In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2020

No. 15-1823-cv

DONAHUE FRANCIS,
Plaintiff-Appellant,

v.

KINGS PARK MANOR, INC., AND CORRINE DOWNING,
Defendants-Appellees,

and

RAYMOND ENDRES,
Defendant.

On Appeal from the United States District Court
for the Eastern District of New York

ARGUED *EN BANC*: SEPTEMBER 24, 2020
DECIDED: MARCH 25, 2021

Before: LIVINGSTON, *Chief Judge*, CABRANES, POOLER, KATZMANN, CHIN, LOHIER, CARNEY, SULLIVAN, BIANCO, PARK, NARDINI, MENASHI, *Circuit Judges*.[*]

CABRANES, *Circuit Judge*, filed the majority opinion, in which LIVINGSTON, *Chief Judge*, SULLIVAN, BIANCO, PARK, NARDINI, and MENASHI, *Circuit Judges*, joined in full.

CHIN, *Circuit Judge*, joined by POOLER, KATZMANN, LOHIER, and CARNEY, *Circuit Judges*, filed an opinion dissenting in part and concurring in part.

LOHIER, *Circuit Judge*, joined by POOLER, KATZMANN, CHIN, and CARNEY, *Circuit Judges*, filed an opinion dissenting in part and concurring in part.

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[*] Judge Katzmann, who assumed senior status on January 21, 20201, participated in this case pursuant to 28 U.S.C. § 46(c).

The principal question presented to the *en banc* Court is whether a plaintiff states a claim under the Fair Housing Act of 1968 ("FHA"), 42 U.S.C. § 3601 *et seq.*, and parallel state statutes for intentional discrimination by alleging that his landlord failed to respond to reported race-based harassment by a fellow tenant. We conclude that landlords 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.

We **VACATE** the panel decision and **AFFIRM** the judgment of the District Court dismissing the Complaint.

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FRANK W. BRENNAN (Stanley J. Somer, Paul A. Bartels, *on the brief*), Uniondale, NY, *for Defendants-Appellees.*

DEBO P. ADEGBILE (Stephanie Simon, *on the brief*), New York, NY, *Amicus Curiae in support of Plaintiff-Appellant*.

ALEXANDER V. MAUGERI, Deputy Assistant Attorney General (Eric S. Dreiband, Assistant Attorney General, Thomas E. Chandler, Attorney, U.S. Department of Justice; J. Paul Compton, Jr., General Counsel, Timothy J. Petty, Deputy General Counsel, U.S. Department of Housing and Urban Development, *on the brief*), Washington, D.C., *for* the United States of America, *Amicus Curiae in support of neither party*.[†]

[†] *See* Appendix A for a list of filings by amici curiae who did not participate in oral argument.

JOSÉ A. CABRANES, *Circuit Judge*:

The principal question presented to the *en banc* Court is the following: Does a plaintiff state a claim under the Fair Housing Act of 1968 ("FHA")[1] for intentional discrimination by alleging that his landlord failed to respond to reports of race-based harassment by a fellow tenant? On the record before us, we answer this question in the negative. As persuasively explained by our dissenting colleague on the panel, we think landlords typically do not, and therefore cannot be presumed to, exercise the degree of control over tenants that would be necessary to impose liability under the FHA for tenant-on-tenant harassment.[2]

It is undisputed that the FHA, a landmark civil rights statute, makes it unlawful for a public or private landlord intentionally "[t]o

[1] 42 U.S.C. § 3601 *et seq.*

[2] *See Francis v. Kings Park Manor, Inc.*, 944 F.3d 370, 381-95 ("*Francis I*") (Livingston, J., dissenting).

discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin."[3] There is thus no question that a landlord may be liable under the FHA for intentionally discriminating against a tenant based on race. But after more than five decades of experience in applying this important statute, our Court adopted a rule that would make landlords responsible under the FHA not only for their own affirmative discriminatory acts, but also for failing to respond to tenant-on-tenant discriminatory harassment. Although framed in terms of intentional discrimination, the panel majority's decision effectively established a landlord's positive duty under the FHA to police the conduct of tenants in their relations with each other.

We ordered rehearing of this appeal *en banc*, which took place in September 2020. It was the most recent chapter in a case that began

[3] 42 U.S.C. § 3604(b).

in 2014, when Plaintiff-Appellant Donahue Francis filed a complaint (the "Complaint") in the United States District Court for the Eastern District of New York (Arthur D. Spatt, *Judge*) against his landlord, Kings Park Manor, Inc. ("KPM"); Corinne Downing, KPM's property manager (with KPM, the "KPM Defendants"); and a fellow tenant, Raymond Endres.[4]

I. BACKGROUND

In ruling on a motion to dismiss, we "must take all of the factual allegations in the complaint as true."[5] According to the Complaint, at all relevant times, Francis, a Black man, rented and lived in an apartment at Kings Park Manor, a residential complex in Suffolk

[4] In the intervening six years, this hard-fought litigation has yielded opinions by the District Court, *Francis v. Kings Park Manor, Inc.*, 91 F. Supp. 3d 420 (E.D.N.Y. 2015), as well as successive panel majority and dissenting opinions on appeal, *Francis v. Kings Park Manor, Inc.*, 917 F.3d 109 (2d Cir.), *opinion withdrawn*, 920 F.3d 168 (2d Cir. 2019), and *Francis I*, 944 F.3d at 370. To avoid undue repetition, we respectfully refer our readers to these thorough opinions and summarize here only the most salient aspects of the record.

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted).

