

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LARRY JOHNSON,

Plaintiff,

v.

THOMAS BRENNEKE; GARRETT
LAMAR MILES; GUARDIAN
MANAGEMENT, LLC; GUARDIAN
REAL ESTATE SERVICES; UPTOWN
TOWER APARTMENTS; LISA
SIMONSON; KELLY PAINE; and
SUNSHINE SALES,

Defendants.

No. 3:21-cv-00582-JR
(Lead Case)

No. 3:21-cv-00685-JR
No. 3:21-cv-00871-JR
(Trailing Cases)¹

FINDINGS AND
RECOMMENDATION

RUSSO, Magistrate Judge:

Pro se plaintiff Larry Johnson filed this Fair Housing Act (“FHA”) action against defendants Thomas Brenneke, Lisa Simonson, Kelly Paine, Guardian Management, LLC, Guardian Real Estate Services, and Uptown Tower Apartments (collectively “Guardian defendants”), as well as Garrett Lamar Miles and Sunshine Sales. The Court denied plaintiff’s motion for summary judgment against the Guardian defendants regarding alleged FHA discrimination for failure to control criminal elements at the Uptown Tower Apartments and granted the Guardian defendants cross motion for summary judgment as to all claims and dismissed them from this action. (ECF [99](#)). Plaintiff now seeks summary judgment against

¹ All citations are to documents in the lead case unless otherwise noted.

defendant Garret Miles.² In addition, plaintiff seeks leave to amend his complaint to add additional defendants.

BACKGROUND

Uptown Tower is an apartment complex that participates in the Section 8 project-based housing assistance program through the U.S. Department of Housing and Development (“HUD”) and qualifies as a “covered dwelling” under the FHA. Guardian Management is the property manager for Uptown Tower.

Plaintiff, Miles, and Sales are all residents of Uptown Tower. Miles and Sales are romantically involved and share the same apartment. Plaintiff is a low-income senior with significant health needs. His rent is subsidized by the HUD Section 8 project-based housing program.

On January 9, 2020, plaintiff obtained a protective order from Multnomah County Circuit Court against Miles. Pl.’s Partial Mot. Summ. J. Ex. E (ECF [35](#)). Although the precise circumstances underlying the protective order are unclear, Miles was subsequently arrested and jailed in Multnomah County for violation of the protective order due to an incident that occurred on February 18, 2020, in which Miles walked by plaintiff in the lobby to access the stairwell to his apartment. *Id.* An amended protective order was entered on March 2, 2020. Pl.’s Partial Mot. Summ. J. Ex. A ([ECF 35](#)). The amended protective order continued to find that Miles presented an “immediate and present danger of further abuse” to plaintiff, but allowed Miles to “be less than 10 feet away” from plaintiff in the Uptown Tower lobby to access his apartment. *Id.*

Plaintiff also alleges that Miles, along with other individuals residing at Uptown Tower including Kenneth De Groot and Lisa Rudhe,³ have “criminal conviction history[ies]” and engage

² Defendant Miles has not appeared in this action.

³ De Groot and Rudhe are listed as individual defendants in Case No. 3:21-00685-JR.

in the sale and manufacturing of illegal drugs. Am. Compl. ¶ 69 ([ECF 52](#)). According to plaintiff, these behaviors represent violations of the Uptown Tower rental agreement and HUD rules. Id.

Plaintiff made repeated reasonable accommodation requests to either evict or transfer Miles. See, e.g., Pl.'s Partial Mot. Summ. J. Exs. B, F ([ECF 35](#)).

DISCUSSION

A. Partial Summary Judgment

In the First Amended Complaint, it appears the allegations regarding defendant Miles are made for the purpose of alleging a failure to act by the Guardian defendants to prevent allegedly harassing behavior in violation of the FHA. However, it is unclear whether any claims are alleged directly against defendant Miles. Nonetheless, plaintiff seeks partial summary judgment against Miles asserting the “harassment complained of by Miles is based upon my vulnerability as an elderly and disabled person and also as a wheelchair user under the Fair Housing Act.” Motion for Partial Summary Judgment ([ECF 92](#)) at p. 2.

