GANFER SHORE LEEDS & ZAUDERER LLP

CLIENT ADVISORY

JANUARY 2020

HAPPY NEW YEAR

Ganfer Shore Leeds & Zauderer LLP wishes all of our clients and friends a very happy and healthy 2020.

FEDERAL APPEALS COURT RULES THAT LANDLORD HAS A DUTY TO PROTECT TENANT FROM RACIAL HARASSMENT BY NEIGHBOR

Landlords have a clearly established legal duty not to harass tenants based on their race or any other legally protected characteristics. But what if the person committing the harassment is not the landlord, but someone else, such as a neighbor? If the landlord knows of the harassment, does it have a duty to protect the tenant? At least where the level of harassment is severe, the answer is yes, according to a recent federal appeals court decision. **Francis v. Kings Park Manor, Inc., No. 15-1823, 2019 U.S. App. LEXIS 36221 (2d Cir. Dec. 6, 2019)**.

The plaintiff in this case, who is African-American, alleged that a neighbor subjected him to a "brazen and relentless" pattern of racial harassment, including abuse and threats. Among other things, the neighbor called plaintiff by racial epithets, accompanied by obscene language, and made at least one death threat. These events left the plaintiff fearful for his safety and he reported them to the police. The harassment was so severe that it led to the neighbor's being arrested for and pleading guilty to hate crimes charges.

The plaintiff filed a lawsuit under the Fair Housing Act and other laws, naming not only the neighbor but also the landlord and the property manager. In the complaint, the plaintiff asserted that both he and the police had told the landlord about the problem, but that the landlord did nothing to try to stop it. In fact, the plaintiff alleged that the landlord told its property manager "not to get involved," even though the landlord had previously intervened to address other tenant disputes that were not race-related. The landlord moved to dismiss the complaint, arguing that it had no duty to protect a tenant from harassment by persons who were not employees of the landlord or otherwise affiliated with it. A federal trial judge accepted the landlord's argument and dismissed the complaint, but the U.S. Court of Appeals reversed and reinstated it. The court held that the Fair Housing Act prohibits housing discrimination not only at the time property is sold or rented, but throughout the term of a landlord-tenant relationship. Further, the court held that a landlord may be liable for tolerating tenant-on-tenant racially hostile conduct "in at least some circumstances." In particular, a landlord may be guilty of intentionally discriminatory conduct, in violation of the Fair Housing Act as well as the Civil Rights Act, when it knows that this conduct is going on and does not attempt to prevent it, at the same time as the landlord is enforcing rules on other matters.

The Second Circuit's decision may not be the last word on this case. The landlord has indicated that it will be asking the court to rehear the case "en banc," meaning before the entire 13-member court rather than the usual three-judge panel. One judge on the three-judge panel filed a strong dissenting opinion, so the request for en banc reconsideration may draw some support, even though this procedure is very rare in the Second Circuit. Otherwise, the case will return to the District Court (the federal trial court) for further proceedings.

NEW AND PROPOSED LEGISLATIVE DEVELOPMENTS AFFECT PROPERTY OWNERS

Owners of real property are affected by several recent legislative developments. Landlords with rent-regulated tenants should be aware of the Tenant Protection Act of 2019, which is statewide legislation prohibiting conduct by landlords that is intended to force tenants out of their homes, such as turning off the heat in the winter,

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exposing tenants to hazardous materials, or conducting unsafe construction on the premises. The new law expands the statutory definition of "landlord harassment" to prohibit intentional conduct designed to force tenants to vacate, with the effect of impairing the habitability of the tenant's housing, endangering the safety or health of the tenant, or disturbing the tenant's quiet enjoyment rights. Repeated violations can result in a felony conviction. New York City has also enacted new laws to increase tenants' protections against harassment by landlords, including measures to stop building owners from using construction work to harass tenants, penalizing building owners for providing false information in DOB submissions, and denying building permits where a residential building has an excessive number of open, immediately hazardous or major construction code violations. The Tenant Protection Act of 2019 has many other provisions, some of which are described in prior issues of this newsletter.

Another new State law prohibits housing discrimination based on the source of a person's income, as long as the source is lawful. In other words, a landlord may not deny housing to a tenant whose income is sufficient to meet the landlord's credit requirements because the income is not derived from a salary or hourly wages, but instead from other sources such as Social Security or pension income, disability benefits, veterans' benefits, child support alimony, or other legally derived non-wage income. Landlords are also prohibited from inquiring into a person's source of income when that person is seeking to secure housing.

In addition, owners of commercial properties – including cooperatives and condominiums with commercial space – should also be aware of proposed legislation that would introduce commercial rent control to New York City. Under the proposed commercial rent stabilization program, a board appointed by the City Council would set maximum annual lease increases on retail, professional service, and manufacturing storefront space. This would dramatically change the current system under which commercial rents are entirely subject to private negotiation. Although commercial rent control has been discussed for many years, it has never been put to a vote of the City Council in the face of concerns regarding its constitutionality and the potential consequences for the commercial real estate market. However, observers believe that with the current make-up of the City Council and a perceived storefront vacancy crisis, the current proposal may be put to a vote in 2020. Other new laws have also been enacted which have been described in prior newsletters and our new law summary.

TENANT-SHAREHOLDER HAS MIXED SUCCESS IN DERIVATIVE ACTION AGAINST BOARD MEMBERS

A tenant-shareholder brought derivative claims against the members of the cooperative's Board of Directors. The directors' motion to dismiss was granted only in part. One group of claims sought to challenge the Board's decision-making in connection with a roof repair and resurfacing project. The court held that the Board's decisions in this area were protected by the business judgment rule, under which "as long as a board of a cooperative corporation acts for the purposes of the entity, and within the scope of its authority and in good faith, its actions are protected by the business judgment rule, even if unwise or inexpedient."

However, a claim that the Board treated commercial tenant-shareholders wishing to sublet differently from residential tenant-shareholders survived the motion to dismiss because "unequal treatment of shareholders by directors is not insulated from liability under the business judgment rule." A claim that the Board contracted for electrical work that benefitted only two board members and not the entire building was held sufficient, as was a claim that a transfer of common space to a company owned by a board member. Finally, the court also sustained a claim that the Board committed trespass by refusing to remediate asbestos that allegedly was brought into the building by a contractor working for the Board. **Real World Holdings, LLC v. Clark, No. 655499/2018, 2019 N.Y. Misc. LEXIS 6586 (Sup. Ct. N.Y. Co. Dec. 13, 2019)**.