To be argued by:
Yoram Silagy
(Time Requested: 15 Minutes)

CASE NO. APL-2023-00156

State of New York
Court of Appeals

In the Matter of the Application of

MARYANN McCABE and
MARYANN McCABE AS EXECUTOR OF
THE ESTATE OF DAVID BURROWS,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

511 WEST 232ND OWNERS CORP.,

Respondent-Respondent.

BRIEF FOR APPELLANTS

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Supreme Court, Bronx County, Index No. 802172/2022E
Appellate Division, First Department Case No. 2022-05809

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PRELIMINARY STATEMENT

The Appellate Division's decision in this case (the "Decision") is contrary to laws that protect couples from discrimination in the purchase or rental or transfer of shares and the assignment of proprietary leases in a cooperative building, where the long term resident of a cooperative unit inherits the cooperative shares for the unit from her long time romantic partner (who owns the shares for the unit) and wishes to continue her residency in the Apartment

Appellant Maryann McCabe is the resident of Apartment #E52 at 511 West 232nd Street, Bronx, NY 10463 (the "Unit"). The Unit is in the cooperative known as 511 West 232nd Owners Corp. The Proprietary Lease for the Unit and the Cooperative Shares for the unit are in the name of David Burrows, who was Appellant Maryann McCabe's long-time romantic partner. They lived together in the Unit from 2006 onward on a continuous basis. David Burrows passed away on June 9, 2019, and in his Last Will and Testament dated March 3, 2015 (R: 30), left the Cooperative Shares and Proprietary Lease for the Unit to the Petitioner Maryann McCabe. Appellant Maryann McCabe as Executor of the Estate of David Burrows is the Executor of Mr. Burrows' estate. She was appointed Executor pursuant to Letters of Testamentary issued on November 21, 2019, in accordance with David Burrows' Last Will and Testament dated March 3, 2015 (R: 30). The Certificate of Appointment of Executor verifies this fact (R: 69). Respondent 511 West 232nd

Owners Corp. is the Cooperative where the Unit is located, and the Cooperative Shares for the Unit are for the Respondent 511 West 232nd Owners Corp.

As will be further detailed below, the Respondent Cooperative is wrongfully refusing to permit the transfer of the Shares for the Unit and the assignment of the Proprietary Lease from David Burrows to his long-time romantic partner, the Appellant Maryann McCabe, as directed by Mr. Burrows in his Last Will and Testament dated March 3, 2015. The Respondent Cooperative's actions violate paragraph 16(b) of the Proprietary Lease (R: 51), which permits the automatic transfer of Shares and assignment of the Proprietary Lease from a decedent to his spouse, without the requirement of cooperative board approval. Since the Appellant Maryann McCabe was the domestic partner and the equivalent of Mr. Burrows' spouse, she is entitled to have the Stock Certificate/Shares for the Unit as well as the Proprietary Lease issued in her name so that she can continue to reside in the Unit. The Respondent Cooperative's actions also violate relevant federal, state, and city discriminatory laws, which forbid discrimination based on marital status and/or domestic partnerships and couples. The Respondent Cooperative's actions also violate federal civil rights laws, which forbid discrimination based on gender. Respondent Cooperative, instead of complying with the terms of the Proprietary Lease and relevant laws barring marital discrimination and protecting couples, has instead served Appellant Maryann McCabe with a Notice to Cure and Notice of

Termination, attempting to evict her from the Unit. That proceeding is pending in Housing Court and has been marked off the calendar on the consent of both parties pending this appeal.

The rulings below should be reversed. The Respondent Cooperative's written decision (to be discussed further below) to refuse to transfer the Shares and Proprietary Lease to Petitioner Maryann McCabe should be reversed and annulled, the ruling dated June 9, 2022 (R: 4-12) of the Court below by the Hon. Mary Ann Brigantti should be reversed, and the Decision by the Appellate Division should be reversed. The Decision should be reversed to result in a fair outcome that is consistent with the discriminatory laws and underlying policy of these laws, which state that couples/domestic partners should not be treated differently than married couples.

QUESTION PRESENTED

I. Is a cooperative's enforcement of a proprietary lease provision, that allows the transfer of shares and assignment of a proprietary lease from a tenant of record who dies to their spouse without requiring cooperative board approval, in violation of city, state, and/or federal discriminatory laws when the cooperative refuses to apply that same provision to similarly situated couples who have lived together as romantic partners in the cooperative for years but never married?

The Court below incorrectly answered this question in the negative.