As with his first summary judgment motion, plaintiff notes he obtained a protective order against Miles and that Miles is a non-elderly adult with post-traumatic stress disorder. Id. at pp. 2-3 Plaintiff further notes that Miles was arrested by Portland Police for violation of the protective order and purportedly in violation of his HUD rental agreement and HUD’s rules. Id. at p. 3. Plaintiff contends the Guardian defendants’ lack of action in addressing defendant Miles’ conduct was sufficiently severe or pervasive as to interfere with his enjoyment of his home requiring him to apply for elder abuse prevention protection. Specifically, plaintiff recites his complaints regarding the Guardian defendants lack of action:

documented and provided an escalating pattern of elder and disabled abuse towards me by tenant Garrett La Mar Miles to Uptown Tower/Guardian Management on four separate occasions which resulted in a Multnomah County Elder/ Disabled Abuse restraining order # 20PO00287 being issued against Garrett L. Miles Apt.

302 of Uptown Tower. The Court has determined that I am disabled and in immediate danger from him. Miles has an unstable and untreated Post Traumatic Stress Disorder. You have copies and notice of the Protective Order. Garrett La Mar Miles DOB: 02-03-1962, ODL: 4025368, SSN: 557-43-1509 has an extensive criminal record on file at the Multnomah County Courthouse notably for felony drug convictions and arrests for sodomy and kidnapping which all should have been the basis for a denial of his initial rental application if a careful investigation of his background had been originally conducted by management or if rental written restraints had been placed upon him to protect other residents.

Id. at p. 9.

Through his motion for partial summary judgment, plaintiff seeks a Court order evicting Miles pursuant to the provisions of the HUD model lease.

In granting summary judgment in favor of the Guardian defendants, the Court stated:

To proceed with a hostile living environment claim, the plaintiff must demonstrate: (1) he is a qualified individual with a disability; (2) he was subject to unwelcome harassment; (3) the harassment was based on his disability or request for accommodation; (4) the harassment was sufficiently severe or pervasive to alter the plaintiff's living conditions and create an abusive environment; and (5) either the harassment was committed by a landlord or his agent/employee, or the landlord knew or should have known of the third-party harassment and had the power to correct it. *Neudecker*, 351 F.3d at 364-65; 24 C.F.R. §§ 100.600, 100.7. The latter is determined by “the extent of the [the landlord’s] control or any other legal responsibility the [landlord] may have with respect to the conduct of such third-party.” 24 C.F.R. § 100.7.

Findings and Recommendation (ECF [77](#)) at p. 10 (Adopted (ECF [99](#))).

In finding plaintiff's FHA claim lacking with respect to Miles' actions, the Court determined:

Plaintiff's claim, however, fails at the third and fourth elements. Precedent makes clear that tenant behavior does not fall within the ambit of the FHA if it is “mean-spirited, but . . . not inherently discriminatory.” See *Neudecker v. Boisclair Corp.*, 2005 WL 1607409, *2 (D. Minn. July 7, 2005) (granting summary judgment on remand in regard to incidents of harassment that were “unrelated to [the plaintiff’s] OCD”).

Critically, beyond noting his own age and wheelchair-status, plaintiff has not set forth any evidence surrounding his interactions with Miles that would allow a factfinder to reasonably conclude the harassment was based on disability, or sufficiently severe or pervasive. [footnote omitted] The only details surrounding

Miles' wrongful actions comes from complaint letters plaintiff wrote to Uptown Tower, which are attached to plaintiff's various briefs and declarations. From these letters, when coupled with plaintiff's pleadings, the Court gleans that Uptown Tower is "a rental community for the elderly and disabled," and Miles is a 58-year-old with PTSD and a drug problem. Am. Compl. ¶ 11 ([doc. 52](#)); *see also McGee, 2021 WL 3602157 at *21* (court must consider the "social context" of a housing complex "in determining whether [another tenant's] alleged harassment rose to the level of being 'sufficiently severe and pervasive'") (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)).

The four incidents involving Miles are as follows: the first occurred in October 2019, when "there was a confrontation with a tenant known as 'Garret' who threatened [plaintiff] with bodily harm" during a cooking class; the second and third in December 2019, when Miles "confronted" plaintiff in the lobby "by stating that [plaintiff] was not allowed near him and would still beat shit" out of plaintiff "if there was no camera," and later threatening plaintiff and giving him "the finger"; and the fourth in February 2020 when Miles walked past plaintiff in the lobby, which prompted an amendment to the protective order to allow Miles to be within ten feet of plaintiff for the purposes of accessing his apartment, even though he otherwise continued to present an immediate danger. Pl.'s Partial Mot. Summ. J. Exs. A, E ([doc. 35](#)); Johnson Decl. Exs. A-C ([doc. 59](#)). [footnote omitted] In other words, there is no indication that plaintiff's physical or mental conditions played any role in his negative interactions with Miles.

