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RECENT DEVELOPMENT

BIG CITIES V. BIG BANKS: DOES A MUNICIPALITY HAVE STANDING TO SUE?

Hamda Hussein

I. INTRODUCTION

The mortgage lending practices of banks and their impact on inner-city housing is a big issue that impacts societal growth, especially when such practices may be discriminatory.¹ During the month of November, the Supreme Court heard arguments for lawsuits filed by the City of Miami against Wells Fargo and Bank of America in order to address the issue of whether a city can be an “aggrieved person” under the Fair Housing Act of 1968 (FHA).² In 2013, Miami filed these lawsuits upon finding a disproportionate number of defaults in home loans between black and Latino homebuyers,³ alleging that the banks violated the FHA through their lending practices. Banks argue that Miami lacks standing under the FHA because its suits fall outside of the statute’s “zone of interests” and the banks’ actions could not be sufficiently linked to the harms claimed by Miami.⁴

The FHA makes it unlawful for any person or entity, whose business includes engaging in residential, real estate-related transactions, to discriminate against any person because of race, color, religion, sex, etc.⁵ Such transactions include the making or purchasing of loans for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling.⁶ In order for a plaintiff to have standing for an FHA violation suit, they must allege: (1) an actual injury, (2) a causal link between the injury and the actions of defendant(s), and (3) that a favorable judicial outcome would redress the injury.⁷

The United States District Court for the Southern District of Florida

1. Mark Walsh, *SCOTUS will decide whether Miami can sue banks under the Fair Housing Act*, A.B.A. J., Nov. 1, 2016, http://www.abajournal.com/magazine/article/scotus_miami_bank_of_america.

2. *Id.*

3. *Id.*

4. *Id.*

5. 42 U.S.C. § 3605(a) (1968).

6. 42 U.S.C. § 3605(b)(1)(A) (1968).

7. *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1272 (11th Cir. 2015).

dismissed Miami's suits, stating that they did not have standing to bring these cases.⁸ The Court of Appeals for the Eleventh Circuit disagreed, stating that the term "aggrieved person" can be expanded as far as Article III of the US Constitution permits, and that Miami has standing under the FHA.⁹ If considered an "aggrieved person", Miami would have standing to sue for redress, for the harms derived from alleged discriminatory practices.¹⁰ This would allow not only Miami, but other big cities with similar lawsuits, to deal with such discriminatory lending practices.¹¹ However, this Supreme Court decision could have a big impact on big banks and may open the "floodgates" for other lawsuits.¹²

II. BACKGROUND & HISTORY OF STANDING UNDER THE FHA

A. The Supreme Court Has Held That Disparate-Impact Claims Are Recognized And Have Standing Under A FHA Lawsuit

Article III of the Constitution grants the courts the power to hear cases that arise out of the Constitution and laws of the United States.¹³ Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act, was created to prohibit discrimination in the sale, rental and financing of dwellings because of race, national origin, religion, sex, family status and disability.¹⁴ In regards to mortgage lending, no lender may impose different terms or conditions on a loan, such as different interest rates or fees, based on race, religion, national origin, sex, family status or disability.¹⁵ In determining whether a case would have standing under the FHA, the Supreme Court, like the Eleventh Circuit, would likely look to several of its past decisions where the high court has recognized standing in disparate-impact claims,¹⁶ and has acknowledged a broad use of the term "aggrieved

8. *City of Miami v. Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 95445 (S.D. Fla. Jul. 9 2014); *see also* *City of Miami v. Wells Fargo & Co.*, 2016 U.S. Dist. LEXIS 41893 (S.D. Fla., Mar. 17, 2016).

9. *City of Miami v. Bank of Am.*, 800 F.3d at 1273; *see also* *City of Miami v. Wells Fargo & Co.*, 801 F.3d 1258, 1267 (11th Cir. 2015)

10. Walsh, *supra* note 1.

11. *See id.*

12. *Id.*

13. U.S. CONST. art. III, § 2, cl. 1.

14. *Fair Housing –It's Your Right*, U.S. DEPT. OF HOUS. AND URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws, (last visited Nov. 30, 2016).

