IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARSHA WETZEL,	)	
	)	
Plaintiff,	)	Case No. 16-cv-07598
	)	
v.	)	Honorable Judge Samuel Der-Yeghiayan
	)	
GLEN ST. ANDREW LIVING COMMUNITY, LLC; GLEN ST. ANDREW LIVING COMMUNITY REAL ESTATE, LLC; GLEN HEALTH & HOME MANAGEMENT, INC.; ALYSSA FLAVIN; CAROLYN DRISCOLL; and SANDRA CUBAS,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Defendants, Glen St. Andrew Living Community, LLC; Glenn St. Andrew Living Community Real Estate, LLC; Glen St. Andrew Health & Home Management, Inc.; Alyssa Flavin; Carolyn Driscoll; and Sandra Cubas, by and through their attorneys, Gordon & Rees LLP, presents its Reply in Support of Its Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In support, Defendants state as follows:

I. ARGUMENT

A. *The Plaintiff's Fair Housing Claims Must Be Dismissed As The Plaintiff Has Failed To Plead Any Intentional Discrimination On The Part Of The Defendants.*

Plaintiff attempts to avoid the requirement of pleading intent on the part of the Defendants by arguing that she is pleading a hostile housing environment claim, and therefore intent is not required. However, the Plaintiff's argument ignores the well-settled case law addressing Section 3604(b) and Section 3617, that intent is an essential element of these claims. *See Edwards v. Lake Terrace Condo. Ass'n*, 2011 U.S. Dist. LEXIS 43304, *12 (N.D. Ill. 2011) (dismissing plaintiff's

complaint for failing to plead any discriminatory intent on the part of the defendant); *See Davis v. Fenton,* 2016 U.S. Dist. LEXIS 50145 *26 (N.D. Ill. 2016) (granting defendant's motion to dismiss where plaintiff failed to allege that the defendant's actions were motivated by prohibited discrimination)

Despite the Plaintiff providing a laundry list of cases discussing hostile housing environment claims, none of the cases relied upon by Plaintiff stand for the proposition that intent is not a required element to prove the claim, and all of those cases involved specific allegations of direct discrimination on the part of the landlord. The fact that direct discrimination by the landlord is alleged in each of those cases is significant because, as a result of the direct discrimination allegations, each of the complaints allege an intent to discriminate by the defendants, and therefore intent is not an issue in the hostile housing environment claims. None of the cases cited by Plaintiff address the issue presented in the instant case—a Plaintiff trying to hold a landlord liable for acts of its tenants, with absolutely no allegations of intentional discrimination by the landlord. Even more problematic for the Plaintiff is that some of the cases relied upon by Plaintiff actually infer that intent on the part of the landlord *is required* to state a claim for hostile housing environment. *See Martinez v. Cal. Investors XII,* (C.D. Cal. December 12, 2007) (citing *Lawrence v. Couryards at Deerwood Association, Inc.*, 318 F.Supp.2d 1133, 1144 (S.D. Fla. 2004), which requires intent for a hostile housing environment claim, in analyzing its own hostile housing environment claim). Each of the cases cited by the Plaintiff are readily distinguishable from the case at hand, and most do not stand for the proposition that Plaintiff states:

- *Krieman v. Crystal Lake Apartments Ltd. Partnership*, (N.D. Ill. May 31, 2006) (hostile housing environment was brought as a result of property manager making harassing comments to plaintiff. No tenant-on-tenant harassment was alleged).

- *Scialabba v. Sierra Blanca Condo. No. One Ass'n*, (N.D. Ill. July 16, 2011) (specifically noted that conduct of other residents and defendants' inaction does not violate Section 3617.

Further, there were allegations of direct discrimination, including harassment, by the landlord, creating the presumption that intent was already established).

- *Wilstein v. San Tropai Master Ass'n*, (N.D. Ill. April, 22, 1999) (specifically alleged that residents, who were members of the condo association, were acting behalf of the condo association in making harassing comments. Clearly, intent was alleged in this complaint).

- *Neudeck v. Boisclair*, 351 F.3d 865 (8th Cir. 2003) (harassment was by children of the property management team. Further, issue of intent was never addressed, and there were allegations of direct discrimination and harassment by the landlord and property managers).

- *Hicks v. Makaha Valley Plantation Homeowners Ass'n*, (D. Haw. June 30, 2015) (Intent was alleged as there were allegations of direct discrimination on the part of the landlord. Further the hostile housing environment claim was support by allegations that employees of the landlord (the gardener) performed actions that contributed to the hostile housing environment).

- *Fahnbulleh v. GFZ Realty, LLC*, 795 F.Supp.2d 360 (D. Md. 2011) (court specifically stated that it was only deciding that tenant-on-tenant harassment could be actionable, but it would not address what needed to pled to state a cause of action).

