***Francis v. Kings Park Manor, Inc.*:**
The Landlord's Obligation to Protect Other Tenants from Harassment

By John Dolgetta, Esq.

On March 4, 2019, the 2nd Circuit Court of Appeals in New York in *Francis v. Kings Park Manor, Inc.* (*see* https://bit.ly/2Kd38bo) found that a landlord can be held liable under the Federal Fair Housing Act ("FHA") (*see* https://bit.ly/2WBzEdH) and the New York State Human Rights Law ("NYSHRL") (*see* https://dhr.ny.gov/law) for failing to protect a tenant from harassment and discrimination by another tenant. While the Court's holding may seem an obvious result, especially in light of the egregious behavior of the defendants, the issue decided in this case is a novel one and it is only the second time that a similar issue has been reviewed by the courts (*see Wetzel v. Glen St. Andrew Living Community, LLC* (U.S. Dist. Ct. Northern Dist. Ill. (July 27, 2016) at https://bit.ly/2MEXocA). It is important for landlords and property managers to know that their exposure to liability under the FHA has been expanded. Real estate professionals should also be aware of the decision in *Francis*, as it could significantly impact their landlord and property management clients.

The Court of Appeals relied on the broad language of the FHA and the interpretation of the rules of the United States Department of Housing and Urban Development ("HUD") in finding that landlords may be held liable for violating the FHA and other fair housing laws due to certain discriminatory behavior of tenants toward other tenants, provided certain elements exist. The Court of Appeals panel overturned the decision of the District Court and remanded the case back to the trial court for further proceedings.

The central issue considered by the Court of Appeals was "…whether a landlord may be liable under the FHA for failing to take prompt action to address a racially hostile housing environment created by one tenant targeting another, where the landlord knew of the discriminatory conduct and had the power to correct it." The Court held that in limited circumstances, a landlord can be held liable for failing to act and protect another tenant by utilizing certain rights and remedies the landlord may have under the terms of a lease agreement with the tenant in question or which may be available to a landlord at law.

The Facts in *Francis*

Donahue Francis (the "Plaintiff"), an African American individual, signed a lease with Kings Park Manor, Inc. (the "Landlord") for the rental of his apartment in 2010. In February, 2012, another tenant, Plaintiff's next-door neighbor, Raymond Endres (the "Tenant-Defendant"), engaged in racially discriminatory and threatening behavior and harassment toward the Plaintiff. The Tenant-Defendant used extreme profanity and made racist remarks. The Plaintiff was continuously harassed and threatened while in his apartment, in the building, and in the parking lot of the complex. The behavior continued for nearly one year.

The Plaintiff called the police several times about the behavior. The first was on March 11, 2012, when an officer in the Department's Hate Crimes Division visited the apartment complex and warned the next-door neighbor to stop his behavior. The officer also informed the Landlord

and the property manager about what had occurred. The Plaintiff filed a formal police report. The Landlord did not address the situation in any manner.

The behavior continued, and in May, 2012, the Plaintiff called the police once again and filed another police report. This time, he wrote a formal letter to the Landlord regarding the tenant's conduct. Again, the Landlord and the Landlord's property manager failed to respond to the Plaintiff's letter. The behavior became even more aggressive and despicable, and, in August, 2012, the Tenant-Defendant was finally arrested for "aggravated harassment" after the Plaintiff contacted the police yet again.

The Plaintiff wrote a second letter to the Landlord detailing the behavior and informing the Landlord of the arrest. Again, the Landlord and the property manager did not act, and did not respond to the second letter. On September 2, 2012, the Tenant-Defendant attempted to photograph the Plaintiff's apartment and the Plaintiff contacted the police again. He wrote a third letter to the Landlord complaining about the Tenant-Defendant's behavior. Again, the Landlord did nothing and this time, as reflected in the decision, the Landlord advised the property manager "not to get involved". The Tenant-Defendant was allowed to continue to live at the apartment complex through January, 2013, when his lease expired. In April, 2013, the Tenant-Defendant ultimately pleaded guilty in connection with the criminal proceedings and the court issued an order of protection prohibiting the Tenant-Defendant from having any contact with Mr. Francis. In June, 2014, the Plaintiff filed a lawsuit against the Landlord, the Landlord's property manager and the Tenant-Defendant.

The Basis for the Lawsuit and the Applicable Law

The lawsuit alleged that the defendants violated the FHA (specifically, Sections 3604 and 3617), the Civil Rights Act of 1866 and the NYSHRL. The Plaintiff also sued the Landlord defendants "…for negligent infliction of emotional distress and for violating the NYSHRL by aiding and abetting a violation of the NYSHRL." The Tenant-Defendant never appeared and a default judgment was entered against him. The District Court, however, ultimately ruled in favor of the Landlord and the property manager and dismissed the Plaintiff's claims against them.

