Reasons to Involve an Attorney in the Rental of an Accessory Apartment

By Dennis C. Valet

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There is a strong temptation for homeowners to rent out the extra space in their home for a few quick bucks on the side, but long gone are the days where being a part time landlord was as easy as posting a classified ad in the newspaper and watching the monthly rent checks roll in.

With the continuing evolution and advancement of tenant protection laws, it is critical that a landlord runs the rental of their accessory apartment in the same way that they would run a business. One of the biggest differences between a professional and someone who dabbles in a field is the thorough understanding and appreciation of the risks their business faces. This article focuses on a few key developments in landlord-tenant law that all mom-and-pop landlords should be conscious of in order to avoid turning their part-time supplemental income into a big time hole in their pocket.

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Disparate impact discrimination

In June, the Supreme Court of the United States held in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*[1] that disparate impact claims are cognizable under the Fair Housing Act, a federal tenant's rights statute. Before, the Fair Housing Act did not bar conduct that was neutral on its face, even if the hidden or unintended effect of that conduct was discriminatory. Now, landlords are on the hook for the hidden consequences of their conduct.

The Fair Housing Act prevents discrimination on the basis of race, color, national origin, religion, sex, disability and familial status. If your listing states that college students cannot rent your apartment, the apparent effect of your words does not appear to infringe upon the rights of any of the enumerated protected classes and therefore, on its face alone, the statement does not seem to violate the Fair Housing Act. However, there is a strong correlation between age and enrollment in college, and accordingly, familial status. There is no question that statistically, excluding college students from the pool of potential tenants would disproportionately exclude single adults without children. Therefore, although your advertisement does not directly discriminate on the basis of familial status, *Texas Department of Housing and Community Affairs* transforms your innocent condition on tenancy to an illegal restriction ripe for a disparate impact discrimination claim. A Fair Housing Act lawsuit permits all the damages defendants worry about — actual, punitive, and attorneys' fees.

The Mrs. Murphy exemption found in section 3603(b)(2) of the Fair Housing Act applies to the rental of an accessory apartment; however, it is noted that the exemption only applies to acts of discrimination, but does not extend to a situation where an in-possession landlord publishes (a/k/a states) their discriminatory intentions. Therefore, although an in-possession landlord of an attached accessory apartment is free to discriminate against college students by way of such landlord's actions and not tell a soul, the same landlord could not publish a listing stating "no college students" because the publication of discriminatory words does not fall under the Mrs. Murphy exemption.

New York City has recognized disparate impact claims in its human rights law since 1991; however, the New York Human Rights Law and the Suffolk County Human Rights Law do not officially recognize disparate impact as a cause of action. With the Supreme Court's ruling in *Texas Department of Housing and Community Affairs*, which upheld the validity of disparate impact claims despite the fact that the Fair Housing Act did not explicitly recognize them, it is increasingly likely that disparate impact claims will also be recognized in claims under the New York and Suffolk County Human Rights Laws. Recognition of disparate impact claims outside of the Fair Housing Act matters because while there are only seven protected classes under the Fair Housing Act, there are 11 under the New York Human Rights Law and 14 under the Suffolk County Human Rights Law.

Lawful source of income discrimination

Included in the 14 protected classes in Suffolk County are individuals deriving their income from government assistance programs.[2] The law states that it is illegal to discriminate on the basis of an individual's lawful source of income. This makes it illegal for a landlord to reject a tenant solely because they derive their income from Social Security Disability or Housing Choice Vouchers (a/k/a Section 8) housing assistance. When combined with the availability of disparate impact discrimination claims, the prohibition against discrimination based upon lawful source of income poses a potential problem for one of the most useful questions landlords love to ask — "Where are you employed and for how long?"