15. *Id.*

16. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

person” under FHA.¹⁷

Regarding disparate-impact claims, the Supreme Court has recently held that such claims are cognizable under the Fair Housing Act.¹⁸ In *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, the high Court ruled that a nonprofit corporation’s disparate impact claim against the Texas Department of Housing and Community Affairs under the FHA was cognizable.¹⁹ The suit occurred due to disproportionate allocation of tax credits in predominantly black inner-city areas compared to white suburban neighborhoods.²⁰ The Court stated that the FHA’s results-oriented language and the court’s interpretation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 allow it to recognize disparate-impact claims under the FHA.²¹ Title VII protects against employment discrimination and other unlawful employment practices on the basis of race, national origin, sex, family status or disability.²² Because the language of the FHA is focused on preventing discriminatory policy based not on the use of race, but the resulting impact of the policy, disparate-impact claims therefore have standing under the FHA, similarly to Title VII claims.²³

B. The Supreme Court Has Also Maintained That An “Aggrieved Person” Can Be Broadly Defined To Determine Whether A Plaintiff Has Standing Under A FHA Lawsuit

The Supreme Court has recently held that the term “aggrieved” in Title VII allows a suit by plaintiffs who have an interest within statutory protections while excluding plaintiffs whose interests are unrelated to the prohibitions under Title VII.²⁴ In *Thompson v. North American Stainless, LP*, the Court held that a plaintiff may not sue unless their claim fall within the “zones of interests”.²⁵ The term “aggrieved” in Title VII incorporates the “zones of interest” test²⁶ by allowing any plaintiff to have standing when they have an interest that is arguably sought to be protected by the

17. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972); See also *Gladstone, Realtors v. Bellwood*, 441 U.S. 91 (1979); See also *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

18. *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525.

19. *Id.*

20. *Id.*

21. *Id.*

22. 42 U.S.C. § 2000e-2(a) (2017).

23. *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525.

24. Walsh, *supra* note 1.

25. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177-78 (2011).

26. *Id.* (stating that a plaintiff does not have a right to file a claim if they are not claiming an injury to an interest that is protected by the law in question).

law.²⁷

Additionally, in relying on previous Supreme Court cases, the Eleventh Circuit court found that the application of the term “aggrieved person” is as broad as the Constitution allows. In *Trafficante v. Metro. Life Ins. Co., Gladstone, Realtors v. Village of Bellwood* in 1979, and *Havens Realty Corp. v. Coleman*, the Supreme Court mentioned that the term “aggrieved” in the FHA extends as far as Article III permits.²⁸ However, the Court in *Thompson*, while not overruling the previous courts, deemed that previous courts’ suggestions about the broad application of “aggrieved person” were nothing more than “ill-considered dictum”.²⁹

The Eleventh Circuit court in *Nasser v. Homewood* took a stricter position.³⁰ The court stated that a plaintiff has no standing under the FHA if they make no allegation of discrimination or disparate impact.³¹ The plaintiff’s claim in *Nasser* only alleged an economic injury, claiming that the rezoning of their property would cost them money.³² Thus, the court found that the plaintiff’s claim was for interest in the value of the property rather than an interest that is protected by the FHA.³³

C. Instant Cases

In the case of Miami, the city claims that the banks aimed predatory loans, which carried steeper, riskier fees and higher costs, at minority customers and not at white customers in similar circumstances.³⁴ The loans included higher interest rates than those rates established by federal benchmarks, interest-only loans, balloon payment loans, loans with prepayment penalties, and adjustable rate mortgages with teaser rates.³⁵ After conducting an analysis of the situation, Miami found that a black Wells Fargo borrower was about four times more likely to receive a predatory loan than a white borrower with similar circumstances.³⁶ Also, a Latino Wells Fargo borrower was about 1.5 times more likely to receive such loans than a similarly situated white borrower.³⁷ Miami’s suits allege that by guiding minority borrowers into these alleged predatory loans, the

27. *Thompson*, 562 U.S. at 177-78.

28. Walsh, *supra* note 1.

29. *Thompson*, 562 U.S. at 176.

30. *See* *Nasser v. Homewood*, 671 F.2d 432, 437 (11th Cir. 1982).

31. *Id.*

32. *Id.*

33. *Id.* at 437.

