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'Bloch v. Frischholz': A Novel Approach to the Mezuzah Case

Benjamin Weinstock

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It was a simple case of religious discrimination, or so the Bloch family thought. They had lived in a Chicago condominium for nearly 30 years and always had a Mezuzah[1] affixed to the entrance door of each of their three units.

But in 2004 everything changed. The condominium's board began enforcing a "hallway rule" enacted three years earlier that it claimed prohibited the continued presence of the Blochs' Mezuzot. They insisted it prohibited the placement of "[m]ats, boots, shoes, carts, or objects of any sort…outside Unit entrance doors" and therefore also applied to religious symbols such as Mezuzot. They ignored the fact that although the rule had been in effect for three years, no one previously interpreted it to prohibit the display of religious articles.

The Blochs' explanation of the religious necessity of their Mezuzot fell on deaf ears. At the board's direction, the maintenance staff would take the Mezuzot down and leave them in the management office. The Blochs would retrieve and reaffix them, only to have them removed again. The condominium association even threatened to fine the Blochs if they continued to display their Mezuzot. When confronted, the president of the board told the Blochs that if they did not like the way the rules were enforced, they could "get out."[2]

The final straw came with the passing of Marvin Bloch, the patriarch of the family. The Blochs requested that they be permitted to leave their Mezuzot up while the family observed Shivah, a seven-day mourning period, and the board president agreed. To their horror, the mourners, along with their rabbi,[3] returned home from the funeral service to find that while a coat rack and card table had been left in the hall, the Mezuzot were gone. In 2005, the Blochs filed suit in federal court "seeking an injunction and damages for distress, humiliation and embarrassment" under Federal Housing Act (FHA) §§3604(a), 3604(b), and 3617.[4]

'Bloch' and the FHA

While the FHA clearly bars discrimination on the basis of race, color, religion, sex, national origin, disability, or familial status in the sale or rental of housing and in the terms and conditions of the sale or rental of housing,[5] the district court would not apply the FHA to the Blochs' case.[6]

For many years, courts applied the FHA to prohibit religious discrimination against persons seeking housing accommodations and persons who already have housing.[7] Then, in 2004, the U.S. Court of Appeals for the Seventh Circuit created a circuit court split when it decided *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*,[8] holding

that the FHA provides no cause of action for discrimination occurring after the purchase or rental of a residence.[9] Based on *Halprin*, the district court in *Bloch* found that the FHA prohibits religious discrimination only to persons seeking housing accommodations. It therefore dismissed the Blochs' case.[10]

A few months later, the city of Chicago amended its code to proscribe condominium rules that restrict residents' display of religious signs or symbols on doorposts.[11] The Illinois legislature enacted a similar statute shortly afterwards,[12] mooting the Blochs' claim for injunctive relief, but allowing the family to continue to seek damages against the condominium and its board president.

Although the Seventh Circuit initially issued a ruling consistent with its holding in *Halprin*, on rehearing en banc, the court reversed itself, holding that the Fair Housing Act *can* reach post-occupancy discrimination, but only under specific and limited circumstances.[13]

Section 3604(a) of the FHA proscribes refusal "to sell or rent…or to refuse to negotiate for the sale or rental of, or otherwise make unavailable…a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[14] Because discrimination may deprive a homeowner or tenant of the right to live in a residence after moving in, the circuit court determined that §3604(a) supports a post-occupancy claim similar to constructive eviction.[15] Applying its reasoning to the Blochs, the court determined that no reasonable jury could conclude that the Blochs' units were unavailable because the family lived in their condominiums throughout the dispute, and dismissed the claim.[16]

Section 3604(b) disallows discrimination "in the terms, conditions, or privileges of sale of rental of a dwelling, or in the provision of services or facilities in connection therewith," on the basis of any of the six classes noted above.[17] Distinguishing *Bloch* from *Halprin*, the court determined that the Blochs' agreement to be governed by the condominium's bylaws was a "term of sale."[18] Accordingly, §3604(b) could be invoked to prohibit the condominium from "discriminating against the Blochs through its enforcement of the rules," even though the rules were facially neutral.[19] This allowed the damages claim to go forward but required proof of intentional discrimination.