County, New York, owned and operated by KPM. **[A.18]** On approximately eight occasions between February and September of 2012, Endres, Francis's neighbor and fellow tenant, verbally attacked and otherwise attempted to intimidate Francis, including by racist insults and at least one death threat. On March 11, 2012, Francis reported Endres to the Suffolk County police, who in turn informed KPM of the reported events. Francis himself did not mention Endres to the KPM Defendants at this time, however, and several months later, on May 1, 2012, Francis renewed his lease without comment. In total, Francis wrote three certified letters to KPM, in which he recounted Endres's behavior, the police's involvement, and Endres's arrest for aggravated harassment in August 2012. Francis does not allege, nor do any of the exhibits to his Complaint show, that he ever requested any action by KPM. Francis alleges that KPM did not at any point investigate or intervene; in fact, Francis claims that KPM's owners expressly directed Downing, their property manager, "not to

get involved."[6] When Endres's lease expired in January 2013, five months after he was arrested, Endres vacated his apartment. He pleaded guilty to a charge of harassment in April 2013.

Francis's Complaint asserted claims of racial discrimination against all defendants under the FHA, Section 1 of the Civil Rights Act of 1866, as amended and codified at 42 U.S.C. §§ 1981[7] and 1982,[8] and the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq*., as well as a common-law claim of negligent infliction of emotional distress. The Complaint also included a breach-of-contract

[6] A.24 (Complaint ¶ 47).

[7] Section 1981 provides, "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981(a).

[8] Section 1982 provides, "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

claim against the KPM Defendants and a claim against Endres for intentional infliction of emotional distress.

In August 2014, the KPM Defendants moved to dismiss all of Francis's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). In March 2015, the District Court denied the motion as to Francis's breach-of-contract claim but otherwise granted it, dismissing Francis's other claims against the KPM Defendants.[9] Judgment entered on May 5, 2015, and Francis timely appealed.

A divided panel of this Court issued an opinion on April 5, 2019, with Judge Livingston dissenting.[10] The panel majority affirmed the dismissal of Francis's claims for negligent infliction of emotional distress but reversed the dismissal of his discrimination claims. On December 6, 2019, the panel majority and dissenter filed revised

[9] Francis voluntarily withdrew his breach-of-contract claim and consented to entry of partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) with respect to the other claims he asserted. *See* A.122-24.

[10] *See Francis*, 917 F.3d at 109.

opinions.[11] Rehearing *en banc* was ordered and oral argument took place in September 2020.

II. DISCUSSION

"[W]e review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6)."[12] In assessing the complaint, we "accept all factual allegations as true, and draw all reasonable inferences in the plaintiff's favor."[13] Nonetheless, conclusory allegations are not entitled to the assumption of truth, and a complaint will not survive a motion to dismiss unless it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[14]

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[11] *See Francis I*, 944 F.3d at 373, 381.

[12] *Austin v. Town of Farmington*, 826 F.3d 622, 626 (2d Cir. 2016).

[13] *Id*. at 625.

[14] *Iqbal*, 556 U.S. at 678, 680 (internal quotation marks omitted).

I. Housing Discrimination Under the FHA[15]

The FHA makes it unlawful "[t]o discriminate 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 . . . ."[16] When, as here, a plaintiff brings a claim under the FHA that does not rest on direct evidence of landlord discrimination, we analyze the claim under the familiar *McDonnell*

[15] Francis claimed initially on appeal that he had stated an FHA claim against the KPM Defendants for "negligent failure to remedy a discriminatory and hostile environment." Dkt. 37 at 14 (capitalization omitted). Francis asserted the existence of a negligence claim based chiefly on an asserted analogy between the FHA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. ("Title VII"), a statute governing employment discrimination. On rehearing *en banc*, Francis has abandoned his negligence theory of landlord liability and concedes that it would be reasonable for this Court to reject such a claim. *See* September 24, 2020 *En Banc* Oral Argument Transcript at 10:12-24.

[16] 42 U.S.C. § 3604(b). The FHA also forbids "coerc[ing], intimidat[ing], threaten[ing], or interfer[ing] with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section . . . 3604 . . . . " 42 U.S.C. § 3617.

Douglas burden-shifting framework first developed in Title VII cases.[17] Plaintiffs have specific, "reduced" pleading burdens in cases subject to the *McDonnell Douglas* analysis.[18] For a plaintiff's claim to survive a motion to dismiss in a *McDonnell Douglas* case, he must plausibly allege that he "[1] is a member of a protected class, . . . [2] suffered an adverse . . . action, and [3] has at least minimal support for the proposition that the [housing provider] was motivated by discriminatory intent."[19]

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[17] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). We have widely applied the *McDonnell Douglas* framework to the various antidiscrimination laws. *See, e.g.*, *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 468 (2d Cir. 2019) (applying *McDonnell Douglas* framework to disability discrimination claim); *Bucalo v. Shelter Island Union Free Sch. Dist.*, 691 F.3d 119, 129 (2d Cir. 2012) (age discrimination claim); *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir. 2008) (FHA disparate treatment claim).

[18] *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015) ("[T]he complaint [in a *McDonnell Douglas* case] . . . must be viewed in light of the plaintiff's minimal burden to show discriminatory intent [at the initial stage of the *McDonnell Douglas* analysis] . . . . The facts alleged must give plausible support to the reduced [initial evidentiary] requirements that arise under *McDonnell Douglas* . . . .")

[19] *Id.* (defining pleading standards for Title VII claims alleging discrimination on the basis of sex and race).