Intent is a required element to prove discrimination under Section 3604(b) and Section 3617, and any argument to the contrary is in direct contradiction to the well-settled case law. *See Edwards*, 2011 U.S. Dist. LEXIS at *12 (dismissing plaintiff's complaint for failing to plead any discriminatory intent on the part of the defendant); *See Davis*, 2016 U.S. Dist. at *26 (granting defendant's motion to dismiss where plaintiff failed to allege that the defendant's actions were motivated by prohibited discrimination); *Bloch*, 587 F.3d at 783; *Echemendia v. Gene B. Glick Mgmt. Corp.*, 199 F. App'x 544, 547 (7th Cir. 2006) ("[t]o prevail on a claim of retaliation under § 3617 of the FHA, [the plaintiff] must show *both* a retaliatory motive and [the defendant's] intent to discriminate on a forbidden ground[.]"); *East-Miller v. Lake Cty. Highway Dep't*, 421 F.3d 558, 563 (7th Cir. 2005) ("[A] showing of intentional discrimination is an essential element of a §3617 claim"); *Sofarelli v. Pinellas Cty.*, 931 F.2d 718, 722 (11th Cir. 1991) (requiring plaintiffs to show "that race played some role" in the defendants" actions that allegedly violated §3617).

Recognizing that intent is a required element of a Section 3604(b) claim and Section 3617 claim, all courts that have addressed a hostile housing environment claim—supported only by allegations of tenant-on-tenant harassment—have either held that a separate cause of action does not exist or that intent is a required element of this claim. The courts have reasoned that to allow for a hostile housing environment claim to stand, without intent, would be in direct contradiction to the congressional intent in Section 3604(b) and Section 3617, and the well-settled case law requiring intent to be pled. *See Smith v. Hous. Auth. Of South Bend*, 867 F.Supp.2d 1004, 1013 (N.D. Ind. 2012) (refusing to recognize a separate cause of action for tenant-on-tenant harassment); *See Francis v. King Park Manor, Inc.*, 91 F.Supp.3d 420 (E.D. N.Y. 2015) (dismissing plaintiff's complaint for failure to state a claim under the Fair Housing Act. The court held that a landlord's failure to intervene in tenant-on-tenant harassment, without more, was insufficient to state a cause of action under the Fair Housing Act); *Ohio Civil Rights Commission v. Akron Metro. Housing Authority*, 119 Ohio St.3d 77 (Ohio 2008) (finding that tenant-on-tenant harassment is not actionable against a landlord. The Court further noted that a landlord's authority to evict a tenant who disturbs another's peaceful enjoyment of their accommodations is insufficient to hold the landlord liable for that tenant's discriminatory behavior); *Lawrence v. Courtyards at Deerwood Association, Inc.*, 318 F.Supp.2d 1133, 1144 (S.D. Fla. 2004) (in dismissing the plaintiff's complaint, the court found that a landlords failure to intervene in a tenant's harassment of another tenant was insufficient to state a claim under the Fair Housing Act).

The case law is clear that intent is required to state a claim under Section 3604(b) and Section 3617, and to hold to the contrary would be against the well-settled case law in this Circuit and in others. Although the issue of hostile housing environment claims involving *only* tenant-on-tenant harassment, with no direct discrimination claims against the defendants, has not been widely

addressed in this Circuit or in others, those courts that have addressed this issue have uniformly found that intent is a required element of these claims, or that something more than mere tenant-on-tenant harassment is required. Accordingly, because the Plaintiff's Complaint fails to plead any discriminatory motive on the part of the Defendants, and the Plaintiff's response makes clear that she is seeking to hold Defendants liable solely for their inaction in tenant-on-tenant harassment, a claim that was rejected by a court in this Circuit, *Smith v. Hous. Auth. Of South Bend*, Plaintiff's Complaint must be dismissed in its entirety.

B. *Department of Housing and Urban Developments recent regulation addressing hostile housing environment claim is not entitled to deference under Chevron, and cannot be applied in this matter.*

Recognizing that there is no case law to support her argument that intent is not required when a plaintiff alleges tenant-on-tenant harassment or a hostile housing environment claim, the Plaintiff next cites to the Department of Housing and Urban Development ("HUD") regulation 81 FR 63054. This regulation adds Section 100.7 to 24 CFR part 100, stating, in part, that a person is directly liable for "failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it." *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices under the Fair Housing Act*, 81 FR 63054 (Aug. 18, 2016). The Plaintiff automatically assumes that this regulation should be accorded deference under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). However, the Plaintiff's argument carries little weight as the Plaintiff has failed to go through the two-part test required under *Chevron* to determine whether such a regulation should be given deference. Had the Plaintiff gone through this required test, and as demonstrated in detail below, it would have been clear that this regulation

cannot be afforded any deference because Congress' intent on this statute is clear, and HUD's interpretation of the statute is completely unreasonable.