34. Walsh, *supra* note 1.

35. *Id.*

36. *Id.*

37. *Id.*

banks caused their properties to fall into foreclosure more rapidly than for white borrowers.³⁸ As a result, the city was deprived of tax revenue and was required to spend more to deal with the resulting consequences.³⁹

At trial, the banks argued for dismissal of the case because the city lacked standing under the FHA.⁴⁰ The banks claimed that the suits fall outside the statute's "zone of interests" and that the banks' actions could not be sufficiently linked to the injuries claimed by Miami.⁴¹ The Federal District Court for the Southern District of Florida agreed and dismissed Miami's suits.⁴² However, the Eleventh Circuit later reversed the lower court's ruling, stating that the phrase "aggrieved person" in the FHA extends standing as far as allowed under Article III of the Constitution.⁴³ It also held that the city's allegations were sufficient to meet the housing law's proximate-cause requirement.⁴⁴ Miami's suits alleged the banks' discriminatory lending caused minority homeowners to enter premature foreclosure, which deprived the city of tax revenue and increased municipal expenditures.⁴⁵ The court determined that although there are several links in that causal chain, none are unforeseeable, and therefore the claims sufficiently show a causal link.⁴⁶ The case is now before the Supreme Court and a decision should come soon.⁴⁷

III. ANALYSIS

A. The Supreme Court Is Likely To Find That The Term "Aggrieved Person" Is Broadly Applied And That Miami Would Have Standing Under This Status

The purpose of the FHA is to prevent discrimination against minorities in residential real-estate related policies.⁴⁸ While Miami attempts to combat alleged discriminatory lending practices that would violate the FHA, if it is

38. *Id.*

39. *Id.*

40. *City of Miami v. Bank of Am.*, 2014 U.S. Dist. LEXIS 95445, at *15; *see also City of Miami v. Wells Fargo*, 2016 U.S. Dist. LEXIS 41893, at *15-16.

41. *Id.*

42. *Id.*

43. *City of Miami v. Bank of Am.*, 800 F.3d at 1273; *see also City of Miami v. Wells Fargo*, 801 F.3d at 1267.

44. *City of Miami v. Bank of Am.*, 800 F.3d at 1283; *see also City of Miami v. Wells Fargo*, 801 F.3d at 1267.

45. Walsh, *supra* note 1.

46. *Id.*

47. *Id.*

48. *Fair Housing –It's Your Right*, U.S. DEPT. OF HOUS. AND URBAN DEV., *supra* note 14.

not considered an “aggrieved person” under the FHA, Miami would have no standing in its lawsuits.⁴⁹ But, it is very likely that the Supreme Court agrees with the appellate court’s decision.

The Eleventh Circuit Court, using dictum from *Trafficante*, *Gladstone*, and *Havens*, and distinguishing the case from *Nasser* and *Thompson*, reversed the trial court’s decision that the term “aggrieved” person did not apply to the municipalities like Miami.⁵⁰ Because *Trafficante*, *Gladstone*, and *Havens* have never been overruled, the court felt that the rulings which state that statutory standing under the FHA extends as broadly as is constitutionally permissible under Article III.⁵¹ While the *Thompson* court treated the rulings as merely “ill-considered dictum”, it never overruled those courts.⁵² *Thompson* was a Title VII case, not a Fair Housing Act case.⁵³ Title VII does contain similar language as the FHA, and therefore the *Thompson* ruling might suggest a possible narrowing of the Supreme Court’s interpretation of the FHA in the future.⁵⁴

But, it is more likely that the Supreme Court uses the broader application in the case of Miami. In *Gladstone*, the Court granted standing to a village that sued a reality firm for violating the FHA in using racial steering.⁵⁵ The Court not only emphasized that Congress could expand the standing under the FHA for as far as Article III allows⁵⁶, but also stated that, in no event, could Congress decrease Article III.⁵⁷ What this suggests is that the Court is likely to use a broader application of standing within the FHA. Miami’s lawsuits are intended to end the alleged discriminatory lending practices that harm the city’s fair housing efforts.⁵⁸ Because the FHA was created to protect society from such discriminatory actions,⁵⁹ the Supreme Court is likely to find that Miami’s interest, to protect against discriminatory lending, falls within the zone of interest of the FHA.