We conclude that the factual allegations in Francis's Complaint do not suffice to carry his modest burden.[20] Although Francis has claimed that he is a member of a protected class, his Complaint lacks even "minimal support for the proposition" that the KPM Defendants were motivated by discriminatory intent.[21] The Complaint alleges, in a conclusory fashion, only that the "KPM Defendants have intervened against other tenants at Kings Park Manor regarding non-race-related violations of their leases or of the law."[22] But because the Complaint does not provide enough information to compare the events of which

[20] One of our dissenting colleagues characterizes this case as turning on the "very limited issue" of "whether the specific allegations in a complaint satisfy the plausibility pleading standard" and doubts that this is a "question of exceptional importance" warranting rehearing *en banc*. Lohier, J. Dissenting Op. at 21 n.8 (quoting Fed. R. App. P. 35(a)(2)) (hereinafter "Lohier Dissent"). This case raises questions of exceptional importance because the panel's ruling, if undisturbed, would significantly expand landlord liability, with the probable result of fundamentally restructuring the landlord-tenant relationship. See Note 44, *post*.

[21] *Id*. at 311. Because we conclude that Francis has failed to adequately allege that the KPM Defendants' failure to intervene was motivated by discriminatory intent, we need not address whether that failure constituted "adverse action" within the meaning of *McDonnell Douglas*.

[22] A.28 (Complaint ¶ 63).

Francis complains to the KPM Defendants' responses to other violations, there is no factual basis to plausibly infer that the KPM Defendants' conduct with regard to Francis was motivated by racial animus.[23]

To hold that Francis has plausibly pleaded discriminatory intent on these facts would be to indulge the speculative inference that "because the KPM Defendants did *something* with regard to *some* incident involving *some* tenant at *some* past point," racial animus explains the failure to intervene here.[24] Francis does not allege that the KPM Defendants regularly intervened in other disputes among tenants, much less that it had a practice of addressing tenant-on-tenant

[23] Judge Lohier takes issue with our acknowledgement that Francis's Complaint alleged *some* information, but not enough to transform his claim from conceivable to plausible. Lohier Dissent at 17-18. But this is exactly what *Twombly* and its progeny require us to do. *See Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 87 (2d Cir. 2015) ("On a motion to dismiss, the question is . . . whether plaintiffs allege enough to 'nudge[] their claims across the line from conceivable to plausible.'" (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007))).

[24] *Francis I*, 944 F.3d at 384 (Livingston, J., dissenting).

harassment when the matter did not involve an African American victim and a white harasser. Francis's vague allegation that the "KPM Defendants have intervened against other tenants . . . regarding non-race-related violations of their leases" could refer to efforts to collect rent, stop unauthorized subletting, or remedy improper alterations to the rental premises. Only untethered speculation supports an inference of racial animus on the part of the KPM Defendants. We decline to engage in such speculation.[25]

[25] Court-appointed *amicus curiae* Debo Adegbile suggests that we can infer a discriminatory motive from KPM's alleged departure from policy within a "larger context of racial antagonism." Adegbile Br. at 42-43. This argument is unavailing. The Complaint alleges no details regarding the KPM Defendants' actions in comparable circumstances, nor does it otherwise support the inference that a relevant "policy" existed, much less that the KPM Defendants departed from it. In the cases Adegbile cites, the actors who created the "context of racial antagonism" could be reasonably presumed to have substantial influence over the party charged with discrimination. *See, e.g.*, *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 612 (2d Cir. 2016) (housing board discriminated by knowingly "acquiesc[ing] to race-based citizen opposition" to affordable housing). By contrast, Francis's Complaint provides no factual basis to suggest, much less show, that Endres had any influence over the KPM Defendants.

In an apparent attempt to avoid the obligation to plead facts that plausibly support an inference that the KPM Defendants were motivated by racial animus, Francis asserts that his allegations establish that the KPM Defendants intentionally discriminated against him under a deliberate indifference theory of liability. This theory of liability has been applied almost exclusively in custodial environments such as public schools and prisons, where it is clear that the defendant has both "substantial control over the context in which harassment occurs" and "a custodial [power over the harasser] . . . permitting a degree of supervision and control that could not be exercised over free adults."[26] Francis argues that a landlord may be held liable for intentional discrimination if the landlord "ignore[d] the known discriminatory harassment of a third party."[27]

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[26] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646 (1999) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)).

[27] *En Banc* Opening Brief of Appellant Donahue Francis ("Appellant's *En Banc* Opening Brief"), Dkt. 217, at 38 (quoting *Davis*, 526 U.S. at 645).

We assume, for purposes of this appeal, that deliberate indifference may be used to establish liability under the FHA when a plaintiff plausibly alleges that the defendant exercised substantial control over the context in which the harassment occurs and over the harasser.[28] Nevertheless, we hold that Francis has failed to state a claim because his Complaint provides no factual basis to infer that the KPM Defendants had "substantial control over [Endres] and the context in which the known harassment occur[red]."[29] Nor can such control be

[28] The dissent suggests that "the majority opinion . . . assumes a landlord may be liable for being deliberately indifferent to the general circumstances Francis alleges." [**RJL Dissent, 2:3-5**]. Not so. We assume, without deciding, that deliberate indifference may be used to ground an FHA claim when a plaintiff plausibly alleges that a defendant had the requisite control over both the alleged harasser and the context in which the harassment occurs. *See Davis*, 526 U.S. at 646. As set forth herein, no such control is present in the typical landlord-tenant relationship, nor does the Complaint suggest that the KPM Defendants had such control here.