STATEMENT OF FACTS

Appellant Maryann McCabe and David Burrows were long time romantic partners for 27 continuous years, through the date of his death on June 9, 2019. They lived together in the Unit for 13 years, right through the date that he passed away, and Appellant Maryann McCabe continues to reside there as her primary residence. David Burrows fell ill in 2010. In 2018, David Burrows and Appellant Maryann McCabe, through their attorneys Vernon & Ginsburg LLP, requested by letter dated July 6, 2018 (R: 70) to the Cooperative and their managing agent that Appellant Maryann McCabe be added to the Stock Certificate/Shares as a shareholder and to the Proprietary Lease as a tenant. The Respondent Cooperative ignored this request.

Five months later, after receiving no response, Appellant Maryann McCabe and David Burrows had their attorneys Vernon & Ginsburg, LLP send another letter dated December 14, 2018 (R: 71-74), this time to the Respondent Cooperative's lawyer, in response to a complaint the Respondent Cooperative had regarding an issue that arose due to the hospice care which Appellant Maryann McCabe had arranged for David Burrows in the Unit. The December 14, 2018 letter once again asked that Appellant Maryann McCabe be added to the Shares and Proprietary Lease for the Unit. The Respondent Cooperative refused, demanding in a letter dated April 23, 2019 (R: 75-76) a domestic partnership certificate, or proof that Appellant Maryann McCabe was the spouse of David Burrows. Absent one of those two

documents, they claimed that any such addition is subject to written consent of the Respondent Cooperative's Board, which they said could be withheld for any reason. This was incorrect, since as a long-time domestic romantic partner, Appellant Maryann McCabe was the equivalent of a spouse, and no such board consent is required when a request is made to add a spouse to Shares and a Proprietary Lease in the Respondent Cooperative.

Shortly thereafter, on June 9, 2019, David Burrows passed away. Pursuant to his Last Will and Testament dated March 3, 2015 (R: 30), Mr. Burrows left the Cooperative Shares and Proprietary Lease for the Unit to Appellant Maryann McCabe. Appellants Maryann McCabe and Maryann McCabe as Executor of the Estate of David Burrows then had their attorneys, Vernon & Ginsburg, LLP, advise the Respondent Cooperative in a letter dated January 6, 2020 (R: 77-80) to the Respondent Cooperative that Mr. Burrows passed away and that he left the Cooperative Shares and the Proprietary Lease for the Unit to the Appellant Maryann McCabe, and asked for any documents necessary to effectuate the transfer. After a miscommunication between the parties, the Respondent Cooperative served Appellant Maryann McCabe with a Notice to Cure dated February 4, 2020 (R: 81-83) demanding that she vacate the Unit. Appellant Maryann McCabe, through her attorneys Vernon & Ginsburg LLP, responded by letter dated February 21, 2020 (R: 84-85) which explained once again that David Burrows left the Cooperative Shares

for the Unit to her under Mr. Burrows' Last Will and Testament dated March 3, 2015, which they attached to the letter. The letter further explains that pursuant to paragraph 16(b) of the Proprietary Lease (R: 51), the right to transfer shares from a decedent to their spouse is automatic and does not require approval by the Cooperative. Since Appellant Maryann McCabe was the equivalent of Mr. Burrows' spouse, Cooperative Board approval was not required for the transfer of the shares, and additionally, she has the right under this provision to continue to reside in the Unit.

The Respondent Cooperative, in a response letter dated March 9, 2020 (R: 86), rejected Petitioner Maryann McCabe's right, as the long-time romantic partner of David Burrows, to inherit the Shares and Proprietary Lease for the Unit and to continue to live in the Unit, and demanded that she apply to the Cooperative to purchase the Unit like any other purchaser of shares in the Cooperative. Appellant Maryann McCabe did so without prejudice to her rights to the automatic transfer, as detailed in her attorneys' numerous letters to the Respondent Cooperative.

The Respondent Cooperative ignored Appellant Maryann McCabe's application to purchase which they had wrongfully demanded she submit, as it was never their intent to allow to her to remain as a resident in the Unit notwithstanding her legal right to do so. The Respondent Cooperative subsequently served Appellant Maryann McCabe with a second Notice to Cure dated March 24, 2021 (R: 111-119),

followed by a Notice of Termination dated June 9, 2021 (R: 120-135) allegedly terminating her tenancy, without even ruling on her purchase application. It was only after service of these legal notices that the Cooperative, in a letter dated July 28, 2021 (R: 136), requested more documents for the purchase application, which she duly provided. They then rejected the application by letter dated October 27, 2021 (R: 137).