The Suffolk County Human Rights Law doesn't just forbid a landlord from actively discriminating, it also forbids a landlord from asking questions about information which would be protected from discrimination because the question implies that there is a limitation on who can rent based upon the answer provided.[3] To illustrate, by asking for employment information, a landlord implies that you must be employed to rent. On its face, even if a landlord would only rent to the employed, the question and implied restriction is not discriminatory because the unemployed are not a protected class. Understandably, a landlord wants a tenant who can pay rent consistently. However, the question, and the implied restriction, does have a disparate impact on individuals who derive their income from a government assistance programs. Individuals receiving Social Security Disability statistically are unlikely to be employed. By excluding the unem-

(Continued on page 26)

Involve an Attorney in the Rental of an Accessory Apartment (Continued from page 6)

ployed, there is an unintended consequence of excluding Social Security Disability recipients and therefore, the landlord is discriminating based upon their lawful source of income.

A creative attorney could combine the Suffolk County Human Rights Law with the ruling in *Texas Department of Housing and Community Affairs* to hold a landlord liable for a claim of disparate impact discrimination. Pursuant to the *Texas Department of Housing and Community Affairs*' precedent, the only safety for such a landlord is to have a legitimate business rationale for obtaining the information, which is not pretextual or contrived.

Rental permits

Outside of discrimination lawsuits, one of the biggest risks for landlords is the failure to obtain a rental permit when required. Many municipalities in Suffolk County already require a rental permit, and the trend points to more municipalities following suit. Fines vary, but generally are large enough that a scorned tenant reporting a landlord to the authorities will quickly result in the loss of any realized rental profits. Worse, many rental permit laws carry the risk of imprisonment.

The Town of Southampton, well known for its extravagant summer rental season, has some of the most restrictive rental laws in the county. Going further than most, the Town of Southampton renders the existence of a rental permit, a condition precedent to the collection of rent.[4] Recently, in *Schwartz v. Torrenzano*,[5] Justice Whelen went so far as to hold that this condition precedent to the collection of rent permits a tenant to maintain an action against a landlord without a rental permit for the return of rent even if the tenant enjoyed the use and occupancy of the property for the periods claimed.

It is unclear whether the plaintiff in *Schwartz* will ultimately prevail, particularly in light of the precedent set in the Appellate Term, First Department, which prevents the return of rent in a nearly identical claim under New York City's Multiple Dwelling Law.[6] New York City's Multiple Dwelling Law forbids the collection of rent in the absence of a valid certificate of occupancy, but it does not explicitly provide for the refund of rent paid for use and occupancy actually enjoyed. Accordingly, courts have declined to sustain actions under the latter theory. Similarly, while the Town of Southampton Code forbids the collection of rent absent a rental permit, but it also does not explicitly authorize a private right of action for the reimbursement of rent paid for use and occupancy actually enjoyed. As of the writing of this article, the Second Department has not considered any aspect of the Town of Southampton rental permit requirement, but we may have some guidance shortly as a Notice of Appeal has been filed in *Schwartz*.

Regardless of the outcome, the continuing advancement of tenant protection laws makes it clear that even the mom-and-pop landlord must treat their rental as a business and shelter themselves from risk. Like any business, the guidance of an attorney at the outset can prevent headaches and the mass exodus of hard earned profits later down the road.

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[1] 576 U.S. ____ (Docket nos. 13-1371).
[2] Suffolk County Administrative Code §528-9.
[3] Suffolk County Administrative Code §528-9(A)(7).
[4] Town of Southampton Code §270-13.
[5] 16 N.Y.S.3d 697 (Supr. Ct. Suffolk Cnty., 2015).
[6] *Goho Equities v. Weiss*, 149 Misc.2d 628, 572 N.y.S.2d 836 (App. Term., 1st Dept. 1991).

Consumer Arbitration (Continued from page 1)

In sum, while the Federal Arbitration Act established a national policy in favor of arbitration, the Dodd-Frank Act carved out a potential exception in the area of consumer finance agreements. Since arbitration agreements provide a vehicle for businesses to insulate themselves from class actions, concerns over the elimination of class actions as a method for enforcing claims and deterring non-compliance have prompted the reexamination of arbitration as a method for resolving individual consumer complaints. In my view, these issues should be untangled. The consumer due process protocols established by the AAA and other ADR purveyors do guarantee a fair and efficient hearing on the merits. If class actions are viewed as an essential enforcement tool, then let the parties decide whether they should take place in court or in arbitration. Of note, AAA and JAMS both have specific rules for administration of class action arbitrations.

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