[29] *Davis*, 526 U.S. at 645. One of our dissenting colleagues takes issue with the different courses taken by our Court in granting *en banc* rehearing here in *Francis* and denying it in *Mandala v. NTT Data, Inc.*, No. 19-2308. This analogy, made in an attempt to show "inconsistently applied . . . legal standards," is misplaced. Chin, J. Dissenting Op. at 5 (hereinafter, "Chin Dissent"). To put it plainly, *Francis* and *Mandala* are different cases. While both cases involve similar statutory schemes and were disposed of at the pleading stage, that is where the similarities end. One presents a novel FHA intentional discrimination claim, while the other is a Title VII disparate impact case—and they feature completely different legal and factual

reasonably presumed to exist in the typically arms-length relationship between landlord and tenant, unlike the custodial environments of schools and prisons.[30] The typical powers of a landlord over a tenant—

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issues. *Mandala* addressed whether the plaintiffs in that case had adequately pleaded a claim under Title VII. Here, by contrast, the panel's opinion held, for the first time since the FHA was enacted over fifty years before, that a plaintiff may hold his landlord liable under the FHA based on the conduct of another tenant. That decision dramatically expanded the scope of the FHA and effectively established a new cause of action under federal law. Unlike the pleading issue in *Mandala*, this case "raise[s] issues of important systematic consequences for the development of the law and the administration of justice," *Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2009) (per curiam) (en banc), and there is no inconsistency in the Court's treatment of the two cases.

[30] Francis's attempt to analogize the FHA to Title IX, 20 U.S.C. § 1681 *et seq.*, ignores the substantial textual differences between the two statutes. While Section 3604(b) of the FHA simply prohibits *committing* discrimination, Title IX also prohibits *permitting* discrimination. Instead of focusing on the intent of the actor, as the FHA does, *see* 42 U.S.C. § 3604(b) (making it unlawful to "discriminate . . . because of" a protected characteristic), the language of Title IX evinces a concern for consequences, *see* 20 U.S.C. § 1681(a) (prohibiting a student from being "excluded from participation in," "denied the benefits of," or "subjected to discrimination under any education program or activity"). Accordingly, Title IX is best read as requiring a lesser showing of intent for liability than does Section 3604(b) of the FHA. *See, e.g.*, *Davis*, 526 U.S. at 649 (holding that defendant board of education could be held liable if plaintiff could "show that the Board '*subjected*' [plaintiff] to discrimination by failing to respond" to complaints of harassment (alteration omitted and emphasis added)).

such as the power to evict—do not establish the substantial control necessary to state a deliberate indifference claim under the FHA.[31]

Francis's appeal to the employment context to support his theory of liability for landlords under the FHA is also unavailing. He argues that since employers are responsible for employee-on-employee harassment under Title VII, landlords must be responsible for tenant-on-tenant harassment under similarly worded provisions of the FHA.[32] But the employer-employee relationship differs from the landlord-tenant relationship in important ways. Employees are considered agents of their employer. And a landlord's control over

[31] Contrary to the views of the dissenters, we draw no inferences against Francis, nor do we hold his Complaint to a "probability" standard or otherwise heighten his pleading burden. *See* Lohier Dissent at 17, 18; Chin Dissent at 2, 4. Rather, we conclude as a matter of law that the ordinary powers of a landlord do not establish the substantial control over tenants necessary to impose liability on landlords under the FHA for tenant-on-tenant conduct. Here, Francis simply fails to allege—either plausibly or implausibly—that the KPM Defendants had extraordinary power over tenants. Francis therefore fails to allege a necessary element of his FHA claim.

[32] *See, e.g.*, Appellant's *En Banc* Opening Brief, Dkt. 217, at 23-25.

tenants and their premises is typically far less than an employer's control over "free adult[]" employees and their workspaces.[33] We are hard-pressed to presume that an employer's manner and degree of

[33] *Davis*, 526 U.S. at 646 (quoting *Acton*, 515 U.S. at 655). As the panel dissenter explained, "an employee is considered an agent of the employer while the tenant is not considered an agent of the landlord" and "employers . . . exert far more control over not only their employees, but also the entire workplace environment than do landlords over their tenants and the residences those tenants quite literally call their own." *Francis I*, 944 F.3d at 391-92 (Livingston, J., dissenting). The Supreme Court has observed that the workplace is generally characterized by "[p]roximity and regular contact" among employers, supervisors, and employees. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760 (1998). Most employers have ready access to, effective control over, and the ability to move within, the physical workplace and can freely dismiss at-will employees. Employers typically can, and generally do, "monitor employees" as well as use a wide range of tools to adequately "investigate . . . misconduct" (including mandatory interviews and other means of gathering information) and "remediate . . . misconduct" (including suspension, compensation reduction, demotion, transfer, training, and dismissal), all of which gives employers extensive and reliable control over employee behavior. *Francis I*, 944 F.3d at 392-93 (Livingston, J., dissenting). Accordingly, this Court has recognized employer liability for the actions of non-employees under Title VII only where "(1) the employer *exercises a high degree of control over the behavior of the non-employee*, and (2) the employer's own negligence permits or facilitates that non-employee's discrimination." *Menaker v. Hofstra Univ.*, 935 F.3d 20, 39 (2d Cir. 2019) (emphasis added) (internal quotation marks omitted).

control over its agent-employees is equivalent to that of a landlord over its tenants.[34]

To hold the KPM Defendants liable for Endres's conduct on the facts alleged would also be inconsistent with the background tort principles against which the FHA was enacted. The Supreme Court has been clear that when Congress creates "a species of tort liability,"[35] as it did in enacting the FHA, Congress "legislates against a legal background of ordinary tort-related . . . liability rules" which it presumptively "intends its legislation to incorporate."[36]

Under New York law, landlords have a duty "to take reasonable precautionary measures to protect members of the public from the

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[34] A landlord may well have *contractual* liabilities to tenants resulting from the acts of third parties, but these are typically satisfied by appropriate *contractual* remedies like rent abatement. *See, e.g.*, *Nostrand Gardens Co-Op v. Howard*, 221 A.D.2d 637, 638 (2d Dep't 1995) (affirming rent abatement based on landlord's failure to remedy excessive noise emanating from neighboring apartment).

