sought to depose key witnesses or conduct additional discovery.

{¶88} In the present case, Appellant gave no indication that she could not fully defend against Appellee's motion for summary judgment without additional discovery, nor did she claim that she lacked facts essential to justify her opposition to Appellee's summary judgment motion. To the contrary, Appellant filed a motion in opposition to Appellee's motion for summary judgment. Appellant did not, at any point, avail herself of Civ.R. 56(F) and seek a delay of the trial court's ruling on the summary judgment motion.

{¶89} Further, Appellant has failed to sufficiently explain, including on appeal, how additional discovery would have aided her in rebutting Appellee's motion for summary judgment. She makes only general references to information that may have added additional evidence to their case.

{¶90} Appellant has failed to establish how additional time would have led to the existence of a genuine issue of material fact. See *Ball v. Hilton Hotels, Inc.* (1972), 32 Ohio App.2d 293, 290 N.E.2d 859.

{¶91} We fail to see how the common pleas court abused its discretion by not granting Appellant an extension of time for reasons she never expressed. Accordingly, the trial court did not abuse its discretion in ruling upon the pending summary judgment motions prior to the completion of discovery.

{¶92} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

By Wise, J.,

Gwin, P.J., and

Delaney, J., concur

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