15-1823-cv

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DONAHUE FRANCIS,

Plaintiff-Appellant,

v.

KINGS PARK MANOR, INC., CORRINE DOWNING,

Defendants-Appellees,

and

RAYMOND ENDRES,

Defendant.

On Appeal from the United States District Court
for the Eastern District of New York (Central Islip)

EN BANC BRIEF FOR DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, the undersigned attorney of record for KINGS PARK MANOR, INC. (the "Defendant-Appellee"), hereby certifies that the Defendant-Appellee is a New York domestic business corporation with no parent corporations and no publicly held corporation that owns 10% or more of the Defendant-Appellee.

Dated: Commack, New York
May 7, 2020

Respectfully submitted,

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COUNTERSTATEMENT OF THE CASE

Francis, a self-identified African American black male, and Raymond Endres ("Endres"), a white male, were living in the same community, and were involved in a personal dispute. There is no mistaking that Francis and Endres did not get along. However, there are no allegations that the Landlord, Kings Park Manor, engaged, in any manner, in the dispute between these neighbors. Nonetheless, Francis contends that Kings Park Manor and Corrine Downing, King's Park Manor's property manager (collectively "KPM"), are liable under the Fair Housing Act ("FHA") and the New York State Human Rights Law because they did not take action to curtail Endres's speech, even though the Suffolk County Police Department ("SCPD") was currently investigating the matter. A review of the Complaint, which sets forth the alleged statements by Endres, makes clear that this was a personal dispute about Francis's refusal to close his front door and his repeated disturbance of Endres's quiet use and enjoyment of his own home. (A. 016-037).

Endres allegedly made the following statements: (1) in February 2012 while outside of his apartment he said "Jews, fucking Jews, and fucking niggers"; (2) on March 3, 2012 he said "damn fucking Jews" and "fucking asshole" from outside Francis's apartment, while Francis was inside with his door open; (3) on March 10, 2012, Francis had his door open and allegedly heard Endres use unspecified

inappropriate language with another tenant, but not directed towards him; (4) on March 11, 2012 while Francis was inside his apartment with his door open, Endres said "fucking nigger, close your god-darn door, fucking lazy, god-damn fucking nigger"; and (5) on March 20, 2012 Mr. Endres called Mr. Francis a nigger in the parking lot. (A. 019-020). Notably, *after* the alleged comments were made, on March 21, 2012, Francis opted to renew his lease, and voluntarily remained in his apartment. (A. 068).

Francis further alleged that Endres made the following comments after he renewed his lease; (1) on May 14, 2012, Endres was outside of Francis's front door and said "fuck you"; (2) on May 15, 2012, Endres told Francis to "keep your door closed you fucking nigger"; and (3) on May 22, 2012 Endres said "I oughta kill you, you fucking nigger". (A. 021). It was only after the May 22, 2012 incident that Francis informed KPM of Endres's comments. In this regard, in a May 23, 2012 letter to KPM, Francis confirmed that the matter was being handled by the Suffolk County Police Department, and did not request that any action be taken. (A. 021-022).

Francis alleged that Endres made one final comment to him on August 10, 2012, in which Endres called Francis a "fucking nigger and black bastard". (A. 022). Thereafter, the Suffolk County Police Department Hate Crimes Unit investigated Endres's alleged comments, and *failed to charge him with a hate*

crime. (A. 022-023). Rather, Endres was charged with aggravated harassment, a criminal violation which does not involve racial harassment. Francis's final allegation against Endres is that on September 2, 2012, Endres took photos of the inside of his apartment. (A. 024). Despite the above allegations, Francis *again* renewed his lease at KPM on February 15, 2013, and continues to reside in his apartment. (A. 069). Meanwhile, KPM refused to renew Endres's lease in January 2013. (A. 089).

Francis's allegations and police reports are uncorroborated by any witness statements and are supported only by his own self-serving reports of the alleged incidents. Indeed, the police reports corroborate only Francis's self-depiction of the alleged incidents. (A. 045, 056). Further, Endres's ultimate guilty plea was to harassment under N.Y. Penal Law § 240.26(1), which is non-racial based, non-hate, harassment, and only classified as a violation. *See* N.Y. Penal Law § 240.26(1). (A. 025).

Francis never requested the assistance of KPM, and instead complained about Endres to the SCPD. In light of the SCPD's involvement and Francis's admitted failure to ask KPM for help, it would have been reasonable for KPM to assume that their intervention was not required. Significantly, Francis does not allege that he had any communications with KPM regarding the alleged

harassment prior to his voluntary decision to renew his lease with KPM, or his filing of a complaint with the SCPD on March 11, 2012.

The first notification given to KPM of this alleged harassment came via letter dated May 23, 2012, three months after the alleged behavior(s) began. (A. 021-022, 041-045). Moreover, a review of the May 23rd letter makes clear that said letter was simply a means to inform KPM of the alleged harassing behaviors and advise KPM that Francis elected to take a course of action with the SCPD. (*Id.*) This letter describes the incidents complained of concerning Endres and advises KPM of the status of the report(s)/investigation(s) made to the SCPD in connection therewith. (*Id.*) At no point in this letter does Francis request any form of investigation or intervention by KPM. (*Id*).

Francis drafted two additional letters to KPM, dated August 10 and September 3, 2012, which merely updated KPM on the status of the SCPD investigation. (A. 049-051, 055-056). Significantly, these letters did not request any investigation, intervention or other action by KPM. (*Id*). While Francis alleged in his Complaint that the foregoing letters "expressed" to KPM that "Endres's remarks and conduct were unwelcome, based on race, and unreasonably interfered with the use and enjoyment of the premises" a review of said letters makes clear that no such statements were made. (*Id.*, A. 023).

In sum, while Endres's alleged comments are reprehensible, they do not give rise to a hostile housing environment claim. Specifically, Endres used racial slurs against Francis only six (6) times between February 2012 and August 2012, and the majority of Endres's comments had nothing to do with Francis's race. Further, these comments were all made in the context of a personal dispute between the two men. Notably, while being subjected to an alleged "hostile housing environment," Francis voluntarily elected to renew his lease. Francis's voluntary decision to renew his lease invalidates his claim that he faced severe and pervasive harassment from Endres. Moreover, despite the alleged racial harassment, Francis continued to leave his door open during this time. He could have simply closed his door and resolved the dispute with Endres. Further, KPM was reasonable in its belief that the police investigation and non-renewal of Endres's lease would resolve the dispute. Therefore, notwithstanding KPM's lack of legal liability for Endres's comments, the aforesaid facts do not give rise to a hostile housing environment claim.

I. Prior Proceedings

A. KPM's Motion to Dismiss

On August 1, 2014, KPM moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint as against them for failure to state a claim. By order dated March 16, 2015, District Court Judge Arthur D. Spatt granted KPM's motion to

dismiss as to all claims other than Francis's claim for breach of warranty of habitability against KPM. (A. 092-121).

Judge Spatt dismissed Francis's claims pursuant to the Civil Rights Act of 1866, 42 U.S.C. §§1981 and 1982 and held that "to state a claim for racial discrimination under §§1981 or 1982, a plaintiff must allege intentional discrimination on the part of the defendant." (A. 098). Judge Spatt concluded that "the Plaintiff has failed to allege specific facts sufficient to support an inference that KPM, rather than Endres, intentionally discriminated against him on the basis of race." (A. 099). Further, Judge Spatt noted that the "naked assertions[s] by the Plaintiff that race was a motivating factor [in the alleged failure to intervene by the KPM Defendants] without a fact-specific allegation of a causal link between [KPM Defendants'] conduct and the [P]laintiff's race [are] too conclusory." (*Id.*). Significantly, Judge Spatt held that "[p]laintiff makes no allegation…of disparate treatment based on race or any allegations supporting an inference of discrimination on basis of race." (*Id.*)

Judge Spatt similarly dismissed Francis's FHA claims against KPM on the basis that Francis failed to allege intentionally discriminatory conduct by Defendants-Appellees. In his decision, Judge Spatt noted that:

> Fairly read, the text of both Section 3604(b) and Section 3617 of the FHA, and the above-mentioned cases

> interpreting those statutes, require intentional discrimination on the part of a Defendant in order to state a claim under those provision. The Court identifies no compelling reason why that requisite showing is also not necessary for a "hostile housing environment claim" assuming, without deciding, such a claim is actionable against a landlord or property owner under the FHA. (A. 110).

Judge Spatt dismissed Francis's claims under the New York Human Rights Law pursuant to the same framework as was used for the FHA. (A. 111-113). The District Court dismissed Francis's claim for negligent infliction of emotional distress for failure to state a cause of action, and maintained Francis's claim for breach of implied warranty of habitability. (A. 113-120).

B. The Appeal

On June 4, 2015, Francis filed a Notice of Appeal of Judge Spatt's decision. (A. 126). After submitting their respective briefs, on April 7, 2016, the parties appeared for oral argument of the appeal. On March 4, 2019, nearly three (3) years after oral argument, this Circuit rendered a decision which vacated Judge Spatt's order, and remanded the case back to District Court. (A. 128-201). On April 5, 2019, this Circuit withdrew its March 4, 2019 decision. (A. 202). On December 6, 2019, this Circuit issued a new decision, which also vacated Judge Spatt's order, and remanded the case to District Court. (A. 203-261).

C. The Majority Opinion

The December 6, 2019 Majority Opinion vacated the District Court's dismissal of Francis's Federal and New York State claims, and remanded the case for further proceedings.