[35] *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (quoting *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999)).

[36] *Id.*

reasonably foreseeable criminal acts of third persons . . . on the premises."[37] But New York tort law has long been clear that a landlord has no general duty to protect tenants even from "the criminal acts of yet another tenant, since it cannot be said that [a] landlord ha[s] the ability or a reasonable opportunity to control [the offending tenant]" and the "power to evict cannot be said to . . . furnish" such control.[38]

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[37] *Luisa R. v. City of New York*, 253 A.D.2d 196, 200 (1st Dep't 1999). As the facts of *Luisa R.* suggest, however, this duty applies only where harm was allegedly caused by conditions that posed a risk to the general public (not just to specific tenants) and where both the foreseeability of criminal acts and the landlord's practical ability to respond were evident. *See id*. at 198-203 (tenant plaintiff's negligence claim survived summary judgment, where plaintiff was assaulted by intruder associated with non-tenant drug dealers, and landlord failed to maintain working doors, locks, or intercom and to remove non-tenant drug dealers).

[38] *Blatt v. N.Y.C. Hous. Auth.*, 123 A.D.2d 591, 592-93 (2d Dep't 1986). Notably, the *Blatt* court held that the landlord had no duty of care even when (1) the plaintiff alleged more severe co-tenant misconduct than is alleged here; and (2) the defendant landlord, unlike KPM here, allegedly promised the plaintiff that it would protect him and evict his harasser. *See id*. at 591 (co-tenant threatened plaintiff with a gun and "warn[ed plaintiff] to 'stay away from his daughter' or he would 'blow [his] brains out'" and—roughly six weeks after the landlord assured plaintiff of protection—co-tenant shot plaintiff in apartment building lobby after declaring his intent to kill plaintiff). While we agree with Judge Lohier that the degree of control sufficient for landlord liability for the behavior of tenants under New York law is fact-dependent, Lohier Dissent at 25, cases like *Blatt* make clear that landlords cannot be presumed to have substantial control over tenants without allegations of unusual circumstances. Francis alleges no facts suggesting that KPM's relationship

It is true that the Seventh Circuit, in *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856 (7th Cir. 2018), has recognized a deliberate indifference theory of liability for a claim of discrimination under the FHA.[39] But, unlike in this case, the plaintiff's allegations in *Wetzel* gave rise to the plausible inference that the defendant-landlord had unusual supervisory control over both the premises and the harassing tenants.[40] Moreover, as the panel dissenter observed, the

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with its tenants was in any way atypical. The lease terms identified by the dissent to support an inference of substantial control (terms forbidding tenants from impairing the "rights, comforts or conveniences" of other tenants, A.61) are unremarkable, and do not suggest the existence of a special "arsenal of incentives and sanctions" reasonably attributable to KPM. *See* Lohier Dissent at 26 (quoting *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 865 (7th Cir. 2018).

[39] As the majority panel opinion acknowledged, the Seventh Circuit is the only other circuit to have entertained this theory of FHA liability in circumstances even arguably analogous to those here. *Francis I*, 944 F.3d at 378.

[40] *See Wetzel*, 901 F.3d at 860-65 (defendant landlord ran a "living community" for senior citizens with "a common living area, a common dining area, common laundry facilities, and hallways" and had a demonstrated capacity to restrict tenants' access to common spaces, suspend cleaning services, assign dining locations, and enter private apartments). Our dissenting colleagues note that the *Wetzel* court did not expressly limit its reasoning to circumstances involving enhanced landlord control and made clear that it was not determining the FHA's application to circumstances that "more closely resemble[] custodial care, such as a skilled nursing facility, or an assisted living environment, or a hospital." *Id*. at 864; *see also* Lohier Dissent at 29 n.12. It does not follow, however, that the *Wetze*l court

landlord in *Wetzel*, unlike the KPM Defendants, was alleged to have affirmatively acted against the plaintiff.[41] In the absence of any factual allegations suggesting that the KPM Defendants had a similarly unusual degree of control over the premises and tenants, or actively facilitated or compounded harm to Francis, the Seventh Circuit's decision in *Wetzel* does not suggest, much less compel, a different outcome here.[42]

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counterfactually presumed that it was confronted with a *typical* landlord-tenant relationship—*i.e.*, one with virtually no resemblance to custodial care at all. Therefore, we cannot accept the proposition that *Wetzel* purports to set a "floor" for landlord liability for tenant conduct under the FHA. In any event, the Seventh Circuit's decision in *Wetzel*, while instructive, is of course not binding on this Court.

[41] *Francis I*, 944 F. 3d at 391 ("The defendant-landlord [in *Wetzel*] was alleged not only to have failed to remediate harassment of the plaintiff by other residents, but also . . . to have *itself* barred the plaintiff from common spaces that she was entitled to frequent.")

