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Outside Counsel

Landlords May Be Sued for Failing to Address Racial Harassment

By **Robert L. Schonfeld**

Can a landlord be held liablefor 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? A divided panel of the U.S. Court of Appeals for the Second Circuit recently ruled in the affirmative that a landlord could be so held liable.

In *Francis v. Kings Park Manor*, plaintiff Donahue Francis, an African-American, signed a residential lease with defendant Kings Park Manor (KPM), an apartment complex in Suffolk County. As alleged in the complaint, not long after he moved in, Francis's next-door neighbor began to subject Francis to a continuous campaign of racial harassment, abuse and threats. The neighbor repeatedly used racially derogatory language to Francis's face, told Francis that "I oughta kill you," and stood at Francis' open front door and photographed the interior of Francis's apartment.

Concerned about his personal safety, Francis called the Suffolk County police, which informed KPM about the neighbor's activity. KPM did nothing in response to the information it had received from the police. Francis then wrote KPM directly about his neighbor's conduct, and KPM failed to do anything and did not even respond to Francis's letter.

The neighbor was eventually arrested for aggravated harassment in violation of the New York Penal Law. Francis continued to write to KPM, even advising KPM about the neighbor's arrest, and KPM continued to ignore Francis's letters and allowed the neighbor to remain as a tenant in the building. Eventually, the neighbor's lease expired and he moved out of the building. Thereafter, the neighbor pleaded guilty to harassment in violation of the New York Penal Law and a state court entered an order of protection prohibiting the neighbor from contacting Francis.

> A major issue in the case is whether the Federal Fair Housing Act is applicable to events that happen after a resident acquires housing.

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Francis filed a lawsuit in the U.S. District Court for the Eastern District of New York against both KPM and the neighbor, alleging that they had engaged in racial discrimination in violation of the Federal Fair Housing Act, the Civil Rights Act of 1866, and the portion of the New York State Human Rights Law which bars housing discrimination in New York. While tenants in this Circuit have been allowed to sue neighbors who created a hostile housing environment based on their religion (*Ohana v. 180 Prospect Place Realty*, 996 F. Supp. 238 (E.D.N.Y. 1998)), Francis's case appears to be a case of first impression in this Circuit with regard to suing a landlord.

The District Court granted KPM's motion to dismiss, holding that Francis had failed to allege that KPM's conduct was the result of direct, intentional racial discrimination. Francis appealed to the Court of Appeals.

By a 2-1 margin, the Court of Appeals on March 4, 2019 vacated the District Court's dismissal of Francis's claims under the Federal Fair Housing Act, the Civil Rights Act of 1866, and the New York State Human Rights Law. The Court of Appeals remanded the case back to the District Court where Francis will have the opportunity to prove his claims.

A major issue in the case is whether the Federal Fair Housing Act is applicable to events that happen after a resident acquires housing. In other words, most cases under the Federal Fair Housing Act involve cases where someone refuses to sell or rent premises to another person because of that person's race, religion, national origin, gender, marital status, or disability or where the terms and conditions of the sale or rental are different to someone because of membership in a protected class. Many cases are also brought under the Federal Fair Housing Act where a governmental action such as a discriminatory statute or the denial of a necessary permit deprives a person in a protected class of the right to live in housing of choice.

In this case, Francis was already living in his apartment at the time he filed his action. Indeed, KPM had agreed to rent the apartment to Francis knowing that he is an African-American. Nonetheless, the court held that the Fair Housing Act applied not only to the sale or rental of a unit of housing but also to certain benefits or protections flowing from and following the sale or the rental. Writing for the majority, Judge Raymond Lohier noted that Title VII of the Civil Rights Act of 1964 barred both pre- and post-hiring discrimination, and that housing discrimination should not be treated any differently.

The majority opinion also cited to a 2016 final rule of the U.S. Department of Housing and Urban Development (HUD) which stated that "hostile environment harassment" could be a violation of the Fair Housing Act if it involved "unwelcome conduct that is sufficiently severe or pervasive as to interfere with: … the use or enjoyment of a dwelling." The court held that the language in the HUD rule persuaded it to reach its conclusion that a landlord may be liable under the Fair Housing Act for failing to intervene on tenant-on-tenant racial harassment of which it knew or reasonably should have known and had the power to address. The court also rejected KPM's argument that Francis had failed to allege that it had intentionally discriminated against him, holding that one did not need to show discriminatory intent in order to prevail in a Fair Housing Act action.

The court also found that Francis had also stated a cause of action under the Civil Rights Act of 1866

and the New York State Human Rights Law, and remanded the matter back to the District Court to determine if KPM indeed knew about the actions of the neighbor or whether KPM tried but failed to respond to Francis's complaints or whether KPM had any control over the tenants and the power to act to redress the neighbor's abuse.

Circuit Court Judge Debra Ann Livingston wrote a dissenting opinion. In her opinion, Judge Livingston stated that the Fair Housing Act was concerned with access to housing rather than events occurring after a member of a protected class was granted access to the housing. Judge Livingston noted that the complaint did not allege that KPM undertook any obligation in its rental agreement with Francis for monitoring the conduct of other tenants and remediating their behavior.

Judge Livingston also criticized the majority's reliance on Title VII law, stating that there are distinctions between an employer-employee relationship and a landlord-tenant relationship in that the employee is considered an agent of the employer while the tenant is not considered an agent of the landlord. In her opinion, Judge Livingston noted that a landlord has far less control over a tenant than an employer has over an employee.

As the U.S. Supreme Court held in *City of Edmonds v. Oxford House*, 514 U.S. 725, 731 (1995), the Fair Housing Act has a "broad and inclusive compass." That principle alone should be enough to allow Francis to have his day in court to prove that KPM knew about the relationship between Francis and the neighbor and could have done something to protect Francis from the abuse he suffered from his neighbor because of his race. However, to prevail, Francis will have to demonstrate that the landlord could have done something for Francis's protection. In other words, did the landlord's lease with the neighbor give the landlord the right to evict the neighbor because of his conduct?

It is noteworthy that even if a plaintiff like Francis does not prevail on a federal claim or a New York State Human Rights Law claim, a plaintiff may be able to prevail on an old-fashioned warranty of habitability claim against the landlord. That claim was not raised in the federal action.

Other outside factors may imperil this decision even if the Supreme Court does not grant certiorari to this case. In 2015, the U.S. Supreme Court held by a 5-4 margin that one does not need to allege intentional discrimination in order to prevail under the Federal Fair Housing Act. *Texas Dept. of Housing and Community Affairs v. Inclusive Community Project*, 135 S.Ct. 2507 (2015). However, that decision was written by Justice Anthony Kennedy, and a future similar case may have a different result with his replacement, Justice Brett Kavanaugh. Also, the HUD rule relied upon by the majority was written in 2016 under President Obama, and HUD under President Trump may take a different view.

In any event, as *Francis* is the law in the Second Circuit at present, New York and Connecticut landlords under that decision must take every allegation of racial harassment seriously and aggressively act on those allegations when appropriate.