COURT OF APPEALS
STATE OF NEW YORK

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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.

----------X

Appellate Division First Dept. Case No. 2022-05809

Bronx County Index No. 802172/2022E

NOTICE OF APPELLANTS' MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that upon the annexed affirmation of Yoram Silagy dated April 18, 2023 and accompanying memorandum of law, the undersigned will move this this Court, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, on May 15, 2023, at 10:00 A.M., or as soon thereafter as counsel may be heard, for an order granting leave to appeal to the Court of Appeals from the Appellate Division's decision and order entered on March 23, 2023 (exhibit A), and for such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to N.Y. Civil Practice Law and Rules § 2214(b), answering papers, if any, shall be served upon the

undersigned at least seven (7) days before the return date of this motion, and reply papers, if any, shall be served at least one (1) day before the return date of this motion.

Dated: New York, New York
April 18, 2023

VERNON & GINSBURG, LLP
Attorneys for Petitioners-Appellants
261 Madison Avenue, 26th Floor
New York, New York 10016
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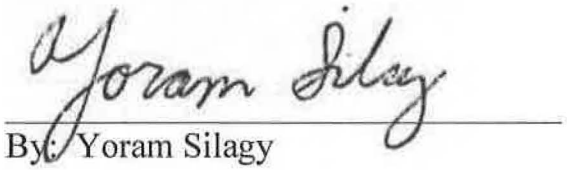

By: Yoram Silagy

TO: GALLET DREYER & BERKEY LLP
Attorneys for Respondent-Respondent
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COURT OF APPEALS
STATE OF NEW YORK

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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.

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Appellate Division First Dept. Case No. 2022-05809

Bronx County Index No. 802172/2022E

AFFIRMATION IN SUPPORT OF APPELLANTS' MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

YORAM SILAGY, an attorney authorized to practice law before the Courts of the State of New York, affirms under penalty of perjury as follows:

1. I am a partner in the firm of Vernon & Ginsburg LLP, attorneys for Petitioners-Appellants (the "Petitioners") in the above captioned matter.
2. This affirmation is respectfully submitted in support of Petitioners-Appellants' motion for leave to appeal to the Court of Appeals.
3. Attached here as Exhibit A is a true and correct copy of the Appellate Division First Department's Court's decision, dated March 23, 2023 ("Decision"), together with the Notice of Entry filed on March 23, 2023.

4. No prior request for the relief requested herein has previously been made.

5. This Article 78 proceeding was commenced in Supreme Court, Bronx County. In a Decision/Order dated June 9, 2022, the Supreme Court (Hon. Mary Ann Brigantti, J.) denied Petitioners' Petition. A true and correct copy of the Decision/Order dated June 9, 2022 by the Hon. Mary Ann Brigantti, J, together with Notice of Entry is attached as Exhibit "B". The Article 78 Petition sought an order pursuant to Article 78 of the CPLR reversing and annulling the respondent 511 West 232nd Owners Corp. (the "Respondent")'s written decisions to refuse to transfer the cooperative stock certificate/shares (the "Shares") and proprietary lease (the "Lease") for the Cooperative Unit known as #E52 at 511 West 232nd Street, Bronx, NY 10463 (the "Unit"), and an order requiring Respondent issue the Shares and Lease for the Unit in the name of Petitioner.

6. Petitioners timely perfected their appeal to the Appellate Division First Department.

7. The June 9, 2023 Decision and Order of Hon. Brigantti was affirmed by the Appellate Division First Department's Decision/Order dated March 23, 2023. Respondent served and filed via NYSCEF the notice of entry on March 23, 2023.

8. Pursuant to CPLR § 5513(b), the within motion seeking leave to appeal to this Court is timely.

9. This Court has jurisdiction to hear this motion for leave, and, if granted, an appeal of the Appellate Division's Decision and Order. The Appellate Division affirmed a final judgment by Supreme Court dismissing the original action.

10. A statement of the question presented for review by this Court, and why the question merits its review, can be found in the accompanying Memorandum of Law in Support of Appellants' Motion for Leave to Appeal to the Court of Appeals.