The Majority Opinion states that "the main question before us is whether a landlord may be liable under the FHA for intentionally discriminating against a tenant based on the tenant's race." (A. 205). The Majority Opinion thereafter finds that Francis sufficiently pled intentional discrimination by KPM, based on their alleged failure to remediate a hostile housing environment. The Majority Opinion's finding rests solely on Francis's conclusory and non-specific allegation that KPM may have taken some unspecified action against other tenants for lease violations unrelated to racial harassment. (A. 221).

The Majority Opinion blurs the lines between a hostile housing environment claim and an intentional housing discrimination claim under the FHA. In this regard, the Majority Opinion transforms all hostile housing environment claims into intentional discrimination claims whenever a landlord takes action against any tenant for reasons other than tenant-on-tenant racial harassment or discrimination. (A. 221).

In addition to creating a new legal standard which merges hostile housing environment claims with intentional discrimination claims, the Majority Opinion states that the FHA imputes liability to landlords for tenant-on-tenant racial harassment. (A. 219). The Majority Opinion largely relies on the Seventh Circuit's decision in *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 862 (7th Cir. 2018), which held the defendant landlord liable for the physical and verbal abuse suffered by the plaintiff from other tenants and the landlord itself. (*Id.*). The Majority imposes liability on KPM by applying the Title VII hostile work environment standard to landlords.

The Majority Opinion similarly vacated the District Court's order dismissing Francis's Claims under the Civil Rights Act of 1866 §§1981 and 1982, and the New York Human Rights Law on the basis that Francis had alleged intentional discrimination by KPM. (A. 222-225). The Majority affirmed the District Court's dismissal of Francis's claims for negligent infliction of emotional distress. (A. 225-226).

D. The Dissenting Opinion

The Dissenting Opinion by Circuit Judge Debra Ann Livingston sets forth a strong rebuttal to the Majority Opinion and states that "the majority steers our FHA jurisprudence into unchartered territory…where courts improbably discover new

causes of action in half-century old provisions, heedless of the deleterious consequences for parties, courts, and the housing market." (A. 228).

The Dissent frames the core issue of this case differently than the Majority. Whereas the Majority Opinion addresses if a landlord can be held liable pursuant to the FHA for post-acquisition intentional discrimination, the Dissent asks if the FHA imposes a duty on landlords to remediate tenant-on-tenant racial harassment. (A. 227-228).

The Dissent notes that "when this appeal was argued over three years ago, on April 7, 2016, Francis asserted that the question presented was 'whether the FHA should be read to impose an obligation on housing providers to remedy a discriminatory housing environment created by one tenant harassing another.'" (A. 231). The Dissent further observes that Francis's brief on appeal did not allege intentional discrimination by KPM, but argued for the imposition of liability for their negligent failure to remedy a discriminatory housing environment. (*Id.*).

The Dissent agrees with Judge Spatt that "the naked assertion on which the majority relies to once again revive this complaint…does not plausibly support an inference of discriminatory intent, dooming both the FHA claims and Francis's claims pursuant to §§ 1981 and 1982." (A. 234). Specifically, the Dissent notes that FHA claims are analyzed similar to Title VII employment discrimination

claims, in which an employee "must show she was similarly situated in all material respects to the individuals with whom she seeks to compare herself.", *citing, Mandel v. Cnty. of Suffolk*, 316 F.3d 368, 379 (2d. Cir. 2003) (A. 234). Here, the Dissent holds that Francis failed to make this showing because he "did not set out to plead the claim that the majority belatedly discerns." (A. 235).

The Dissent acknowledges the widespread ramifications of the Majority Opinion on landlords, and states that:

> But any faithful application of the pleading standard today would appear to expose *all* landlords to suit for purposeful discrimination based on the wrongful conduct of one tenant vis-à-vis another so long as such landlords have ever responded to a lease violation. (A. 235).

The Dissent further reaffirmed the District Court's conclusion that the complaint is devoid of allegations suggesting that KPM "failed to intervene on account of their own racial animus towards the Plaintiff." (A. 236).

The Dissent also rebuts the Majority Opinion's interpretation that the FHA requires landlords to remediate tenant-on-tenant racial harassment. The Dissent's argument in this regard is based upon the plain text of the FHA, which does not provide for landlord liability for tenant-on-tenant harassment. (A. 237).

The Dissent objects to the Majority's embrace of the Seventh and Ninth Circuit's expansive interpretation of the FHA, and instead favors this Circuit's adoption of the Fifth Circuit's more restrictive approach, which would exclude landlord liability for tenant-on-tenant racial harassment, *citing, Cox v. City of Dallas*, 430 F.3d 734 (5th Cir. 2005). (A. 243-244). The Dissent also notes that Seventh Circuit's decision in *Wetzel* is a case of first impression, and distinguished from this case, and as such, should be afforded no weight. (A. 251). The Dissent also rejects the Majority's ultimate conclusion that landlords possess the same duty to monitor and remediate their tenant's behavior, as employers do their employees. (A. 251-255).

SUMMARY OF THE ARGUMENT

The District Court properly held that the FHA (and New York Executive Law § 296) should not be extended to hold landlords liable for racial harassment between tenants absent their own intentional discrimination, or a failure to intervene based upon their own racial animus. The District Court further properly found that Francis failed to sufficiently plead claims for racial discrimination under 42 U.S.C. § 1981 or 1982 as no intentional discrimination was pled on the part of KPM or Downing (J.A. 90-91); and that Francis's claim for negligent infliction of emotional distress failed by reason that KPM and Downing had no common law duty to investigate or intervene in this personal dispute (J.A. 105-16).

Francis and the Majority changed the issue initially presented before this Court on appeal from whether a landlord is liable for tenant-on-tenant harassment under the FHA, to whether a landlord is liable under the FHA for intentional discrimination. However, this Court should not be led astray from the real issue to be decided by this Court which pertains to the scope of the FHA, and not intentional discrimination.

Francis argues, inspired by the Majority, that he pled a claim for intentional discrimination against KPM based solely on his allegation that KPM "intervened against other tenants at Kings Park Manor regarding non-race related violations of their leases, or of the law." (A. 028). Francis however, only alleges that KPM

intervened against "other tenants," but does not state the *race* of the "other" tenants, or if KPM's alleged interventions were even the result of tenant complaints. Further, Francis did not plead that KPM failed to follow a set policy regarding the investigation or remediation of tenant complaints. Accordingly, Francis failed to plead that he was treated less favorably than similarly situated tenants outside of his protected class. Francis's failure to plead a comparator in this regard renders his intentional discrimination claims against KPM fatal, as without such a comparator, there can be no inference of discrimination against KPM. Without an inference of discrimination against KPM, Francis's intentional discrimination claims under 42 U.S.C. § 1981, 1982 and the FHA fail.

Francis and the Majority's fallback argument is that the FHA extends liability to landlords for tenant-on-tenant racial harassment. However, the plain text of the FHA is silent as to tenant-on-tenant harassment, and the statute therefore does not extend liability to landlords for same. Francis and the Majority improperly expand the scope of the FHA in this regard, even though not a single Circuit Court has found landlords liable for tenant-on-tenant racial harassment. The text of the FHA is clear that a defendant itself needs to discriminate to be held liable under the FHA. For this reason, KPM agrees that in certain circumstances, a landlord who actively subjects a tenant to racial harassment may be liable under the FHA. However, here, Francis does not allege that KPM engaged in any

harassment of any shape or form, at any time. Accordingly, because KPM is not alleged to have engaged in the alleged harassment of Francis, KPM cannot be held liable to Francis under the FHA.

Even if KPM could legally be held liable to Francis for Endres's harassment under the FHA, Francis has failed to plead that he was subjected to a hostile housing environment. To this end, Francis was allegedly subjected to a handful of derogatory comments over a period of several months, but renewed his lease in the midst of the alleged harassment. Accordingly, Endres's alleged harassment was not sufficiently "severe and pervasive" for Francis's to state a claim for a hostile housing environment. Further, even if Francis was subjected to a hostile housing environment, KPM was reasonable in assuming that the ongoing police investigation and their non-renewal of Endres's lease would address Endres's alleged harassment. Ultimately, Endres was arrested and forced to move out of his apartment, both of which ceased Endres's alleged harassment of Francis. KPM's reasonable actions in this regard warrant dismissal of Francis's claims for a hostile housing environment, under both the FHA and New York State law.

Francis and the Majority's attempt to equate an FHA hostile housing environment claim with a Title VII hostile work environment claim has been rejected by all courts which have addressed the issue. All courts have acknowledged the significant difference in the employer-employee relationship

and the landlord-tenant relationship. These differences require a rejection of Francis and the Majority's attempt to treat these two entirely different, and unique environments, as one and the same.

We urge this Court to consider the severe consequences of expansion of the FHA on the realms of federally-assisted and other rental housing when landlords and public housing authorities are already under severe administrative and financial burdens. The requirement that landlords police tenant behaviors and the potential for damage awards under the FHA, where the housing authority/landlord itself has not committed any discrimination, would unjustly divert resources from the most pressing needs of current and future public housing residents.

ARGUMENT

I. The Legal Standard on KPM's FRCP 12(b)(6) Motion

To survive a Rule 12(b)(6) motion to dismiss "a plaintiff must provide grounds upon which their claim rests through 'factual allegations sufficient to raise a right to relief above the speculative level.' (A. 097) (*citing ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)(*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (A. 097-098) (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

In *Ashcroft*, Supreme Court held that "[a] pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do. *Id* at 1949. The Court further held that "while legal conclusions can provide the framework of a Complaint, they must be supported by factual allegations." *Id* at 1950. Here, Francis's Complaint was clearly pled as a hostile housing environment claim, and he argued as much in his prior motion and appellate papers. However, Francis now effectively seeks to amend his Complaint to include a claim of intentional discrimination against KPM, which was not pled in his Complaint. In

this regard, Francis's alleged intentional discrimination claim is simply a bare legal conclusion without any relevant factual allegations, rendering said claim fatal pursuant to the standard set forth in *Iqbal*. Further, Francis's hostile housing environment claims fail because the FHA does not provide for a cause of action based on tenant-on-tenant harassment, and even if it did, Francis has not pled a hostile housing environment.