Pursuant to *Chevron*, 467 U.S. at 842-43, courts must defer to agency interpretation of a statute where Congressional intent is unclear, and a statute affords an agency authority under the statute. A two-step analysis is used for determining whether *Chevron* deference applies. In the first step of the Chevron analysis, the court must determine whether "the intent of Congress is clear" regarding the question at issue. *See Barnhart v. Walton*, 535 U.S. 212, 218, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002) (citing *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694). If "the statute speaks clearly 'to the precise question at issue,' [a court] 'must give effect to the unambiguously expressed intent of Congress.'" *Id*. If, on the other hand, "the statute is silent or ambiguous with respect to the specific issue," the Court proceeds to the second step of the *Chevron* analysis, in which the Court defers to any reasonable agency interpretation of the statute. *See Castro v. Chicago Hous. Auth.*, 360 F.3d 721, 727 (7th Cir. 2004).

1. The Intent of Congress in Section 3604(b) and Section 3617 is clear.

Chevron deference is not total, when straightforward judicial interpretation dissipates any possible statutory ambiguity and fills any possible gap in the statute, Chevron deference is not owed. *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002). Courts glean congressional intent from two sources, the statutory language itself and (at least at times) the legislative history. *See Chevron*, 467 U.S. at 846-848; *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 120 L. Ed. 2d 379, 112 S. Ct. 2589 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished").

Here, Section 3604(b) and Section 3617 are clear that, aside from disparate impact, which is not pled in this case, Congress intended only to hold a landlord liable if he acted with discriminatory intent. There is absolutely nothing in Section 3604(b) or Section 3617 which would suggest that Congress intended to hold a landlord liable for the actions of its tenants, when there are no allegations of discriminatory animus on the part of the defendant. In fact, Section 3604(b) specifically states: "[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, color, religion, sex, familial status, or national origin." (Emphasis added). Similarly, Section 3617 specifically prohibits "interfer[ing] with any person in the exercise or enjoyment of, or on account of [her] having exercised or enjoyed, . . . any right granted or protected by Section 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. § 3617. The Seventh Circuit has held that, to succeed on a Section 3617 claim for interference, a plaintiff must show that the defendants were motivated by an intent to discriminate." *Bloch v. Frischholz*, 587 F.3d 771, 783 (7th Cir. 2009). (Emphasis added).

Accordingly, Congress' intent is clear that Section 3604(b) and Section 3617 require some action on the part of the landlord, whether it be through enacting a policy (disparate treatment) or direct discrimination (disparate treatment). Neither statute permits an interpretation that a landlord can be liable for the acts of third-parties, including its tenants, and there is no gap in the statute that would allow for such an interpretation. Further, it is clear under the statute that the defendant must act with discriminatory animus, and therefore to hold a landlord liable for the acts of its tenants—without more—is in direct contradiction to the clear language of Section 3604(b) and Section 3617. Accordingly, 81 FR 63054 should not be accorded deference by this Court as Section 3504(b) and Section 3617 are clear on this issue.

2. HUD's regulation on hostile environment is unreasonable.

Should this Court find that Congress' intent was not clear or that Section 3604(b) and Section 3617 are somehow ambiguous on this issue, *Chevron* deference is still not permitted because HUD's interpretation of the statute is unreasonable. HUD's new regulation seeks to impose direct liability on the part of a landlord for the acts of its tenants when it knew or should have known of the harassment. Such a regulation would have significant ramifications on the housing industry, and would essentially eviscerate the long held requirement that a landlord must act with discriminatory animus to be held liable under the FHA.[1] Looking at the totality of HUD's proposed new regulation, HUD seeks to impose the same liability on a landlord for its own employees actions as a third-party tenant over whom the landlord has no control.

> a) *Direct liability.* (1) A person is directly liable for:
>
> (i) The person's own conduct that results in a discriminatory housing practice.
>
> (ii) Failing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent, where the person knew or should have known of the discriminatory conduct.
>
> (iii) Failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct and had the power to correct it. The power to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of the person's control or any other legal responsibility the person may have with respect to the conduct of such third-party.