Appellant then filed an Article 78 Petition challenging the Respondent Cooperative's denial, which was denied by the Honorable Mary Ann Brigantti in a ruling dated June 9, 2022 (R: 4-12), resulting in an appeal to the Appellate Division, which was denied in the Decision dated March 23, 2023 (R: 405-408), and which is the subject of this appeal. The Respondent Cooperative has subsequently filed a holdover petition in Bronx Housing Court seeking Appellant's eviction based on the claims alleged in the predicate notices mentioned above and the issues raised in this appeal. The Housing Court proceeding has been marked off the calendar on the consent of both parties during this appeal.

The evidence submitted before the Court below of the long-term romantic partnership of the Appellant Maryann McCabe and David Burrows and their living together in the Unit for 13 years included the following:

(a) Last Will and Testament of David L. Burrows, dated March 3, 2015 (R: 30).

(b) The obituary (R: 138) for Appellant Maryann McCabe's mother Constance McCabe published in the Boston Globe on November 11, 2007, which refers to Appellant Maryann McCabe as David Burrows' life companion.

(c) The obituary (R: 144) of Appellant Maryann McCabe's father Warren James McCabe, which was published in the Patriot Ledger in 2007, which refers to Appellant Maryann McCabe as David's life companion.

(d) The obituary (R: 147) dated January 15, 2020 for David Burrows from the News & Press which refers to Appellant Maryann McCabe as his companion.

(e) Three letters of reference as part of Appellant Maryann McCabe's application to live in the Unit: letter by Renee Ehle, dated April 20, 2021 (R: 150), letter by Justine McCabe, dated April 20, 2021 (R: 151), letter by Deirdre Deloatch, dated April 21, 2021 (R: 152).

(f) Citibank statement of December 21, 2017 showing a joint bank account for David Burrows and Appellant Maryann McCabe and additional Citibank statements from April 2018 to October 2019 showing the joint account of David Burrows and Appellant Maryann McCabe (R: 153-227).

(g) September 20, 2010 Notice from SBLI Life Insurance Company to Appellant Maryann McCabe regarding her life insurance policy (R: 228).

(h) April 9, 2019 Letter from Bronx Community College to Petitioner Maryann McCabe regarding her employment (R: 229).

(i) Healthcare Proxy of David Burrows dated March 3, 2015 (R: 230-232) designating Appellant Maryann McCabe to be his healthcare agent.

ARGUMENT

I. THE RULINGS OF THE COURTS BELOW SHOULD BE REVERSED AND THE COOPERATIVE SHOULD BE REQUIRED TO ISSUE SHARES AND A PROPRIETARY LEASE FOR THE UNIT IN THE NAME OF THE APPELLANT MARYANN McCABE

The refusal of the Respondent Cooperative to automatically transfer the Shares and the Proprietary Lease from David Burrows to the Appellant Maryann McCabe so that she can continue to live in the Unit, and their subsequent termination of her tenancy, was made in violation of lawful procedure, affected by errors of law, and additionally was arbitrary and capricious and in abuse of their discretion. The same applies to the Respondent Cooperative's decision to reject Appellant's application for the transfer, which she should not have even been required to do since the right to transfer is automatic under the terms of the Proprietary Lease.

The Respondent Cooperative's actions violate paragraph 16(b) of the Proprietary Lease (R: 51), which specifically provides:

> If the lessee shall die, consent shall not be unreasonably withheld or delayed to an assignment of the lease and shares to a financially responsible member of the lessee's family (other than the Lesee's spouse, as to whom no consent is required).

Appellant Maryann McCabe, as the long time 27-year romantic partner of David Burrows who lived together with him for 13 years in the Unit and took care of him throughout his long illness and arranged for hospice care for him in the Unit before his death, was the equivalent of David Burrows' spouse.

The Respondent Cooperative's actions in refusing to recognize this fact further violate the prohibition against marital discrimination and domestic partnerships and couples protection as set forth in the relevant New York City, New York State, and Federal laws, including, without limitations, NYC Human Rights Law Administrative Code of the City of New York §8-107(5)[1]; New York State Human Rights Law §296(5); and the Federal Fair Housing Act and Civil Rights Act of 1964. See also Morse v. Fidessa Corp., 165 A.D.3d 61, 84 N.Y.S.3d 50 (1st Dept. 2018). The actions further violate Civil Rights Law §19-a (NY CLS Civ R §19-a),

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[1] NYC Admin Code §8-107(5) states:

> Housing accommodations, land, commercial space and lending practices. (a) Housing accommodations. It shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agent or employee thereof:
>
> (1) Because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, **marital status, partnership status**, or immigration or citizenship status of any person or group of persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons:
>
> (a) To refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any such person or group of persons such a housing accommodation or an interest therein;
>
> (b) To discriminate against any such person or persons in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith; or
>
> (c) To represent to such person or persons that any housing accommodation or an interest therein is not available for inspection, sale, rental or lease when in fact it is available to such person. [Emphasis Added].

which prohibits a cooperative corporation from withholding consent to the sale of stock in such corporation because of the sex of the purchaser.