II. Francis Fails to Plead a Claim for Intentional Discrimination Against KPM Pursuant to 42 U.S.C §§ 1981 and 1982

An action under 42 USC § 1981 must allege three (3) elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute. *Reyes v. Erickson*, 238 F. Supp.2d 632, 638 (S.D.N.Y. 2003). Due to the related origins and language of 42 USC §§ 1981 and 1982, "they are generally construed in pari material…[and] the court will apply the same standard to both sections." *Puglisi v. Underhill Park Taxpayer Ass 'n*, 947 F. Supp, 673, 699-700 (S.D.N.Y. 1996).

Accordingly, the District Court properly held that "[t]o state a claim for racial discrimination under §§ 1981 or 1982, a plaintiff must allege intentional discrimination on the part of the defendant." (A. 098) (*citing Samuels v. William*

Morris Agency, No. 10 CIV. 7805 (DAB), 2011 U.S. Dist. LEXIS 79293, 2011 WL 2946708, *at* *4 (S.D.N.Y. July 19, 2011)(*citing Mian v. Donaldson, Lufkin & Jenrette Sec.,* 7 F.3d 1085 (2d Cir. 1993)); *Perry v. State of New York,* No. 08 Civ. 4610 (PKC), 2009 U.S. Dist. LEXIS 74006, 2009 WL 2575713 (S.D.N.Y. Aug. 20, 2009)("A plaintiff is required to set forth factual circumstances from which discriminatory motive can be inferred. . . . In the absence of such allegations, dismissal at the pleading stage is warranted.")(internal citations omitted).

The District Court further held that for a Section 1981 claim to withstand dismissal, "the events of the intentional and purposeful discrimination, as well as the racial animus constituting the motivating factor for the defendant's actions must be specifically pleaded in the complaint." (A. 099) (*citing Yusuf v. Vassar College*, 827 F. Supp. 952, 955 (S.D.N.Y. 1993)(citation omitted), *aff'd in part, rev'd in part on other grounds*, 35 F.3d 709 (2d Cir. 1994).

Housing discrimination claims are often analyzed in a similar framework as Title VII disparate treatment claims. To that end, to establish a claim of employment discrimination under Title VII, a plaintiff needs to show "that the employer treated [her] less favorably than a similarly situated employee outside [her] protected group…[and] must show [she is] similarly situated in all material respects to the individuals with whom she seeks to compare herself." *E.E.O.C. v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 257 (2d. Cir. 2014). The cases cited by

Francis in his brief further confirm that a plaintiff needs to plead that he was treated worse than a similarly situated individual(s) outside of his protected class. *See*, *Tex. Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507 (2015) (plaintiffs alleged discrimination based upon the disparate treatment of Black v. White neighborhoods); *United States v. Starret City Assoc.*, 840 F.2d 1096 (2d. Cir. 1988) (plaintiffs sued defendants based upon disparate treatment of Black and Hispanic rental applicants compared to White applicants); *Cabrera v. Jakabovitz*, 24 F.3d 372 (2d. Cir. 1994) (plaintiffs sued landlords and brokers for racial discrimination in the disparate treatment of minority apartment searchers v. White apartment searchers). Significantly, Francis failed to cite a single housing discrimination case in which the plaintiff did not allege that similarly situated individuals outside of their protected class were treated more favorably.[1]

Here, Francis's Complaint was clearly pled as a hostile housing environment claim, and contained only conclusory allegations pertaining to intentional discrimination or disparate treatment as compared to tenants from other races.

[1] Francis cited several cases in support of his argument that he did not need to plead a comparator to establish his intentional discrimination claims. However, none of the cases cited by Francis support his argument. *See; Faragher v. City of Boca Raton*, 524 US 775 (1998) (employee sued employer for hostile work environment and not disparate treatment); *Petrosino v. Bell Atl.*, 385 F.3d 210 (2d. Cir. 2014) (constructive discharge claims dismissed against employer); *Alfano v. Costello*, 294 F.3d 365 (2d. Cir. 2002) (employee specifically alleged she was treated less favorably than similarly situated male co-workers): *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887 (7th Cir. 2018) (employee's intentional discrimination claim dismissed because comparator was not pled).

Specifically, Counts I, II, III, IV, V and VI of Francis's Complaint allege only that KPM "tolerated and facilitated Mr. Endres's pattern of racist conduct, despite repeated specific requests to investigate and intervene on behalf of Mr. Francis." (A. 030-035). Francis's allegations continue that "...the KPM Defendants' tolerance and/or facilitation of said acts were sufficiently severe so as to create a hostile housing environment based on race...". (*Id.*).

Francis's complaint lacks any specific factual or legal allegations that Defendants KPM and Downing intentionally discriminated against him on the basis of his race. The District Court properly held that Francis made no allegation of derogatory remarks by KPM or Downing, disparate treatment based on race, or any allegations of any circumstantial evidence supporting even an inference of discrimination based upon race. (A. 099). Francis's complaint was unable to survive dismissal because he failed to plead any "events of purposeful discrimination, as well as the racial animus constituting the motivating factor for the defendant's actions." *Id.* "Naked assertion by [Francis] that race was a motivating factor in the alleged failure to intervene [] without a fact-specific allegation of a causal link between KPM defendants' conduct and the Plaintiff's race are too conclusory." *Id.* (citing *Hardin v. Meridien Foods*, 2001 WL 1150344 at *8, No. 98 Civ. 2268 (S.D.N.Y. Sep. 27, 2001) (*quoting Yusuf*, 827 F. Supp. at 955-56)(citation omitted).

Accordingly, the District Court was correct that Francis's failure to plead disparate treatment as compared to similarly situated tenants outside of his protected class renders his intentional discrimination claims, both under the FHA and §§1981 and 1982, fatal. Francis acknowledges his failure to plead a comparator, and claims that "[t]here is no reason why Mr. Francis must plead a specific tenant comparator with respect to whom the defendants *did* follow the law and their lease obligations." App. Brief. Pg. 20. However, Francis does not support this statement with a single case. Rather, Francis states that KPM "intentionally departed from their own policies and obligations rather than address known racial harassment." *Id.*

Francis's argument fails because he did not plead these allegations in the Complaint. The Complaint fails to allege that KPM intentionally departed from its practices, fails to list any of these practices, and, most importantly, fails to allege that tenants of other races were treated more favorably than he was. Francis broadly alleges discrimination by KPM, which, as the District Court decided, was insufficient to state a claim for housing discrimination. Francis attempts to amend his Complaint in his instant brief, and proffers an entirely new argument than was set forth in his initial brief. Francis's new argument, of course, was copied from the Majority's decision, which held that it is plausible to simply *assume* that KPM

addressed a non-race related tenant issue, and therefore its failure to address Endres's alleged racial harassment constituted disparate treatment.

The Majority's arguments fail. First, the Majority does not use other tenants as a comparator. Rather, the Majority uses non-racial tenant disputes as the comparator. A dispute itself cannot serve as a comparator, a person or class of persons must. Accordingly, neither the Majority nor Francis alleges that Francis was treated worse than individuals outside of his protected class. Moreover, it is possible that all of the tenants in KPM are Black and all of the non-racial tenant disputes addressed by KPM involved Black tenants. However, even in this situation, where Francis could not possibly have been treated worse than an individual outside of his protected class, the Majority would find that KPM intentionally discriminated against Francis. This unintended outcome is the result of the Majority's decision to treat non-race related tenant issues and lease violations as comparators. There is no precedent to treat a non-person as a comparator in §§1981 and 1982, FHA, Title VII and Title IX claims race discrimination claims. By definition, a comparator must be a living person, not an intangible event which may not even exist. See *Mandel v. Cnty. of Suffolk*, *supra.* In sum, the Majority and Francis's arguments fail for their failure to consider that it matters *whose* complaints went unaddressed, as opposed to the nature of the

complaints themselves. Francis's failure to plead a human comparator eliminates any inference of discrimination on the part of KPM.[2]

Francis also adopts the Majority's argument that a housing provider with authority to address misconduct, but refuses to do so with respect to known discriminatory misconduct, commits intentional discrimination. Notwithstanding Francis's failure to plead an intentional discrimination claim, as set forth above, this argument has no basis in the facts as alleged in the Complaint, or the law.

Francis furthers his argument by broadly declaring that that under the FHA and "every analogous civil rights statute," an entity having the requisite authority and duty to act who refuses to address discriminatory conduct as it would anything else that seriously degrades the environment it oversees commits intentional discrimination. First, no Federal Courts of Appeals have decided a tenant-on-tenant racial harassment lawsuit similar to the instant case. Accordingly, this is a case of first impression in the Second Circuit and nationwide. Therefore, Francis's statement that it is "well-established" that the FHA deems landlords to have

[2] Francis citation to *Armindo v. Padlocker*, 209 F.3d 1319 (11th Cir. 2000) (pregnancy discrimination case dismissed where no comparator pled) and *Bradley v. Carydale Enterprises*, 730 F.Supp 709 (E.D.V.A. 1989) (landlord retaliated for complaints of harassment and had clear policy of investigating tenant complaints) in support of his argument that he need not plead a comparator is misplaced, as the cases are distinguishable from this case and do not otherwise support Francis's argument.

intentionally discriminated against tenants for failing to address tenant complaints of racial harassment is incorrect.

