REAL ESTATE

Landlords/Associations Need Policies/Procedures to Address Tenant-on-Tenant Harassment

By Andrew Lieb

On March 4, 2019, the Second Circuit Court of Appeals upheld 24 CFR §100.7(a)(1)(iii)[1] through an admittedly expansive reading of the Fair Housing Act, and ruled that landlords face exposure from post-acquisition, tenant-on-tenant, discrimination in *Francis v. Kings Park Manor, Inc.* In so holding, the Second Circuit joined the Seventh Circuit, which reached the same conclusion in August of 2018 within *Wetzel v. Glen St. Andrew Living Community, LLC*. These holdings, and the applicable regulation, have sent shockwaves throughout the rental industry.

Beyond rentals, homeowner's associations, condominiums, and cooperatives also face exposure under 24 CFR §100.7(a)(1)(iii), as each was identified in prior versions of the regulation during rulemaking and their liability continues as HUD explained in its response to comments ("*the rule requires that when a community association has the power to act to correct a discriminatory housing practice by a third party of which it knows or should have known, the community association must do so*"). As a result, landlords, homeowner's associations, condominiums and cooperatives need to take immediate action to mitigate exposure. It cannot be overstated that third-party harassment claims against landlords and associations are completely preventable where appropriate policies, procedures and trainings have been implemented.

In *Francis*, HUD issued its Final Rule, 81 FR 63054-01, during the interim between the District Court's dismissal and the reversal by the Second Circuit while expressly calling out the District Court in the comments to such Final Rule ("*The district court decision in Francis v. Kings Park Manor is the sole exception to that principle, and HUD disagrees with its ruling*"). In reversing the District Court, the Circuit expressly afforded "great" weight to the Final Rule while adopting its position and reasoning.


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The Circuit held that the FHA "reaches conduct that, as here, 'would constitute discrimination in the enjoyment of [a] residence in a dwelling or in the provision of services associated with that dwelling' after acquisition" and found that the text of 42 USC §3617 "encompasses landlord liability for a tenant's racially hostile conduct" by forbidding "'interfer[ence]' with a person's 'exercise or enjoyment of' his or her rights under the FHA."

The facts in *Francis* concern a neighbor's "brazen and relentless campaign of racial harassment, abuse, and threats" over months at the plaintiff. In response, the plaintiff made numerous complaints to the police, sent three letters to the landlord and otherwise contacted the landlord about the harassment. Nonetheless, the landlord did nothing.

In finding a cause of action having been pleaded, the Circuit "distill[ed] from the Rule" the elements of a cognizable cause of action as: "'(1) [t]he third-party created a hostile environment for the plaintiff; (2) the housing provider knew or should have known about the conduct creating the hostile environment;' and (3) notwithstanding its obligations 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.'" Turning to the third-element, the Circuit pointed to discovery as the appropriate time to ascertain "the level of control . . . actually exercised over tenants and whether they had the power to act to redress . . . abuse." The Circuit further explained that control is a "fact-dependent inquiry" and that the "landlord's ability to control a given tenant is relevant to determining the landlord's liability."

The Final Rule also supports a fact-dependent inquiry in that HUD expressly declined a commentator's request to include a dispositive safe harbor. Nonetheless, the Final Rule encourages "housing providers to create safe, welcoming, and responsive housing environments by regularly training staff, developing and publicizing anti-discrimination policies, and acting quickly to resolve complaints." HUD notes that the power to evict is not dispositive and advises that "verbal and written warnings," "issuing no-trespass orders against guests, . . . reporting conduct to the police," "notices of violations, threats of fines, and fines" also constitute powers to act. In fact, HUD suggests "offering to move an aggrieved tenant" as a solution to harassment.

Moving forward, counsel must review landlord's leases and set forth a list of powers to act so that landlords and their agents have the requisite tools to avoid exposure readily available. Then, counsel should draft and assist the landlord in implementing policies and procedures for staff to field and respond to harassment complaints. Finally, counsel should refer their clients to a digital discrimination training vendor and make such trainings available to the landlord's staff, third-party vendors and tenants. Counsel to boards/managing agents of homeowner's association, condominiums and cooperatives must similarly act by reviewing bylaws, declaration, operating agreement, house rules, proprietary leases and the like (i.e., offering plan). At the least, all residents must be notified that discrimination and harassment will not be tolerated and residents should be advised of the policies and procedures established to field and address complaints of harassment.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Smithtown and Manhasset. He is a past co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for years.