[42] Francis's lease with KPM contained provisions that arguably prohibited the actions Francis imputes to Endres. *See* A.61 Landlord-Tenant Agreement § B(4) ("Tenant shall not allow or commit any objectionable or disorderly conduct . . . that disturbs or interferes with the rights, comforts, or conveniences of other residents"); A.63 HAP Contract Addendum § 8(c)(1)(a) ("The owner may terminate the tenancy during the term of the lease if any member of the household commits . . . [a]ny criminal activity that threatens the health or safety of, or the right to peaceful enjoyment of the premises by, other residents."). However, even if we were to assume that Endres's lease with KPM contained substantially identical terms to

As a final matter, we note that even if Francis had plausibly pleaded that the KPM Defendants had substantial control over Endres, he would still have failed to state an FHA claim for discrimination under a deliberate indifference theory. To state a deliberate indifference claim, a plaintiff must plausibly plead that the defendant's response to harassment by a third party was "clearly unreasonable in light of the known circumstances."[43] It cannot be said that the KPM Defendants' inaction was "clearly unreasonable" in light of the circumstances described in Francis's Complaint. The KPM Defendants were aware that the police were involved, and indeed, the police conducted an investigation that ultimately led to Endres's arrest

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Francis's, those terms would not afford KPM sufficient control over Endres to make it liable for his actions. Endres's breach of those terms might give KPM grounds to terminate his lease, but as the *Blatt* court held, the "power to evict cannot be said to . . . furnish[]" a landlord with the "ability or a reasonable opportunity to control" a tenant. 123 A.D.2d at 592-93.

[43] *Davis*, 526 U.S. at 648.

and prosecution.[44] We therefore have no factual basis to infer that the KPM Defendants clearly acted unreasonably.[45]

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[44] Although "[l]andlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person," *Mason v. U.E.S.S. Leasing Corp.*, 96 N.Y.2d 875, 878 (2001), courts have been careful to avoid imposing standards of conduct that would effectively make the landlord an arm of law enforcement. *See, e.g., Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 485 (D.C. Cir. 1970) ("The landlord is not expected to provide protection commonly owed by a municipal police department."); *Gill v. N.Y.C. Hous. Auth.*, 130 A.D.2d 256, 267 (1st Dep't 1987) (holding that "arbitrarily . . . [assigning] a landlord . . . responsibility for the unprecedented acts of a mentally ill tenant over which the landlord has no control" would "create[] havoc with the landlord-tenant relationship, imposing upon the landlord unprecedented responsibilities having nothing to do with the proprietary function, and subjecting the tenant to a degree of scrutiny about his private affairs and insecurity about his living accommodation that is intolerable").

Scholars have also warned that broad liability regimes might place landlords in the role of "cops" who threaten their tenants with "unrestrained vigilantism." *See* B. A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 Case W. L. Rev. 679, 791 (1992).

[45] To be clear, we both (1) decline to apply a deliberate indifference theory of liability under the FHA in the circumstances of this case because there were no factual allegations to suggest that the KPM Defendants exercised substantial control over Endres; and (2) decline to infer discriminatory intent from the KPM Defendants' alleged deliberate indifference to Francis's reports of harassment. A discrimination plaintiff may adequately plead that a defendant engaged in intentional discrimination through deliberate indifference to a third party's conduct where he plausibly alleges that the defendant's "[deliberate] indifference was such that the defendant intended the discrimination to occur." *Gant*, 195 F.3d at 141. Had Francis plausibly alleged that KPM's inaction occurred against a backdrop of consistently exercised control over tenants in roughly comparable

We think that our decision today coheres with the aims of those who are concerned about mounting housing costs for renters and increasing risks of housing loss for some of the most vulnerable among us.[46] The alternative pleading standard proposed by Francis would generate considerable uncertainty about the scope of a landlord's responsibility for tenant behavior. The prophylactic measures by which landlords would manage the ensuing uncertainty would come at a cost, one that would almost certainly be borne, in one form or another, by current and prospective renters.[47]

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circumstances, it might be reasonable to infer that the KPM Defendants intended Endres's race-based harassment of Francis to occur. Instead, Francis alleges only that KPM intervened, with unspecified frequency and forcefulness, to address other unspecified violations of leases or of the law. Such allegations are insufficient as a matter of law to give rise to the inference that the KPM Defendants intended discrimination to occur.

[46] *Francis I*, 944 F.3d at 395 (Livingston, J., dissenting).

[47] Specifically, under the alternative proposed by Francis, tenants would conceivably bear rent increases (or suffer lower quality housing) that reflect the costs of enforcing antidiscrimination protocols, such as by hiring security staff. Further, prospective and current renters would confront more restrictive leases rife with *in terrorem* clauses, intensified tenant screening procedures, and intrusions

Finally, we note that laws making landlords legally responsible for discriminatory tenant misbehavior are conspicuously absent from the abundant and exemplary history of New York legislation designed to proscribe discrimination in housing.[48] If the legislative bodies of New York have not seen fit to impose such landlord liability, there is

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into their dealings with neighbors, all of which could result in greater hostility and danger, even culminating in (or beginning with) unwarranted evictions.

Our holding should also be of special interest to those concerned with the evolution of surveillance by state actors or by those purporting to act at their direction. *See* Note 44, *ante* (warning against broad liability schemes that would encourage landlords to act as law enforcement).