Next, Francis relies on cases that have no bearing on this case. For example, in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), plaintiff sued the defendant school district after a teacher allegedly abused a student. As the teacher in *Gebser* was an agent of the district, *Gebser* is not applicable to this case. In *Davis v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 641 (1999), the Court upheld the plaintiff student's sexual harassment claims because the abuse occurred in a school classroom, over which the district had direct and substantial control. Here, KPM was only the landlord for the apartment complex, and does not have nearly the degree of control over its tenants as the school district had over its students or teachers in *Davis*. As such, *Davis* has no bearing on this case, other than to confirm the stark differences between the FHA and Title IX environments.

Francis repeatedly cites to *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) to support his argument that KPM is liable for intentional discrimination. However, in *Meritor*, the alleged sexual harassment was from the plaintiff employee's supervisor, who was deemed to be an agent of the defendant. Id at 59-60. Here, Francis has not alleged that he was harassed by KPM or any of its employees or agents. As such, *Meritor* is markedly distinguishable from this case

and Francis's reliance on it to support holding KPM liable for intentional discrimination fails.

Francis cites *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655 (2d. Cir. 2012), which follows *Davis*. In *Zeno*, plaintiff student sued the defendant school district for racial harassment by other students. The Court noted that liability for the actions of third-party conduct "only arises if plaintiff establishes: (1) substantial control, (2) severe and discriminatory harassment, (3) actual knowledge and (4) deliberate indifference." *Id* at 665. Here, KPM does not have substantial control over the minute to minute actions of its tenants, as a school does over its students. Further, KPM did not have actual knowledge of the events, as they were not witnessed by any KPM staff members. Finally, KPM was not deliberately indifferent, because it was aware that the SCPD was investigating the harassment. In this regard, the court in *Zeno* held that "a school district's actions are only deliberately indifferent if they were 'clearly unreasonable in light of the known circumstances'" and that "a court must afford sufficient deference to the decisions of school disciplinarians." *Id* at 666. Here, it was reasonable to assume the police department was handling the matter and would take effective measures against Endres. As such, if this Court follows *Zeno*, clearly KPM does not have liability.

Francis's reliance upon cases permitting use of a "deliberate indifference" standard also fails. *See, e.g., Gant v. Wallingford Bd. Of Ed.*, 195 F.3d 134 (1999)

(discrimination by school officials themselves); *Farmer v. Brennan*, 511 U.S. 825 (1994) (plaintiff inmate sued defendant for violations of his Eighth Amendment Rights); *Lance v. Lewisville Ind. Sch. Dist.*, 743 F.3d 982 (5th Cir. 2014) (plaintiff's case against school district for disability harassment dismissed when district took reasonable steps to address the harassment). None of the cases Francis cites regarding deliberate indifference involve the FHA. Further, here, KPM was reasonable in assuming that the SCPD would appropriately investigate and address Endres's alleged harassment. KPM's assumption was correct, as Endres's was arrested, charged with a *non-hate crime*, and his lease was thereafter not renewed by KPM. As such, KPM was not deliberately indifferent to Endres's harassment, as it reasonably assumed that his harassment was being addressed by the police, and they did not renew Endres lease.

Francis and the Majority's transparent attempt to transform Francis's claims into intentional discrimination claims is a tacit acknowledgment that the FHA and §§ 1981 and 1982 do not cover tenant-on-tenant racial harassment. FHA and §§ 1981 and 1982 clearly outlaw intentional discrimination, but are silent as to liability for tenant-on-tenant racial harassment. Tellingly, not a single Federal District Court or Appellate Court has upheld a tenant-on-tenant racial harassment claim against a landlord. Faced with no support from the relevant statutes and case law, the Majority and Francis decided to draft their own law, creating a hybrid

intentional/negligence standard for hostile housing environment claims. This Court should reject the Majority and Francis's attempts to create this hybrid legal standard by legislating from the bench, as this new hybrid legal standard will have serious unintended impacts on FHA, Title VII and Title IX jurisprudence across the country.

Accordingly, the District Court order granting KPM's motion to dismiss the Section 1981 and Section 1982 claims should be affirmed. As such, Francis's new intentional discrimination claims should be dismissed.

III. Francis Fails to State a Claim Against KPM for Intentional Discrimination under the FHA

The FHA prohibits "discriminat[ion] 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." *42 U.S.C. § 3604(b)*(emphasis added). "Because of" means that a defendant is not liable when the actions complained of would have been taken in the absence of discrimination." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-53 (1989); *see also Denton*, FH-FL Rptr. P 25014 (HUD ALJ,

1992)(holding that this principle also applies to FHA). Therefore, a defendant must have acted with discriminatory motive to be liable under the FHA.[3]

Here, the allegations that KPM and Downing did not take "immediate and appropriate corrective action" is simply not a fair housing claim without the additional claim that KPM and/or Downing failed to take such action *because of* the race or color of Francis. Just as with Francis's §§1981 and 1982 claims, because Francis makes no specific claims in the Complaint suggesting that KPM or Downing discriminated in any way, the District Court below properly dismissed Francis's claims. Francis has tailored his En Banc opening brief to the Majority's Decision which *sua sponte* amended the Complaint to include claims for intentional discrimination against KPM. However, this Court should look to the plain language of Francis's Complaint and his initial Appellate Brief which clearly framed Francis's claims against KPM as hostile housing environment claims pursuant to the FHA. Accordingly, notwithstanding Francis's and the Majority's transparent machinations, the real issue here remains from its inception; to wit, whether KPM is liable to Francis for Endres's alleged racial harassment. As KPM

[3] Francis repeatedly argues that the FHA provides a cause of action for discriminatory enforcement of housing rights secured by contract. KPM agrees. However, here, by failing to plead that a comparator, or similarly situated individual outside of his protected class, was treated more favorably, Francis has failed to state a claim for discriminatory enforcement under the FHA.

and its agents did not engage in intentional discrimination, they cannot be liable to Francis for Endres alleged racial harassment.

IV. Francis Fails to State a Claim Against KPM for a Hostile Housing Environment

A. Landlords Should Not Be Liable for Claims of "Hostile Housing Environment" in the Absence of Their Discrimination or that Imputed to Them *via* Their Authorized Agents

Here, Francis does not allege that KPM or Downing created the alleged hostile environment, engaged in any direct discriminatory acts, or elected not to intervene based upon their own racial animus. The environment was created by Endres. The FHA and related New York statutes were not created to serve as "some all purpose civil code regulating conduct between neighbors." *Lawrence v. Courtyards at Deerwood Assoc.*, 318 F.Supp.2d 1133, 1142 (S.D. Fl. 2004); *see also Halprin v. The Prairie Single Family Homes of Dearborn Park Assoc'n*, 388 F.3d 327, 330 (7th Cir. 2004)("[W]e do not want, and we do not think Congress wanted, to convert every quarrel among neighbors in which a racial or religious slur is hurled into a federal case."); *Lachira v. Sutton*, 2007 U.S. Dist. LEXIS 33250 at *60 (Dist.Conn.)(same).

As noted by the District Court, the District Courts in this Circuit have recognized hostile housing environment claims against landlords under the FHA only where the landlord *created* the conditions of harassment. (A. 101-102). *See,*

e.g. Cain v. Rambert, 2014 U.S. Dist. LEXIS 74188 (E.D.N.Y. May 30, 2014). It is inconceivable that either Congress or the New York legislature intended to hold a housing provider, particularly a low-income housing provider, liable for the actions of its tenants. To hold otherwise opens the door to judicially legislate against "bad neighbors."

B. The Post-Acquisition Scope of the FHA is Unsettled Law

Francis asserts claims against KPM pursuant to the Fair Housing Act ("FHA"), 42 U.S.C. §§3604(b) and 3617. To plead a claim for discrimination under Section 3604(b) of the FHA, a plaintiff must establish, in relevant part, that the defendant subjected them to discrimination in the terms, privileges of sale or rental of a dwelling. Section 3617 provides, in part, that it is unlawful to coerce, intimidate, threaten or interfere with any person's privileges as protected in Section 3604. Neither statute references tenant-on-tenant harassment. Absent any reference to tenant-on-tenant harassment, there is no test for a theory of liability for same. Accordingly, pursuant to the plain text and natural reading of the FHA, KPM is not liable for Endres's alleged harassment. Francis's argument otherwise is a distortion of the text of the FHA, which speaks for itself.

Fair Housing Act claims under §§ 3604 or 3617 cover a wide range of

conduct and the standard for a prima facie case differs depending on the conduct. *See Haber v. ASN 50th St. LLC*, *supra* at 586. However, "regardless of how the prima facie standard is articulated, the plaintiff is required to show that defendants' actions against him arose from a discriminatory motive." *Id.* A showing of intentional discrimination is an essential element of a § 3617 claim. *See Lachira v. Sutton*, *supra* at *63. As set forth above, Francis's Complaint does not plead a cause of action of action for intentional discrimination against KPM, warranting dismissal of his FHA claims.

In keeping with the principles and language of the FHA described above, a "toleration" or "failure to remedy" claim, as Francis asserts here, must involve discriminatory acts by KPM or its agents. *See Lawrence v. Courtyards at Deerwood Assoc.*, 382 F. Supp. 2d at 1142; *Sofarelli v. Pinellas County*, 931 F.2d 718, 722 (11th Cir. 1991); *East-Miller v. Lake County Highway Dep't,* 421 F.3d 558, 563 (7th Cir. 2005); *Campbell v. Robb*, 162 Fed. Appx. 460 (6th Cir. 2006).