Section 3617 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 granted or protected by" §§3603-606.[20] The court stated that a §3617 cause of action can exist independent of other violations of the FHA, determining that "§3617 reaches a broader range of post-acquisition conduct" and that a §3617 claim does not require a plaintiff to actually vacate the premises."[21] On this ground, the court ruled in favor of the Blochs.

Aftermath and Legislation

While the Seventh Circuit's ruling in *Bloch* is a step forward, there are still holes in the application of the FHA to post-occupancy claims that the decision fails to fill.[22] Moreover, there is still a circuit split in the treatment of post-acquisition claims under the FHA and only time will tell how, and if, it will resolve itself. Subsequent to *Bloch*, a series of copy-cat cases involving condominium associations confiscating residents' Mezuzot were filed in Florida,[23] New York,[24] Texas[25] and Connecticut;[26] each evolved from the discriminatory application of a facially neutral hallway clutter rule, as in *Bloch*.

Like *Bloch*, each of these cases has inspired state legislative remedies seemingly tailored to the protection of Mezuzot.[27] However, simply waiting for each state to enact protective legislation is so inefficient as to be illusory. We believe that there is a simple, effective, broadly applicable and readily-available solution.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) equates the ability to use real property for religious practice to the "Freedom of Religion" guaranteed by the First Amendment. According to RLUIPA, if one's ability to use real property for religious practice is substantially burdened or circumscribed by even a facially neutral land use regulation, the land use regulation is invalid.[28] Similarly, the Religious Freedom Restoration Act (RFRA)[29] prohibits federal laws and practices that substantially burden religious practice.

However, both RLUIPA and RFRA apply only to governmental regulation, not the actions of the private entities governing common interest communities.[30] Accordingly, if either of these statutes were to be applicable to the facts of *Bloch* or a similar case, a court would have no difficulty finding that the discriminatory application of a facially neutral hallway rule is unlawful. How can one make RLUIPA and RFRA applicable to private acts of religious discrimination?

Enter 'Shelley v. Kraemer'

The solution may be found in the U.S. Supreme Court's holding in *Shelley v. Kraemer*,[31] a landmark case that dealt with racial discrimination. In *Shelley*, a private land conveyance contained a racially restrictive covenant that prohibited the sale or use of privately owned land "against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."[32] The covenant was challenged on the ground that it was an unconstitutional violation of the Fourteenth Amendment guaranteeing all citizens "equal protection of the laws."

The court in *Shelley* found that the 14th Amendment was not violated, stating that

the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the *States*. That Amendment erects no shield against merely *private conduc*t, however discriminatory or wrongful.[33]

However, in a moment of judicial brilliance, the court in *Shelley* determined that even though the covenant itself did not violate the 14th Amendment, if a court were to enforce the racially restrictive covenant, it would convert a private covenant into State action, thereby violating the 14th Amendment.[34] In the words of Chief Justice Fred Vinson:

the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of [W]e hold that, in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws, and that, therefore, the action of the state courts cannot stand.[35]

The application of the principle of *Shelley* to a case of religious discrimination is natural and simple. Although the private "rule" of a common interest community that prohibits the installation of Mezuzot is not state action and does not violate federal law, such a rule, if enacted by a state, would undoubtedly violate RLUIPA and the RFRA. Accordingly, a court cannot enforce any such rule inasmuch as judicial enforcement would convert private action into prohibited state action.

It is significant to note that courts have already extended *Shelley* to cases involving age discrimination,[36] condominium rules,[37] and religious land use.[38] Thus, *Shelley* provides an elegant solution to this complex problem: broad application without waiting for the resolution of a circuit split or the spread of specifically tailored legislative remedies.

If, as we suggest, *Shelley* had been applied to *Bloch*, the Seventh Circuit easily could have found the condominium association's religious discrimination to be intentional and the hallway rule unenforceable to prevent the maintenance of Mezuzot. The simple application of the *Shelley* principle provides for an effective path to prevent private religious discrimination in housing accommodations and eliminates the hairsplitting analysis and incomplete solution offered by the *Bloch* decision.

