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Victory! Second Circuit Refuses to Make Landlords Liable for Tenant-on-Tenant Racial Harassment

Donahue Francis v. Kings Park Manor, Inc., et al.

Washington, DC (March 25, 2021) – NCLA is celebrating today's 7-5 *en banc* ruling in the U.S. Court of Appeals for the Second Circuit to vacate a flawed panel decision and dismiss the complaint in the case *Donahue Francis v. Kings Park Manor, Inc., et al.* The court's decision on narrow grounds correctly interpreted the scope of the statutes, held the plaintiff to appropriate pleading requirements, and thus affirmed the district court's dismissal of a claim that sought to hold a landlord liable for tenant-on-tenant racial harassment.

Out of more than a dozen *amicus* briefs filed, NCLA's brief was the only one not filed in support of the plaintiff and expanding liability. NCLA's *amicus curiae* brief which supported neither party, urged this result by asking the bench to eschew *Chevron* deference in its decision, respect the rule of lenity, observe the principle of party presentation, and avoid the appearance of bias.

At issue was whether to recognize a brand new cause of action against landlords under the Civil Rights Act of 1866 and the Fair Housing Act of 1968 (FHA)—statutes more than 150 and 50 years old, respectively. This novel theory of liability would have recognized a "racially hostile housing environment" claim against landlords based on egregious tenant-on-tenant racial harassment. HUD's brief to the panel argued "[a]s a reasonable interpretation of the FHA, HUD's final rule is entitled to deference under *Chevron.*" A letter brief from the plaintiff likewise urged the court to apply *Chevron* deference. NCLA argued that putting a case on hold long enough to defer to a newly issued HUD regulation tailor-made for the litigation—as the Second Circuit panel did—offends judicial independence, separation of powers, and due process.

Judge Cabranes wrote the majority opinion joined by Chief Judge Livingston and Judges Sullivan, Bianco, Park, Nardini, and Menashi, concluding "[L]andlords cannot be presumed to have the degree of control over tenants that would be necessary to impose liability under the FHA for tenant-on-tenant misconduct."

NCLA's brief also brought to light conduct by the panel that raised questions whether the court exhibited bias in favor of one party, Mr. Francis. In its eagerness to accommodate one point of view and one party, the court appeared to allow bias to infect the proceedings. In particular, judicial appointment of *amici* to argue particular points suggested by the judges when a party already has competent counsel violates the party presentation principle, as a unanimous Supreme Court held in an opinion by then-Justice Ruth Bader Ginsburg in *United States v. Sineneng-Smith* on the very day NCLA's *amicus* brief was filed.

Affording *Chevron* or any other deference, in this case, would violate judicial independence by forcing judges to abandon their oaths to provide their own judgment of the law's meaning. Moreover, agency deference violates the separation of powers and offends due process under the Constitution by denying defendants fair warning of what conduct is illegal.

NCLA released the following statement:

"The Second Circuit's *en banc* majority opinion is a welcome course-correction of an earlier panel ruling that had found retroactive landlord liability for tenant-on-tenant harassment. The unusual procedural history of this case, which included prolonged delay to allow HUD time to issue a regulation to which the court could then defer, and solicitation and scripting of agency *amicus* briefing, offends judicial independence, separation of powers, and due process. The majority opinion's careful statutory interpretation and application of pleading standards restores judicial independence by rejecting a novel expansion of liability that has no basis in any law passed by Congress."

— Peggy Little, NCLA Senior Litigation Counsel

For more information about this case visit here.

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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