Dated: New York, New York
April 18, 2023

YORAM SILAGY

EXHIBIT “A”

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 25

----------x

In the Matter of the Application of

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

Petitioners,

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

-against-

511 WEST 232ND OWNERS CORP.,

Respondent.

----------x

Index No. 802172/2022E

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order of the Appellate Division of the Supreme Court, First Department, County of New York, dated March 23, 2023 and entered with the Clerk of the Court on March 23, 2023.

Dated: New York, New York
March 23, 2023

Respectfully submitted,

GALLET DREYER & BERKEY, LLP
Attorneys for Respondent
511 West 232nd Owners Corp.

by: _____
Michelle P. Quinn
845 Third Avenue, 5th Floor
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To: Vernon & Ginsberg, LLP
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Attn: Yoram Silagy, Esq.

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Supreme Court of the State of New York
Appellate Division, First Judicial Department

Renwick, J.P., Friedman, Scarpulla, Mendez, Rodriguez, JJ.

17574 In the Matter of MARYANN MCCABE et al.,
Petitioners-Appellants,

-against-

511 WEST 232ND OWNERS CORP.,
Respondent-Respondent.

Index No. 802172/22E
Case No. 2022-05809

Vernon & Ginsburg, LLP, New York (Yoram Silagy of counsel), for appellants.

Gallet Dreyer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for respondent.

Judgment (denominated an order), Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about June 13, 2022, denying the petition to annul the determination of respondent cooperative board, dated October 27, 2021, which declined to transfer the shares and proprietary lease for the subject cooperative unit to petitioner, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The cooperative board's decision was made in furtherance of a legitimate corporate purpose, and was not "arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; *see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 542 [1990]). The cooperative legitimately applied the terms of paragraph 16 of the proprietary lease to find that petitioner was not the decedent's spouse and therefore required approval by the board prior to transfer of the proprietary lease and shares of the subject unit (*see Hudson View Props. v Weiss*, 59 NY2d 733, 735 [1983]; *see also*

Matter of Cadalzo v Russ, 195 AD3d 463, 465 [1st Dept 2021]). Furthermore, based on petitioner's tax returns and financial information provided on her application to transfer such shares, the cooperative offered a legitimate, nondiscriminatory reason for denying its approval (*see Hirschmann v Hassapoyannes*, 52 AD3d 221, 222 [1st Dept 2008]). Absent bad faith or discrimination, the board's decision is protected by the business judgment rule (*see Matter of Levandusky*, 75 NY2d at 538).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 23, 2023

Susanna Molina Rojas
Clerk of the Court

EXHIBIT “B”

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 25

----------x

In the Matter of the Application of

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

Petitioners,

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

-against-

511 WEST 232ND OWNERS CORP.,

Respondent.

----------x

Index No. 802172/2022E

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order of the Supreme Court of the State of New York, County of Bronx (Hon. Mary Ann Brigantti, J.), dated June 9, 2022 and entered with the Clerk of the Court on June 13, 2022.

Dated: New York, New York
June 13, 2022

Respectfully submitted,

GALLET DREYER & BERKEY, LLP
Attorneys for Respondent
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by: Michelle P. Quinn
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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART **25**

----------X

In the Matter of the Application of
MARY ANN McCABE and MARYANN McCABE AS
EXECUTOR OF THE ESTATE OF DAVID BURROWS

Petitioners,

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

-

against-

511 WEST 232ND OWNERS CORP.,

Respondent.

----------X

Index №. 802172/2022E

Hon. **MARY ANN BRIGANTTI**
Justice of the Supreme Court

The following papers numbered 1 to 31 were read on these motions **(Seq. No.** 1) for **SPECIAL PROCEEDINGS – CPLR ARTICLE 78** noticed on **March 9, 2022** and duly submitted as **Nos.** on the Motion Calendar of **March 9, 2022**

Sequence No.	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	1-28
Cross Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits, Memorandum of Law	29-31
Reply Affidavit	

This motion is decided in accordance with the accompanying memorandum decision.

