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ANALYSIS

Landlord Liability for Tenant-on-Tenant Discrimination: Split in the Federal Circuits

In rendering its decision, the Second Circuit took great pains to differentiate its instant case, 'Francis v. Kings Park Manor' from the Seventh Circuit's prior 2018 decision in 'Wetzel v. Glen St. Andrew Living Cmty.' However, that differentiation collapses on itself, and now the issue is ripe to be taken up by the Supreme Court.

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By Andrew M. Lieb

The U.S. Court of Appeals for the Second Circuit, in an en banc decision, split from the Seventh Circuit in holding that a landlord "cannot be presumed to have the degree of control over tenants that would be necessary to impose liability under the FHA for tenant-on-tenant misconduct." In rendering its decision, the Second Circuit took great pains to differentiate its instant case, *Francis v. Kings Park Manor*, 2021 WL 1137441 (2021), from the Seventh Circuit's prior 2018 decision in *Wetzel v. Glen St. Andrew Living Cmty.*, 901 F.3d 856. However, that differentiation collapses on itself, and now the issue is ripe to be taken up by the Supreme Court.

The Second Circuit, in *Francis*, framed the issue in terms of a deliberate indifference theory of liability for disparate treatment discrimination under the Fair Housing Act. The Seventh Circuit, in *Wetzel*, framed the issue as whether a landlord could have liability imputed for a hostile housing environment. Regardless, the issue, whether a landlord can be liable for tenant-on-tenant harassment, was the same before both Circuits.

Now, the rule in the Seventh Circuit is that the Fair Housing Act "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." However, the rule in the Second Circuit is that a traditional landlord does not have suitable control to stop tenant-on-tenant harassment and is consequently, not liable.

In rendering its decision and splitting from the Seventh Circuit, the Second Circuit attempted to differentiate its case by explaining that there were no factual allegations suggesting that the *Francis* defendants "had a similarly unusual degree of control over the premises and tenants, or actively facilitated or compounded harm." (The differentiation was lip service because the Second Circuit, at footnote 40, acknowledged the split by writing "the Seventh Circuit's decision in *Wetzel* ... [is] not binding on this Court.") In expounding on this differentiation, the Second Circuit explained that the Seventh Circuit case involved a defendant that "ran a 'living community' for senior citizens with 'a common living area, a common dining area, common laundry facilities, and hallways' and had a demonstrated capacity to restrict tenants' access to common spaces, suspend cleaning services, assign dining locations, and enter private apartments" whereas the defendant before the Second Circuit only involved a "typical landlord-tenant relationship," albeit, neither admittedly rose to the level of "custodial care." From that, the Second Circuit departed from the Seventh Circuit and held that "[t]he typical powers of a landlord over a tenant—such as the power to evict—do not establish the substantial control necessary to state a deliberate indifference claim under the FHA." We are therefore left with a split in the circuits as to whether the power to evict is enough to state a claim.

The partial dissent in *Francis*, which was authored by Circuit Judge Raymond Lohier Jr. and joined by Circuit Judges Rosemary Pooler, Robert Katzmann, Denny Chin, and Susan Carney, hit this issue head on by arguing that "[t]he majority opinion latches on to a single New York case, *Blatt v. New York City Housing Authority*, to assert that the power to evict is never enough to show control under New York law. But *Blatt* demonstrates that whether a landlord has a duty under New York law to address tenant-on-tenant wrongdoing depends on the facts and circumstances developed in each case." Specifically, the dispositive issue is whether discriminatory conduct is specified in the lease as constituting objectionable conduct, which would empower a New York landlord to terminate the lease and bring a summary proceeding for eviction, pursuant to RPAPL §711(a). *Perrotta v. Western Regional Off-Track Betting*, 98 A.D.2d 1 (4th Dep't 1983). If the lease provides this control, a court should impute liability to a landlord's inaction in a hostile housing environment case, where the landlord is aware or should have been aware of the harassment. If not, they should not.

The Seventh Circuit looked to the landlord's power derived from the lease and explained that the tenancy was conditioned on "refraining from 'activity that [St. Andrew] determines unreasonably interferes with the peaceful use and enjoyment of the community by other tenants" or that is "a direct threat to the health and safety of other individuals," and complying with the "Tenant Handbook." The Second Circuit instead conflated the concepts of manner of control with degree of control, to wit: "[w]e are hard-pressed to presume that an employer's manner and degree of control over its agent-employees is equivalent to that of a landlord over its tenants." However, manner of control is irrelevant under the dispositive inquiry, which solely focuses on the existence of a suitable degree of control; the ability to evict. Stated otherwise, the issue of control cannot rest on the number of tools in a landlord's arsenal, but instead, it must be determined by examining whether the most extreme tool of control in a landlord's arsenal can stop the harassment.

Ironically, the Seventh Circuit may have created this mess in the first instance by including in its decision an inartful quotation from its prior holding on employment discrimination from *Dunn v. Washington County Hosp.*, 429 F.3d 689 (2005). Specifically, the Seventh Circuit wrote that "[c]ontrol in the absolute sense, however, is not required for liability. Liability attaches because a party has 'an arsenal of incentives and sanctions ... that can be applied to affect conduct' but fails to use them." The Second Circuit's decision appears to harp on this arsenal of control concept. However, the remainder of the Restatement (2d) of Agency §213(d), as set forth in *Dunn*, but not in *Wetzel*, makes clear that the control of "excluding the offending [actor] from its premises" is all the control that is required for liability to follow regardless of the rest of the landlord's arsenal. In fact, the Seventh Circuit expounded as such in its decision by citing to the applicable HUD rule, which interprets the FHA, and which establishes that a landlord is "directly liable for failing to 'take prompt

action to correct and end a discriminatory housing practice by a third party' if the landlord 'knew or should have known of the discriminatory conduct and had the power to correct it.'" 24 C.F.R. §100.7(a)(1)(iii). When the Supreme Court ultimately resolves this split, it should similarly defer to the regulatory agency and set a clear test, to wit: Does the applicable lease give the landlord enough control to have the power to stop the continuation of the hostile housing environment? See *Shalala v. Guernsey Memorial Hosp.*, 514 US 87 (1995).

Andrew M. Lieb *is managing attorney of Lieb at Law, P.C.*