Accordingly, the District Court properly held that "the text of both Section 3604(b) and Section 3617 of the FHA, and the cases interpreting those statutes, require intentional discrimination on the part of a Defendant in order to state a claim under those provisions." (A. 110) The District Court further found "no compelling reason why that requisite showing is also not necessary for a 'hostile

housing environment' claim, assuming, without deciding, such a claim is actionable against a landlord or property owner under the FHA." (A. 110).

Francis does not allege that KPM or Downing ever participated in the harassment against him. Nor does his Complaint allege that race played any factor in KPM's decision not to intervene, or that his complaints were handled any differently than that of a specific non-minority. Where "there are no specific facts [] from which a rational finder of fact could support a reasonable inference that Defendants were racially motivated" an action must be dismissed. *Haber v. ASN 50th St. LLC*, *supra* at 586.

Francis argues that the plain language of the FHA bars discriminatory harassment of tenants, because it mirrors the language of Title VII. While case law is unsettled on this issue, for the purposes of this case, KPM will concede that the FHA may bar the discriminatory harassment of tenants by landlords themselves in certain circumstances. Francis and the Majority, however, attempt to make the case that the FHA imputes liability for tenant-on-tenant racial harassment to landlords. This position is not supported by the plain language of the FHA or the relevant case law.

The Majority and Francis rely on the Seventh Circuit's decision in *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856 (7th Cir. 2018) to support their argument that landlords are responsible for all tenant-on-tenant racial harassment.

However, *Wetzel* is markedly distinguishable from this case, and does not support Francis's or the Majority's position. In *Wetzel*, the plaintiff was a lesbian who sued her landlord for alleged harassment and discrimination on the basis of her sexual orientation. The plaintiff in *Wetzel* alleged that she was "repeatedly" called derogatory terms for lesbians, was subjected to and threatened *with physical violence*, and residents "derided Wetzel's son for being a 'homosexual-raised faggot.'" *Id.* at 860. Here, Francis does not allege that he was subjected to any physical violence from Endres or any other tenants.

Further, in *Wetzel, management* took affirmative steps to discriminate and retaliate against the plaintiff for her complaints." *Id.* The plaintiff in *Wetzel* "was relegated to a less desirable dining room," "barred...from the lobby," had her cleaning services halted, was subjected to false accusations, and was actually slapped in the face by the management company's staff. *Id.* As a result of this abuse, she was forced to change her daily routine and behaviors. *Id* at 861. Here, Francis does not allege that KPM took any retaliatory actions against him and does not proffer any specific allegations of discrimination by KPM.

The Seventh Circuit emphasized that "it is important to recognize that the facts [plaintiff] presented...go far beyond mere rudeness, all the way to direct physical violence," including by the management company itself. *Id.* at 866.

Further, in Wetzel, the majority of the harassment occurred in areas over which the defendants had substantial control, which is not the case here. *Id* at 864.

Finally, as noted by Judge Livingston in her dissent Dissent, *Wetzel* was a case of first impression in the Seventh Circuit, and the Supreme Court has never held that a landlord is responsible for tenant-on-tenant harassment pursuant to the FHA. Moreover, even if *Wetzel* was applicable here, as set forth *infra*, KPM is still not liable to Francis.

In the other hostile living environment cases cited by Francis, the perpetrator of the discriminatory conduct was the *landlord or owner, or their employee or agent. See, e.g., Neudecker v. Boisclair Corp.*, (harassment included actions by landlord's agent); *DiCenso v. Cisneros*, supra, (sexual harassment by landlord); *Honce v. Vigil*, (sexual harassment by landlord); *Halprin v. Prairie Single Family Homes of Dearborn Park Assn.*, *supra* (religious harassment by homeowners' association); *Khalil v. Farash Corp.*, 277 Fed.Appx. 81 (2d Cir. 2008)(familial status discrimination by landlord – assuming without deciding that a plaintiff may state an FHA claim based upon hostile housing environment); *Hall v. Meadowood Limited Partnership*, 7 Fed. Appx. 687 (2001)(alleged direct discrimination by landlord); *Beliveau v. Caras*, 873 F.Supp. 1393 (C.D. Ca. 1995)(alleged direct discrimination by landlord). *Reeves v. Carrollsburg Condo. Unit Owners Assoc.*,

1997 WL 1877201 (D.D.C. 1997) (plaintiff alleged she was prohibited from using common areas and subjected to discrimination from the homeowner's association).

Here, there were no discriminatory acts by KPM or Downing to constitute an "interference" claim, and an alleged failure to act, even if such a standard were applicable here, is simply not enough. The court in *Lawrence*, *supra*, provides a compelling analysis in interpreting a neighbor dispute in which one neighbor sought to hold the homeowners association liable for failing to remedy the harassment. *Lawrence,* 318 F. Supp.2d at 1144 (*citing Gourlay v. Forest Lake Estates Civil Ass'n of Port Richey, Inc.*, 276 F. Supp.2d 1222, 1235 (M.D. Fla. 2003)). The *Lawrence* court held that "the word 'interfere'... 'extends only to discriminatory conduct that is so severe or pervasive that it will have the effect of causing a protected person to abandon the exercise of his or her housing rights.'" *Id.* The *Lawrence* court further concluded that "[a] failure to act does not rise to the level of the egregious overt conduct that has been held sufficient to state a claim under section 3617." *Id.* at 1144-1145. Accordingly, the *Lawrence* court rejected the plaintiffs' argument that the defendants should have done something to prevent or curtail the harassment and by refusing to do so the defendants violated Section 3617. *Id.* at 1145.

Ultimately, Francis's complaint cannot survive dismissal because it is required to plead "the events of the intentional and purposeful discrimination, as

well as the racial animus constituting the motivating factor for the defendants' actions." (A. 111) (*citing Nelson v. Brown*, No. 13-CV-3446 (KAM)(MDG), 2014 U.S. Dist. LEXIS 126671, 2014 WL 4470798 (E.D.N.Y. Sept. 10, 2014). It is impossible for Francis survive this standard because he did not plead a single intentional discriminatory act of KPM, including harassment. Absent an allegation of racial harassment or discrimination by KPM itself, Francis's claims under the FHA must be dismissed. *United States v. Space Hunters, Inc.*, 429 F.3d 416 (2d Cir. 2005) (punitive damages pursuant to the FHA are limited "to cases in which the defendant has engaged in intentional discrimination."). Therefore, while *Wetzel* may have extended landlord liability under the FHA to extreme cases of tenant-on-tenant harassment in the Seventh Circuit, it does not apply to this case, and even if it did, Francis's still failed to plead a cause action against KPM under the FHA.

C. An Analogy Between this Case and that of Hostile Work Environment Claims under Title VII is Misplaced

Francis and the Majority seek to invoke Title VII to support their argument that KPM is liable to Francis under the FHA for their alleged failure to remediate a hostile housing environment. Tellingly, however, Francis and the Majority embrace Title VII in the hostile housing environment context, yet completely ignore Title VII's application to disparate treatment discrimination claims. In this regard, Francis and the Majority disregard the well settled case law which requires

a Title VII plaintiff to allege that he was treated worse than a similarly situated employee outside of his protected class. Francis and the Majority claim, with no support or explanation, that a comparator is not needed in the FHA and §§1981 and 1982 housing discrimination context, as it is in the Title VII employment discrimination context. However, in the hostile housing environment context, Francis and the Majority argue that the Title VII analysis does apply, even though the allegations here, the respective laws, and the dissimilarities between an apartment complex and a workplace remain the same. Francis and the Majority cannot have it both ways. If Francis and the Majority analyze this case as if it was a Title VII employment discrimination and hostile work environment case, then their application of the Title VII analysis should be uniform, not cherry picked.

Title VII's application to this case is of course more nuanced, but Francis and the Majority have reversed the manner in which it should be applied. In a disparate treatment housing discrimination case, the Title VII analysis clearly applies, as one can only infer discriminatory intent by comparing the treatment between two similarly situated individuals from two different protected classes, or from the defendant's words. In a hostile housing environment case, the Title VII hostile work environment comparison is less appropriate, because the differences between a workplace and an apartment complex are immense. Here, Francis and the Majority incorrectly applied the Title VII analysis to the hostile housing

environment claim and not to the disparate treatment claim. The Majority's failure to appreciate the nuances between Title VII cases and housing cases directly led to the Majority's flawed decision which has resulted in this *en banc* review.

Francis cites various cases to support his argument that FHA cases should be analyzed similar to Title VII cases. However, these cases largely support KPM's argument that Francis's disparate treatment claim should be analyzed pursuant to Title VII standards. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys Project*, *supra,* (plaintiff sued defendants for disparate treatment of Black inner-city areas as opposed to White suburban neighborhoods); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d. Cir. 1988) (plaintiffs sued defendants for discriminatory zoning policies); *United States v. Starret City Assoc.*, *supra*, (plaintiffs sued defendants for the use of racial quotas in apartment rentals); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009) (plaintiffs sued municipal defendants for discriminatory urban planning practices); *Cabrera v. Jakabovtiz*, *supra* (plaintiffs sued defendant landlords and brokers for disparate treatment of minority apartment applicants v. White applicants). All of these cases cited by Francis pertain to intentional discrimination, disparate treatment claims, as opposed hostile housing environment claims, and are therefore inapplicable to Francis's hostile housing environment claim.