Dated: JUNE 9, 2022

Hon. _____
Mary Ann Brigantti, J.S.C.

1. CHECK ONE..... ☒ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X
In the Matter of the Application of
MARY ANN McCABE and MARYANN McCABE AS EXECUTOR OF THE ESTATE OF DAVID BURROWS

DECISION and ORDER
Index No. 802172/2022E

Petitioners,

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

-against-

511 WEST 232ND OWNERS CORP.,
Respondent.
----------X

HON. MARY ANN BRIGANTTI

Upon the foregoing papers, the petitioner Maryann McCabe (the "Petitioner") seeks an order pursuant to Article 78 of the CPLR reversing and annulling the respondent 511 West 232nd Owners Corp. (the "Respondent")'s written decisions to refuse to transfer the cooperative stock certificate/shares (the "Shares") and proprietary lease (the "Lease") for the Cooperative Unit known as #E52 at 511 West 232nd Street, Bronx, NY 10463 (the "Apartment"), and an order requiring Respondent issue the Shares and Lease for the Apartment in the name of Petitioner, and for any and other relief that is just and proper. Respondent has filed an answer to the petition.

Background

This matter arises out of the disputed ownership of the Shares and Lease for the subject Apartment. The Apartment is part of the 511 West 232nd Owners Corp Cooperative (the "Co-Op"). The Lease and the Shares for the Apartment are in the name of David Burrows ("Burrows"). Petitioner and Burrows allegedly resided in the Apartment together from 2006 onward. On March 3, 2015, Burrows executed a Last Will and Testament (the "Will") which bequeathed the Apartment to Petitioner (NYSCEF Doc. No. 3, page 2). On July 6, 2018, Petitioner requested by letter to Respondent to be added as a shareholder and tenant to the Lease and Shares (NYSCEF Doc. No. 7). Petitioner sent another letter on December 14, 2018, requesting the same (NYSCEF Doc. No. 8). On April 23, 2019,

Respondent replied and requested a domestic partnership certificate or proof that Petitioner was the spouse of Burrows, pursuant to paragraph 16 of the lease, which concerns the manner assignment may be made (NYSCEF Doc. No. 9). David Burrows them passed away on June 9, 2019.

On February 4, 2020, the Co-Op served Petitioner with a Notice to Cure and vacate the unit (NYSCEF Doc. No. 11). On February 21, 2020, Petitioner responded by letter seeking assignment of the shares under paragraph 16, subsection (b) ("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 Lessee's spouse as to whom no consent is required)") (NYSCEF Doc. No. 12). The Co-Op responded on March 9, 2020, stating that Petitioner was required to apply to the Cooperative to purchase the apartment as she had not demonstrated she was a spouse or family member (NYSCEF Doc. No. 13). Petitioner applied for purchase. On March 24, 2021, the Co-Op served Petitioner with an additional Notice to Cure (NYSCEF Doc. No. 14). On June 9, 2021, the Co-Op served Petitioner a Notice of Termination (NYSCEF Doc. No. 15). On July 28, 2021, the Co-Op requested more documents for the purchase application (NYSCEF Doc. No. 16). The Co-Op ultimately rejected Petitioner's application on October 27, 2021 (NYSCEF Doc. No. 17). Petitioner now seeks reversal.

Standard of Review

Where a cooperative shareholder seeks to challenge a cooperative board's action, such challenge is to be made in the form of an Article 78 proceeding (*Musey v. 425 E. 86 Apartments Corp.*, 154 A.D.3d 401, 403 [1st Dept. 2017], *Katz v. Third Colony Corp.*, 101 A.D.3d 652, 653 [1st Dept. 2012]). CPLR Article 78 proceedings determine whether an administrative or quasi-judicial review was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (CPLR 7803(3), *Cohan v. Bd. of Directors of 700 Shore Rd. Waters Edge, Inc.*, 108 A.D.3d 697, 699 [2d Dept. 2013]). The courts defer to a cooperative board's determination, "so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith" (*40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 153 [2003]). Absent bad faith or discrimination the courts will defer to the business judgment of a board (*Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 538 [1990]). Where a lease's directive states that "consent shall not be unreasonably withheld" the court applies a "heightened standard of reasonableness" to be applied in lieu of the usual business judgment rule and the burden shifts to the Co-op to reasonably show that the proposed transferee is not "financially responsible" (*Kotler v. 979 Corp.*, 191 A.D.3d 473 (1st Dept. 2021), *Olcott*