[48] Long before the FHA was enacted, "[i]n 1939, the State of New York banned discrimination in publicly owned housing based upon a tenant's 'race, creed, color or national origin.'" Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: the New York City Human Rights Commission*, 23 Fordham Urb. L.J. 991, 1006 (1996) (citation omitted). In 1943, the New York City Council outlawed discrimination in any housing benefitting from tax exemptions, *id.* at 1006, and in 1955, the Commission on Intergroup Relations (the predecessor to the New York City Human Rights Commission) was founded, *id*. at 1005, beginning "its life primarily dedicated to promoting open housing for New York's racial and ethnic minorities," *id*. at 991. In 1957, the City Council enacted the nation's first law prohibiting discrimination in the private housing market: the Fair Housing Practices Law ("FHPL"). *Id*. at 991-92. This pathbreaking law aimed "to outlaw discrimination in housing based upon racial or ethnic characteristics," with "acts against black and Hispanic homebuyers and renters" of particular concern. *Id*. at 992. In 1961, the City Council amended the FHPL to ban discriminatory lending practices and discriminatory advertising, as well as to narrow previous exemptions. *Id*. at 1009.

good reason to doubt that it is a suitable tool for promoting fair housing. Contrary to the suggestions of a dissenting colleague, such observations do not indicate that our interpretation of the FHA improperly "puts a policy concern ahead of a legal mandate."[49] Rather, we stress the potentially dramatic and arguably undesirable implications of the panel's faulty interpretation of the FHA because it is improbable that such implications could have gone unnoticed for over fifty years after the passage of that much-discussed and much-litigated legislation.

We accordingly affirm the District Court's dismissal of Francis's intentional discrimination claim under the FHA pursuant to Rule 12(b)(6).[50]

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[49] Lohier Dissent at 29-30

[50] Because the Complaint fails to allege intentional discrimination, we need not consider to what extent the FHA's prohibition of discrimination reaches conduct engaged in after a tenant acquires the dwelling. *Compare Francis I*, 944 F.3d at 377 (concluding that the FHA forbids conduct that "would constitute discrimination in the enjoyment of residence in a dwelling or in the provision of

II. Housing Discrimination Under Sections 1981 and 1982

Sections 1981 and 1982 reach "only purposeful discrimination."[51] Therefore, to state a claim under either Section 1981 or 1982 a plaintiff "must allege facts supporting [a defendant's] intent to discriminate against him on the basis of his race."[52] We conclude that Francis's allegations that the KPM Defendants discriminated against him because of his race are insufficient to support his claims under Sections 1981 and 1982 for the same reasons we conclude they were insufficient to state a claim under the FHA.

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services associated with that dwelling after acquisition" (internal quotation marks omitted)), *with id*. at 387-89 (Livingston, J., dissenting) (noting holdings of courts of appeals limiting the post-acquisition reach of the FHA to conduct constituting constructive eviction).

[51] *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982) (interpreting Section 1981 in tandem with Section 1982 and holding that Section 1981 reaches only purposeful discrimination).

[52] *Sherman v. Town of Chester*, 752 F.3d 554, 567 (2d Cir. 2014).

We therefore affirm the District Court's dismissal of Francis's claims under Sections 1981 and 1982.

III. Housing Discrimination Under the NYSHRL

The NYSHRL makes it an unlawful discriminatory practice for a landlord to "discriminate against any person because of race . . . in the terms, conditions or privileges of the . . . rental or lease of any . . . housing accommodation or in the furnishing of facilities or services in connection therewith."[53] We have held that "[c]laims under the FHA and [NYS]HRL § 296 are evaluated under the same framework."[54] Because we conclude that Francis has failed to state a claim under the FHA, we conclude that he also fails to state a claim under Section 296(5) of the NYSHRL.

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[53] N.Y. Exec. Law § 296(5)(a)(2).

[54] *Olsen v. Stark Homes, Inc.*, 759 F.3d 140, 153 (2d Cir. 2014) (internal quotation marks omitted).

New York law also provides that it is an unlawful discriminatory practice "for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article [including discrimination]."[55] "[A]n individual defendant may be held liable under the aiding and abetting provision of the NYSHRL if he actually participates in the conduct giving rise to a discrimination claim."[56] Even if we were to assume that Endres discriminated against Francis in violation of Section 296(5), Francis has failed to plead any facts indicating that the KPM Defendants in any way "actually participat[ed]" in or incited the predicate unlawful conduct so as to give rise to liability under the aiding and abetting provision of the NYSHRL.

[55] N.Y. Exec. Law § 296(6).

[56] *Rojas v. Roman Cath. Diocese of Rochester*, 660 F.3d 98, 107 n.10 (2d Cir. 2011) (internal quotation marks omitted).

We therefore affirm the District Court's dismissal of Francis's NYSHRL claims.

IV. Negligent Infliction of Emotional Distress

To plead a negligent infliction of emotional distress claim under New York law, a plaintiff must allege (1) a breach of a duty owed to the plaintiff; (2) emotional harm; (3) a direct causal connection between the breach and the emotional harm; and (4) circumstances providing some guarantee of genuineness of the harm.[57]

Francis has failed to plead that the KPM Defendants breached a duty owed to him. "The common law does not ordinarily impose a duty to prevent third parties from injuring others unless the defendant has the authority to control the conduct of such third parties."[58] In

[57] *See, e.g.*, *Ornstein v. N.Y.C. Health & Hosps. Corp.*, 10 N.Y.3d 1, 6, (2008); *Taggart v. Costabile*, 131 A.D.3d 243, 252-53 (2d Dep't 2015). To establish the fourth element, the plaintiff generally must plead that the breach endangered his physical safety or caused him to fear for his physical safety. *See Taggart*, 131 A.D.3d at 253.