Broad Interpretation of the FHA and "Post-Acquisition" Claims

The Court of Appeals relied on a broad interpretation of the statutory language contained in the FHA. It held that the FHA applies to discrimination that occurs after a plaintiff purchases or rents a property, also referred to as "post-acquisition" claims, and not only discrimination that occurs during the process of buying or renting a property. While it would seem that such a "post-acquisition" claim would be an obvious right afforded to the tenant, the law and caselaw are not clear that such a right exists in the context of a tenant harassing and engaging in discriminating behavior against another tenant. The Court, citing Section 3604(b) of the FHA, points out that,

> "…it is unlawful '[t]o discriminate 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 therewith, because of race, color, religion, sex, familial status, or national origin. Section 3617 of the Act 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 Act.' The language of the FHA has a 'broad and inclusive compass,'…and we therefore give it 'generous construction,'…[and] the Act's provisions are designed 'to eliminate all traces of discrimination within the housing field' [citations omitted]."

The Court also relied on certain HUD regulations promulgated in 1989 which "prohibited '[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of race,' 24 C.F.R. Section 100.65(b)(2), or '[l]imiting the use and privileges, services or facilities associated with a dwelling because of race…of an owner [or] tenant,' 24 C.F.R. Section 100.65(b)(4)." The Court found that a tenant is continuously afforded the protections of the FHA throughout the rental term even after the initial rental process. The Court compared the relationship of the landlord-tenant to that of an employer-employee and held that simply because the employee is hired, does not mean that the employer is no longer subject to Title VII of the Civil Rights Act of 1964 during the period the employee is employed by the employer after being hired. While the Court did admit it was not a perfect comparison, it certainly did support the position that "post-acquisition" claims are covered under the FHA.

Landlord's Obligation to Address "Tenant-on-Tenant" Racial Harassment

The most important issue decided in ***Francis*** was whether a landlord may be held liable under the FHA for failing to address a situation where one tenant is discriminating against another tenant. The Court, citing the ***Wetzel*** decision, pointed out that "…the only other Circuit to grapple with the issue recently concluded that the 'FHA creates liability against a landlord that has actual notice of tenant-on-tenant harassment based on a protected status, yet chooses not to take any reasonable steps within its control to stop that harassment.'" The Court ultimately held that in limited instances a landlord may have a duty to act in a reasonable manner to stop a tenant from harassing and discriminating against another tenant.

The Court of Appeals again relied heavily on the rules promulgated by HUD, particularly the rule entitled *Quid Pro Quo and Hostile Environment Harassment and Liability Under the Fair Housing Act* (81 Fed. Reg. 63,054 (Sept. 14, 2016)) (the "Rule" or "HUD Rule"). It also relied on the amicus curiae brief submitted by HUD which supported the position that a landlord does have a duty in certain instances to stop discrimination by using some of the tools available to it, for example, the eviction process. According to the Court, "[t]he Rule, HUD's other implementing regulations for §3604(b) and §3617, and the views expressed in [HUD's] amicus brief only reinforce our textual interpretation, reflect the Act's broad scope and purpose, comport with the holdings of several of our sister circuits, and further persuade us that a landlord may be liable under the FHA for failing to intervene in tenant-on-tenant racial harassment of which it knew or reasonably should have known and had the power to address."

The Court elaborated on the following three distinct elements derived from the HUD Rule which a plaintiff-tenant would need to establish in order to be successful against a landlord in a tenant-on-tenant situation:

(1) "the third-party created a hostile environment for the plaintiff;

(2) the housing provider knew or should have known about the conduct creating a hostile environment; and

(3) notwithstanding its obligation under the FHA to do so, 'the housing provider failed to take prompt action to correct and end the harassment while having the power to do so.'"

The Landlord defendants in ***Francis*** argued that this would open the door to a flood of people attempting to use the FHA to settle wide-ranging disputes and impose far-reaching liability on landlords that is not based in the plain reading of the FHA. The Court, however, points out that the HUD Rule makes it very clear that this duty on landlords would only apply in "…a discrete subset of disputes that involve discrimination 'sufficiently severe or pervasive as to interfere with,' among other things, the 'use and enjoyment of a dwelling.'" Therefore, in order for a landlord or property manager to be found liable under the FHA, there would have to be egregious and "severe" behavior of which the landlord and/or property manager were aware and simply did nothing about. This would involve a fact specific and case-by-case determination, which is why the Court of Appeals remanded the case back to the District Court for reconsideration.

The defendants also argued that landlords do not have the requisite control or power to curb or stop a tenant's discriminatory actions. However, the Court explained, again citing ***Wetzel***, that "…housing providers ordinarily have a range of mechanisms at their disposal to correct discriminatory tenant-on-tenant harassment, such as 'issuing and enforcing notices to quit, issuing threats of eviction, and, if necessary, enforcing evictions,' all of which are 'powerful tools' that may be 'available to a housing provider to control or remedy a tenant's illegal [discriminatory] conduct."' The Court's decision clearly places a heavier burden on landlords and management agents to act quickly and utilize tools at their disposal to deal with tenant-on-tenant discrimination.

The Role of Real Estate Professionals in Light of the *Francis* Decision

The decision in ***Francis*** can have far-reaching effects on the way landlords, property managers, and other housing providers deal with their tenants. This decision, taken to its next logical step, could also potentially be applied to cooperative corporations, homeowners' associations, and their management companies. If any of these individuals or entities are aware of discriminatory behavior and fail to address it, they too could be held to be in violation of the FHA, NYSHRL and other fair housing and anti-discrimination laws. Real estate professionals who represent landlords, property managers, or other housing providers should make them aware of the decision in ***Francis*** so that they can address any issues before they incur liability.

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