v. 308 Owners Corp., 189 A.D.3d 687 [1st Dept. 2020]; *Estate of Del Terzo v. 33 Fifth Ave. Owners Corp.*, 136 A.D.3d 486, 488 [1st Dept. 2016])

Applicable Law and Analysis

The subject lease sets out in relevant portion that: "16. (b) 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 Lessee's spouse as to whom no consent is required)." (NYSCEF Doc. No. 5 par. 16[b]).

Petitioners allege the Respondent is wrongfully refusing to permit the transfer of the Shares for the Apartment and the assignment of the Lease as directed by Burrows in his Will. Petitioner alleged she is the "equivalent of Mr. Burrows' spouse" and therefore she is entitled to the Shares and Lease without the need of acquiring board approval pursuant to the terms the Lease. Petitioner alleges Respondent is violating "relevant federal, state, and city discriminatory laws, which forbid discrimination based on marital status" (NYC Human Rights Law Administrative Code of the City of New York §8-107(5); New York State Human Rights Law §296(5); the Federal Fair Housing Act and Civil Rights Act of 1964).

In reply, Respondent argues that Petitioner's status as "like a spouse" is insufficient to qualify her to come in under the lease terms reserved for assignment between spouses. The Lease sets forth shares may be transferred (assigned) to a shareholder's spouse without need to gain the approval of the Co-Op board, but transfer to a shareholder's family member, or a transfer to an individual unrelated to the shareholder, is subject to the approval of the board. Respondent argues, as New York does not recognize common law marriage, Petitioner is not a spouse, and therefore the Co-Op is not required to permit the assignment of the Lease without their approval. Further, as Petitioner did not establish she was a family member, Respondent is not required to permit her to seek assignment under the preferred status of a family member. Therefore, Respondent examined Petitioner's application as they would an unrelated individual and rejected her based on an analysis of the financials provided. Respondents submits to the Court Petitioner's application and provides their explanation for rejection based on those financial records. Respondent additionally argues that there is doubt as to whether Petitioner was considered a spouse, as Burrows Last Will and Testament and his Health Care Proxy both refer to Petitioner as "my friend", and Petitioner's tax returns for the years 2018, 2019 and 2020 has a self-reported "single" filing status. Respondent adds that the Co-op is not attempting to deprive Petitioner of the value of the shares for the apartment, which she may sell to a person financially qualified and

approved by the cooperative to obtain the value of the same.

Discrimination Based on Marital Status

The board of directors of a cooperative apartment may generally withhold consent to the assignment of a proprietary lease for any reason absent bad faith or discriminatory practice (*Simpson v. Berkley Owner's Corp.,* 213 A.D.2d 207 [1st Dept. 1995]). A cooperative board can be challenged for refusing to approve a prospective purchaser or assignee if the decision is based on prohibited discriminatory grounds (*Sayeh v. 66 Madison Ave. Apt. Corp.*, 73 A.D.3d 459 [1st Dept. 2010]). The burden is on the prospective buyer or assignee to establish a prima facie case of discrimination against the cooperative, and if they do so, the burden then shifts to the cooperative to offer a legitimate, nondiscriminatory reason for rescinding its approval (*Hirschmann v. Hassapoyannes*, 52 A.D.3d 221 [1st Dept. 2008]).

Section 8–107 (5)(a)(1) of the Administrative Code of the City of New York makes it an unlawful discriminatory practice to refuse housing accommodations to any person because of that person's "actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, or alienage or citizenship status".