[58] *Adelstein v. Waterview Towers, Inc.*, 250 A.D.2d 790, 791 (2d Dep't 1998).

other words, "[a] landlord has no duty to prevent one tenant from attacking another tenant unless it has the authority, ability, and opportunity to control the actions of the assailant."[59] But the Complaint does not allege that the KPM Defendants had the requisite "authority, ability, and opportunity to control" Endres.[60] Nor does the KPM Defendants' power to evict Endres "furnish [them] with a reasonable opportunity or effective means to prevent or remedy [Endres's] unacceptable conduct, since . . . the pattern of harassment alleged by the plaintiff[] arose from a purely personal dispute between the two individuals."[61] Francis has thus failed to state a claim of negligent infliction of emotional distress under New York law.

[59] *Britt v. N.Y.C. Hous. Auth.*, 3 A.D.3d 514, 514 (2d Dep't 2004).

[60] *Id.*

[61] *Id.* (internal quotation marks omitted).

Accordingly, we affirm the District Court's dismissal of Francis's claim of negligent infliction of emotional distress against the KPM Defendants.

III. CONCLUSION

To summarize, we hold that:

(1) A landlord cannot be presumed to have the degree of control over tenants necessary to impose liability under the FHA for tenant-on-tenant harassment;

(2) Francis fails to state a claim that the KPM Defendants intentionally discriminated against him on the basis of race in violation of the FHA, Sections 1981 and 1982, or the NYSHRL; and

(3) Francis fails to state a claim of negligent infliction of emotional distress against the KPM Defendants under New York law.

For the foregoing reasons, we **VACATE** the panel decision and **AFFIRM** the judgment of the District Court.

Appendix A

Filings by Additional *Amici Curiae*[1]

Kenneth M. Klemm, Baker Donelson Bearman Caldwell & Berkowitz, New Orleans, LA; Thomas S. Silverstein, Lawyers' Committee for Civil Rights Under Law, Washington, DC, *for Amicus Curiae* Lawyers' Committee for Civil Rights Under Law *in support of Plaintiff-Appellant*.

Karen L. Loewy, Lamda Legal Defense and Education Fund, Inc., New York, NY; Susan Ann Silverstein and Elizabeth A. Aniskevich, AARP Foundation, Washington, DC, *for Amici Curiae* AARP and AARP Foundation; Lambda Legal Defense and Education Fund, Inc.; Human Rights Campaign; Justice in Aging; Mobilization for Justice; National Disability Rights Network; and Services & Advocacy for GLBT Elders *in support of Plaintiff-Appellant*.

[1] *Amici Curiae* listed herein did not participate in oral argument.

Margaret A. Little and Richard Samp, New Civil Liberties Alliance, Washington, DC, *for Amicus Curiae* New Civil Liberties Alliance *in support of neither party*.

Thomas J. Moloney, Cleary Gottlieb Steen & Hamilton LLP, New York, NY; Juan Cartagena, Francisca D. Fajana, and Natasha Bannan, LatinoJustice PRLDEF, New York, NY, *for Amici Curiae* LatinoJustice PLDEF; Legal Aid Society; Empire Justice Center; Long Island Housing Services, Inc.; Community Service Society of New York; and Justice For All Coalition *in support of Plaintiff-Appellant*.

Barbara D. Underwood, Solicitor General, Steven C. Wu, Deputy Solicitor General, Caroline A. Olsen, Assistant Solicitor General, *for* Letitia James, Attorney General for the State of New York, for *Amicus Curiae* the State of New York, *in support of Plaintiff-Appellant*.

Daniel Matza-Brown, Assistant Corporation Counsel, Richard Dearing, Claude S. Patton, *for* James E. Johnson, Corporation Counsel of the City of New York (New York, NY)) *for Amicus Curiae* the City of New York *in support of Plaintiff-Appellant*.

Heather R. Abraham, Brian Wolfman, Olivia Grob-Lipkis, Sara Hainbach, and Spencer Myers, Georgetown Law Civil Rights Clinic, Washington, DC, *for Amicus Curiae* Georgetown University Law Center Civil Rights Clinic *in support of Plaintiff-Appellant*.

Sherrilyn A. Ifill, Janaie S. Nelson, Samuel Spital, Kristen A. Johnson, Ashok Chandran, Kevin E. Jason, New York, NY, and Mahogane D. Reed, Washington, DC, NAACP Legal Defense and Educational Fund, Inc. *for Amicus Curiae* NAACP Legal Defense and Educational Fund, Inc. *in support of Plaintiff-Appellant*.

Dena Elizabeth Robinson, Public Justice Center, Baltimore, MD, *for Amici Curiae* Paralyzed Veterans of America and Public Justice Center *in support of Plaintiff-Appellant*.

Devi M. Rao, Washington, DC, and Emily Mannheimer, New York, NY, Jenner & Block LLP; Sandra S. Park and Lunda Morris, ACLU Women's Rights Project, New York, NY; Sunu P. Chandy and Amy Matsui, National Women's Law Center, Washington, DC; Molly K. Bilken and Antony P.F. Gemmell, New York Civil Liberties Union Foundation, New York, NY, *for Amici Curiae* American Civil Liberties Union; New York Civil Liberties Union; National Women's Law Center; and Other Organizations Referred to in the Appendix to the *Amicus* Brief *in support of Plaintiff-Appellant*.

Diane L. Houk and David B. Berman, Emery Celli Brinkerhoff & Abady LLP, New York, NY; Stephen M. Dane, Dane Law LLC, Perrysburg, OH, *for Amici Curiae* National Fair Housing Alliance; Fair Housing Justice Center; Connecticut Fair Housing Center;

Westchester Residential Opportunities; CNY Fair Housing; and Erase Racism *in support of Plaintiff-Appellant*.