Francis then argues that the Title VII analysis has also been "widely adopted" to FHA cases alleging discriminatory harassment. However, the cases Francis cites to for this argument involve discriminatory conduct *by the landlord's themselves*, or their agents, and accordingly are clearly distinguishable from the facts *sub judice*. *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996) (landlord sued for their own sexual harassment of tenant); *Quigley v. Winter*, 598 F.3d 938 (8th Cir. 2010) (plaintiff sued landlord for landlord's sexual harassment); *Cain v. Rambert, supra* (landlord not liable for harassment by tenants even when landlord tacitly participated in harassment).

Notably, in *Wetzel*, the primary case relied upon by Francis and the Majority, the Seventh Circuit specifically stated that:

> We recognize, however, that there are some potentially important differences between the relationship that exists between an employer and an employee, in which one is the agent of the other, and that between a landlord and a tenant, in which the tenant is largely independent of the landlord. We thus refrain from reflexively adopting the Title VII standard and continue our search for comparable situations." *Wetzel*, 901F.3d at 863.

Therefore, even the Seventh Circuit was hesitant to adopt the Title VII analysis for hostile housing environment cases. As noted by the Dissent, in *Curtis v. Loether*,

415 US 189, 197 (1974), the Supreme Court further highlighted the nuances between Title VII and FHA, and cautioned against a reflexive like for like analysis.

The case law demonstrates that Francis's argument that a Title VII analysis has been "widely adopted" for FHA cases in the hostile housing environment context is incorrect, and for good reason. The relationship between an employer's duty and its ability to control employees through discipline or termination, and that of a public or private housing provider's duty and ability to control the conduct of its' tenants, is tenuous and abstract. There is no agency relationship between landlord and tenant. Thus, the cases cited by Francis are clearly distinguishable, even by their own holdings, as they pertain to the employer-employee relationship, or other relationships which are based in much greater control (i.e. independent contractor, student, client, etc.).[4]

[4] *See, e.g., Fahnbulleh v. GFZ Realty, LLC*, 795 F. Supp. 2d 360, 364 (D. Md. 2011)(sexual harassment of landlord's employee who was also a tenant); *Beckford v. Dept. of Corrections*, 605 F.3d 951 (11th Cir. 2010)(sexual harassment *of employees* by inmates); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (1997)(sexual harassment *of employees* by resident of developmentally disabled residential program); *Galdamez v. Potter*, 415 F.3d 1015 (9th Cir. 2005)(racial harassment of *employee* by customer); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2001) (harassment of *employee* by customer); *Lockard v. Pizza Hut*, 162 F.3d 1062 (10th Cir. 1998)(harassment of *employee* by customer imputed to franchisee, but not to franchisor because no employer relationship); *Williams v. Poretsky Mgmt.*, 955 F.Supp. 490 (D. Md. 1996)(landlord liable to tenant for acts of *employee*); *Freeman v. Dal-Tile Corp.*, 750 F.3d 413 (4th Cir. 2014) (claim against employer for acts of *employee*); *Dunn v. Washington Cnty Hosp.*, 429 F.3d 689 (7th Cir. 2005)(claim against hospital for acts of *independent contractor* surgeon); *Summa v. Hofstra Univ.*, 708 F.3d 115 (2d Cir. 2013)(claim for *co-worker* harassment against employer); *Vance v. Ball State Univ.*, 113 S.Ct. 2434 (2013) (same); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971)(alleged direct discrimination by employer).

To hold a landlord vicariously liable for one's discriminatory practices, the plaintiff must establish that the harasser is the landlord's agent. *See Cabrera v. Jakabovitz*, *supra.* In the context of the landlord-tenant relationship, the landlord (particularly a Public Housing Authority ("PHA") or a landlord of a large apartment complex like the one at issue) is in no position to police the communications between tenants. Landlords simply do not have the same control and access over tenants that employers have over employees. Private employers exercise immediate control over employees so it is reasonable to hold them accountable for the known and tolerated hostile acts of employees in the workplace. However, even employers are not liable for acts of third-parties without consideration of "the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." *Kudatsky v. Galbreath Co.,* 1997 U.S. Dist. LEXIS 14445 at *11-12 (S.D.N.Y. 1997). It is unreasonable to hold lessors in harassing situations to the same level of accountability given the impracticability of both the exercise of such control over renters and the burden of policing "bad neighbors." Furthermore, all of the options that an employer has to remedy harassment in the workplace are effective without the need for judicial intervention. Even if a complaint is made to a landlord that racial epithets were used toward a tenant by another tenant, the

landlord is faced with the impossible standard of proving such uncorroborated statements at trial in an attempt to evict the alleged aggressor.

Employers are only liable for their employee's actions that legally can be imputed to them through established agency principles. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. at 72 (third-party's liability for harassment depends on nature of agency relationship between harasser and third-party). Since the court in *Meritor* held that employer liability is dependent on the nature of the agency relationship with the harassing employee, *Meritor* should prevent landlord liability for the actions of tenants regardless of the nature of their relationship, since it is not one of agency. A hostile housing environment test as proposed by Francis essentially presumes that all landlords have an agency relationship with their tenants, even though the United States Supreme Court, in *Meritor*, has refused to allow courts to make that same presumption even with respect to employers. The application of the standard proposed by Francis would be precisely the application that *Meritor* will not allow.

The District Court properly distinguished the foregoing agency principles in the landlord-tenant context:

> The agency principles that govern employer-employee liability have no parallel in the context of landlord-tenant disputes: 'The relation of landlord and tenant in itself involves no idea of representation or of agency. It is a

> relation existing between two independent contracting parties. The landlord is not responsible to third persons for the torts of his tenant.' (citations omitted). The amount of control that a landlord exercises over his tenant is not comparable to that which an employer exercises over his employee . . . the power of eviction alone . . . is insufficient to hold a landlord liable for his tenant's tortious actions against another tenants.' (A. 105-106) (citing *Ohio Civ. Rights Comm. v. Akron Metro Hous. Auth*, 119 Ohio St. 3d 77, 81, 892 N.E.2d 415, 419 (2008)).

The power to evict cannot be said to have furnished KPM with "a reasonable opportunity or effective means" to prevent or remedy Endres's alleged unacceptable conduct, since the "pattern" of harassment alleged by Francis arose from a purely personal dispute between the two individuals. *Blatt v. New York City Housing Auth.*, 123 A.D.2d 591 (2d Dept. 1986).

As held in *Siino v. Reices*, 216 A.D.2d 552, 553 (2d. Cir. 1995), "absent authority to control the conduct of a third-person, a landowner does not have a duty to protect a tenant from the conduct of another tenant. A reasonable opportunity or effective means to control a third person does not arise from the mere power to evict." Thus, restricting liability on a landlord is proper because a landlord maintains no direct control over the actions of his tenants.

Accordingly, because of the nature of the relationship between the parties, landlords do not possess anywhere near the same level of direct control over tenants that employers have over employees. While employers have a wide range

of options that they can use to control the behavior of their employees (such as progressive discipline, suspension, demotion and firing), landlords only have one option – eviction. Eviction of a low-income family, or of any family for that matter, is a harsh remedy that may only be imposed after sufficient legal due process. In the public housing realm, HUD regulations govern the process and require legal due process, including the existence of a good cause to evict, notice, and an opportunity for a grievance hearing. *See* 24 C.F.R. 966.50, *et seq.* (administrative grievance procedure). As discussed at length, *infra*, in situations like the one at hand, where there is a he-said-she-said dispute and the landlord or PHA is unable to determine if good cause exists to evict, a "knew or should have known" liability standard leaves the landlord/PHA without any recourse and wide open to a potential fair housing suit by either or both tenants.

More directly on point is the matter of *Ohio Civ. Rights Comm. v. Akron Metro. Hous. Auth.*, 119 Ohio St.3d 77 (2008), which supports its' holding upon the aforementioned New York precedent that a reasonable opportunity or effective means to control third persons does not arise from the mere power to evict. In *Ohio Civ. Rights Comm.* the Supreme Court of Ohio refused to apply a Title VII analysis. *Id.* In a unanimous decision on appeal, the court held that a landlord could not be held liable for failing to take corrective action against a tenant whose racial harassment of another tenant created a hostile housing environment. *Id.*

Ohio Civ. Rights Comm. is consistent with well-settled law in this jurisdiction that a landlord cannot be held liable for the acts of its tenants. *See Blatt v. New York City Housing Auth.*, supra (unreasonable burden would result from imposition of duty to guard against wanton acts of third-party over whom landlord exerts no control); *Palmitesta v. Bonifazio*, 602814/2014, NYLJ 1202668581902, at *1 (Sup. Nass, Aug. 21, 2014)(accepting every allegation as true, including that landlord was aware of other tenant's violent propensities, was aware of history of harassment, was aware that plaintiff made complaints about other tenant's behavior, was aware of other tenant's criminal history, a cause of action still does not lie against landlord).

A landlord must be found to have a duty to remedy harassment before it can be found liable for failing to fulfill it. It cannot be presumed that in contracting to provide a tenant with a housing unit, a landlord is also contracting with the tenant to provide a housing unit free of any unwelcome or invidious conduct by others. Further, even if such a duty existed, it must be explained why that duty would fall within the ambit of the FHA. The fact that the housing problem to be remedied is harassment by another person does not, in itself, mean that the claim falls within the ambit of the FHA. To the contrary, some discriminatory action *on the part of the defendant* is required to bring an FHA claim. *See infra*. Thus, a landlord – including a PHA – cannot simply be presumed to have a duty to provide a

harassment-free living situation, and even if such a duty exists, it is far from clear why the failure to fulfill that duty would constitute a claim under the FHA.