In this case, Petitioner did not meet her burden of demonstrating a prima facie case of discrimination based upon marital status because eligibility for the cooperative apartment "does not turn on the marital status" of the individual (see *Putnam/N. Westchester Bd. of Co-op. Educ. Servs. v. Westchester Cnty. Hum. Rts. Comm'n*, 81 A.D.3d 733, 736 [2d Dept. 2011]; *Levin v. Yeshiva Univ.,* 96 N.Y.2d 484, 490 [2001]). This distinction being that here, the issue faced by Petitioner arises not because she was unmarried, but because the lease restricts transfer or assignment on the lease without Board approval unless it is to spouses; Respondent did not refuse her based on discrimination against her marital status (*see Hudson View Prop. v. Weiss,* 59 N.Y.2d 733 [1983]).

Therefore, absent discrimination, Respondents are entitled to the deference due under the business judgment rule (*Levandusky,* 75 N.Y.2d at 538).

Business Judgment Deference

A proprietary lease is a valid contract that shall be enforced according to its terms (*Himmelberger v. 40-50 Brighton First Road Apartments Corp.*, 94 A.D.3d 817 [2d Dept 2012]; *Fe Bland v. Two Trees Mgmt. Co.,* 66 N.Y.2d 556, 565 [1985]).The tenant-shareholder of a cooperative apartment is bound by the provisions contained in its proprietary lease with the cooperative corporation

(*Darnet Realty Associates, LLC v. 136 East 56th St. Owners, Inc.*, 246 A.D.2d 312 [1st Dept. 1998]). "In the absence of discriminatory practices prohibited by law, the directors of a residential housing cooperative have the contractual and inherent power to approve or disapprove the transfer of shares and the assignment of proprietary leases" (*Bachman v. State Div. of Human Rights,* 104 A.D.2d 111, 114 [1st Dept. 1984*], Bresnick v. Farquahar*, 151 A.D.2d 390 [1st Dept. 1989]).

Petitioner cites NYC Human Rights Law Administrative Code of the City of New York §8-107(5) in support of her claim of martial discrimination. The definition of spouse can be found in §8-102 which states "[t]he term "spouse" means a person to whom a caregiver is legally married under the laws of the state of New York." Petitioner was not legally married to Burrows. It has long been settled law that New York does not recognize common-law marriages (*Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289, 292 [1980]). Petitioner argues they are "the equivalent of Mr. Burrows' spouse" (NYSCEF Doc. No. 1 at 5) due to their long relationship. Petitioner has not established she was the spouse of Burrows as defined by this section. Further, being the equivalent of a spouse is insufficient under the lease terms. As the lease is a contract, by the contract is to be read using plain language of the lease terms as they are written, constrained to the four corners of that agreement (*see Riesenburger Properties, LLLP v. Pi Assocs., L.L.C.,* 49 Misc. 3d 1206(A) [Sup. Ct. Queens Co. 2015, Ritholtz, J.], *aff'd sub nom.* 155 A.D.3d 984 [2d Dept. 2017][petitioner could not receive transfer under lease provision for spouse where assignment was sought to an LLC representing the spouse, as the rules of contact interpretation foreclosed on reading outside of the four corners of the lease]; *see also Zunce v. Rodriguez*, 22 Misc. 3d 265, 276 [Civ. Ct. Kings Co. 2008, Heymann, J.][a long term relationship does not qualify as a spouse]). Respondent permissibly applied the plain language of the term spouse and found Petitioner did not qualify. As this was within the scope if their authority under the lease, and in good faith under the law, the Court shall defer to a board's determination (*40 W. 67th St. Corp.*, 100 N.Y.2d at 153).