Benjamin Weinstock *is a partner at Ruskin Moscou Faltischek, where he co-chairs the real estate department.* **Samantha Baer***, a summer associate at the firm and third-year student at Brooklyn Law School, assisted in the preparation of this article.*

Endnotes:

1. A Mezuzah is small scroll of parchment inscribed with passages from the Torah. The Torah, the holiest text in Judaism, commands (Deutoronomy 6:9) Jews to fasten Mezuzot (the Hebrew plural of Mezuzah) to the exterior doorposts of their homes. It is customary, upon entering a home, for Jews to touch the mezuzah and then kiss their fingertips to remind them of their faith and God's presence in the home.

2. Apparently, the president of the board had other episodes of religiously motivated aggression toward the Blochs. He intentionally scheduled board meetings on Friday evenings, while the Blochs were observing the Sabbath, so that Lynne Bloch, a board member, could not attend. When asked whether he was aware Lynne's religious obligations he stated: "'She's perfectly able. She decides not to.…She says she can't attend after sunset, because it is Shavus [sic].'" During this time, the president of the condominium board also "accused Lynne of being a racist, called her a liar, [and] encouraged other tenants to vote against her re-election to the Association's Board of Managers…."

3. "The Blochs were humiliated having to explain to the rabbi why, on the day of the funeral, their [M]ezuzah was not on the doorpost." *Bloch*, infra. at 774.

4. *Bloch v. Frischholz*, 587 F.3d 771, 773-74 (7th Cir. 2009) (rehearing en banc) rev'd, 533 F.3d 562 (7th Cir. 2008).

5. 42 U.S.C. §§3601-619 (2006).

6. *Bloch*, 533 F.3d 562, 565 (7th Cir. 2008).

7. See Jessica D. Zietz, "On Second Thought: Post-Acquisition Housing Discrimination in Light of *Bloch v. Frischholz*," 66 U. Miami L. Rev. 495, 495-96 (2012).

8. 388 F.3d 327 (7th Cir. 2004).

9. Id. at 328-29.

10. *Bloch*, 533 F.3d at 565.

11. Chi., Ill., Municipal Code, §5-8-030(H).

12. 756 ILCS 605/18.4(h).

13. See *Bloch*, 587 F.3d at 787.

14. 42 U.S.C. §3604(a) (2006).

15. See *Bloch*, 587 F.3d at 776-79.

16. Id. at 778-79.

17. 42 U.S.C. §3604(b) (2006).

18. See *Bloch*, 587 F.3d at 779-81.

19. Id.

20. 42 U.S.C. §3617 (2006).

21. See *Bloch*, 587 F.3d at 781-84.

22. See Zietz, supra note 7, at 517-21 (discussing the limitations of the *Bloch* holding).

23. In 2007, a condominium board threatened to fine one of its residents when she refused to remove her Mezuzah. The board justified its action under a rule that prohibited residents from "caus[ing] anything to be affixed or attached to, hung, displayed or placed on the exterior walls, doors, balconies, railings or windows of the building." However, the board allowed Christmas wreaths to be displayed. The board eventually changed the rule after the Florida Attorney General wrote an admonishing letter. See Michael Mayo, "Condo Board's Stance Against Mezuzah is Totally Meshuganeh," Sun Sentinel, March 18, 2007, http://articles.sun-sentinel.com/2007-03-18/news/0703170353_1_condo-association (last visited June 22, 2012); Leila Krieger, "Florida Resident Battles Case of Confiscated Mezuzah," The Jerusalem Post, Feb. 14, 2007, http://www.jpost.com/JewishWorld/JewishNews/Article.aspx?id=51407.