To allow such a regulation to stand, without requiring something more for tenant-on-tenant harassment, would essentially put a landlord in the same shoes as a employer is to its employees with respect to tenants—a third-party who, unlike an employee, is not acting on behalf of the landlord. Clearly, the broad scope of liability that HUD seeks to impose on a landlord for the actions

[1] Defendants recognize the recent ruling in *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2518-19 (2015), and Plaintiff's reliance on that case in its argument that intent is not required. However, that case dealt with Section 3604(a), and involved disparate impact claims, which are not at issue in the instant case.

of its tenants is unreasonable, and no deference should be accorded to this regulation. In fact, this Circuit has specifically recognized the unreasonable nature of HUD's regulation in finding that mere allegations of tenant-on-tenant bullying cannot suffice to state a cause of action. S*mith*, 867 F.Supp.2d at 1013. Further adding to the unreasonable nature of the regulation is that it could potentially impose liability on a landlord for speech that, although distasteful, is protected by the First Amendment. Simply put, HUD's regulation will seek to impose significant liability on a landlord for actions outside of its control, and committed by an individual over whom it has no control nor is acting on behalf of the landlord, and such a regulation is therefore unreasonable.

Lastly, given the significant impact that this regulation will have landlords, and the fact that this type of liability was never imposed before, this rule should be not given retroactive effect, and therefore should not apply to the case at hand. "Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Fairness concerns dictate that courts must not lightly disrupt settled expectations or alter the legal consequences of past actions. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990). Nowhere is HUD's regulation does it state that it will have retroactive affect, and because the statute was not put into place until October 14, 2016, this regulation should not apply to the instant action.

Accordingly, for the reasons stated above, Plaintiff's Complaint still must be dismissed in its entirety.

C. *Glen St. Andrew Living Community Real Estate, LLC Is An Improper Party, And Therefore Must Be Dismissed.*

Defendant Glen St. Andrew Living Community Real Estate, LLC ("GSALC Real Estate, LLC") must be dismissed because Plaintiff completely fails to assert any factual allegations against

GSALC Real Estate, LLC. *See Stevens v. Hollywood Towers & Condo Ass'n*, 836 F.Supp.2d 800 (N.D. Ill. 2011). In Plaintiff's Complaint, she alleges one single allegation against Defendant GSALC Real Estate, LLC. She alleges only that GSALC Real Estate, LLC owns the land and the building where the subject property is located. *See* Pl. Compl. ¶ 12. GSALC Real Estate, LLC does not lease the property, does not manage the property, and does not employ anyone who leases or manages the property. *See generally* Pl. Compl. ¶ 13-17. Plaintiff tries to combat her failure to plead any liability on the part of GSALC Real Estate, LLC by relying on her conclusory allegations that all defendants are in an agency relationship, and that GSALC Real Estate, LLC is a party to the lease. Plaintiff has provided absolutely no factual allegations to support these conclusory allegations, and a review of the lease clearly shows it is between Marsha Wetzel and "St. Andrew Life Center". In fact, there is no mention of GSALC Real Estate, LLC anywhere in the lease. [2]

Plaintiff's reliance on *Uhler v. Beach Park, LLC*, 2006 U.S. Dist. LEXIS 94308 (N.D. Ill. Dec. 20, 2006) is also misplaced because in that case the defendant was the owner of the property where the incident took place, and there was *no lease* of the property by a separate party. Here, the property owned by GSALC Real Estate, LLC is leased by Glen St. Andrew Living Community, LLC. Further, basic tort principles suggest that an owner is not liable for property that is leased to another. *Gilley v. Kiddel*, 372 Ill.App.3d 271, 275 (2nd Dist. 2007); *Richard v. Nederlander Palace Acquisition, LLC*, 2015 IL App (1st) 143492, ¶ 39. Accordingly, because the property is

[2] A copy of the Tenant Agreement is attached hereto as Exhibit A. If a district court is asked to consider matters outside the pleadings, procedural rules normally require that the motion shall be treated as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *GE Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997). The Courts, however, may also "examine documents that a defendant attaches to a motion to idsmis if they are referred to in the plaintiff's claim and are central to her claim." *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 971 (7th Cir. 2002). Effectively, incorporation-by-reference doctrine provides that if a plaintiff mentions a document in his complaint, the defendant may then submit the document to the court without converting defendant's 12(b)(6) motion to a motion for summary judgment. *Brownmark v. Films, LLC v. Comedy Partners*, . The doctrine prevents a plaintiff from evading dismissal under Rule 12(b)(6) by failing to attach to its complaint a document that proves its claim has no merit. *Id.*

leased by Glen St. Andrew Living Community, LLC, GSALC Real Estate, LLC is an improper party to this lawsuit, and therefore must be dismissed.

CONCLUSION

WHEREFORE, Defendants Glen St. Andrew Living Community, LLC; Glenn St. Andrew Living Community Real Estate, LLC; Glen St. Andrew Health & Home Management, Inc.; Alyssa Flavin; Carolyn Driscoll; and Sandra Cubas respectfully request that this Honorable Court enter an order dismissing Plaintiff's Complaint in its entirety with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and for such further relief as this Court deems just and proper.

Dated: October 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all attorneys of record:

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