1 Dismissal of New York Executive Law §296 claims was also reversed because evaluation is "under the same framework" as the FHA.

TRUSTS AND ESTATES

By Ilene Sherwyn Cooper

Summary Judgment

In *In re Owens*, the court granted summary judgment in proponent's favor. The proponent of the will was the decedent's former partner and sole beneficiary of her estate; the objectant to probate was the decedent's father and sole distributee. The record revealed that the proponent and the decedent lived together until 2003, when the proponent moved out of their home. The nature of their relationship after that time was undisputed. The objectant had divorced the decedent's mother before her death in 2007. The propounded will specifically disinherited him, and instead, made the decedent's maternal aunt as contingent beneficiary of the estate in the event the proponent failed to survive the decedent.

On the issue of testamentary capacity, the court opined that the level of capacity to execute a will is less than to execute a contract and other legal documents. Moreover, the law presumes that a testator had the requisite capacity to execute a testamentary document. Within this context, the court found that the record contained ample evidence of the decedent's capacity to execute the propounded instrument. Three witnesses executed a contemporaneous self-proving affidavit, and the attorney drafter testified that he had no reason to doubt the decedent's capacity to execute the will. In support of his claim that the decedent lacked capacity, the objectant alleged that the decedent was a drug abuser and suffered from a chronic physical illness. Nevertheless, the court held that neither illness nor use of drugs or alcohol are inconsistent with testamentary capacity. To this extent, the court found that the objectant failed to offer any evidence indicating that the decedent's capacity at the time the will was executed was compromised by her purported medical condition or drug use. Similarly, the court found that the decedent's inability to manage her personal finances did not raise a genuine issue as to whether she had the minimal level of capacity needed to execute her will. Accordingly, the court dismissed the objections alleging lack of testamentary capacity.


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With respect to the objections alleging lack of due execution and forgery, the court noted that where the execution of a will is supervised by an attorney, there is a presumption that the will was duly executed. Additionally, the court observed that an attestation clause and self-proving affidavit also serve to create a presumption of due execution. Further, the court found that the statement in the attestation clause that "the foregoing instrument was signed [by the testator] . . . in our presence . . ." constituted corroborating evidence that the instrument was not forged. In the face of proponent's prima facie case of due execution, the court found that objectant had failed to offer any evidence or even an expert opinion that the propounded instrument was forged. Moreover, although the objectant made much ado about the failed memory of two of the three attesting witnesses regarding the will execution, the court noted that the inability of the witnesses to recall the will execution did not preclude summary dismissal of an objection based on due execution. Accordingly, the objections based on lack of due execution and forgery were dismissed.

Further, the court found that the proponent succeeded in showing that the propounded instrument was "natural" in its provisions to the extent that it favored a person with whom the decedent had a close relationship prior to her death and was not the product of undue influence. The court found that the objectant failed to refute this proof much less offer any detailed allegations or evidence supporting his claims to the contrary.

In re Owens, NYLJ, Oct. 31, 2018, at 27 (Sur. Ct. New York County).

Revocation

Before the Surrogate's Court, New York County (Anderson, S.), in *In re Kalt,* was an uncontested proceeding pursuant to SCPA 1407 for probate of a photocopy of the purported will of the decedent. The proponent, who was the decedent's son, was the nominated executor under the instrument, and he and his brother were the sole beneficiaries of the decedent's estate.

The record revealed that the decedent died with an estate valued at approximately $12 to $16 million. According to an affirmation filed by the lawyer who supervised the execution of the will, the decedent had told her that he had arranged with the proponent to pick up the instrument from her office and arrange for its safekeeping. The proponent confirmed that he retrieved the instrument from counsel's office several days later and placed it in a safe deposit box owned by him and the decedent at a savings bank. However, thereafter, it appeared that a burglary took place at the bank where the will was maintained, which involved a breach of the safe deposit boxes at the site. Following the burglary, the will could not be found.

The court recognized the general rule that when an original will last in the possession of the testator cannot be found after death, it is presumed to have been revoked by the testator with the intention of doing so. Nevertheless, the court acknowledged that this presumption can be rebutted under appropriate circumstances demonstrating that the testator had no intention to revoke the instrument.

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