24. A condominium resident faced a fine in 2009 when she refused to remove her Mezuzah in response to an association rule preventing occupants from "changing or altering the exterior of their home without permission, which includes affixing signs, advertisements, or statuary." The board told Jewish residents to remove their Mezuzot or purchase a screen door to conceal them. The New York Attorney General required the association to pay a $10,000 fine and demanded that it rewrite the rule. Bart Jones, "Dix Hills Condo Complex Agrees to Allow Mezuzahs," Newsday, Oct. 30, 2009, http://www.newsday.com/long-island/suffolk/dix-hills-condo-complex-agrees-to-allow-mezuzahs-1.1558072.

25. In 2007, a Houston condominium association told Jewish residents to remove "the item" on their doorframe to avoid violating community rules. The residents brought suit in U.S. district court, but the court ruled in favor of the condominium association. See Corrie Maclaggan, "Lawmakers Seek to Prevent Homeowners' Associations from Banning Mezuzahs," American Statesman, Nov. 13, 2009, available at http://www.statesman.com/news/texas-politics/lawmakers-seek-to-prevent-homeowners-associations-from-banning-56469.html?printArticle=y. This is unsurprising given that the Fifth Circuit adheres to the Seventh Circuit's reasoning in *Halprin* regarding post-occupancy claims under the FHA. See Zietz, supra note 7, at 510.

26. In March 2012, a woman was ordered to remove her Mezuzah from the doorpost of her condominium unit and threatened with a fine. She complained that Easter decorations and crosses were permitted on other residents' doors. A week later, the association issued an apology letter, ending the dispute. See Kate Czaplinski, "Mezuzah Controversy Sparks Legislation, Stratford Star," April 9, 2012 available at http://stratfordstar.com/news/72613-mezuzah-controversy-sparks-legislation.html.

27. The Florida legislature later passed a bill requiring "a reasonable accommodation for the attachment on the mantel or frame of the door of the unit owner of a religious object not to exceed 3 inches wide, 6 inches high, and 1.5 inches deep"—approximately the size of a Mezuzah. See FLA. STAT. ANN. §718.113 (West 2011). The New York legislature is now considering New York Senate Bill 2222, which would declare void as against public policy, any covenant or restriction against the display of religious symbols, but as yet, state Congress has not acted on the bill. See S.B. 2222, 234th Leg., Reg. Sess. (N.Y. 2011). However, further legislation may be unnecessary in New York inasmuch as N.Y. Gen. Oblig. Law §5-331 (McKinney) already provides that a restriction in any agreement affecting real property which restrains the use of real property because of religion is void as against public policy.

The Texas legislature enacted a statute prohibiting restrictions against "displaying or affixing on the entry to the owner's or resident's dwelling one or more religious items, the display of which is motivated by the owner's or resident's sincere religious belief. See H.B. 1278, 82nd Leg. Reg. Sess. (T.X. 2011).

In April 2012, Connecticut State Senate Majority Leader Martin Looney announced he would propose a bill aimed at protecting the rights of residents to display religious symbols in condominiums. See Press Release, State Senator Martin M. Looney, Majority Leader, Looney Joins with Anti-Defamation League and Barbara Cadranel Announce Legislation to Protect the Rights of Citizens to Display Mezuzahs and Other Religious Symbols, April 10, 2012, available at http://www.senatedems.ct.gov/pr/looney-120410.php.

28. 42 U.S.C. §2000cc (2006).

29. Id. at §§2000bb-2000bb-4.

30. See id. at §§2000bb-2000bb-4 and 2000cc (2006); see also, Angela C. Carmella, "Religion-Free Environments in Common Interest Communities," 38 Pepp. L. Rev. 57, 58, (2010).

31. 334 U.S. 1 (1948).

32. Id. at 5.

33. Id. at 13 (emphasis added).

34. Id. at 18-21.

35. Id. at 20.

36. See *Riley v. Stoves*, 22 Ariz. App. 223 (1974).

37. See *Franklin v. White Egret Condominium*, 358 So.2d 1084 (Fla. Dist. Ct. App. 1978); *Gerber v. Longboat Harbour North Condominium*, 757 F. Supp. 1339 (1991).

38. See *West Hill Baptist Church v. Abbate*, 24 Ohio Misc. 66 (1969).