Administrative Code §8-130(a) provides that the New York City Human Rights Law "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed." The same section recognizes cases which have "correctly understood and analyzed the liberal construction requirement" (Administrative Code §8-130(c), including this Court's ruling in Albunio v. City of New York, 16 NY3d 472, 477-478, 947 NE2d 135, 922 NYS2d 244 (2011) and its progeny, which recognize that the New York City Human Rights Law, since the Local Civil Rights Restoration Act of 2005, must be "construe[d]…broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (citing Local Law No. 85 [2005] of City of NY §1). See also Cahill v. Rosa, 89 N.Y.2d 14, 651 N.Y.S.2d 344 (1996).

As this Court further stated in Albunio v. City of New York, 16 NY3d 472, 477-478, 947 NE2d 135, 922 NYS2d 244 (2011) regarding the liberal construction requirement when it considered whether discrimination occurred under Administration Code §8-107 (1)(a):

> In answering this question, we must be guided by the Local Civil Rights Restoration Act of 2005 (LCRRA), enacted by the City Council "to clarify the

> scope of New York City's Human Rights Law," which, the Council found "has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law" (Local Law No. 85 [2005] of City of NY § 1). The LCRRA, among other things, amended Administrative Code § 8-130 to read: "The provisions of this title [i.e., the New York City Human Rights Law] shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed."

This was further confirmed by the Appellate Division held in Morse v. Fidessa Corp., 165 A.D.3d 61, 84 N.Y.S.3d 50 (1st Dept. 2018), where the Court explained that more recent enactments subsequent to the Human Rights Law such as the Restoration Act and Local Law No. 35 (2016) of the City of New York provide that the Human Rights Law should be "interpreted liberally and independently of similar federal and state provisions to fulfill the 'uniquely broad and remedial' purposes of the law". 165 A.D. 3d at 65. The Court in Morse further cited this Court in finding that:

> As the Court of Appeals ruled in Albunio (16 NY3d 472, 947 NE2d 135, 922 NYS2d 244), one of the Committee Report cases, all the provisions of the City HRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (16 NY 3D AT 477-478).

165 A.D.3d 67.

In providing for such a liberal interpretation, the Court in Morse further held that "marital status" under the NYC Human Rights Law should be given a broad meaning. 135 A.D.3d at 62. Therefore, pursuant to this ruling, Appellant in the case

at bar should be allowed to inherit and continue to reside in Mr. Burrows unit, since the Cooperative's proprietary lease does not require consent for such a transfer for a shareholder who passes away and leaves the shares for the unit to his spouse.

The Supreme Court, in its ruling dated June 9, 2022 which was affirmed by the Appellate Division, mistakenly relied upon the ruling in Levin v. Yeshiva Univ., 96 N.Y.2d 484, 490 (2001). As the Court held in Morse v. Fidessa Corp., 165 A.D.3d 61, 84 N.Y.S.3d 50 (1st Dept. 2018), the ruling in Levin regarding the interpretation of "marital status" is no longer followed due to subsequent amendments to the NYC Human Rights Law. The Court stated in Morse:

> Levin v. Yeshiva Univ., (96 NY2d 484, 754 NE2d 1099, 730 NYS2d 15 [2001] relied in part on an interpretation of the New York State Human Rights Law and failed to engage in liberal construction analysis, let alone the enhanced liberal construction analysis intended by the comprehensive 1991 amendments to the City HRL (Local Law No. 39 [1991] of City of NY) (which were only brought to life in 2005, with the passage of the Restoration Act). Thus *Levin's* interpretation of "marital status" cannot be sustained.
>
> 165 A.D. at 67.
>
> …(d) the narrow definition in Levin (96 NY2d at 490) of marital status for City HRL purposes was legislatively overruled; (e) providing City HRL protection for couples on the basis of whether or not they are married to one another involves an entirely plausible interpretation of "marital status"; and (f) encompassing "couples protection" within the proscription against discrimination on the basis of marital status is the best way to achieve broad coverage of the city law in accordance with the stated goal of the Council to "meld the broadest vision of social justice with the strongest law enforcement deterrent" (Committee Report at 11 [internal quotation marks omitted]; see Williams, 61 Ad3d at 68.