Heightened Reasonableness Standard

Respondent is not required to show that it rejected Petitioner's application under the heightened reasonableness standard, as Petitioner did not show she was a family member (*cf. Estate of Del Terzo v. 33 Fifth Ave. Owners Corp.,* 136 A.D.3d 486, 488 [1st Dept. 2016]). Nevertheless, Respondent submits Petitioner's purchase application and avers the documentation establishes it was reasonable to determine Petitioner was not financially responsible. Respondent cites concerns raised by the fact that Petitioner

holds a mortgage already on the adjacent apartment, Apartment E51, which she is also the shareholder of. Respondent cites the high level of interest paid on that mortgage, as well as concerns over the inconsistently reported rental income derived from that apartment. Respondent further alleges Petitioner incorrectly states her "total assets" by including the total amount of payments Petitioner has made on the existing mortgages for apartments E51 and E52, which are not assets. Respondent therefore presents sufficient documentation to establish the Co-Op provided a reasonable basis for rejecting Petitioner even under the heightened applicable standard for family members, which Petitioner does not qualify for regardless (*Leonard v. Kanner*, 239 A.D.2d 153, 154, [1st Dept. 1997]).

Transfer of Value

The requirement that a transfer be approved by the cooperative board does not prevent a testator from disposing of a cooperative by will, although it may nonetheless prevent the legatee from occupying the apartment (*Estate of Finkelstein,* 186 A.D.2d 90 [1st Dept. 1992], *Joint Queensview Housing Enterprise, Inc. v. Balogh*, 174 A.D.2d 605 [2d Dept. 1991]).

Respondents aver they do not seek to block Petitioner's receipt of the monetary interest of the value of the cooperative shares, in compliance with this precedent.

Accordingly, it is hereby

ORDERED, that the Petition is denied, and the proceedings are dismissed, and it is further,

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly,

This constitutes the Decision and Order of this Court.

ENTER

Dated: JUNE 9, 2022

Mary Ann Brigantti, J.S.C.

COURT OF APPEALS
STATE OF NEW YORK

Appellate Division, First Dept.
Case No. 2022-05809

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.

PETITIONER-APPELLANTS' MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of the Application of

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

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511 WEST 232ND OWNERS CORP.,

Respondent-Respondent.

----------X

Appellate Division
First Dept. Case No.
2022-05809

Bronx County Index No.
802172/2022E

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS-APPELLANTS' MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

The Appellate Division's decision in this case (the "Decision")[1] 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

[1] The Decision is attached as Exhibit A to the accompanying Affirmation of Yoram Silagy, dated April 18, 2023. ("Silagy Aff.").

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 on the consent of both parties pending this appeal.

Leave to appeal should be granted. 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.

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, and which is the subject of this motion for Leave to 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.

I. LEAVE TO APPEAL TO THIS COURT SHOULD BE GRANTED

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)[2]; 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),

[2]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.

As the Appellate Division held in Morse v. Fidessa Corp., 165 A.D.3d 61, 84 N.Y.S.3d 50 (1st Dept. 2018), 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 stated 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. For this reason, leave to appeal should be granted.[3]

[3] A second reason why leave to appeal should be granted 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, it is respectfully submitted that Appellant's Motion for Leave to Appeal should be granted, and the Court should award to Appellant any other relief that is just and proper.

Dated: New York, New York
April 18, 2023

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COURT OF APPEALS
STATE OF NEW YORK

----------X

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.

----------X

Appellate Division First Dept. Case No. 2022-05809

Bronx County Index No. 802172/2022E

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

TIFFANY YU, being duly sworn, deposes and says:

I am over 18 years-old, I am employed by Vernon & Ginsburg, LLP, and I am not a party to this action.

On April 18, 2023, I served a true copy of the Notice of Appellants' Motion for Leave to Appeal the Court of Appeals, Affirmation in Support of Appellants' Motion for Leave to Appeal to the Court of Appeals, Exhibit "A", Exhibit "B", and Memorandum of Law in Support of Petitioners-Appellants' Motion for Leave to Appeal to the Court of Appeals upon the parties below by depositing a true copy thereof in a properly addressed post-paid envelope, in an official depository of the U.S. Postal Service within the State of New York, addressed to the party at the address below.

TO: GALLET DREYER & BERKEY LLP
845 Third Avenue, 5th Fl.
New York, NY 10022
Attn: Michelle P. Quinn, Esq.

TIFFANY YU

Sworn to before me on
April 19 2023

NOTARY PUBLIC

Lorraine Catalano
Notary Public, State of New York
No. 01CA6436353
Qualified in New York County
Commission Expires 07/11/2026