Accordingly, the District Court properly held that a Title VII analysis should not be used to analyze Francis's hostile housing environment claim.

D. Assuming the Standard Alleged by Francis, He Has Still Failed to Sufficiently Plead a Claim for a Hostile Housing Environment

Even assuming a Title VII standard is applicable, the allegations pled are insufficient. The Title VII analysis adopted in hostile *work* environment cases, is: (1) the plaintiff was subjected to harassment that was sufficiently severe and pervasive so as to create a hostile environment; (2) the harassment was because of the plaintiff's membership in a protected class; and (3) a basis exists for imputing the allegedly harassing conduct to the defendants. *Rich v. Lubin,* No. 02 CIV. 6786 (TPG), 2004 U.S. Dist. LEXIS 9091, 2004 WL 1124662, at *4 (S.D.N.Y. May 20, 2004); *Rivera v. Rochester Genesee Reg'l Transp. Auth.,* 743 F.3d 11, 20 (2d Cir. 2014).[5]

Francis's Complaint fails to allege facts supporting that the alleged harassment he suffered was "sufficiently severe or pervasive", warranting

[5] Francis argues that this analysis is best left for a jury. However, the case cited by Francis supporting this position, *Hayut v. State Univ. of N.Y.,* 352 F.3d 733 (2d. Cir. 2003), is distinguishable from this case, as the allegations in *Hayut* were brought under Title IX and were specifically pled, unlike the allegations here.

dismissal of his hostile housing environment claims. *See King v. Interstate Brands Corp.*, 2009 U.S. Dist. LEXIS 36594 at *34 (E.D.N.Y. 2009) (citations omitted)(isolated instances of harassment do not create hostile environment); *Marvelli v. Chaps Cmty. Health Ctr.*, 193 F.Supp.2d. 636 (E.D.N.Y. 2002) (series of incidents were not sufficiently continuous and concerted to alter condition of working environment); *McCowan v. HSBC Bank USA*, 689 F. Supp. 2d 390 (E.D.N.Y. 2010) (same).

There are no allegations by Francis that there was *interference* with his use and enjoyment of the premises. He constantly kept his door wide open for the world to see how much he "used and enjoyed" his home. He even *renewed his lease* for the premises during the very same period he alleges he was suffering harassment at the hands of Endres. Said renewal was entered into without any notification to KPM or Downing that he was allegedly experiencing harassment by another neighbor. He did not vacate the premises, nor has he pled any facts supporting an inability to use and enjoy the premises. All that is pled are facts to support a personal dispute with one of his neighbors, which neighbor was of a different race and whom allegedly used abhorrent language. Further, Francis has not established that such incidents were nothing more than "isolated incidents." This Circuit has repeatedly held that "[f]or racist comments…to constitute a hostile environment, there must be a 'more than a few isolated incidents…there must be a

steady barrage of opprobrious racial comments." *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d. Cir. 1997). As pled by Francis, there was no such barrage in this case. Accordingly, Endres's harassment as alleged by Francis was not "sufficiently severe and pervasive" so that he was unable to use and enjoy the premises.

Further, Francis has failed to plead any basis for imputing the allegedly harassing conduct to KPM or Downing. First and foremost, Francis does not allege that KPM engaged in any racial harassment. Next, KPM's course of action in relying on the SCPD to investigate the neighbor dispute was reasonable and does not constitute a failure to act.[6] Francis charted a course with the SCPD to pursue Endres for a crime. There was no need for KPM or Downing to intervene, nor did Francis make any requests to KPM or Downing for assistance. He did not request relocation, nor that Endres be moved or removed, nor that Francis be relieved of his lease obligations to vacate the apartment. He specifically chose the remedy of police action and he further advised KPM and Downing of the status of same, all the while continuing to reside in the apartment, with his door wide open inviting the continued feud with Endres. He renewed his tenancy during this period of alleged harassment and continued to use the facilities without incident other than the alleged disputes with Endres.

[6] The police investigation and reports are directly referenced in and annexed to the Complaint. (A. 022-023, 025, 045, 056). Accordingly, KPM's arguments are fully rooted in Francis' allegations.

Moreover, even if KPM was required to act to alleviate the alleged harassment, KPM's choice not to renew Endres's lease was reasonable. The termination of a tenant's tenancy based upon a neighbor dispute, without corroboration, is practically unachievable and Francis's allegation that KPM has evicted tenants for "conduct far less egregious" (A. 028, Par. 61) is wholly unsupported by any facts.

E. To Impose Liability on a Landlord for the Acts of One Tenant Against Another Flies in the Face of Well-Settled Precedent Defining the Scope of Landlord Duties Vis-à-vis Their Tenants

A decision to impose liability on a landlord for the acts of one tenant against another flies in the face of long-standing case law defining the scope of a landlord's liability. In *Siino*, 216 A.D.2d at 552, the Second Department aptly held that a landowner does not have a duty to protect a tenant from the conduct of another tenant and further, that a reasonable opportunity or effective means to control a third-person does not arise from the mere power to evict. (*citing Blatt v. New York City Hous. Auth.*, *supra* at 593); *see also Adelstein v. Waterview Towers, Inc.*, 250 A.D.2d 790, 673 N.Y.S.2d 465 (2d Dept. 1998) (landlord had no duty to protect tenant from criminal acts of another tenant because landlord had no ability or authority to control other tenant's actions).

Courts have consistently recognized that an unreasonable burden would result from the imposition of a duty to guard against the wanton acts of a third-party over whom a landlord exerts no control. *See Johnson v. Slocum Realty Corp.*, 191 A.D.2d 613 (2d Dept. 1993) (common law "does not impose a duty to control the conduct of third persons to prevent them from causing injury to others; liability for the negligent acts of third persons generally arises when the defendant has authority to control the actions of such third persons").[7]

In *Blatt v. New York City Housing Auth.*, 123 A.D.2d 591 (2d Dept. 1986) the Second Department rejected, as untenable, plaintiff's claim that it was incumbent upon defendant NYCHA to evict the tenant and that the failure to fulfill such a duty results in liability. *Id.* The court held that the power to evict cannot be said to have furnished the NYCHA with "a reasonable opportunity or effective means" to prevent or remedy the tenant's conduct stemming from personal dispute. *Id.*; *see also Britt v. N.Y. City Hous. Auth.*, 3 A.D.3d 514 (2d Dept. 2004).

[7] None of the New York State cases cited by Francis regarding a landlord's duty to its tenants for the actions of third-parties involve tenant-on-tenant racial harassment. See App. Brief, F.N. 12. Rather, Francis proposes an unprecedented judicial expansion of a landlord's duty under New York State Law to cover tenant-on-tenant racial harassment. Further, the damages recoverable in breach of warranty of habitability cases under New York State law are significantly less than the damages recoverable in Section 1981, 1982 and FHA cases. *Park West Management Corp. Mitchell*, 47 N.Y.2d 316 (1979) (New York Court of Appeals held that the damages for breach of warranty is the difference between the fair market value of the premises if they had been as warranted, and the value of the premises during the breach). Here, Francis seeks damages which exceed the difference in the fair market value of the premises.

Accordingly, an extension of the FHA, and New York Executive Law § 296, would fly in the face of this long-standing precedent that a landlord does not have the obligation to evict a tenant who is harassing another tenant.

V. The 2016 HUD Rule Has Not Been Followed by Circuit Courts

Francis repeatedly cites HUD's 2016 rule which interprets the FHA to make a landlord directly liable for tenant-on-tenant harassment. 24 C.F.R. § 100.7(a)(1)(iii). However, the Majority failed to follow the HUD rule in its December 6, 2019 Decision. In this regard, the Majority specifically stated that "...we need not and do not rely on it to resolve this appeal..." A. 220. In discussing the rule, the Majority further states that "[w]e express no view regarding this formulation. A. 220.

Similarly, in *Wetzel,* the Seventh Circuit chose not to rely on the HUD rule and noted that:

> HUD's rule mirrors the scope of employee liability under Title VII for employee-on-employee harassment. We have no need, however, to rely on this rule. As we noted earlier, there are salient differences between Title VII and FHA. In the end it is possible that they could be overcome, but more analysis than HUD was able to offer is necessary before we can take that step. *Wetzel*, 901 F.3d at 866.

Accordingly, neither the Majority nor the Seventh Circuit deferred to the HUD rule, a strong indication that the rule was an overly expansive interpretation

of the FHA that neither of those courts were willing to accept. As such, it is submitted that this Court should also afford the HUD rule no deference.

If this Court affords the HUD rule deference generally, it should not be applied to this case, as the alleged facts and circumstances arose long before this the HUD rule was proposed and implemented, and KPM could not be charged with knowing that the FHA could extend to landlord "tolerance" of tenant-based harassment. Further, the facts in the Complaint as alleged confirm that KPM acted reasonably when it relied upon the investigation by the SCPD and elected not to renew Endres's lease.

To this end, the HUD rule states that "corrective actions appropriate for a housing provider to stop tenant-on-tenant harassment…might include…reporting conduct to the police." 24 C.F.R. § 100.7(a)(2). The rule further provides that "involving the police" is a "powerful tool" to a housing provider to control or remedy a tenant's illegal conduct." *Id.* Therefore, if this Court defers to the HUD rule and applies it to this case, KPM still avoids liability, as police involvement is specifically referenced as an appropriate step to stop tenant-on-tenant harassment. As a police investigation was underway and KPM was fully apprised of and cooperating with same, KPM satisfied its obligations under the HUD rule, and is therefore not liable under the FHA.