165 A.D. at 72.

The Supreme Court in this proceeding also mistakenly relied on what is apparently an older pre-amended version of NYC Administrative Code §8-107(5)(a)(1). The version that the Court quoted in its ruling (R: 10) did not include "partnership status", which is exactly the issue in this action.

The Appellate Division in the case at bar ignored the mistakes of the Supreme Court and failed to protect couples such as Appellant and her deceased romantic partner, as required under the liberal interpretation of the discriminatory laws as set forth above. Many of the proprietary leases in New York City contain virtually identical clauses allowing the automatic transfer of shares and a proprietary lease to a "spouse", as in the case at bar. Allowing the Decision by the Appellate Division to stand in the case at bar will result in discrimination to potentially thousands of romantic couples, gay or straight, who have resided in a cooperative unit for years and wish to continue their residency in a unit after their partner's death. For this reason, the rulings of the Courts below should be reversed.[2]

[2] A second reason why the rulings of the Court below should be reversed is that even under the wrong standard applied by the Cooperative in considering whether the shares and proprietary lease should be transferred to the Appellant, Appellant should have been approved by the Cooperative. The Cooperative admitted in their Appellate Division brief that when they forced Appellant to gain board approval for the transfer of the shares from Mr. Burrows to her rather than treating her as a spouse, they considered her application as a family member as "a courtesy". They also did not dispute that under paragraph 16(b) of the proprietary lease, they were not permitted to unreasonably withhold consent to such a transfer, which is the standard under this paragraph for a family member. Their refusal to provide consent was clearly unreasonable. Appellant's

application showed that she is an adjunct professor with a net worth of $674,583, and that her adjusted gross income as listed in her 2018, 2019, and 2020 (amended) tax returns was respectively $90,963, $187,16, and $114,265 (R: 348-384). The Cooperative pointed to an item on the tax returns for loan interest paid for either the Unit or Appellant's other unit (or both – it is not clear from the Record) of $8,243.00 for 2018 and $9,227.00 for 2019 (R: 373, 360). However, this is a weak argument for rejecting the Appellant, as these interest payments are relatively small given Appellant's adjusted gross income, and the same applies to the amounts of the existing loans on the Unit and the unit next door that Appellant owns, which are respectively only $109,451 and $85,975 (R: 344, 345).

In Estate of Del Terro v. 33 Fifth Avenue v. 33 Fifth Avenue, 136 AD 3d 486 (1st Dept. 2016), a cooperative had a similar proprietary lease clause as paragraph 16(b) in the case at bar. The Court, in reversing a lower court ruling, held that a residential cooperative board violated the proprietary lease by unreasonably withholding its consent to an assignment of the shares to the adult sons of the deceased lessee because, among other reasons, both sons were financially qualified to meet the carrying expenses of the apartment. The Court also ruled that the business judgment rule was inapplicable since it involved a lease violation, and also considered the fact that the purpose of the lease clause at issue was to more easily allow the gifting of shares to family members. Pursuant to this standard and if this Court for some reason rejects Appellant's argument that board approval was not required for the transfer of the shares to her, then the ruling should be reversed based on the "family member" standard that the Cooperative used in considering Appellant's application. The ruling in Estate of Del Terro v. 33 Fifth Avenue v. 33 Fifth Avenue, 136 AD 3d 486 (1st Dept. 2016) should be applied given the purpose of the paragraph 16(b) lease provision and because Appellant is financially qualified to pay the maintenance for the Unit.

CONCLUSION

For all these reasons, Appellant requests that the Cooperative's decisions to refuse to transfer the Cooperative Shares and Proprietary Lease for the Unit to Appellant Maryann McCabe and the rejection of her application (which the Cooperative wrongfully required her to submit) and its termination of her tenancy be reversed, annulled and vacated; that the ruling of the Court below be reversed; that the Cooperative be ordered to issue new Cooperative Shares and transfer the Proprietary Lease for the Unit into the name of the Appellant Maryann McCabe; and that Appellant be awarded legal fees pursuant to paragraph 28 of the Proprietary Lease (R: 55) and RPL §234, and the Court award to Appellant any other relief that is just and proper.

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR Section 500.13(c)(1) the foregoing brief was prepared on a computer using Microsoft Word.

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