Given the context of plaintiff's living situation – which involves subsidized housing for people in need, some of whom are suffering from and living with mental health issues – coupled with the fact that the individual who allegedly harassed plaintiff in no way can be considered an agent of Guardian Defendants, the threshold for "sufficiently severe and pervasive" harassment is not clear cut. Nevertheless, even viewing the record in the light most favorable to plaintiff in this unique context, the Court cannot conclude that Miles' harassment created a hostile housing environment. *See Westendorf v. W. Coast Contractors of Nev., Incorp.*, 712 F.3d 417, 422 (9th Cir. 2013) (affirming the district court's grant of summary judgment in favor of the defendant on a Title VII hostile work environment claim because four "crude and offensive remarks," including comments about breast sizes, tampons and orgasms, and gender-based stereotypes, were not "sufficiently severe or pervasive"); *see also McGee, 2021 WL 3602157 at *22* (four sex-based comments by another tenant within a 10 month period at a women's shelter were inadequate to establish the fourth prima facie element).

The Court is cognizant of the fact that police, and ultimately the Multnomah County Circuit Court, were involved in plaintiff's relationship with Miles; however, due to the dearth of facts and evidence surrounding those proceedings, they are insufficient to allow a reasonable juror to infer the existence of a prima facie case.

Id. at p. 10-13.

Moreover, plaintiff presents no evidence that defendant Miles is himself subject to liability under the FHA. Tenants who do not own the subject property are not liable under the FHA. See Hoostein v. Mental Health Ass'n (MHA), Inc., 98 F. Supp.3d 293, 298 (D. Mass. 2015). While agents or employees of a property owner may be liable for their own unlawful conduct under the FHA, see, e.g., Meyer v. Holley, 537 U.S. 280, 285 (2003); Dillon v. AFBIC Dev. Corp., 597 F.2d 556, 562 (5th Cir. 1979); Hintz v. Chase, 2017 WL 3421979, at *3 (N.D. Cal. Aug 9, 2017), plaintiff fails to present evidence demonstrating an agency relationship between the Uptown Tower property owners and Miles. Accordingly, plaintiff's motion for summary judgment against defendant Miles should be denied.

B. Leave to Amend

Plaintiff seeks leave to amend his complaint to add more defendants who purportedly have an ownership interest in the Uptown Apartment or are employees of Guardian Management. Plaintiff ostensibly seeks leave pursuant to Fed. R. Civ. P. 15. However, the deadline for adding parties lapsed on August 19, 2021. (ECF 5).⁴ Accordingly, plaintiff must show good cause under Fed. R. Civ. P. 16 to join new parties at this stage of the litigation.

Rule 16 allows modifications of the pretrial schedule for good cause. Fed. Civ. P 16(b)(4). A party demonstrates good cause to modify a scheduling order by showing that, even with the exercise of due diligence, he or she was unable to meet the deadlines set forth in the order. I find no good cause shown here. Plaintiff asserts he "recently discovered" the ownership interest in the Uptown Tower with no further explanation. However, plaintiff does not show why, with the

⁴ Even if leave to amend were allowed, the grant of summary judgment to the Guardian defendants demonstrates the futility of adding more defendants. Plaintiff does not identify any actions by the proposed new defendants that would subject them to liability under the FHA and instead suggests liability based on actions already determined to present no triable issue of fact regarding liability under the FHA.

exercise of due diligence, he could not have discovered and added the proposed defendants within the established deadlines. Accordingly, plaintiff's motion to amend should be denied.

C. Motions For Relief

After this Court issued its Findings and Recommendation recommending summary judgment in favor of the Guardian defendants, plaintiff submitted several motions for relief from judgment. The motions were construed as objections to the Findings and Recommendation given their filing prior to entry of a final order on the summary judgment motions. Judge Karin Immergut adopted the Findings and Recommendation after considering the motions for relief as well as other objections. (ECF [99](#)). Accordingly, the motions should be denied as moot.

RECOMMENDATION

For the reasons stated herein, Plaintiff's Motion for Partial Summary Judgment (ECF [92](#)) should be denied, plaintiff's motion to amend (ECF [91](#)) should be denied. In addition, plaintiff's motions for relief (ECF [81](#), [82](#), [83](#), [84](#), [85](#), [86](#), [87](#), [88](#), [89](#), [90](#)) should be denied as moot.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to [Rule 4\(a\)\(1\), Federal Rules of Appellate Procedure](#), should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right

to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 12th day of May, 2022.

/s/ Jolie A. Russo
Jolie A. Russo
United States Magistrate Judge