The HUD rule has not faced appreciable judicial scrutiny in any federal court, and no federal court has exclusively relied on the rule to interpret the FHA. To the contrary, the two federal courts which had the opportunity to rely on the rule intentionally chose not to. Accordingly, the Seventh Circuit's explicit concern regarding the HUD Rule's nearly identical treatment of Title VII and FHA harassment claims is a bright red flag waving in the direction of this Court. The Circuit which has adopted the most expansive interpretation of the FHA has directly rejected the HUD Rule for improperly equating Title VII and FHA claims. It is submitted that this Court should follow suit and similarly reject the HUD Rule.

VI. Landlord Liability for Tenant Disputes Will Lead to Unintended Consequences Jeopardizing the Mission of Providing Public Housing and Other Assisted Housing and Will Negatively Impact Private Landlords

The Majority's decision will have practical adverse consequences on already financially-strapped PHAs. In particular, the U.S. Housing Act of 1937 ("1937 Act") requires all PHA leases to "require that the public agency may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause." *42 U.S.C. § 1437d(1)(7)*. Public housing is deemed an entitlement which carries with it the burden of due process before it can be taken from a resident. *Goldberg v Kelly*, 397 U.S. 254 (1970); *Escalera v. New York Hous. Auth.*, 425 F.2d 853 (2d. Cir. 1970), *cert denied* 400

U.S. 853. These due process requirements are implemented through a detailed grievance process that every PHA must have. 42 U.S.C.§ 1437d(k); 24 C.F.R. § 966.50 *et seq.* [8]

Since the PHAs' authority is so restricted, they would have limited options for heading off a hostile housing environment claim by preventing or addressing the behavior of an offensive tenant. If that behavior did not rise to the standard required for eviction under the 1937 Act, or if the PHA sought to resolve the situation in a manner short of eviction, thereby terminating housing assistance for the family, then one of the possible tools available to the PHA is an "involuntary transfer" of a household from its current unit to another public housing unit in the same or a different project (assuming there is even availability of another unit). However, even if the PHA was able to navigate such an action, the PHA might very well open itself up to an additional fair housing claim from the new neighbors by transferring into a nearby unit a household that has one or members with known racist views. The PHA would have little ability to prevent the situation from replicating itself again. This same scenario is equally applicable to the private landlord who would be faced with the same dilemma. Thus, given these concerns, PHAs and landlords will be forced to pursue evictions for behaviors that would not otherwise be cause for eviction, rather than risk a claim that it has essentially

[8] PHAs and landlords will likely be sued for violating a tenant's Fourteenth Amendment right to Due Process if tenants are evicted based solely on alleged harassment.

imposed racial harassment on yet another family. As a result of this additional pressure to evict, landlords and PHA's will certainly be subject to civil lawsuits for wrongful evictions, further clogging up an already overwhelmed judicial system.

The District Court was correct in finding that courts should only impose liability where the landlord's own conduct, or that of its' duly authorized agent, serves as the basis of the underlying discrimination. The simple "knew or should have known" standard is inappropriate for landlords given the true nature of their relationship with, and control over, their tenants, and this standard would unfortunately result in a further reduction of scarce public resources available to PHAs to run effective programs and house the poorest of our country's tenants.

The monies and human resources that will be necessary to respond to what may easily become an onslaught of "hostile living environment" claims whenever a tenant is unhappy with his or her neighbor can significantly hamstring a PHA of any size, if not bankrupt smaller PHAs given the HUD regulations that provide for grievance hearings. *See* 24 C.F.R. 966.50, *et seq*. If liability in this context is so easy to come by, it will clearly impact PHAs as PHA federal funding (the lion's share of their budget) has been drastically cut and their budgets have been significantly prorated in the last several years. *The Sequester and the Homeless (2014, March 23). New York Times, P. SR12.*

In addition to the financial burden on PHAs in having to hire additional staff and perform additional administrative functions, a reversal of the District Court's holdings would open to the door to increased liability for substantial money judgments, which such PHAs have virtually no ability to pay considering the current fiscal state of the industry. This could result in dire consequences for the PHAs' continued viability (as well as the sustainability and habitability) of their public housing units for all other current and future residents and could result in an increase in homelessness. *See generally United States v. Leasehold Interest in 121 Nostrand Avenue,* 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991) (eviction from public housing means immediate homelessness).

Expansion of the FHA also has the potential to federalize and fill court dockets with a broad range of disputes between neighbors. Further, the creation of landlord liability will likely cause rent to increase to cover additional insurance, legal costs and to implement new policies and procedures. The end result will be exorbitant rents and fewer rental units. In addition, landlords will become more selective in whom they rent to resulting in fewer housing choices for many renters. An expansion of the FHA is also likely to be an economic disincentive for individuals, companies and other investors to engage in the business of renting residential and potentially commercial real estate, reducing the supply of available units and harming low-income families.

In cases such as this, where it has not been alleged that the landlord acted with any discriminatory intent, the benefit of imposing this additional source of liability is outweighed by the burden imposed upon landlords, public and private, and on tenants or applicants who will experience a decline in the number and quality of available housing units.

VII. Francis Fails to Allege Active Participation in the Discrimination as Required to State a Claim Under New York Executive Law § 296(5) and (6)

The New York Executive Law, with exceptions not pertinent here, contains provisions prohibiting housing discrimination similar to those in the FHA. *N.Y. Exec. Law § 296(5)(a)(2); §296(6).* Claims under the FHA and New York Executive Law § 296 are "evaluated under the same framework." (A. 112) (*citing Olsen v. Stark Homes, Inc.*, 759 F.3d 140, 153 (2d Cir. 2014); *Rivera v. Inc. Vill. Of Farmingdale*, No. 060CV-2613 (DRH)(AEL), 2011 U.S. Dist. LEXIS 34185, 2011 WL 1260195 (E.D.N.Y. Mar. 20, 2011)). Accordingly, by reason that an individual must actually participate in the discrimination, these claims similarly fail and were properly dismissed.[9]

Further, the cases cited by Francis in support of his argument that the interpretation of New York Executive Law § 296 requires referral to the New York

[9] The District Court did not uncover a single successful § 296(6) claim against an employer or landlord, rather than an individual actually participating in the discrimination. (A. 112).

Court of Appeals do not actually support his position. *See State Div. of Human Rights v. Stoute*, 36 A.D.3d 257 (N.Y. App. Div. 2006) (New York Executive Law § 296 analyzed under same standard as FHA); *Curley v. Bon Aire Props Inc.*, 2 NYS.3d 571 (N.Y. App. Div. 2015) (no reference to FHA or scope of Court of Appeals review); *Ewers v. Columbia Heights Realty*, 44 A.D. 3d 608 (N.Y. App. Div. 2007) (no comparison of New York Executive Law § 296 and FHA standard of review); *Margerum v. City of Buffalo*, 24 NY.3d 721, 737 (2015) (concurring opinion held that "rejection of the federal approach should be limited to those rare cases where federal interpretations of Title VII are at odds with, or undermine, the text or legislative goals of the Human Rights Law"). Francis has not cited to any authority which indicates that the FHA undermines the goals of New York Executive Law § 296. Accordingly, his request that this matter be referred to the Court of Appeals should be denied.

VIII. Francis Fails to Allege Facts to Support a Negligent Infliction of Emotional Distress Claim

The District Court properly held that in New York, "[a] landlord has no [common law] duty to prevent one tenant from attacking another tenant unless it has the authority, ability, and opportunity to control the actions of the assailant." (A. 113-114) (*citing Britt v. N.Y. City Hous. Auth.*, *supra.* As discussed, *supra*, the power to evict did not furnish KPM with a reasonable or effective means to

prevent or remedy Endres's conduct, particularly where the conduct arose from a purely personal dispute between two individuals. *See Id.; Adelstein v. Waterview Towers, Inc., supra.* Nor does the landlord-tenant relationship, alone, create any duty to protect. *Nickelson v. Mall of Am. Co.*, 593 N.W.2d 726 (Minn. App. 1999). Accordingly, without a duty owed to Francis, there can be no breach and the claim for negligent infliction of emotional distress was properly dismissed[10].

CONCLUSION

Based upon the foregoing arguments, the District Court's holdings should be affirmed.

Dated: May 7, 2020

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[10] The Second Circuit has declined to refer federal cases to the New York Court of Appeals to certify questions of law where, as here, "existing precedents in New York Law provide [] sufficient guidance..." *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d. Cir. 1997). Here, the District Court and the Majority properly followed well settled and unambiguous New York law in dismissing Francis's negligent infliction of emotional distress claim.

CERTIFICATION OF COMPLIANCE PURSUANT TO SECOND CIRCUIT LOCAL RULE 32.1(a)(4)(A) AND FRAP 32(A)(7) FOR CASE NO. 15-1823

This brief complies with the type-volume limitation of FRAP 32(A)(7) and Second Circuit Local Rule 32.1(a)(4)(A) because this brief contains 13,384 words excluding the parts of the brief exempted by Fed. R. App. P. 32. The certificate was prepared in reliance upon the word-count function of the word processing system (Microsoft Word) used to prepare this brief. This brief complies with the typeface and type style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using font size 14 Times New Roman.

Dated: May 7, 2020

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Docket No. 15-1823-cv

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DONAHUE FRANCIS, Plaintiff-Appellant, v. KINGS PARK MANOR, INC., CORRINE DOWNING, Defendants-Appellees, RAYMOND ENDRES, Defendant.	)	No. 15-1823-cv CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE I hereby certify that on May 7, 2020, I electronically filed the foregoing EN BANC BRIEF FOR DEFENDANTS-APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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