49. Walsh, *supra* note 1.

50. *City of Miami v. Bank of Am.*, 800 F.3d at 1277; *see City of Miami v. Wells Fargo*, 801 F.3d at 1267; *see also* cases cited *supra* note 16; *but see* sources cited *supra* notes 1, 25-29 and accompanying text.

51. *Id.*

52. *City of Miami v. Bank of Am.*, 800 F.3d at 1277; *See also City of Miami v. Wells Fargo*, 801 F.3d at 1267.

53. *Id.*

54. *Id.*

55. Walsh, *supra* note 1.

56. U.S. CONST. art. III, § 2, cl. 1.

57. *Gladstone, Realtors*, 441 U.S. at 100.

58. Walsh, *supra* note 1.

59. *Fair Housing –It’s Your Right*, U.S. DEPT. OF HOUS. AND URBAN DEV., *supra* note 14.

B. *While The Supreme Court Might Find Miami's Claim Falls Within The Zones Of Interest Of The FHA, The Court May Have Trouble Finding A Sufficient Causal Link When the Perceived Injury is Economic*

The Eleventh Circuit Court determined that Miami's claim was sufficient to find a causal link between the lending practices of the banks and the disparate-impact injury Miami alleges. The banks argue that there are too many links between the alleged injury and their actions. Both arguments come down to how the Supreme Court interprets Miami's alleged injury.

If the Supreme Court considers the purpose of FHA⁶⁰ and looks at what Miami has presented to the court, the court is likely to find a sufficient causal link. Miami argues that the discriminatory mortgage-lending practices at issue directly harm the city's fair housing efforts, deprive the city of the benefits of an integrated community, decrease property values and tax revenues, and increase in demand for police presence.⁶¹ Additionally, the statistical disparities amongst black and Latino borrowers should be enough to show existence of disparate impact because of the lending practices.⁶² Therefore, the Court, in keeping with its past cases, should likely find a causal link between the banks' lending practices and the harm done to the city.

However, the banks make a valid argument. Miami acknowledges that their injury has an economic component.⁶³ Banks argue that Miami is no different from other individuals and entities that suffered economic losses after the collapse of the housing market.⁶⁴ Per the Eleventh Circuit in *Nasser*, a plaintiff's interest involving value of property, or some other economic impact, does not implicate an interest that is protected by the FHA.⁶⁵ Among the injuries Miami claims, loss of tax revenue from inner citing housing is an economic injury that does not fall within the interests protected by the FHA.⁶⁶ However, unlike in *Nasser*, Miami claims includes more than just an economic injury claim. They claim an economic injury that specifically falls within FHA.⁶⁷ The impact of discriminatory lending practices leads not only to economic harm to property values and tax revenues, but does so in a manner that harms minorities as well, and

60. *Fair Housing –It's Your Right*, U.S. DEPT. OF HOUS. AND URBAN DEV., *supra* note 14.

61. Walsh, *supra* note 1.

62. *Id.*

63. *Id.*

64. *Id.*

65. *City of Miami v. Bank of Am.*, 800 F.3d at 1278 (citing *Nasser*, 671 F.2d at 437).

66. Walsh, *supra* note 1.

67. *Id.*

prevents the city from maintaining integrated communities.⁶⁸ While the banks have a valid argument about an economic motive for Miami to sue, they do not sufficiently challenge other possible interests that the city has, like protecting community diversity.⁶⁹

IV. CONCLUSION

Regardless of the outcome, the decision will have a big impact on FHA and the government's ability to sue under the law.⁷⁰ The Supreme Court should likely agree with the appellate court. The definition of "aggrieved person" can be expanded as far as the Constitution allows, which means the court can deem a municipality to be an "aggrieved person" under FHA.⁷¹ Additionally, while the Supreme Court might find Miami's claim falls within the zones of interest of the FHA, it may have trouble finding a sufficient causal link between injury and defendant's actions when the injury could be perceived as an economic injury.⁷² The Court decision here will either open up the "floodgates" for more municipalities to sue or limit the power these municipalities have under the FHA.⁷³

68. *Id.*

69. *City of Miami v. Bank of Am.*, 800 F.3d at 1278.

70. Walsh, *supra* note 1.

71. *City of Miami v. Bank of Am.*, 800 F.3d at 1278; *see also City of Miami v. Wells Fargo*, 801 F.3d at 1267.

72. Walsh, *supra* note 1.

73. *Id.*